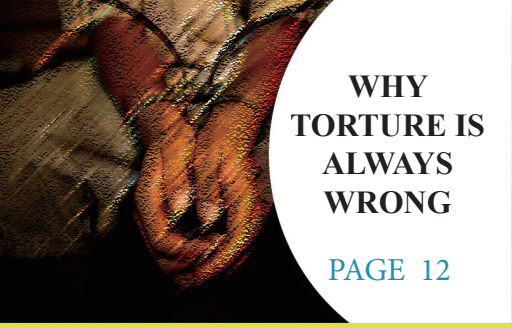

WHY TORTURE IS ALWAYS WRONG

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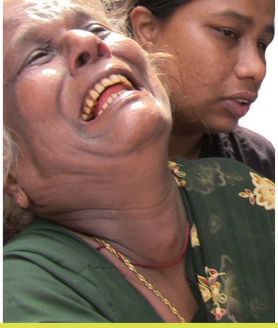

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ASIAN AND GLOBAL PERSPECTIVES

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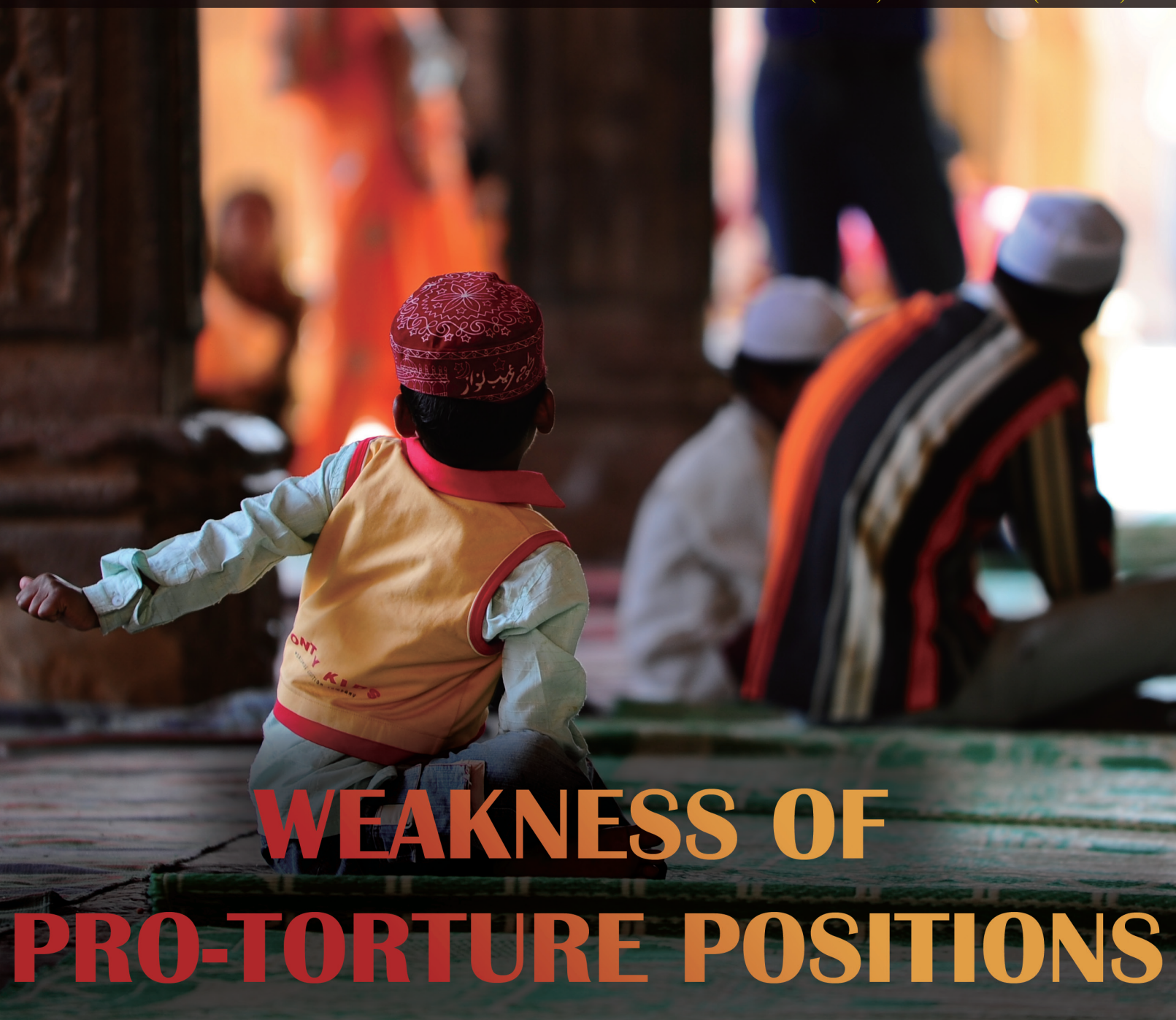

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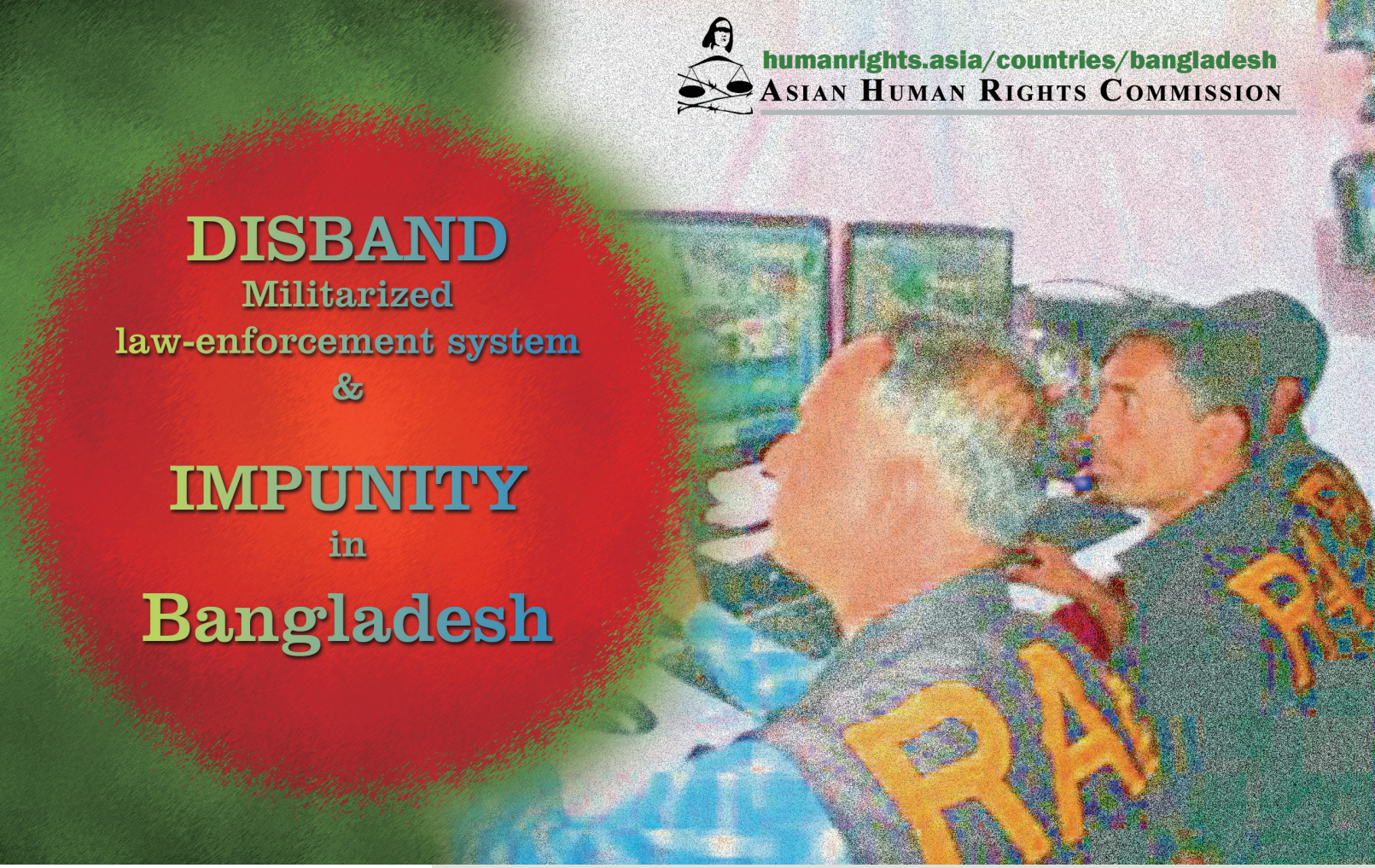

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TORTURE

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COVER STORY: A NEW DAWN FOR DIALOGUE

In July 2012, the Asian Alliance Against Torture and Ill-treatment hosted an unprecedented event in Hong Kong. Several Asian parliamentarians and leading human rights activists were invited to deliberate on ways to combat the practice of torture and ill-treatment in Asia. It was a new dawn of dialogue towards the prevention of torture: the first time legislators and human rights activists from various countries sat together to share their experiences and ideas on torture and human rights abuse.

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'No rule of law means: no human rights, and no human rights means: no democracy.'

- Dr. Ole Espersen,
former Minister of Justice, Denmark

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'No prospect for a moral and torture free world until the West is held accountable...'

- Dr. Paul Craig Roberts, former Assistant Secretary of Treasury for Economic Policy, US

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ARTICLE

'The history in regard to the independence of Sri Lanka's judiciary from that point onwards may be divided into three phrases.'

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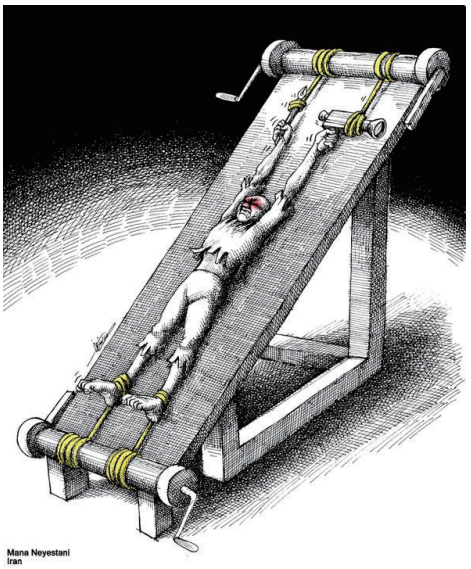
EDITORIAL

POLITICAL STIGMA OF TORTURE



Mana Neyestani, Iranian Cartoonist
(Courtesy: en.irangreenvoice.com)

Torture is not an isolated phenomenon. It is a tool of the unjust having absolute power. As a social phenomenon, torture has links with the divisions of society. No fog hides the reality of a society where torture and other human rights violations are part of daily life. Torture further creates social anxiety, which enables absolute power to play its game without hindrance.

Undoubtedly, fears and anxieties in the minds of people, created by modern-day political inconsistencies, insecurities, and hegemony, are further precipitated by commercialization.

However, once the system deviates from functioning in a lawful framework, real freedom of society is nothing but a nightmare. Once absolute power escapes from the cage of law, it starts damaging the basic pillars holding the structure of society.

At this point, mankind is subject to such a power, where the very status of citizens can be made to disappear, just like in ancient times under "royal absolutism."A functional system can no longer exist once the basic pillars have been damaged or abolished.

In many Asian countries, real social stress and anxiety developed due to the problem of a dysfunctional social system and the breakdown of social structure. There are several reasons behind this problem, one being the dialogue of "terrorism" becoming social order in every ideological governance system. Old policies came to be questioned, and most have been replaced. The mandate for closer supervision and justification to establish whatever the government did against its own people and outside its jurisdiction was promoted.

August 2012, marks the 10 year anniversary of the publication of "Torture Memos", written by John Yoo, Steven G. Bradbury, and Jay Bybee, officials in the Office of Legal Counsel under the Bush Administration. These memos provided a legal framework to work against the torture of detainees held by the CIA in connection with the "War on Terror." The contents of the memos are spine-chilling. And, it has created new debate on torture internationally. They seem to have paved the way for legal reasoning and disembowelment of the definition of torture in domestic and international laws.

As one of our contributors explained the situation after the memos, "there is nothing 'simple' about the literature surrounding the ethics of torture. The idea that the debate will be settled by simply applying one's preferred moral theory (deontological, utilitarian, virtue theory, or whatever) is itself an extreme oversimplification of the landscape of moral dialogue." The issue is still critical and many have objected. As our contributor stated, "the argument in favor of torturing the hypothetical terrorist is intuitively persuasive: the utilitarian guideline is 'the greatest good for the greatest number.' Nevertheless, absolutist opponents of torture have vehemently attacked the scenario."

Unfortunately, many innocents have been victimized, and even worse has been that some corrupt regimes also used the memos as a pretext to undermine basic rights of their citizens and political opponents. Many countries in Asia faced this fatal situation, and by and large the people have been victimized. The framework of rule of law has broken down and has been replaced with that of absolute power. Humanity has been murdered, and its rebirth has created tremendous conflict amongst these societies.

As mentioned, many countries in Asia have taken this opportunity to crackdown on real opposition, so they may maintain absolute power. The social system has been tactically assassinated, in addition to which, some regimes have taken the opportunity to get rid of their personal political challenges constitutionally.

The 18th amendment to the constitution of Sri Lanka is a prime example of this political stigma, where the incumbent President passed a bill to abolish the term limit of the executive presidency and thereby assassinated basic norms and dignity of the democratic citizen. Another example is the crackdown by the Burmese regime of the Rohingas Muslims, who live in the Arakan region in western Burma. Hidden causes wring a black history of social control and abuse of mankind – as in the case of Hmong people in Laos, Pashtuns in Pakistan, and Chittagong hill tracks in Bangladesh.

The structural collapse of the social system have narrowed opportunities to social reform, and seem to have led to the police, the legislative and the judiciary becoming tools of the military and/or the executive. In these circumstances, the power of multi-party politics has vanished while the electoral process has been cynically manipulated and seems to have created its own definition of freedom and justice. Major human rights violations such as kidnapping, disappearances, torture, extra judicial killings have become part of daily lives.

Society has become chaotic. And, torture is one of symptoms of destructive social sickness, where justice prevails in text but not in reality. In other words, the practice of torture is a symbol of social failure and destruction. This is the extent of the damage absolute power brings to society. Keeping a weaker opposition or opposition (party or community fighting for justice) with multiple internal conflicts or rifts is an important factor for absolute power to systematically assassinate social order and introduce disorder into the system.

We have entered the situation where the regime only, "imagines that it believes in itself". These are the words of Slavoj Zizek, who posits that "*the formula of a regime which only imagines that it believes in itself" nicely captures the cancellation of the performative power ('Symbolic Efficiency') of the ruling ideology: it no longer effectively functions as the fundamental structure of the social bond.*"[1]

1. Slavoj Zizek – 'First as Tragedy then as Farce.'

EXCLUSIVE INTERVIEW

Dr. Paul Craig Roberts

THE RESPONSIBILITIES OF THE WEST

Dr. Paul Craig Roberts *was educated at Georgia Tech, the University of Virginia, the University of California, Berkeley, and Oxford University where he was a member of Merton College. He has been the Assistant Secretary of the US Treasury in the Reagan administration, a member of the US Congressional staff, an associate editor and columnist for the Wall Street Journal, and a columnist for Business Week, the Scripps Howard News Service, and Creators Syndicate. He was also a Senior Research Fellow for the Hoover Institution at Stanford University and was appointed to the William E. Simon Chair in Political Economy at Georgetown University's Center for Strategic and International Studies. He is currently the chairman of the Institute for Political Economy and has authored or coauthored ten books and numerous articles in scholarly journals. He has testified before committees of Congress on 30 occasions. Dr. Roberts was awarded the US Treasury's Meritorious Service Award for "outstanding contributions to the formulation of US economic policy," and France's Legion of Honor as "the artisan of a renewal in economic science and policy, after half a century of state interventionism." Dr. Roberts recently communicated with* ***Nilantha Ilangamuwa****, Editor, Torture Magazine.*

NI: You worked at the US treasury as Assistant Secretary during the Reagan administration, when the world economy changed towards neo-liberalism, and you are famous for being a co-founder of Reaganomics. How did this happen? What was your contribution to changing the model of world economy?

PCR: Reaganomics is a term the media attached to an innovation in economic theory and policy known as supply-side economics.

Supply-side economics is not an ideology and it is not neo-liberalism.

I do not think that the Reagan administration changed the model of the world economy or that the administration thought of itself as neoliberal. What the Reagan administration did was to change the macroeconomic policy that had prevailed in the post-war English speaking world. That policy, known as Keynesian demand management, relied on government fiscal policy and monetary policy in order to maintain full employment and low inflation. If unemployment was the problem, government would enact a budget deficit and the central bank would expand money and credit. The monetary and fiscal stimulus would boost aggregate demand, and the increased spending would raise the level of employment. If inflation was the problem, the government would enact a budget surplus and the central bank would reduce the growth rate of money and credit. This was how the policy was supposed to work. For example, in the early 1960s US economists understood the reduction in marginal income tax rates championed by President John F. Kennedy as a stimulus to consumer demand. Prior to Reagan, economists did not understand that fiscal policy could increase or decrease aggregate supply.

The demand management policy broke down during the Carter presidency. Each boost to employment had to be "paid for" with a higher rate of inflation, and each attack on inflation had to be "paid for" with a higher rate of unemployment. These worsening trade-offs became known as "stagflation."

The only economists who had an answer to the problem of stagflation were the few supply-side economists of which I was one. Supply-side economics was an innovation in economic theory and in economic policy. Supply-side economists said that fiscal policy directly impacts aggregate supply. For example, a reduction in marginal tax rates (the rate of tax on additional income) changes important relative prices. It makes leisure more expensive in terms of foregone current income, and it makes current consumption more expensive in terms of foregone future income. Therefore, a reduction in marginal tax rates does not merely increase consumer demand. The lower tax rates result in an increase in labor and investment inputs, and aggregate supply increases.

The demand management policy had stimulated demand, but the high marginal tax rates discouraged or made weaker the response of supply to demand. Therefore, prices rose. Supply-side economists said that the solution to stagflation was to change the policy mix: a tighter monetary policy and a looser fiscal policy. In other words, reduce the monetary stimulus and increase the supply incentives.

The policy worked, and the worsening "Phillips curve" trade-offs between employment and inflation disappeared.

President Reagan had two main goals: to end stagflation and to end the Cold War. He campaigned on the supply-side policy. In order to get the policy implemented, he appointed me Assistant Secretary of the Treasury for Economic Policy. Later he associated me with his second goal by appointing me to a secret committee. Reagan thought that the Soviet economy was too decrepit to withstand the stress of a high-tech arms race. He believed that by threatening the Soviets with an arms race, he could bring them to negotiate the end of the Cold War. The CIA told Reagan that the Soviets would win the arms race, because it was a centrally planned economy that controlled investment and could allocate as many resources as necessary to the military. Reagan did not believe the CIA and appointed a committee to make the determination. The committee concluded that the Soviet economy would be unable to compete in an arms race.

NI: The United States' image was still reeling from the Vietnam War, which ended in 1975, when President Jimmy Carter came in to power. America had learnt an expensive lesson from the loss of more than 57,000 American servicemen in the jungles of Southeast Asia. However, during Carter administration there were also tremendous conflicts from Afghanistan to Iran, Grenada to Nicaragua. It was a hot time in the Cold War. Then in 1980 Ronald Reagan won the election, and had won the Cold War by the time he left office. How was the Reagan administration different from other presidencies?

PCR: Reagan achieved both of his goals, and that is what makes him different from other presidents. The military conflicts during the Reagan years were minor, and, unlike the military conflicts of the George W. Bush and Obama regimes, were not conflicts on behalf of US world hegemony. Reagan said that if he was to be successful in bringing the Soviets to an agreement to end the Cold War, he had to draw the line in the sand and prevent any further communist expansion, whether in Afghanistan, Grenada, or Nicaragua. He said that if more countries fell to communism and became Soviet clients, the Soviets would be too confident to negotiate an end to the Cold War.

NI: Your book entitled, "Alienation and the Soviet Economy", has extensively examined the economic policy of the USSR and their weaknesses in planning. Could you please share with us how their weakness benefited the US to develop a neo-liberal economy and an identity as the leader of the West?

PCR: My book explains the Soviet economy as the outcome of an ideological attempt to remake human nature and society by substituting a planned economy for the unplanned market economy. Paradoxically, the collapse of the Soviet Union is one of the two developments (the other being the rise of the high speed Internet) that wrecked the US economy.

When the Soviet Union collapsed, the American neoconservatives spoke of "the end of history," by which they meant that American capitalism was the only viable socio-economic system. The Soviet collapse caused the communists in China and socialists in India to rethink their approaches and to get on the winning side. These two Asian giants opened their vast under-utilized labor forces to western capital.

The era of jobs offshoring began. US corporations, pressed by Wall Street for higher profits, by large retailers such as Wal-Mart, and by the cap that Congress placed on executive pay that is not "performance based," moved the production of goods for US markets offshore where labor costs were a small fraction of US wages. This development caused profits to rise, but separated American consumers from the incomes associated with the goods and services that they consume. The same happened to professional service jobs, such as software engineering, Information Technology, and research and design. The ladders for upward mobility for Americans were dismantled. Wages and employment fell, medical benefits were lost, and careers disappeared.

The system by which First World corporations offshore the production of goods and services that they market in their home countries is called "globalism." Globalism is turning the US into a third world country. For the past two decades, the only jobs the US economy has been able to create are in lowly paid domestic services, such as waitresses, bartenders, and hospital orderlies. There has been no increase in real income for the bulk of the population. The gains in income and wealth are concentrated at the very top, and the distribution of income is now the worst in the developed world and worse than many

Third World countries. The economy of the Reagan years is simply gone, disappeared.

NI: In more recent years, especially after 9/11, you became a critical analyst of US foreign policy. When did things start going wrong in the US and how did it happen?

PCR: Things began going wrong in the US when the US became "the sole superpower." American neoconservatives had a triumphal attitude and spread their attitude to the public and Congress with their propaganda. They argued that American capitalism had to be spread to the rest of the world, even if it had to be imposed by force of arms. Americans, neoconservatives proclaimed, were "the indispensable people," who had the right and the responsibility to impose their way on the world. Neoconservatives used the US Endowment for Democracy to foment "color revolutions" in former Soviet republics. The event of 9/11 provided neoconservatives with the opportunity to initiate US military invasions and "regime change" in the Middle East, Afghanistan, and North Africa.

NI: Let's start talking about our main subject - torture. I recall from our very first communication that you said you didn't have much of an idea about torture except in the context of the US and Israel. What analysis can you share, regarding torture involving the United States?

PCR: In the US torture is prohibited by the US Constitution and by US statutory law. It is also prohibited by the Geneva Conventions and international law. I do not know why the George W. Bush regime violated US and international law and tortured "detainees", most of whom were hapless individuals kidnapped by war lords and sold to the Americans for the bounty. It is well known among intelligence services that torture does not produce reliable information. Generally, a tortured person invents a story to tell his tormentors in order to stop the torture. Soviet dissidents accused of fantastic plots and tortured to elicit the names of their co-conspirators, would give the names of dead people. One dissident wrote that, expecting to be arrested, he memorized the names on gravestones.

In my opinion, the Bush regime, a neoconservative regime, used the hyped fear about the threat of "Muslim terrorism" to get the acquiescence of the American public, Congress and the federal courts to torture, arguing that torture was necessary in order to protect Americans from events such as 9/11.

The neoconservatives reasoned that if the executive branch could violate, with impunity, both constitutional and legal prohibitions against torture, the precedent could be expanded to habeas corpus, due process, and to free speech, free assembly, (protests) and to criticism of the government's policies, which is being redefined as "aiding and abetting terrorism."

Once law and the Constitution could be side-lined, the regime could escape war criminal accountability for its wars of naked aggression.

President Obama won the presidential election, because voters expected him to stop the wars, stop the torture, and to hold the Bush regime criminals accountable. However, Obama found the new powers convenient and held on to them and expanded them. He refused to hold the Bush regime criminals accountable. He had the illegal and unconstitutional powers asserted by the Bush regime codified in US law. And Obama asserted new powers--the right to murder American citizens of whom he was suspicious, without due process of law. What the Bush and Obama regimes have done is to turn the United States into a Gestapo-like police state. Prior to Bush/ Obama it was illegal for the government to spy on Americans without cause presented to a court, which, if convinced, would provide

a warrant. Now every aspect of Americans' lives are routinely watched, their movements, their emails, their internet usage, and even their purchases. Not only are air travelers subjected to intimate searches, but train and bus travelers too, and car and truck traffic on interstate highways is stopped and searched. There have been no terrorist attacks on trains, buses, or highway travel. Yet, the freedom of mobility in the US has been compromised even more than it was in the Soviet Union with the system of internal passports.

NI: What is your suggested solution to this critique? In other words how can the responsible governments correct things and lead their people towards freedom?

PCR: In the US, government is no longer accountable to law or to the people. Whoever is elected to the presidency or to Congress is accountable to the powerful private interest groups that provide the funds for the political campaign. Having purchased the government, the special interests expect government to serve them. The military/ security complex makes billions of dollars in profits from wars, whether hot or cold. Peace is not in the interest of the military/ security complex. Peace reduces the profits of the armaments industry and it reduces the power of the CIA, Homeland Security, Pentagon, FBI, and National Security Agency. In America today, peace is for sissies.

NI: Just hours after the release of the State Department's annual human rights report, you wrote an opinion saying that the US government was the second worst human rights abuser on the planet and the sole enabler of the worst abuser –Israel. If this is true, US pressure for human rights reforms in other countries seems hypocritical. Do you want the US government to stop talking to these other countries? If the US doesn't have the right to criticize human rights violence in other countries, who does?

PCR: To use biblical language, the US government focuses attention on the mote in Syria's or Iran's or China's eye in order to direct attention away from the beam in its own eye. It is Washington that conducted war for eight years in Iraq, killing hundreds of thousands of people on false pretenses. It is Washington that is conducting war for eleven years in Afghanistan on false pretenses, killing an unknown, but large, number of Afghans. It is Washington that is violating the sovereignty of Pakistan and Yemen, murdering people in these countries daily on false pretenses. It was Washington that organized the overthrow of the Libyan government, leaving the country in total chaos, with untold deaths. It is Washington that is responsible for endless violence in Somalia. It is Washington that has sent US troops to four African countries as part of the new imperialist venture known as the US Africa Command. How can a government that commits massive violations of human rights in Afghanistan, Pakistan, the Middle East, Africa, and at home lecture, or speak to, any other country about human rights? The world accepts this unbelievable hypocrisy because of the success of US propaganda during the Cold War. The propaganda placed the white hat firmly on the head of the US government.

NI: You opposed the war in Afghanistan, Iraq, Libya and other ongoing conflicts in East Asia as well. We saw how torture occurred in those wars. Perhaps the most high profile and visible case of torture in recent years was the public execution of Muammar Gaddafi. Torture has become a norm, regardless of the victim's guilt or innocence. There are numerous international conventions against torture but torture still exists in many places. What are your feelings about this? Why are events moving in that direction?

PCR: In the 20th century, the West, which was hardly innocent, nevertheless stood

for civil liberty, for law as a shield of the people instead of a weapon in the hands of the government. In Hitler's Germany and Stalin's Soviet Union, law was a weapon in the hands of the government. Today the US has caught up with Hitler and Stalin. Law in the US is a weapon in the hands of the government.

In my opinion, neoconservative triumphalism has destroyed American morality and left hubris in its place. Americans are overwhelmed by how great and good and moral and indispensable they are. American hubris raises Americans above everyone else in the world. Americans can torture, murder, invade, and still lecture the rest of the world about human rights.

NI: In one of your pieces published last April, you pointed out, "I agree that there is a lot of evil in every country and civilization. In the struggle between good and evil, religion has at times been on the side of evil. However, the notion of moral progress cannot so easily be thrown out." As you say, in many countries liberty was lost, though the notion of moral progress cannot be easily thrown out. Can you explain more about this interesting conclusion?

PCR: I don't know enough about the nonwestern world to answer this question with confidence. The point I was making is that the struggle between good and evil is ancient. In various historical periods evil prevails; in other periods good prevails. This means that moral concepts survive even during the periods of the prevalence of evil. As I have written, not far into the past, slavery was a fact of life, not a moral issue. Today, even the worst government would not openly legitimize slavery, although tax slavery, except for the mega-rich who control the governments, exists everywhere in the West.

The point is that we cannot give up hope that the world can be returned to a moral existence. What is discouraging is that it is no longer the West, and certainly not the US government, that is the upholder of "the rights of mankind."

NI: How can we change for the better? Where should it start if we are to achieve a torture free society?

PCR. In my opinion, there is no prospect for a moral and torture free world until the West is held accountable for its crimes. The war crimes tribunal in Malaysia was a beginning. The convictions of the Bush regime monsters have no legal authority, but the convictions assert morality authority. If the Malaysian war crimes tribunal is repeated in many other countries, the US and UK war criminals and their NATO (The North Atlantic Treaty Organization) puppet criminals would not be able to travel beyond their own borders. The image would be created of Western leaders hunted by the rest of the world for their criminal actions. This is the only way to re-empower morality as a force in history.

Western governments have become the antithesis of morality.

ANALYSIS

TORTURE: A PRACTICE WHICH IS ALWAYS WRONG

BY RON JACOBS

In 1960, when I was a first grader at a Catholic school near Washington DC, my teacher regaled us with horror stories about torture administered to Christians by the Maoist government in China. Reading from a conservative Catholic newspaper, she told my classmates and me about soldiers placing bamboo under the fingernails and multiple other tortures. Of course, we were told the point of these tortures was to convince the Christians to give up their religion. Furthermore, our teacher and the priests at church emphasized that torture was never practiced by US forces. Imagine my surprise a few years later when I heard for the first time that US Special Forces and their Vietnamese trainees were torturing and killing suspected insurgents using tactics much more painful and "scientific" than those used by the Chinese forces. As my understanding of how governments and their police forces actually worked expanded, it became clear that torture was accepted by many more countries than I had been led to believe.

In western studies, much of the history of torture in the Post-World War Two era is focused primarily on authoritarian regimes in the southern hemisphere and in Asia and Africa. This is due in large part to the existence of the struggle between the United States and the Soviet Union. A struggle that took place on many fronts-commercial, ideological, diplomatically and militarily, it manifested itself most brutally in these regimes. Many of these governments were allied with Washington, while some were in the Soviet sphere of influence. Despite Washington's all-too-often claim of ignorance regarding the regimes in its sphere utilizing torture, the fact is that the Pentagon and CIA were intimately involved in the training of the torturers and, in the case of the CIA, often involved in the torture itself. The anti-communist mindset of Washington and other western capitals provided those governments with a rationale needed to oppose indigenous resistance movements in subject nations. By labeling such movements communist, western intelligence and military forces believed that any means they chose could be used to subvert and destroy them.

Perhaps nowhere was this process more obvious than in southern Vietnam. After the French lost the country of Vietnam (leaving their own legacy of torture and brutality), Washington stepped in. In a story familiar to most, the US commitment began with a relatively small force whose job was to create a client military to prop up the client regime installed in Saigon. Eventually over half a million US troops were involved in fighting a revolutionary army supported by the military of northern Vietnam, which was in turn supported by the Soviet Union. Stories of torture and brutality came from both sides, encompassing combatants and civilians alike. In addition, the program known as Operation Phoenix coordinated by US military and intelligence forces in Vietnam was notorious for its torture of non-combatants. Despite this history of cold war torture, there seemed to be a gradual

momentum across the globe towards eradicating torture prior to September 11, 2001.

September 11, 2001 and Its Aftermath

Generally understood to have begun in medieval Europe, the use of torture has ebbed and flowed since then. In recent years, not only has its use spread across the world, but tolerance for its methods has also increased. One can place much of this increased tolerance to the public endorsement of torture by the United States in its so-called Global War On Terrorism (GWOT). The official acknowledgment of the use of torture by US interrogators allowed other regimes historically identified with torture to continue their practice merely by stating that those they were torturing were terrorists. After all, this reasoning is exactly what the self-identified world's greatest democracy was using and getting away with. From Bangladesh to Syria; from Indonesia to China; and all points in between; all a nation had to do was identify an individual as a terrorist. Once identified, any type of interrogation was permissible.

"The practice of torture varied according to cultural and political realities in each country. Despite the variations in its frequency and methodology one would be hard put to find a government that forsook the use of torture entirely."

This situation rendered a decades-long trend towards eradicating torture essentially irrelevant. In addition, the legal arguments proffered by US officials like former Secretary of Defense Donald Rumsfeld and former Justice Department Attorney John Yoo made a mockery of years of work by the United Nations and non-governmental organizations like Amnesty International. In the best tradition of George Orwell, torture became redefined as enhanced interrogation. Washington's attempts to redefine torture made it clear that the definition of torture, once thought to be absolute, is clearly dependent on who is doing the defining and, more importantly, who is being defined. A perfect example of this can be seen in the case of Syria and Egypt, once Washington's favored destinations for those suspects rendered by Washington for torture and further interrogation. Those very same regimes and techniques are now condemned by elements of the US government as the old regimes fall from favor.

The Nuremberg Principles clearly defines the responsibility of torturers in this way: "The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him."[1] In the fervor surrounding Barack Obama's election to the presidency of the United States, several calls to try the torturers of Abu Ghraib and Guantanamo Bay went up and were quickly thwarted. As of this date, the only people to stand trial for any of the torture ordered by Donald Rumsfeld and other officials of the Bush administration have been a few low-ranking soldiers. As Anupama Rao wrote in an article for India's *Economic and Political Weekly* in 2004: "We run the risk again today of singling out the perpetrators of torture, while ignoring the structural brutality, the profound redefinition of humanity, which characterises the 21st century emergence

1 International Committee of the Red Cross. "Principle IV, Nuremberg Principles." *International Humanitarian Law - Treaties & Documents.* http://www.icrc.org/ihl.nsf/FULL/390 accessed July 1, 2012

of a new imperial formation."[2] In other words, the real criminality of today's torture encompasses considerably more than the specific acts carried out by soldiers, police and so-called contractors on prisoners. In fact, it is reasonable to argue that the redefinition of humanity utilized by those who establish the rationales for torture is considerably more harmful in the long term, given that a generalized acceptance of this redefinition could, in a worst case scenario, make almost any type of torture acceptable.

Concomitant to the aforementioned attempts to redefine torture as enhanced interrogation is the argument made that torturing a suspect can save hundreds of lives. Despite the testimony of several military and intelligence operatives who swear that information derived via torture is most often unreliable, this claim continues to be made and provoke discussion, especially in the media. By providing a forum for this discussion about the supposed usefulness of torture, the media is enabling torturers to get away with serious crimes that would appall most people if they were being committed against them or their families. The debate around the systematic torture of prisoners in US custody or the custody of any other nation should not be about the efficacy of such tactics, but about the elimination of those tactics.

The fact that the discussion is centered around tactics and their efficacy shows how far the discussion about torture has regressed. Until recently, the international trend was edging away from torture, with the United Nations taking on regimes known for the practice. Unfortunately for the tortured, the UN endeavor depended on the clarion example of nations that rightly or wrongly represented a commitment to human rights like the United States. Now that Washington is known as a nation that not only tortures, but publicly defends its actions, the UN's struggle to outlaw torture must find new allies. Like Rosemary Foot writes in an article in *International Affairs*: "Emulation of the powerful has always been important in world politics; thus US behavior has done untold damage, not only to the rights of those held in US detention centres, but far more broadly to the human rights regime, particularly in a part of the world (Asia and Middle East-Ron J.) where the hold of this norm was already somewhat tenuous." [3]

Unfortunately, torture is a common human experience. Different torturers may have used different techniques, but the desired result was the same. However, when we begin to examine the colonial and postcolonial history of torture in Asia (and elsewhere in the world for that matter) we begin to see a commonality in techniques. Much of this can be traced to the colonial forces teaching the indigenous torturers. Naturally those teachers were members of the colonial and imperial armies and their mercenary counterparts. Along with the development of western military and policing techniques came the adoption of western torture techniques as well.

The practice of torture varied according to cultural and political realities in each country. Despite the variations in its frequency and methodology one would be hard put to find a government that forsook the use of torture entirely. Equally true is the fact that as humankind became more "civilized" the use of torture has become more common.

2 Rao, Anupama. "Torture, The Public Secret." *Economic and Political Weekly*. (39), no. 23.p. 2349

3 Foot, Rosemary. "Collateral Damage: human rights consequences of counterterrorist action in the Asia-Pacific", *International Affairs*, vol. 81, no. 2, March 2005

This is despite claims to the contrary. If one examines this phenomenon more closely, a rather convincing argument can be made connecting the growth of colonialism and imperialism to a greater use of torture. It seems also safe to assume that the expansion of torture is directly related to the imperial nations' attempts to subjugate the people's whose land and resources they covet.

A key part of this gradual transition was a move from purely physical torture to a more psychological approach. The latter approach does not eliminate physical pain but relies more on the threat of such pain to extract something from the tortured. No matter what, as J. Jeremy Wyznewski and RD Emerick make clear in their 2009 text The Ethics of Torture, torture is first and foremost about manipulating the human mind. It might even be fair to argue that the long term effects of psychological torture are more harmful than torture of a purely physical brand. There simply is not enough data to draw a clear conclusion.

Psychological or otherwise, torture is always wrong. No government claiming to be concerned with human rights can make such a claim as long as they allow torture in their name. Indeed, no government concerned with human rights can make such a claim unless they prosecute those within their legal sphere who either are involved in torture or provide administrative and legal support to those who do. Unless and until the human rights organizations so willing to challenge torture undertaken by regimes in the developing world are willing to mount a comparable charge on the capitals of the west, their agency as accountable voices against the scourge of torture will be ignored.

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INTERVIEW

FIGHT AGAINST TORTURE
A LONG WAY TO GO

Wong Kai Shing © AHRC Photo

The elimination of torture is not an isolated experiment. It is a project that requires significant social interaction and team work. How do we prepare the ground to address the political powers for institutional reforms to eliminate torture? We are trying to find insights for these basic facts. As a regional organization, how does the Asian Human Rights Commission act to prevent torture? ***Mr. Wong Kai Shing****, Executive Director of AHRC, shared with* ***Torture Magazine*** *his understanding and experiences of torture prevention.*

TM: Every country has agreed to so many conventions in order to eliminate torture and other inhuman cruelty. But torture continues to be an ongoing social phenomenon. How do you look at this problem and why have we been unsuccessful in eliminating torture?

WKS: Torture is still prevalent in many countries in the world. In Asia, torture is widely practiced in police stations in many countries. The purposes of police torture include extracting information and confessions, inflicting punishment, extorting money, etc. Torture is used as a means of criminal investigation by the police to extract confessions and information. Torture is also used for inflicting punishment and fear by the police for political purposes, such as suppressing opposition and silencing dissent. In some social contexts, discrimination on different grounds such as ethnicity, religion, caste, or gender is the reason for torture. Torture is a way of extorting money by forcing people to pay not to be tortured in police custody.

It is difficult to eliminate torture in these countries due to the following reasons:

Torture becomes a means of benefitting corrupt police officers. Bribes are taken to fabricate charges against innocent people and to extort confessions through torture. Money is extorted from people to avoid torture under police custody.

First, most Asian countries lack a functioning and effective domestic framework to combat torture. Although many Asian countries have ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), there are serious deficiencies in adopting effective legislative, administrative, and judicial measure to prevent acts of torture as required by Article 2 of the CAT. In particular, most countries have not made torture a crime as required by Article 4 of the CAT. At the same time, there is a lack of independent and effective mechanisms with the criminal justice system for the lodging and investigation of complaints against torture. Torture victims face great difficulties and often threats from perpetrators when they make complaints. Executive interference on prosecution and judiciary as well as judicial delays undermines the judicial process for fair and effective legal redress for victims. As a result, the possibility of impartial investigations, prompt prosecutions and proportionate punishments are limited or non-existent, and impunity for the perpetrators of torture continues.

Second, most Asian governments lack the political will to eliminate torture. This is shown by their reluctance to criminalize torture or adopt effective reform measures to prevent torture. Sri Lanka and the Philippines have specific laws to criminalize torture, but the implementation of these laws is very weak. Many governments not only tolerate police torture as a means of criminal investigation, but also use torture to silent dissent and maintain a climate of fear so as to prevent greater participation of people in social and political life.

Third, the high prevalence of corruption in many Asian countries has undermined the proper functioning of all public institutions, especially the administration of justice by the police, the prosecution, and the judiciary. Torture becomes a means of benefitting corrupt police officers. Bribes are taken to fabricate charges against innocent people and to extort confessions through torture. Money is extorted from people to avoid torture under police custody. At the same time, judicial corruption blocks the way to justice.

Fourth, a lack of professional knowledge and skills among police officers, as well as resources for criminal investigation, has maintained the practice of torture as a means of criminal investigation. In many Asian countries, police officers are poorly trained and equipped to conduct criminal investigation scientifically, while torture is tolerated as a means of criminal investigation. This is closely related to the neglect of the governments to take the establishment of a professional and credible police force as a priority to ensure the proper functioning of the criminal justice system and the due process.

Fifth, the public awareness towards the nature and the impact of torture on victims and society as a whole is still weak in many parts of Asia.

TM: As you've said, some countries have not even passed laws against torture. Do

you think torture can be solved by laws?

WKS: Making laws is one of the key measures to tackle the issue. Criminalizing torture is required by Article 4 of the CAT. It provides a legal framework to pursue accountability of torture perpetrators and establishes the norms in society for the prohibition and prevention of torture that torture should not be allowed under any circumstances. However, very few Asian countries have this kind of legislation, such as Sri Lanka and the Philippines. Many governments claim that torture can be dealt with under the related crimes in existing criminal law, such as physical assaults. This cannot fulfill the definition of torture in Article 1 of the CAT. Torture is not an ordinary crime committed by anyone. It is specified in the definition that torture 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." The acts of torture are performed or sanctioned by people with official capacity. It is a serious abuse of state power. Under international law, torture is one of the most heinous crimes against humanity. Torture should be punishable by appropriate penalties which take into account this grave nature. Furthermore, the crime of physical assault does not include mental torture which is widely used nowadays by the police and intelligence agencies. Therefore, we should promote the making of specific legislation to criminalize torture according to the definition of the CAT.

However, torture is a systemic problem which cannot be solved solely by laws. We should go beyond legislation and advocate for legal and institutional reforms to establish a functional criminal justice system and set up an independent and effective investigation mechanism for the lodging and investigation of torture complaints.

TM: As a human rights activist how do you address the people who have little knowledge about torture as a social and political evil?

WKS: For people who have little knowledge about torture, it is important to present to them the impacts of torture upon victims and the society as a whole. Human rights activists can start with documentation of cases of torture and then exposing the problems of torture among law enforcement agencies and the situation of torture victims in media and public forums. With the documentation of cases, activists can conduct in depth analyses regarding the adverse impact of torture on the proper functioning of law enforcement agencies and public institutions in the protection of human rights. The knowledge generated can provoke public discussion on the problems of torture. Channels and opportunities can be created to allow torture victims to speak out and let others know about their stories and sufferings.

TM: The elimination of torture is long process that we have to walk through carefully. What are some of the challenges that we (activists and ordinary people) could face in this regard and how could we overcome those difficulties?

WKS: There will be many challenges in working for the elimination of torture. They include how to find out about torture cases, how to approach the victims of torture, how to provide support to victims, how to analyse the problems of torture, how to raise public awareness and discussion on the problems of torture, how to lobby the government to make laws and institutional reforms for the prevention of torture, how to raise international concern about torture cases and raise international support for domestic advocacy for reforms, how to develop an attitude against torture among the general

public, etc. In the process, activists will also face a lot of pressure or threats from law enforcement bodies and intelligence agencies.

To deal with these challenges, activists should first develop in depth understandings of the problems of torture through documentation of cases of torture and analyzing the institutional problems reflected in these cases. The knowledge generated is the basis for generating public support against torture and lobbying with the government on related reforms by providing evidence, analysis, and reasonable arguments. The use of electronic media and internet communication can be very useful nowadays to raise the issue of torture to a wide audience, both locally and internationally. To develop support for victims not only requires legal knowledge and skills, but also the knowledge about the psychological impacts of torture upon the victims and how to handle this aspect. It is also important to build alliances with other professional groups such as lawyers, doctors, (medical and forensic) and psychologists as well as people in political arena, such as parliamentarians, to strengthen the public campaign against torture and lobby with the government. The protection of activists from threats can be enhanced by developing regional alliances with groups in other countries of the region and maintaining support links with international human rights networks.

TM: Many argue that the United Nations, as a common front or as an international body, has failed to address the root cause of the problems in many countries. Torture is one of them. Do you have a counter argument or can you elucidate on the role of the UN in not only the prevention of torture but also the protection of human rights?

WKS: A key role of the UN is setting international standards. The UN has made the major international human rights treaties and standards in terms of civil and political rights as well as economic, social and cultural rights. These standards form the core of the international human rights laws that every person can claim. One such treaty is the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Different from other international agreements that regulate the behaviors and relationships between states, international human rights treaties stipulate the obligations of states in the protection of human rights within their countries. The states have to ensure the protection of human rights domestically by undertaking legislative, judicial, and administrative measures, as well as providing effective remedies by the legal system. Therefore, the fundamental safeguards of human rights should be provided by domestic institutions, especially the justice institutions that function on the principles of the rule of law.

Bearing its limitations in mind, the UN is still a very important arena for raising human rights concerns. Every country wants to avoid being criticized and shamed in international arenas.

The UN has set up various human rights mechanisms to monitor and promote the implementation of international human rights standards by the states. The functions of these mechanisms, such as the various human rights treaty bodies, are mainly monitoring and interpretation of the standards, not the implementation of rights, which is the responsibility of the state. The UN Human Rights Council provides a regular platform for member states to discuss and act on human rights issues. It plays the key

functions of standard settings and monitoring of the performance of states on human rights. The Special Procedures on thematic issues and countries of the Human Rights Council play an important role in developing in depth analyses on the problems of human rights protection and recommendations for improving the existing standards and mechanisms. They also handle urgent appeal cases through communication with related governments. The limitation of these mechanisms is that their capacity of ensuring domestic enforcement of international human rights standards is weak compared to the capacity of other mechanisms to enforce agreements regulating interstate behaviors and relationships. The resources of these mechanisms are also very limited for tackling human rights issues in countries around the world.

Bearing its limitations in mind, the UN is still a very important arena for raising human rights concerns. Every country wants to avoid being criticized and shamed in international arenas. For example, when a human rights issue of a country is raised in the UN Human Rights Council by NGOs and many other countries, this will create great pressure on the government of the country to solve the issue. Particularly in a crisis situation, concerted international actions, backed by the wide support of the international community, can make a difference. Moreover, international pressure is often useful in creating space for local activists to conduct advocacy for human rights and related reforms in the country. This applies to the issue of torture. We should also continue to raise the issue of torture at the UN to improve the standards on the implementation of the CAT and the obligations of the state. It needs long term efforts.

TM: Having been a human rights activist for years, do you have personal experiences on social reforms as found in Hong Kong? I understand that we can't apply the same model to each and every country, but we could learn from the achievements of others. Can you share your experiences on social change in Hong Kong?

WKS: Hong Kong was a place of rampant corruption before 1974. The government bodies were very corrupt, in particular the police. The police systematically collected bribes from gangsters and protection money from shop owners. Torture was practiced in police stations. Firemen asked for money before released water to put out fire. In the late 1960s and early 1970s, there were mass protests against the rising costs for daily livelihood and rampant corruption. People demanded an end to corruption and called for the prosecution of corrupt high rank police officials. As corruption had made the livelihood of people very difficult, the British government which ruled Hong Kong at that time realized that without resolving the problem of corruption, the social unrests would continue. Therefore, the Hong Kong colonial government set up the Independent Commission Against Corruption (ICAC) to investigate briberies in public sectors as well as private sectors. The ICAC was totally independent from the police and other government bodies. It had its own investigative force, trained by itself, and was provided with wide investigative powers. The corruption in the police was the key target of the ICAC. In a few years, the ICAC succeeded in eradicating the corruption in the police. The ICAC also conducted public education and developed prevention measures against corruption. This three-pronged approach - law enforcement, prevention, and education - is considered the key to the success of anti-corruption by the ICAC.

"There are still many problems with Hong Kong. In particular, the political system of Hong Kong is still undemocratic after the reversion of Hong Kong to China. Because of this, the people of Hong Kong have to constantly be vigilant to advocate for democratic reforms and express their voices on government policies that infringe the rights and freedoms of people."

At the same time, the Hong Kong colonial government decided to improve the professionalism of the police in conducting criminal investigations and serving the community. In the past, the key function of the police was to maintain public security to safeguard the colonial rule. This could no longer fulfill the rapid social and economic development of Hong Kong and the demands for good governance from society. The key function of the police was changed to protect and serve people in society. The police began putting emphasis on training officers on scientific investigation techniques and in developing forensic facilities and technologies. Police officers were trained to hold the attitude of serving the community and respecting the rights of people. As a result, the Hong Kong police became a highly professional police force and more or less clean from corruption. With all these changes, torture by the police was largely eradicated.

The experience of Hong Kong shows that the situation of rampant corruption and serious malpractices in the police system can be changed by determined reforms with the adoption of effective mechanisms. A key of these changes is the participation of the people in demanding reforms. There are still many problems with Hong Kong. In particular, the political system of Hong Kong is still undemocratic after the reversion of Hong Kong to China. Because of this, the people of Hong Kong have to constantly be vigilant to advocate for democratic reforms and express their voices on government policies that infringe on the rights and freedoms of the people. For example, over half million people demonstrated on the street on 1 July 2003 to protest against the national security bill. Afterwards the Hong Kong government had to shelve the bill. The vigilant people's movement of Hong Kong is still playing a key role to maintain the rule of law and freedoms in Hong Kong.

Therefore, developing a vigilant people's movement for the elimination of torture is very important for the success of the campaign.

The experience of Hong Kong also indicates that the eradication of corruption followed by enhancing the professionalism of the police in scientific investigations and in serving the community can help to largely eradicate and prevent the practice of torture.

INTERVIEW

NO ONE CAN TOLERATE TORTURE

Erik Wendt © RCT Photo

Erik Wendt has shared with us his insights about the prevention of torture programme, in which he has been involved for over decade. Erik is the Programme Manager for Asia of the RCT - Rehabilitation and Research Centre for Torture, which is one of best organisations working against torture, globally. Since 1997, he has worked as RCT Asia Program Manager and has been responsible for the development of the programme in Asia. His main duties include co-ordination and development of rehabilitation and prevention projects, s well as regular project visits to Sri Lanka, Bangladesh, Thailand (Thai-Burmese border), India, Nepal, Pakistan, and the Philippines. Mr Wendt speaks to ***Torture Magazine****.*

TM: Despite being illegal and socially taboo in many countries, torture remains rampant. This was an important point that you raised in your article just after forming the Asian Alliance Against Torture and Ill-treatment (AAATI) in 2011. Could you please explain more about this point and the experiences you have gained from working to prevent torture?

EW: Well….the fear factor is always there, when we address the state torture. Nevertheless, people do come forward and we have reached the point today where courageous local and international human rights watchdogs document, investigate and report many torture cases. We still do not have regular and updated baseline data on the prevalence of torture and the identity of the perpetrators, due to several factors. The fact that torture is illegal results

in many of the atrocities being committed in a clandestine fashion. This shows the cowardly nature of the perpetrators. Also, the fact is that torture and disappearances are used by military operations in areas that are severely restricted from public scrutiny. I do see tendencies towards a broader public awareness of torture around Asia; however, we also observe how governments, even legitimate elected and in named democracies of Asia, seek to maintain their international reputation and dismiss the use of torture by their so-called law-enforcement agencies as individual excesses of force and non-validated cases. Furthermore, they use direct and indirect censorship of the national media to suppress the flow of information to the broader public. It is rare to see a state television report on a torture case by their police or military force.

"As in the case of any long-term chronic conditions of maladies, the fight against torture is not singular or straightforward.

I have visited many development and human rights organizations and my conclusion is that most mainstream civil society organization are genuinely interested in our work against state torture and ill-treatment; however, they are more difficult to activate and engage in a dialogue on partnership against torture. They may focus on violence against women and children, but when it comes to state torture I think the fear factor is widespread within these organizations. On the other hand, I have observed more and more civil society agents coming forward in years.

TM: Based on your time working on the issue of torture prevention and your dealings with local organisations, what are the major challenges that human rights activists are facing?

EW: In comparison to the abundance of local organizations working with poverty reduction projects, you find fewer organizations driven by human rights protagonists who are dedicated to torture prevention. Accordingly, at the end of the day it is easier for the state to spot, isolate, control and suppress these anti-torture initiatives. We need to take care and protect the human rights defenders. This is a major issue. It is important to counteract the state suppression by seeking protection of the legitimate work of these human rights organizations. We contribute through local alliance building as well as building solidarity with regional and international networks. Although the human rights activists share a similar vision of a world free of torture, it is unfortunate that, in some cases, these rights activists are split along different ideologies and personalities. Secondly, any leader of a human rights organization has to mobilize some funds to sustain his program, the donor community is smaller when it comes to donations for prevention of torture. Here we have a challenge to explain better to the donors the linkages between state torture and development.

TM: Eliminating the practice of torture is a long process and there is no universal model to apply to every society. What are the core factors that we have to focus on, to help make the public understand and take necessary action against torture?

EW: As in the case of any long-term chronic conditions of maladies, the fight against torture is not singular or straightforward. We do make progress and we do make a difference to thousands of victims and survivors of torture. We have to work with

a long term perspective and we utilize all our theoretical background, our innovative ideas and experience on what works, when and how. Sometimes, we see rapid changes and political openings and we use such opportunities but we have also had setbacks in our anti-torture work when a political regime has changed. The strengths of the RCT model is our close partnership and support from the Danish Government, as it enables us to continue our work and deepen our support to a selected number of civil society organizations and in a selected number of countries across the world. It is our partners, who knows the context and have the details from the inside of the violence and torture. This gives us a unique opportunity to respond quickly to a concrete situation, a sudden political and security shift on the ground. We are able exchange knowledge and experience across many different scenarios in many parts of the world. This is our strength.

TM: You have been observing the socio-political systems of most countries in Asia for some time. Could you please share with us your understanding of major problems that Asian countries are facing today?

EW: Asia has experienced huge development in terms of economic growth. Millions of people have been lifted out of poverty and they have benefitted in terms of access to social services. This is very clear from the monitoring of the implementation of the MDG goals. But at the same time, you see massive negative consequences of this development as millions are left behind and side tracked from the development dividend. Unfortunately, we haven't witnessed a parallel to this massive economic development when it comes to democracy and rule of law. State sponsored violence and police torture is rampant in many Asian societies and genuine human development is not easily forthcoming. Unfortunately, with the economic muscle of the emerging countries has also followed a tendency to ignore or suppress internal and international critique. This is a challenge – not only for the UN system and the international community – but for civil society as a whole, as we need to find ways to reengage the state in a human rights discourse leading to acceptance and action.

State sponsored violence and police torture is rampant in many Asian societies and genuine human development is not easily forthcoming.

TM: According to Prof. Manfrek Nowak, who was a UN special rapporteur on Torture, the RCT is the most famous torture rehabilitation centre in the world. Can you briefly analyse the role of the RCT on torture prevention in the world?

EW: The RCT was started a long time ago. We were one of the first health based organizations worldwide that addressed the negative individual and societal consequences of torture. This year we celebrate our 30 years anniversary and we will have three former Danish foreign ministers attending the ceremony and they will reassure the Danish political commitment to support the international work against torture. This is remarkable and demonstrates the massive public support for our work. But the real strength of our work is the close partnership with courageous and highly dedicated and experienced human rights organizations around the world. Without their work on the ground, in difficult circumstances, our work wouldn't make a big difference.

TM: The AAATI, a regional alliance against torture organized a meeting with Asian parliamentarians recently and you played active role in it. What was the outcome of the meeting and how can it help prevent torture?

EW: The Asian Alliance Against Torture and Ill-treatment (AAATI) represents a unique initiative taken, jointly by human rights organizations, activists, and scholars representing a number of Asian countries. We had our inception meeting in 2011, and the message to unite and reflect deeper on strategies and tactics against torture has now spread throughout Asia from mouth-to-mouth, as well as through written and social media. The recent meeting with Asian parliamentarians has demonstrated that the political will is there. The meeting has not only a symbolic value. Politicians and legislators across party lines are surely concerned, as we are from civil society, to find ways and means to stop torture and ill-treatment. I think that this meeting has shown how important it is to facilitate the dialogue between concerned legislators across borders in Asia and to offer technical support and to share our insight as civil society actors with the legislators who will stand up and contribute within their political domain to promote anti-torture legislation and safeguards. This meeting has broken the myth that Asian parliamentarians close their eyes when it comes to police torture. In fact, I came to realize how many Asian politicians either have themselves or somebody in their families have suffered torture and illegal imprisonment. I am hopeful that we will see more parliamentarians who will become role models and human rights champions in the future. For any genuine sustainable human development to take place the fight against torture and corruption should have the highest priority. This is the message that we learned from the meeting with legislators, the bar association and the anti-corruption agency in Hong Kong.

TM: Do you think that some individuals, especially in countries without much exposure to the outside world, 'tolerate' torture because they do not know of a way out? What kind of educational services could be provided to empower them?

EW: I don't know what kind of human beings or human societies of today would tolerate torture and I speculate if such people would really know the devastating physical, mental, and social consequences of their action for the individual, the family, the community, and society at large, that they would not be content to tolerate anything of the sort. How can anybody be ignorant of such inhuman behavior and go home to sleep and play peacefully with their loved ones? It may be that there are people and institutions, who believe in the use of torture as a necessary mean in their 'duties' for the benefit of a state. But it is peculiar how rare we see representatives from police or the military coming forward to defend such position as necessary. Why? Because they know very well that torture is the negation of all human values and behavior. We do sensitize police, military, and prison officials through training on human rights standards and good policing. These are on-going activities, but not even the best training can in itself be sufficient to stop torture. In my opinion we need to look at the whole picture in a given context, we need to analyze the risk factors and to strategize against torture. There is no single 'magic bullet' to stop torture – unfortunately!

ESSAY

TRAUMA OF BEING A TAMIL IN SRI LANKA

(© AHRC Photo)

BY RAMU MANIVANNAN

Sri Lanka has, among other records as a security state, fought wars continuously against its own people since independence. The 'dirty wars' against the radical Sinhala outfits in 1971 and 1987-89 and the undeclared policy of war against ethnic Tamils in the name of counter-terrorism for over three decades are two faces of the same security regime operating within the democratic framework controlled by the Sinhala elites. Thousands of youth have disappeared in the last forty years. The Sri Lankan State, the armed forces, and the senior leaders of the government, for over three decades, are also privy to a crime of committing torture, war crimes and crimes against humanity, and genocide against their own people. Beginning from the disenfranchisement and dislocation of the plantation Tamils, there have been several waves of displacement of Tamils, both of indigenous and Indian origin, in Sri Lanka. There is nothing so clearly perceived and experienced as injustice by the Tamils in Sri Lanka. It is traumatic to be a Tamil in Sri Lanka. What is 'political' about their cause and struggle has survived several traumatic experiences for the people and continues to beseech for a political solution to the ethnic conflict in Sri Lanka.

It is not difficult to recognize that Tamils in Sri Lanka have long been subjected to

trauma at both personal and collective levels. The family tree has been forcefully rooted out and dislocated, and in several instances destroyed beyond recognition. The collective trauma of society could be experienced in the deathly silence of the markets, temples, street corner shops, and other public places. The consequences of this daily practice are not only traumatic for the common people but constitutes as central element of the psychological warfare waged by the Sri Lankan State and its authorities against the Tamil population. Civil society has been subdued beyond recognition. People do not dare to look Sri Lankan soldiers in the eye and speak with heads bent down. The hospitals are the final memories of the dead and those who survive suffer from a notion of living death. The hospitals in the North are filled with cries and memories of the dead. Children draw paintings of tanks, helicopters, aircrafts and soldiers manning the street posts. The destruction of civil infrastructure, including roads, water tanks, public buildings, schools, fishing restraints' for the Tamils, the loss of agricultural lands, the vast areas of land under the custody of the armed forces, and the military occupation of civilian homes are realities that cannot escape the attention of even a stranger to the north. The ethnic war in Sri Lanka has brought psychosocial problems for individuals and families. In addition, it has had a devastating effect on Tamil society; we can speak of a collective trauma. It has caused regression of all development, destroying social capital, structures, and institutions. It has also resulted in changes, for the worse, of fundamental social processes like socialization, social norms, and social networks. Women have been the worst victims of the war, through their internment in the camps and during the resettlement process. There are large numbers of female headed families within the Tamil community in the North and East of Sri Lanka. The male component to the family tree has been uprooted by the long years of civil war, continued detention, and disappearances of Tamil youth. There is a generation of Tamil children growing up in isolation, without the presence and protection of a father, brother, uncle or nephew. There are additional protection concerns as many female headed families (mostly women and children) are returning to areas patrolled by large numbers of Sri Lankan police and military. There are large numbers of female headed households in Sri Lankan Sinhala families too, but Tamil women have suffered the most during this period. At the end of the war, the Tamil women found themselves in isolated areas patrolled by large number of Sri Lankan Police and Military. There are 49,000 young widows in the East and 40,000 young widows in the North. As an impact of the war, there are 89,000 widows in the North and East of Sri Lanka. They are all under 40 years of age and are forced to stay alone without any protection of a family. There is no physical or financial security for them. They have often been assaulted by soldiers in the name of security searches and through inordinate entries into their homes, which have neither doors nor electricity. The Asian Human Rights Commission had earlier observed that, "*the Sri Lankan security forces are using systematic rape and murder of Tamil women to subjugate the Tamil population…Impunity continues to reign as rape is used as a weapon of war in Sri Lanka*." There is credible evidence to this concern about the violence committed by the security forces in Sri Lanka against Tamil women and is available in the reports of the *World Organisation Against Torture, Asian Human Rights Commission, British Refugee Council on Rape, Amnesty Reports on Rape, Committee to Protect Journalists, United Nations Commission on Human Rights* and several non-governmental organizations in Europe, North America, and Asia. We may quote here the 30th September 2009 speech

to the United Nations by the Secretary of State, Hilary Clinton when she observed that women are used as a "weapon of war". Though the State Department had issued a clarification that, "in the most recent phase of conflict, from 2006 to 2009…we have not received reports that rape and sexual abuse were used as tools of war, as they clearly have in other conflict areas around the world." The U.S. State Department Clarification did acknowledge that there is a well documented history of sexual abuse by security forces in earlier phases of the 30 year long civil war.[1] Rape and sexual assault have long been used as weapons of war against the Tamil population. Permanent Peoples' Tribunal, Dublin had observed that, "*sexual abuse and the rape of women by government troops was yet another atrocity repeated throughout the civil war by government military in destroyed villages and in the "welfare villages". This practice, which is in violation of the Rome Statute as a crime against humanity, led to tragedies such as abortions and suicide on the part of victims, unable to live with family shame and mental trauma. This policy of targeting also applied to Tamils living outside the conflict zone. Apart from mass deportations, selective terror campaigns were carried out by means of abductions, assassinations, arbitrary arrests, detention, sexual assault and torture.*" The heavy presence of the Sri Lankan Armed Forces in the North and East of Sri Lanka continues to be a harrowing experience for the Tamil women and traumatic for the children.

Young Tamils have routinely been singled out as a group; especially the males because of their potential link with terrorist organizations. Female, on the other hand, as sexual objects, have been discriminated against by the Sri Lankan Armed Forces and government agents in the north and east of Sri Lanka. The torture, killings and disappearances of young people are more common in the northern and eastern provinces. It may be appropriate to recall here the observations of the UN Special Rapporteur (UNSR) on Torture, Manfred Nowak, made in October 2007, following a visit, stating that, "torture is widely practiced in Sri Lanka." Manfred Nowak singled out the Terrorist Investigative Department facility Boosa for possessing the "fullest manifestation" of torture methods.[2] There were also widespread reports that several people have been summarily executed at various points during the screening process. There are several concerns about the nature and circumstances surrounding people detained under suspicion of ties with the LTTE. The people who were detained were also denied access to lawyers, their families, ICRC, or any other protection agency. The legal basis of the detention was both arbitrary and unclear. The extrajudicial killings of LTTE suspects, along with the practice of torture and enforced disappearances, have become part of the serious concerns of the detained. It is this large number of men and women, suspected for their links with the LTTE, who faced the greatest risk and became part of the silent majority who never arrived at the so called 'welfare camps' and disappeared soon after, if they did arrive. There is a persistent pattern of torture and other ill treatment of detainees, including individuals detained under the Emergency Regulations or the Prevention of Terrorism Act, on suspicion of links to the Liberation Tigers of Tamil Eelam, (LTTE) as well as individuals arrested in the course of civil policing, including criminal suspects as well as those wrongfully arrested at the behest of third parties engaged in personal disputes.

1 "Sri Lanka: A Bitter Peace," *International Crisis Group*, 11 January 2010.

2 United States Department of State, Bureau of Democracy, Human Rights and Labor, *2008 Human Rights Report: Sri Lanka*, February 25, 2009.

Tamil detainees are often held, arbitrarily, for prolonged periods without charge. Many are arrested and detained on suspicion of links to the LTTE, pending investigation and interrogation by Sri Lanka's intelligence and security forces, or for what the Sri Lankan authorities have termed rehabilitation.[3]

A senior journalist, J. Tissainayagam, was sentenced to 20 years of rigorous imprisonment under the Prevention of Terrorism Act (PTA). The Terrorist Investigation Division (TID) contended that an article contributed by J. Tissainayagam to the North Eastern Herald brought disrepute to the government. He was also charged with violating the 2006 Emergency Regulations with regard to allegations of aiding and abetting terrorist organizations through raising money for the magazine. The detention of J. Tissainayagam was both illegal and arbitrary. It is difficult to imagine that a journalist can be sentenced to 20 years of imprisonment for a piece of writing that was interpreted as aiding and abetting terrorism. The Asian Human Rights Commission (AHRC) observed that, "*AHRC is not surprised by this judgment because at the very inception of this case the AHRC pointed out that this is purely a political case, the first of its kind in which the accused, Mr. Tissainayagam's guilt or innocence was not an issue but an opportunity to send a message to society on the changing circumstances of the country where freedom of expression does not matter at all. That was the real aim of this case. It is the sort of prosecution that could have happened under the regime of Joseph Stalin through the prosecutor, Andrei Vyshinsky*." The charge and the circumstances of Tissainayagam's trail were applied by the Sri Lankan government as a message to the national media. The Sri Lankan government attributed the protest as a challenge to the national security and the regime until the US Government chose to intervene as the fear began to grip even the Sinhala national media. The Press Freedom Index (2008) of the Reporters Without Borders ranked Sri Lanka 165th out of 173 countries in the world.[4] **This was the lowest ranking of any elected democracy in the world**. The International Federation of Journalists observed that Sri Lanka was one of the world's most dreaded places for journalists.[5] US President Barack Obama chose World Press Freedom Day on 3 May, 2009 to deliver the message that, "*in every corner of the globe, there are journalists in jail or being actively harassed: from Azerbaijan to Zimbabwe, Burma to Uzbekistan, Cuba to Eritrea. Emblematic examples of this distressing reality are figures like J. S. Tissainayagam in Sri Lanka or Shi Tao and Hu Jia in China*". The Sri Lankan Government continues to castigate the independent news media as traitors whenever the excesses of the armed forces and the ruling authorities were questioned or exposed by the media. Torture and detention of Tamil and Sinhala journalists has gone unnoticed for a very long time in Sri Lanka and has come to be recognized only after May 2009, outside the human rights network. The deaths and disappearances of journalists and other media professionals in Sri Lanka was little known or spoken about until the gruesome murder of Lasantha Wickramatunga who dared to raise his voice against the Mahinda and Gotabaya Rajapaksas. State terrorism in Sri Lanka has long been underlined by the criminalization of the politics and political elites. This had gradually resulted in the

3 Amnesty International, Sri Lanka: Briefing to the UN Committee against Torture 2011, http://www2.ohchr.org/english/bodies/cat/docs/ngos/AI_SriLanka47.pdf (October 2011).

4 Reporters Without Borders. *Press Freedom Index 2011-2012*, http://en.rsf.org/press-freedom-index-2011-2012,1043.html.

5 Handunneti, Dilrukshi. *Media: Lanka's deadly story*, http://www.thesundayleader.lk/20090503/spotlight.htm (May 3, 2009).

emergence of a rogue state without any guilt or responsibility, neither towards its own people nor the global community.

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TORTURE
ASIAN AND GLOBAL PERSPECTIVES

A NEW DAWN FOR DIALOGUE

Silence implies support. To remain silent in the face of such widespread torture implies that people do not think torture is wrong. If we think torture is wrong we should speak out, loudly, whenever we learn of a person being tortured.

cover story

AHRC Photo: Jan Ole Haagensen

COVER STORY: OP-ED

AHRC File photos: The inaugural event of the Asian Alliance Against Torture & Ill-treatment (AAATI), a regional alliance, co-founded in Hong-Kong in 2011 by AHRC & RCT, for the prevention of torture.

A NEW DAWN FOR DIALOGUE

The development of a culture against torture is a long and winding road; it requires the strongest of efforts to succeed. At the most basic of levels, everyone knows torture is bad, but many people rationalize the existence of torture in certain circumstances. How a society addresses torture defines what kind of dialogue human rights activists can establish to encourage torture's abolition. Torture is not just the acts or tactics of a single person or institution. It has its own cultural, economic, social, and psychological causes and impacts. We cannot eliminate an idea which directly or indirectly advocates torture, because of its deep cultural roots. The elimination of torture will require new dialogue, with an emphasis on education and easy access to all members of a society. Advocating a comprehensive discourse against torture will help to bring about a paradigm shift within the targeted society, leading to greater public involvement.

What we can't deny is that, "Torture cannot be scientific. It is unlikely interrogators can torture in a restrained manner. Technology does not help them in this respect. Torture has strong corrosive effects on professional skills and institutions. Clean, selective, professional torture is an illusion. This is true regardless of whether one uses torture to intimidate, interrogate, or extract false confessions." (Chapter 21, Page 478, Torture and Democracy, Darius Rejali).

Torture has become a common tool for every political system, creating its own justification to continue in various forms. In this context, developing a common culture against torture is required and will take considerable effort. It needs dedicated communities within the society who actively oppose torture and promote opposition to any form of violence.

The Asian Alliance Against Torture and Ill-treatment, (AAATI) a regional alliance

formed in 2011 by the Asian Human Rights Commission, based in Hong Kong, and the Rehabilitation and Research Centre for Torture Victims, based in Denmark, has initiated structured action against torture and ill-treatment. Both organizations have been involved in torture prevention programmes globally, as well as regionally, for a few decades.

Last month, the AAATI hosted an event in Hong Kong, where several Asian parliamentarians and some leading human rights activists were invited to sit together and discuss ways of combating the practice of torture and ill-treatment in Asia. It was a new dawn of dialogue towards the prevention of torture in Asia. This is the first time that legislators from various countries in Asia and human rights activists from across Asia have sat down together to share their experiences on torture and human rights abuses.

In his welcoming speech, chairman of the AHRC, Jack Clancy, said, "Silence implies support. To remain silent in the face of such widespread torture implies that people do not think torture is wrong. If we think torture is wrong we should speak out, loudly, whenever we learn of a person being tortured."

He further said, "Without laws making it illegal, torture is considered legal. We should demand that laws be passed making torture illegal and should insist that those laws be strictly implemented."

Meanwhile, Jan Ole Haagensen, director, International Department of the RCT argued, "Torture is not only a tragedy for the victims; it is also degrading for those who perpetrate it and to societies which tolerate such outrage. Today we have international instruments in place, with primarily the UN Convention against torture and it's Optional Protocol at our hands. Freedom from torture and other cruel, inhuman or degrading treatment or punishment is an inalienable human right. The prohibition of torture is a fundamental principle of international human rights law. This prohibition is absolute and allows no exceptions. Yet, today torture constitutes a huge problem in the world with torture taking place in more than half of all the countries in the world, among these many Asian countries."

In this issue we are presenting the insights of MPs from Asia and human rights activists who have been working against torture over the last few decades. As the founder of the AAATI and director of policy and programme of the AHRC, Basil Fernando, pointed out, "The problem of police torture is quite widespread and this requires addressing if the rule of law is to be preserved. We are talking about an enormous problem. It's not about some kind of aberration or some few people, some bad eggs problem."

The elimination of torture has to be an ideology of our culture and there is still a long way to go before that can be achieved. For it to be effective, such an ideology must be widespread. Only then will ordinary people will get involved. Generally, politics has more in common with culture than legality. Because of this, the idea of "social change" has become central to modern reform movements. Recent discussions with legislators from across Asia have been an important step, which have opened new avenues for expanding the dialogue against the practice of torture and other cruel and inhuman treatments.

COVER STORY: HONG KONG

SILENCE IMPLIES SUPPORT

BY JACK CLANCEY

It gives me great pleasure to address this gathering of legislators from several countries, sitting together with a group of committed human rights activists. This gathering itself, to discuss the evils of torture, is a matter of great significance. While legislators from different countries often gather to discuss matters relating to trade and business, finance, geo-political alliances and other similar matters, it is rare that such meetings are held to discuss matters of great significance for the ordinary citizens of a country. It is therefore a great pleasure for me to participate in such a meeting. I am glad to have been invited to share a few thoughts for your consideration as you prepare to start your sharing and important deliberations.

UN Convention- UN CAT

The primary focus of your deliberations will be on the promotion of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the "Torture Convention"). History is full of examples of people in power flaunting their use of torture. History also records how, until recently, torture was considered acceptable, but a major change has recently occurred. A great milestone in the history of the human race, as well as the history of law, was to develop this convention to express the common point of view of all humanity: firmly stating that each state must do all that is within its power to end the practice of torture and ill treatment of individuals. As people who have an interest in the treatment of human beings, as human beings, and fully respecting the human dignity of each person, I presume each of us is proud to be associated with each and every attempt to implement this great convention.

Violations

As this is a sharing among legislators who are fully aware of the unique circumstances within their respective countries, I do not think it is necessary for me to give examples of the violations of this convention and the rights guaranteed under it within each country. It suffices to say that the Asian Human Rights Commission, which I assist as chairperson, has over many years taken great pains to document violations relating to torture and ill treatment in each country as part of its endeavour to assist concerned persons in these countries to understand their obligations under the UN CAT. The AHRC documentation is a rich source of information which could be quite useful to legislators in their deliberations both now during the meeting, as well as for other domestic and international discourses. As legislators involved in the development of laws and vital policies you understand the need to rely on authentic and credible information on all the matters with which you deal. On the issue of torture and ill treatment the AHRC and ALRC can provide well documented material on which you can rely.

From Old Style to Modern Policing

I presume we all agree that torture and ill-treatment still remains a major problem in many Asian countries. Various historical factors may explain the existence of this situation. One obvious factor is that the development of modern policing systems, which completely reject the use of torture in criminal investigations and that rely entirely on methodologies using up-to-date scientific techniques, have not yet been achieved in many Asian countries.

As a long time resident of Hong Kong, I could share with you the experience here when the decisive change from an old style policing system to modern law enforcement took place: namely about 1974 with the creation of the Independent Commission against Corruption, (ICAC) which I know you will later visit. This institution and the decisive political will that ensured its full implementation have made a fundamental difference to Hong Kong's way of life and its administration of criminal justice.

Perhaps one of the concerns which may be preoccupying you as legislators is how a government can achieve this decisive transformation from an old style of policing to a modern one. A modern policing system has implications that go far beyond the field of criminal justice; it has implications for the realization of full and genuine democratisation of our societies. None of the basic elements needed for a fully functional democracy could be achieved without a radical transformation of policing, as this important institution must be made to function within the framework of democracy itself. Where this does not happen, the policing system itself not only can but has often become a threat to democracy. Even the holding of free and fair elections is not possible without a policing system that functions strictly within the parameters of the rule of law. Thus, the topic that you will be discussing during this meeting is likely to have very significant implications for the very problems that occupy you most as legislators, namely how to ensure a system of public institutions that is capable of sustaining democracy. Where democracy is threatened, even the role of legislators is threatened. Thus, as legislators you have very good reasons, as well as motivation to be deeply interested in the issue of modernising police structures so that the policing system becomes capable of achieving the objectives of the UN CAT.

Budgetary Allocations

Achieving this aim requires that adequate budgetary allocations be made to enable a functional policing system and a functional system of criminal justice as a whole. It is here that the legislators face their most serious challenge. The allocation of budgets is often a test of political will in regards to trying to achieve a desired influence in regard to an objective. Whatever rhetoric legislators may employ when talking about laudable objectives will be of little value if the legislators cannot find a way to make the necessary financial allocations that will ensure their practical implementation. This again is an area to which you will give serious consideration in the coming few days. At least, I hope so.

A Common Misconception that policing without torture is impossible

Please allow me to comment on what seems to be a common misconception: policing without torture is impossible. This used to be a widely held view within the police, as well as in society, when the old style of policing was the only policing that people knew. However, the experience of many

countries, some of which have abandoned the practice of torture a long time ago, clearly proves that policing without torture is not only possible but has become a reality. Old habits, including thinking habits, linger on. That may be one of the reasons for the baseless, but sometimes widely held belief that torture is a necessary aspect of enforcing discipline. A somewhat similar view, held at one time, was that the rearing of children without physical punishment was disastrous and that a husband should beat his wife to assert his authority. However, experience has quite clearly proved that physical abuse has a disastrous impact on human behaviour and it has clearly been proved that policing based on torture does not bring about the desired results. In many of the countries where torture is still being used, the prosecution success rate is around 4% to 5%, or even lower. This alone is proof of the utter uselessness of this practice.

What Psychology Tells About Torture

A very important aspect of this discussion is based on the knowledge and insight that has been obtained through modern psychology. For legislators who want to convince others about the need to eliminate torture and ill-treatment, modern psychology can be very helpful. Modern psychology has demonstrated and shown the negative impact of torture and ill treatment on the human mind and that the suffering people go through during torture leaves permanent imprints, impairing the victims for the remainder of their lives. There is no moral or ethical justification for causing such suffering. The practice of torture violates all moral and ethical norms. Furthermore, modern psychology also reveals that obtaining information under conditions of torture is almost useless. Human beings freeze under torture and parts of their brain become impaired, hampering their ability to communicate.

Another aspect of psychology is the importance of implementing measures for the rehabilitation of torture victims. Rehabilitation is a function of the government. Rehabilitation requires a legal framework, as well as institutions to provide services to the victims. These should include both physical and psychological aspects. As psychological aspects have lasting effects, providing facilities for psychological treatment and counseling should be undertaken by the government. Often victims cannot return to work, or even deal with the essentials of daily life during the period of disability because of the scars engraved on their bodies and souls by torture and ill-treatment. These are also aspects that I hope you will discuss, namely finding ways to ensure rehabilitation facilities for victims of torture.

Impunity

Besides the issue of reforms, I am sure you are also aware of the serious allegation that there is widespread impunity regarding human rights violations in general and violations relating to torture and ill treatment in particular. Impunity, as you know, cripples the discipline of any institution and has adverse effects on the whole country. The police and the military are vital institutions in every society. If it is not possible for a country to maintain discipline in these public institutions, then there appears to be something seriously wrong with the functioning of public institutions in that country. The life blood of a democracy lies in properly functioning public institutions. Therefore, dealing with the issue of impunity and the problems that arise from that impunity should be taken very seriously because it threatens the legislative function in

a society. Carrying out your role as legislators depends on the proper functioning of public institutions.

The struggle against impunity lies in the creation and maintenance of effective complaint, investigation, and prosecution mechanisms, as well as a functioning and independent judiciary. As you will note from AHRC documentation, there is a common problem in several countries that proper complaint mechanisms do not exist, or that even if these mechanisms do exist in the formal sense, they are not functioning effectively. People often complain that getting their grievances registered with the police or other institutions is difficult or even impossible when those grievances are about the military or police. Therefore, it is essential to study the existing complaint system and to provide ways to overcome the limitations of such complaint mechanisms. What seems to be most frustrating is the absence of investigation mechanisms. Without independent investigation mechanisms it is not possible to carry out credible investigations. When there are no credible investigations, people lose confidence in the legal process. If people feel that a fair chance of obtaining justice does not exist, then this implies a crisis in the democratic process itself. This too is an area that requires serious attention. There are also complaints about the politicisation of the prosecution process, or other serious problems with prosecutors. Without able and independent prosecutors it is not possible to maintain an effective system of criminal justice. The last, but most important element is the independence of the judiciary. I respectfully submit that legislators, who have been elected to represent ordinary citizens, should fight hard to ensure that the executive does not in any way interfere with the functioning of the judiciary. I hope all these matters relating to the problem of impunity will be seriously discussed during this meeting.

Laws to Criminalize Torture and Laws for Witness Protection

In dealing with impunity, drafting and approving legislation to enforce the prohibition against torture is essential. UNCAT envisaged that state parties would enact legislative measures to criminalize torture and ill-treatment. A few countries in Asia, such as the Philippines and Sri Lanka, have already done so. There are other legislators who are currently in the process of proposing and pursuing proposed legislation to this end.

Besides criminalization, there also needs to be measures taken to ensure implementation. One of the vital aspects in this regard is witness protection. One witness in a famous case in India, Jessica Lal, said, on the one hand there was a threat of "being treated with a bullet" if she persisted in giving truthful evidence, and on the other, there was an offer of a substantial sum of money if she refused to give her evidence. Her experience reflects a widespread phenomenon in many countries relating to the challenges facing victims and witnesses. Legislators need to take steps to ensure proper legislation and funding for witness protection.

"Without laws making it illegal, torture is considered legal. We should demand that laws be passed making torture illegal and should insist that those laws be strictly implemented."

Another matter of relevance to you as legislators is the Optional Protocol to the

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The purpose of this Optional Protocol is to provide a mechanism for monitoring the conditions of places of detention. As you know, places of detention such as prisons, police stations and other detention centers often happen to be the places where the detainees are subjected to torture and ill-treatment. The Optional Protocol is meant to develop the cooperation between states to provide an effective mechanism for visits to such places with the view to take preventive measures regarding torture and ill treatment. At present only Cambodia and the Philippines have ratified the Optional Protocol.

Civic sense

I am sure you will agree that distrust in public institutions limits public cooperation among people. Each society is an association of free and equal individuals who are ready to cooperate with others. One function of public institutions is to enable and enhance such cooperation. If public confidence in public institutions is lost or lessened, cooperation will be lost or lessened. A discussion on torture and ill-treatment is vital when dealing with problems of a breakdown in public cooperation. Policing is one of the most vital public institutions, both for maintaining order, as well as for ensuring the administration of justice. If the public loses confidence in the police, both public order and the administration of justice suffer. There is an open admission in many Asian societies that confidence in the police is low or does not exist. Therefore, legislators should try to understand this problem and try to find ways of addressing it. In dealing with this problem, the issue of torture and ill-treatment becomes an unavoidable issue that needs to be addressed. In order to develop a civic sense among people, cooperation between the police and the people needs to be re-established. This too, I hope, will also be a topic you can discuss during your deliberations in the coming few days.

Protection of and Cooperation with Human Rights Defenders

I must refer to one further matter of very great importance when dealing with future work for the elimination of torture and ill treatment, as well as all matters relating to the violation of human rights. If this work is to succeed, it will depend on the active participation of civil society. You are aware as legislators that the achievement of any objective requires the closest possible cooperation with all citizens. This is even more the case when the problem involves the violation of civilians' basic rights at the hands of state authorities. Naturally, a great deal of fear is generated by the practice of torture and ill-treatment. Citizens' initiatives that struggle for justice and a better society are seriously hampered due to such fear and intimidation. It is the duty of legislators to protect the right of every citizen to participate in civil affairs. Citizens should not only be enabled, but also encouraged, to complain freely, as well as to pursue their complaints without any harassment or fear of possible harassment.

In this endeavor, it is civil society organisations that play the most vital role: to human rights defenders that the victims go in order to get help. Thus, there is a need to protect the freedom of human rights defenders to offer their services to victims, as well as to society. Intimidation and harassment of human rights defenders has a deeply negative effect on all aspects of democratic life. In the area of monitoring and advocacy, human rights defenders need to be able to move freely and to do their tasks without fear. This is an area where legislators can do a great deal to

stop the present practice of harassment and intimidation of human rights defenders to allow them to perform to their duties and offer their services their fellow citizens.

Please allow me to make two provocative statements:

(1) Silence implies support. To remain silent in the face of such widespread torture implies that people do not think torture is wrong. If we think torture is wrong we should speak out, loudly, whenever we learn of a person being tortured.

(2) Without laws making it illegal, torture is considered legal. We should demand that laws be passed making torture illegal and should insist that those laws be strictly implemented.

These are a few suggestions for your deliberations. I am confident you will be able to bring your well trained minds to the important political task of finding strategies to effectively eliminate the practice of torture and ill treatment in your countries.

(*Jack Clancy is the chairman of the Asian Human Rights Commission and Asian Legal Resource Centre*)

Key
√ – yes
× – no

UN Convention against Torture
Ratification, Criminalization and Witness Protection

Country	Ratification	Optional Protocol	Criminalize Torture	Witness Protection Law
Bangladesh	√	×	×	×
Burma	×	×	×	×
Hong Kong	√	×	√	√
Cambodia	√	√	×	×
China (PRC)	√	×	×	×
India	×	×	×	×
Indonesia	√	×	×	√
Nepal	√	×	×	×
Pakistan	√	×	×	×
Philippines	√	√	√	√
South Korea	√	×	×	×
Sri Lanka	√	×	√	×
Thailand	√	×	×	√

COVER STORY: DENMARK

TORTURE IS AN INDICATOR OF FUNDAMENTAL SYSTEM FAILURE

BY JAN OLE HAAGENSEN

Honourable parliamentarians, government officials, researchers, members of the judiciary, colleagues in the Asian Human Rights Commission and colleagues from other human rights organisations.

First, I would like to greet all participants warmly. A special welcome goes to the parliamentarians and for my colleagues among the human rights organizations. It is a great pleasure for me to see you all here and for me to be together with you in the coming days' elaborations. You cannot imagine how much I have looked forward to this event where two entities - crucial for having a vibrant and living democracy - are present: parliamentarians and civil society organizations. We are here together to explore how we can best eradicate the gruesome and anachronistic practice of torture.

Torture is not only a tragedy for the victims; it is also degrading for those who perpetrate it and to societies which tolerate such outrage. Today, we have international instruments in place, with primarily the UN Convention Against Torture and its Optional Protocol at our hands. Freedom from torture and other cruel, inhuman or degrading treatment or punishment is an inalienable human right. The prohibition of torture is a fundamental principle of international human rights law. This prohibition is absolute and allows no exceptions. Yet today torture constitutes a huge problem in the world with torture taking place in more than half of all the countries in the world - many Asian countries among them.

Torture - an indicator of fundamental system failure

The last 12 years I have been working at the Rehabilitation and Research Centre for Torture Victims in Copenhagen, Denmark. At present, we support activities against torture in more than 20 different countries so I have had the opportunity to travel quite a lot, meeting interesting people, politicians, government officials and human rights defenders who work relentlessly to stop torture and for the alleviation of the sufferings of torture victims. I have participated in productive meetings, but also numerous meetings with many good words and intentions, but that have not always turned into the expected actions. Often the work to stop torture can be rather risky and dangerous. Despite hard work, great effort seems never to be sufficient. Over the years we have met competent and committed government officials who eagerly want to work towards a society that respects the rule of law, but they are often entangled in institutions and systems that have serious flaws and are malfunctioning. The malpractice of torture thrives through another practice that is hindering development – corruption.

Torture is preventable – it is about changing practices and attitudes

Over the years there have been many efforts across the globe to train law enforcement officers, prison staff and the judiciary to abide by human rights laws, but I regret to say that the impact of such training is too often quite meagre. People are trained, but when the police officer, prison officer or the like return to his or her job after their training - they seem to return to their old practices as well. The institutional practices seem so deep-rooted and institutionalized that the value of not torturing people who are in custody is often not internalized, despite the training. When the system and society tolerate torture, something more is needed for ending the practice of torture. It requires a change in practices and attitudes.

Human history has shown that it is possible to eradicate torture, in Denmark, for instance, and Scandinavia, where I come from, as well as in Asia. Among such areas where human rights have made substantial progress is Hong Kong. I look forward to hearing more about this particular experience to see whether there is some insight which can be applied elsewhere. Regardless, it is clear that torture is as preventable in Asia as it has been in Europe. All that seems to be missing in the equation for ending torture is the political will! That is why I am so happy to see the parliamentarians here today to hear from them how they see the elimination of such practices moving forward.

This group of parliamentarians is the most central group of all in this work. If parliamentarians are not solidly behind the absolute prohibition of torture we will never succeed in preventing torture effectively. They are legislating, but they are also representatives of the people and role models. As such, they have an obligation of influencing the public opinion.

An example from Denmark

Here I feel obliged to return to the experience of my own country as it relates to my own organisation, the Rehabilitation and Research Centre for Torture Victims (RCT).

The RCT was founded 30 years ago to undertake the rehabilitation of torture survivors who had fled their own countries and who were in need of specialized treatment due to torture. From the beginning it also took on the task of preventing torture, using the knowledge gained from the treatment and thorough documentation of the consequences of torture on the individual, the family and the community. So we know quite a bit about the evil acts that human beings can inflict on one another.

The RCT was born out of the general value of condemning torture, which is deeply entrenched in the Danish society. This resistance to torture was amplified during the second world War was when Denmark was occupied by the Nazis who used torture when dealing with potential Danish resistance fighters. I will give you an example when this attitude against torture materialised.

In the late 1960s Danish parliamentarians took strong initiatives to support Greek politicians who had been severely tortured by the Greek Military regime (1967-74). (Professor Emeritus at Copenhagen University in international law, Dr. Ole Espersen, presently a legal consultant of the RCT, was one of these Danish Politicians. He later became the chairmen of the RCT in the 1990s). Although Ole Espersen was a Social Democrat, the Danish right wing government supported the public pressure on the Greek regime. Due to the pressure from Denmark and the other Scandinavian countries the Greek regime had to leave the

Council of Europe, due to the harsh critique, and became increasingly diplomatically isolated. Eventually, the military dictatorship collapsed.

Afterwards, the Danish Government has been very supportive of efforts to heal torture survivors and to prevent torture around the globe – expressed, for instance, by many the years of supporting the work of our organization, internationally and nationally, where the rehabilitation of torture survivors (of people who live in exile in Denmark) is part of the Danish public health system. Today, parliament's support for the work against torture cuts across party lines.

The Danish Police also distance themselves from the idea of using torture and for good reason. The police find that information gained from the undertaking of torture is highly questionable and they know that they, as police, would have to pay directly for the consequences. Today we have so much literature on the negative effects of undertaking torture that few remain unaffected by this. Although the values of rejecting torture and respecting human rights are well entrenched, even now, in Denmark, we still have to harness it. Otherwise people forget. It seems that younger generations are less aware about torture and the impacts of torture – so human rights organisations like ours still have an educational role in our respective societies.

Not only 'bad' people torture – it is SOP

Torture is a barbaric practice which is far too common despite the international conventions prohibiting it. Regrettably, this is also the case in Asia where torture in some countries is so common that it can be seen as SOP - Standard Operating Procedures. There is so much ignorance in relation to torture and its tremendous consequences on the individual, the family, the local community and society at large. Torture is often just a way of covering up bad institutional performance – and a gross indicator of severe system failure in respect of the state and its living up to the protection of human rights. We are not talking about a few bad apples, but about a complete system failure. Central research has given evidence to the fact that, under the wrong conditions, we can almost all become torturers. Just listen to Philip Zimbardo when describing the Stanford Prison Experiment.[1]

Or read Stanley Milgram on his authority study at Yale ('Obedience to Authority: An Experimental View', 1974, Harper & Row). No man or woman is born evil or is destined to torture others. It is social systems that create torturers. So torture is a tragedy for the person who is tortured and for the perpetrator, and because hardly anybody is unaffected by the undertaking of torture, it is even a tragedy for society as a whole. (Additionally, if you add the fact that there is a clear over-representation of poor and otherwise marginalised people among those who are tortured, we also see that the poor pay the brunt of the price.)

What is the role of parliamentarians?

First, it is necessary to accept that the problem is huge and that this immense problem will not be solved in a few days or by ratifying a few new conventions. We have lots of documentation. You just have to look into the website of AHRC and its many publications with its numerous cases of people who have been tortured. The elimination of torture demands a thorough analysis of the problem and the preparation of well-developed strategies, as well as a lot of political courage from the parliamentarians, whose responsibility it is to enable and ensure a political environment where we can work against torture without risk. Lack of political

will, transparency, and accountability, due to lack of respect for the rule of law and high level of corruption, all increase the risk of torture. Related to this, parliamentarians are obliged to secure that the necessary legislation is in place. Many stop here. But, if all the countries that had ratified the conventions also succeeded in eradicating torture then the world would look different. We, at RCT too could have concentrated our work on the countries that have not ratified the relevant conventions and passed accompanying legislation, and sat back. But, legislation is not enough. Parliamentarians must also ensure that sufficient funds are available (a common practice is to fail to ensure the relevant institutions have the funds necessary to undertake the tasks) and oversee that the implementation goes as intended. Here cooperation with human rights defender and the press is central. Often, it is not that more funds are needed, but a change of attitudes and practices - practices which are institutionalized and hard to eliminate. It will require political courage as there is substantial resistance to change in the various institutions and in the society at large where a politician can come under pressure for being soft on criminals, by people who call for and expect swift justice. One of democracy's weaknesses is that it can fall prey to majority "mob" rule. Almost no one publicly accepts torture (some may try to redefine the concept of torture – like US under Bush), but many in high places on this continent seem to turn a blind eye to the practice of torture taking place in their countries. It is convenient, because it is such a controversial and sensitive issue. Therefore, political courage is required from the parliamentarians working for the prevention of torture. In the short run – few medals may be won by championing this issue, but it is necessary, not only to avoid critique from the respective UN treaty bodies, but also because of the simple fact that a country with torture and impunity is a country of fear with a lack of trust in public institutions. Torture is very costly, which I will discuss more in-depth tomorrow, and the results are poor. Finally, there is the ethical argument that torture is a non-human practice. It is for that reason that, an absolute prohibition of torture has been put into international law. It is a fundamental human right.

In some countries, to be a politician is to belong to a risky group of people, who face a greater likelihood of being tortured. If you belong to the opposition then you are especially at risk. It is in countries like these that it is particularly difficult to prevent torture because of its use in political struggles. With this in mind, co-operation between politicians from different countries can be a very valuable activity, as in the case of the Danish politicians who supported their Greek colleagues who were being tortured or threatened with it. We must not forget, though, that for every special or celebrity case, there are thousands of cases of poor ordinary people who are tortured in Asia. The overwhelming majority of people who are tortured are poor & marginalised, as mentioned earlier.

The role of Asian Human Rights Commission (AHRC)

This meeting is the first of its kind in Asia and we from the RCT feel privileged to be invited to this by the AHRC, who have been working relentlessly, diligently and with great competency for the prevention of torture for many years. (On the flight we read the last issue of International Herald Tribune where there, once again, was a reference to the work of the AHRC). I would like to greet the AHRC with this pertinent initiative.

PS: I have discussed the content of this regional meeting with some reputable Danish politicians who would feel honoured

to be part of an exchange of experiences and ideas across continents and cultures.

Once more I am happy to be here with you all and we are grateful that you could find time for taking part in this meeting. I hope you all will exchange views and discuss what is realistic, pragmatic and ambitious for the elimination of torture. We are not expecting miracles, but we are working to make them all the same. Hopefully, we can come up with some ideas which can make Asia a continent much less prone to torture by the end of this meeting, because torture in Asia can and must be prevented.

Dr. Jan Ole Haagensen is Director, International Department, Rehabilitation and Research Centre for Torture Victims (RCT)

1. http://www.ted.com/talks/lang/en/philip_zimbardo_on_the_psychology_of_evil.html

AAATI MEETING: 21-24 JULY 2012

Jack Clency (Hong Kong), Basil Fernando (Hong Kong) and Ole Haagesan (Denmark)

Erik Wendt (Denmark), Jack Clency (Hong Kong) and Cheung Yin Leung (Hong Kong)

Mohammad Fazlul Azim (Bangladesh), Answer C'lliah Styarmes (Indonesia) and Sayed Muhammad Muliady (Indonesia)

(Meeting of Asian Parliamentarians: roundtable)

COVER STORY: SRI LANKA

BASIC ARGUMENT FOR THE ELIMINATION OF POLICE TORTURE

BY BASIL FERNANDO

What does police torture mean?

If we were to ask this question, and then proceed to answer it, someone may ask in turn, "Wait, how do you know?" It would take us into realms of epistemology: "how do we know anything?"

Such a question has been asked through the ages. One answer that has emerged in the last few centuries is that one knows by the collection and observation of data. Our age is symbolized by the images of the telescope and the microscope. And today, we answer questions about what something means through observation and analysis of data.

What about the data on torture?

This data is present in the actual stories of victims of torture. The approach of studying torture through the stories of victims differs from the study of mere statistics. Through accurately recorded stories, we can know what torture is, why it happens, and answer all other associated questions.

What does the known data on torture tell us? What it tells us is of the contradictions in our institutions. Observation and analysis of this data reveals to us the malfunctioning of institutions, which defeat the possibility of achieving the rule of law. The study of torture thereby becomes a study of the basic structure of key institutions in our societies, and their peculiar defects.

The data garnered from the stories of victims reveals to us the utter stupidity of the way our major institutions function. It follows that torture is not simply a study of cruelty, but rather, is more a study about the stupidity that has become a part of the way our institutions function.

Thus, asking a question like "what is the meaning of torture?" is like asking the meaning of pneumonia, malaria, or any other disease. Today, the methods of studying such diseases have been well-established. The same principles can be used to study the diseases that afflict our basic institutions.

Democracy, without functioning institutions, is a meaningless expression, an empty balloon floating through space. Democracy, if it is to be meaningful, is about functioning public institutions. The measure of well-functioning institutions is the way such institutions are capable of functioning under the rule of law. When a public institution is dysfunctional, from the point of view of the rule of law, it means that such an institution has ceased to be an institution of democracy, and has transformed into something else.

In our societies, where police torture is widespread, what we are experiencing are public institutions which have become "something else." This "something else" may have gone as far as totalitarianism, or it may be along the path to such an "ism", but what we can be sure of is that such institutions

have not only become non-democratic, they have become an obstacle to democracy.

"Elimination of police torture is one of the most essential tasks in working towards democratization of our societies. It is a practical way of getting about undoing the institutional obstacles to democracy."

In countries where there is widespread use of torture, there is also a belief, particularly among the leaders and operators of public institutions, that policing without torture is impossible. However, the opposite is a more direct reflection of reality. When torture is a widespread practice, policing, in its democratic sense, becomes impossible.

The above reflections are on the very basics of the discussions we have had yesterday.

As for AHRC, such discussions started almost fifteen years back. We have answered questions by stubbornly continuing with the methodology of studying torture via accurately recording stories of victims, day in and day out. Our documentation is a testament to the pursuit of finding-out the meaning of torture through such study of stories. Our maxim in our early days was, "go from micro to macro", which meant, "to know through individual stories of torture the problems of the basic structure of society."

When we know about these stories, the knowledge we have about the basic structure of our societies is explained in a very different way to what it is normally believed or declared to be.

This is why the study of the widespread practice of torture and the exposure of it is a vital part of undoing what is wrong with the basic structure of our societies. It is from this point of view that dealing with the issue of police torture becomes an unavoidable task for anyone who is committed to the pursuit of democracy in our societies.

Elimination of police torture is one of the most essential tasks in working towards democratization of our societies. It is a practical way of getting about undoing the institutional obstacles to democracy.

It is this approach that the Asian Human Rights Commission is presenting to the participants in this meeting. And, in particular, the AHRC is asking the legislators to take this approach seriously in the strategies that they develop to fight for the establishment of democracy.

The elimination of torture and the enabling of the freedom of speech are inseparably linked. When the possibility of the practice of torture is reduced, if not fully eliminated, the psychological conditions for freedom of speech are thereby created. And the core element of democracy is free expression. It is through free speech that we are able to get the views of many, if not all, and thereby develop a collective consciousness with the participation of all. Thus, in the development of civic sense and in the development of people's participation, the elimination of torture is an essential component.

(*Basil Fernando is the Director for Policy and Programme Development, Asian Human Rights Commission*)

COVER STORY: DENMARK

THE ULTIMATE RESPONSIBILITY

BY OLE ESPERSEN

Dear Parliamentarians;

The organizers of this conference feel honored and attach great importance to your presence here and to your participation in the efforts in the fight against torture and ill-treatment.

"No rule of law means: no human rights, and no human rights means: no democracy."

International law and the UN Convention on Human Rights provide us with prohibitions against torture. These prohibitions are part of a 'jus cogens' category – which means that they, just like the prohibition against slavery and genocide, can never under any circumstances be deviated from. Very few rules are of that nature. The reason is, of course, that torture is such a horrifying measure that it should never be applied. In this respect, the international legal situation is in order.

But, something is left to be done and that can only be done by you, esteemed parliamentarians: that is to effectively implement the basic rules prohibiting the use of such means as torture in our countries.

The right not to be exposed to torture is, in fact, not a real and genuine right if it is not combined with an effective remedy for the victims to make use of a legal machinery to redress their grievances and punish all guilty parties.

In other words: Without the rule of law in a country, there is no protection against torture.

What does this mean? It means that the ultimate responsibility for the national fight against torture – and all other human rights violations, rests with the parliament and the government of each country.

This responsibility should be seen as our most sacred and obligatory task, - the task, to ensure the existence and availability of an independent judiciary in each of our countries. This may not be an easy task, and will be more difficult in some countries than in others, but it must be done.

No rule of law means: no human rights, and no human rights means: no democracy.

My conclusion and strong recommendation is this: if you make efforts to fight for the protection of human rights, as we will do in the Asian Alliance Against Torture and Ill-treatment, you should always have in mind that, with no rule of law, there will be no such protection. The effort to provide a certain human rights protection must always be combined with efforts to establish and maintain the rule of law to a generally sufficient degree in each country.

Let us join our strong efforts together to achieve this. I wish you all success with this important event.

(*Ole Espersen is Director, RCT and former minister of justice, government of Denmark*)

COVER STORY: PHILIPPINES

BEYOND LEGISLATION ENDING TORTURE IN THE PHILIPPINES

BY RAYMOND PALATINO

Good afternoon dear friends and fellow human rights advocates. Mabuhay!

On May 19, 2009, Filipino-American Melissa Roxas was abducted by suspected members of the military in a remote village in the Central Luzon region of the Philippines, located north of Manila. Roxas was accused of being a communist rebel. After several days, Roxas was eventually released. She was able to recount her ordeal, including the torture she suffered in the hands of her captors. This is an excerpt of what Roxas mentioned in her affidavit:

> "…throughout my abduction, I was always blindfolded and handcuffed even in my sleep except for those few times when I was made to take a bath."
>
> "…they held my feet and my hands down and doubled up plastic bags were pulled down on my head and face and closed on my neck and I started to suffocate and I could not breath anymore."
>
> "…the interrogation continued non-stop with one interrogator replaced by another after every hour and I was not given lunch although, there was a brief respite from the questions during lunch but it continued after lunch."

The case of Melissa Roxas received national and international attention because she is a citizen of the United States. Fortunately for us, Roxas refused to remain silent about what she endured, and she was able to summon enough courage to share her story with the rest of the world. Last April, Roxas testified in Geneva to highlight the state of human rights in the Philippines.

Roxas gave a face to victims of torture and other human rights violations during the administration of Gloria Arroyo, who was president from 2001 to 2010. By the time Arroyo stepped down from power, in June 2010, the documented cases of torture in the country had already reached 1,099. Roxas was one of the 1,099.

The surge in human rights abuses in the past decade was one of the reasons for the strong lobby, renewed interest, and political commitment which forced the government to enact an anti-torture law. We succeeded in our legislative advocacy when President Arroyo signed Republic Act 9745 or An Act Penalizing Torture and other Cruel, Inhuman and Degrading Treatment or Punishment on November 10, 2009. I'm proud to say before this body that I'm one of the legislators who actively supported and voted in favor of this law.

What are the pertinent provisions of the law?

Section 4 identifies the specific acts of

physical and mental/psychological torture.

Section 6 states that a threat of war or state of war 'shall not and can never be invoked as a justification for torture.'

Section 8 states that 'Any confession, admission or statement obtained as a result of torture shall be inadmissible in evidence in any proceedings.'

Section 11 identifies the institutions (CHR, PAO, Barangay, NGOs) which are empowered to provide legal assistance to torture victims.

Section 12 mandates that torture victims shall be provided with medical treatment and assistance.

Section 13 clarifies that military superiors and public officers can be charged in the courts if they directly or indirectly participated, supported, or tolerated torture.

Section 21 orders educational institutions to integrate human rights topics in the curriculum.

Unfortunately, the passage of the anti-torture law in 2009 didn't prevent the continued use of torture by armed personnel of the state. On February 6, 2010, just a few months after the enactment of the anti-torture law, the army arrested 43 health workers suspected of being members of the communist New People's Army in a suburban town east of Manila. After almost a year of being placed in detention, the health workers were set free after the case against them was dismissed by the Court. The health workers complained that they were subjected to physical and mental torture by their captors.

During one of their court appearances, I was able to listen to their testimonies exposing the daily rituals of torture inflicted against them. A doctor testified that, "Whenever they needed to urinate, a guard had to pull their shorts and underpants down and females had their genitals washed by their guards as they were blindfolded. Electrocution and other forms of torture were also reported."

Human rights under Aquino

The backlash against human rights atrocities committed by state forces contributed to the unpopularity of the Arroyo government. The administration party lost badly in the 2010 elections. The overwhelming victory of the opposition raised expectations that the new leadership will review the security policies and programs of the government which directly and indirectly encouraged the military and police to commit human rights abuses against suspected supporters and sympathizers of communist rebels.

After two years, can we say that there has been a qualitative change in governance in terms of protecting human rights? Sadly, I have to answer in the negative. Human rights violations have continued even under the supposedly reformist leadership of President Benigno Aquino III. Impunity, a word which recently became known to many people because of the government's failure to punish human rights violators, persists. A few days ago, the chairperson of the Commission on Human Rights (CHR) complained that not a single human rights violator has been sent to jail during the term of President Aquino.

The Karapatan NGO reported 67 cases of torture in the past two years. Meanwhile, the CHR received more than 360 cases of human rights abuses involving the military and police. Based on available data, human rights violations have intensified in the poorest regions of the country. Incidentally,

the local communist insurgency and the Muslim separatist movement are strongest in these areas.

National security doctrine

Mandated to crush the rebellion at all cost, state forces have failed to distinguish combatants from non-combatants in conducting their operations. Their aggressiveness can be attributed to the unrealistic deadline imposed by the national government to quell the armed movements in the country.

National security policymakers have advanced a doctrine that the number of NPA rebels will dwindle if members of the legal left are prevented from doing their political and propaganda work. Because of this theory, they made no distinction between communists who bear arms and those who chose to work in the legal arena.

This new doctrine has resulted in the brutal assassination, massacre, torture and kidnapping of non-combatant leftists and even innocent individuals who are not politically active. Hundreds of peasant communities suspected of being influenced by communists are subjected to food blockades and hamletting. Extrajudicial killings became so acute and widespread that the UN was forced to send a special rapporteur in 2007 to investigate the alleged human rights violations perpetrated by state forces.

Longest insurgency

The Philippines is facing the longest communist insurgency in the world. Since 1969, the Maoist-influenced NPA has been waging a protracted people's war and the group is still considered the country's top security threat. Why has it survived this long?

The NPA is composed mainly of poor farmers who probably got attracted by the radical land reform program offered by the Communist Party, or CPP, which involves, at the minimum, the reduction of land rent and abolition of usury, and at the maximum, the confiscation of landlord property and its equitable distribution to the peasants.

The issue of inequitable land distribution in the provinces has fueled countless peasant uprisings across the country's seven thousand islands. Such uprisings have also forced past and present administrations to enact land reform laws many of which have been rejected by farmer groups, and especially the CPP, for being excessively in favor of landlord interest through inserted loopholes and tricks for the landlords to prevent or evade land distribution. Aquino's family, for instance, owns the biggest family-owned farming estate in Southeast Asia and it still remains largely intact despite the passage of a land reform law in 1987 because the Aquinos refused to distribute their vast landholdings to small farmers.

The CPP credits its longevity to the direct and indirect support given by hundreds of thousands or perhaps millions of farmers who sympathize with the communist cause, especially with its land reform program.

Based on official documents on its website, the CPP is not yet on the threshold of clinching victory in the country. It claims to be operating at the strategic defensive phase of the protracted people's war. Its armed forces, though much smaller than the military, are strategically scattered throughout the archipelago. In short, the armed rebellion led by the CPP is neither winning nor losing at the moment.

Despite its failure to capture state power, the CPP wields a little, and sometimes

significant, influence on Philippine politics. During the Marcos dictatorship from 1972 to 1986, the CPP played a key role in sustaining the pro-democracy movement. The CPP was the most consistent and formidable political force that opposed martial law during the Marcos years. It gained prestige and strength as it persevered in undermining the autocratic Marcos rule.

After the downfall of Marcos, the CPP did not renounce its armed struggle. Peace talks were initiated between the government and the communist rebels, but they soon broke down after disagreements on the framework of the negotiations. An amnesty program was offered but it was ineffective in encouraging the rebels to surrender their arms.

A turning point in the history of the CPP was the rectification movement it launched during the early 1990s. The CPP affirmed its adherence to the Maoist line of encircling the cities from the countryside but there were a number of cadres who disagreed with this theory and proposed an urban insurrection as a model for advancing the Philippine revolution. There were also members of the party who wanted to embrace a peaceful transition to socialism. Furthermore, the CPP apologized for the brutal killing of some its own members wrongly accused of being double agents of the government. Those who disagreed with the basic principles of the movement broke away from the CPP.

According to the military, the rectification movement diminished the strength of the CPP and permanently affected the winning chances of the revolution. The CPP reached the peak of its military and political strength in 1986 but the internal disputes which led to a split in the 1990s have fundamentally weakened its influence in Philippine politics.

For the government, the CPP is the major stumbling block preventing the Philippines from achieving sustained economic growth like its more prosperous Asian neighbours. The government insists that poverty will not be eradicated and foreign investors will shy away from the country as long as communist rebels are lurking in the provinces. It accuses the CPP of extortion through the taxes it collects from local businessmen and politicians.

Peace Talks

Since the Marcos era, the principal approach of the government in dealing with the CPP was to use violent and repressive tools against the armed and even the unarmed members of the left.

The secondary approach is to enter into peace negotiations in order to persuade the rebels to declare an indefinite ceasefire.

Arroyo renewed the peace talks with the rebels in 2001 but her attitude changed after the 9/11 terrorist attack in the United States. She started accusing CPP leaders of being terrorists which practically nixed previous attempts to end the insurgency through peace negotiations. Arroyo turned the counterinsurgency drive as part of the US-led "War on Terror" which led again to the escalation of hostilities between rebels and soldiers.

New counterinsurgency program

When Aquino became president in 2010, he unveiled his so-called innovative approach in resolving the country's long running insurgency problem. Patterned after military models in the United States, the new program dubbed as Oplan Bayanihan provides a new framework and strategy in ending the insurgency threat. Officials of the Armed Forces of the Philippines (AFP) claim

that it is a counterinsurgency program that will no longer cost the lives of thousands of civilians, a program that focuses on 'winning the peace' instead of simply defeating the enemy.

The program banks on two strategies: the whole of nation approach, which entails a "multi-faceted and multi-pronged approach" in solving the insurgency problem, and the people-centered security or human security approach that "puts people's welfare at the center of operations." Such concepts were largely based on the US Interagency COIN Initiative, which uses the "whole of government, whole of society" concept in carrying out its counterinsurgency operations. The said US document also distinguishes between an "enemy-centric approach" and a "people-centered approach."

In other words, Oplan Bayanihan aims to end the rebellion by redirecting the energies of the army from engaging the rebels in the battlefield to participation in the delivery of basic social services in the communities. The primary concern now of the army is to win back the trust of the people, especially the poor, and restore public confidence in government institutions. Soldiers are required to undergo human rights seminars and keep a human rights handbook while performing their duties.

While Oplan Bayanihan admits that a purely military solution is insufficient to put an end to the insurgency, peace advocates and left-leaning groups are not convinced that it addresses the roots of armed conflict in the country. Basic issues at the root of the armed conflict such as land reform, national sovereignty, social justice, national industrialization and genuine democracy, according to leftist groups, remain unaddressed under the Aquino administration.

Human rights groups have also expressed doubts whether the paradigm shift would address the problem of rampant human rights violations committed by the Philippine military. They cite, for instance, the continuing practice of army officials of branding legal progressive organizations as communist fronts.

These human rights abuses may be the handiwork of isolated elements inside the army who want to sabotage the ongoing peace talks between the government and the communists, but some analysts fear that it could be an indication of the real strategy of the state: promoting peace on the one hand, while still enforcing terror with the other.

Lessons from the Philippine experience

The Philippine experience, with regard to human rights protection, underscores the following:

1. Human rights legislation must be accompanied by sustained, coordinated, and multi-sector efforts to guarantee effective implementation, documentation, and monitoring of the law.
2. Awareness and education initiatives must begin within the bureaucracy.
3. Legislation is inadequate; in fact it would be rendered meaningless, if it is not supported by substantial judicial, social and political reforms.

Before I left Manila to attend this forum, the Commission on Human Rights released the following comments about their proposed interventions to further promote human rights, and in particular, prevent abuses like torture:

The Commission, as the lead agency of the Oversight Committee stipulated in the anti-torture law, has already drafted its rules of procedure.

The Commission is also pushing for the approval by other involved stakeholders, particularly the Executive branch, to approve the MOA for the National Monitoring Mechanism, a platform through which civil society, government institutions and the CHR can, in a real-time manner discuss urgent cases of human rights violations and even launch quick response actions to prevent arbitrary acts by state security forces as well as by identifying risks that give rise to grave excesses.

In the light of the Philippine adhesion to the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degarading Treatment or Punishment (OPCAT) on 17 April 2012, the Commission, in partnership with civil society groups will be filing a bill which will establish a National Preventive Mechanism (NPM) in the Philippines. The NPM is the OPCAT's domestic arm and main engine of this system of regular visits to places of deprivation of liberty (not just traditional places of detention but also confines such as juvenile centers, drug rehabilitation facilities, and migrant holding centers) for the prevention of torture and other forms of ill-treatment. The CHRP and civil society have been working on drafting this bill since 2010.

Additionally, we are pushing for an efficient witness protection system, the reform of the criminal justice system, the prosecution of human rights violators, and the continuing human rights education among our people.

But for grassroots peoples' organizations and human rights groups, the long term solution to end torture and human rights atrocities cannot be realized through simple bureaucratic and administrative reforms. The laws are actually in place already, legal remedies are available; and even politicians and state forces are publicly and openly embracing human rights concepts and their deep respect for rule of law, freedom, and democracy. Yet abuses continue. Why? Because it's impossible to make human rights mainstream without adopting structural reforms in governance and the inequitable political-economic system that supports it. Therefore, as we continue to enhance the legal framework in our human rights advocacy, people's organizations are also actively demanding key political measures which they think would address the roots of conflict in our country.

For example, they are asking the government to resume the peace talks with rebels. The talks are stalled because of the refusal of the government to release more than 300 political prisoners. The peace talks would allow the continuation of discussion of economic and social issues that drive many people to take up arms.

The government is also urged to scrap its counterinsurgency plan which has caused tremendous suffering in poor villages and victimized thousands of innocent civilians. Instead of militarization and deployment of soldiers in communities, the government should concentrate on the delivery of basic social services in the countryside.

Torture is a taboo which is secretly endorsed and practiced by coercive elements of the state because they think it is essential to weaken their enemies. Unfortunately, in the context of a Third World society like the Philippines, the enemies are the people who resist government programs and development projects. This makes it more imperative for the government to rethink its policies that breed tension, hate, division and suffering.

Furthermore, we can't emphasize enough the importance of expanding the human

rights constituency so that it can be strong enough to push for the sincere and resolute implementation of human rights laws like the anti-torture law.

The lesson from the Philippines is clear: Our work doesn't end with mere enactment of laws. The bigger challenge is to implement these laws. And the more difficult question is if political leaders have the political will to adhere to the highest standards of democracy and the rule of law. The best approach is to encourage the rise of a citizen movement which would articulate the issues we in Parliament often try to ignore or refuse to tackle.

(Raymond Palatino is a member of the House of Representatives, representing the Kabataan (youth) Party.)

AAATI MEETING OF ASIAN PARLIAMENTARIANS

(Members of parliamentarian and human rights activists from Asia sat together to discuss the prevention of torture in Asia, from July 21 -24, in Hong Kong.

The event was co-organised by the AHRC and the RCT in Hong Kong - Photos By Josefina Bergsten).

COVER STORY: NEPAL

COMBATING TORTURE IN NEPAL

BY PUSHPA BHUSAL

Respected Chair, fellow parliamentarians, representatives of the civil society and other delegates to the program, organized by the Asian Legal Resource Centre and the Rehabilitation and Research Center for Torture victims,

I thank you for providing me this forum to share the latest developments in the combat against torture in Nepal.

- The political changes in 1990 led to the adoption of a democratic constitution and of a multiparty system and introduced liberal values in the society. Among many others, the right to protection from torture, cruel, inhuman and degrading treatment was recognized as fundamental and after four years, a Torture Compensation Act was promulgated by the Parliament.

- In the aftermath of the promulgation of the 1990 constitution, the government of Nepal ratified six major international human rights treaties making Nepal bound by the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the Convention against Torture. However, Nepal already had an obligation under the Geneva Conventions ratified in 1963 to treat people with dignity, even during armed conflicts. Further, the promulgation of a Nepal Treaty Act in 1991 established the primacy of international law over domestic law. International law can be referred to in the court to declare any provision as ultra virus. The Supreme Court can issue a directive order to bring in line domestic legislation with the provisions of international law.

- Nepal also established a National Human Rights Commission, which is mandated to protect human rights in accordance with international and national laws, and combating torture has been part of its mandate. Further, the Government also introduced a National Human Rights Action Plan, of which torture is one of the focuses.

- The 10 years of armed conflict in Nepal brought a new political scenario; a Comprehensive Peace Agreement was signed in 2006 followed by the Interim Constitution, 2007. The Interim Constitution prohibited and criminalized torture and ill treatment by including the right to protection from torture in the chapter on fundamental rights. Five years after the adoption of the Interim Constitution, the Government prepared a bill to criminalize torture, which was tabled in the Parliament. The text of it and comments are provided in the dossier prepared and circulated by the ALRC in this program. It is an executive proposal and I will assure you that the Parliament will make necessary changes

in the bill to meet the international obligation and best practices around the world.

- The Comprehensive Peace Agreement, as stated above, promised to deal with the past atrocities committed by the government forces and by the Maoist insurgents, including torture, through the adoption of a Truth and Reconciliation Commission and a Disappearance Commission, for which two separate bills were tabled in the Parliament. The political parties and the government are in the mood to prosecute some of the emblematic cases, as a deterrence, to ensure that such thing will not happen again.

- The activism of NGOs in Nepal has exposed the practice of torture by the Police, Armed Police Force and the Nepalese Army and other quasi-judicial bodies with the alarming indication that Nepal must do away with such practices. Currently, the National Human Rights Commission, previously the Office of the High Commissioner for Human Rights in Nepal, and many national and international organizations and the respective security organizations themselves have been engaged in providing human rights trainings to reform the behavior of the security forces. This has helped to reduce torture, but it still remains a part of the system as a matter of attitude of the law enforcement authorities.

- The Special Rapporteur on Torture visited Nepal in 2004 and in his report he provided many recommendations and these are still being implemented. Further, Nepal took part in the Universal Periodic Review in the Human Rights Council and many of the UPR recommendations are being discussed and implemented in Nepal. The voices and concerns raised by the international organizations, like the Asian Human Rights Commission, have contributed to raise the profile of torture cases and many torture compensation cases are being filed in the courts by organizations like Advocacy Forum. The government is implementing the court orders to provide compensation to the victims.

- The political changes in Nepal, in 1990 and 2007 have strengthened democracy, but we are still continuing our efforts to build up the rule of law and a system to protect human rights. The Police Act, Criminal Code, Evidence Act, the prosecution and the prison system are under question. The government has tabled the Criminal Code Bill in the Parliament. Work is underway to prepare the Police Bill and Witness Protection Bill. The Supreme Court has recently ordered the government to reform the quasi-judicial bodies[1] to make them comply with demands for fair trials and to protect the independence of the judiciary. Further, the Supreme Court has also ordered the reform of the Military Justice System to ensure it also enjoys an independent judiciary. We are in the process of change and increasingly feeling that we need to invest in the infrastructure and human resources development of the police and other law enforcement bodies, along with legal and systemic reforms.

- The Government has been working to implement the 1325 and 1820 resolutions of the Security Council and torture against women, and women's role in the transitional justice system, are being

discussed and an action plan is being prepared.

- Finally, the practice of torture is reduced in Nepal, but the system remains to be built and we have a long way to go to make Nepal a torture-free country. I request the international organizations, the Asian countries and other members of the international community to continuously engage in Nepal and play a role to combat torture. Nepal is going through a difficult time, but we are reforming laws, institutions and procedures. The active civil society and the human rights friendly political parties will work further to raise their voices, build a system to fight against torture and restore the inherent inviolability of physical integrity of human personality.

Note:

1 Established for administrative purposes, but do exercise some judicial power such as the Chief District Officer, Forest Officer, Warden of Conservation and so on. The Supreme Court has recently asked the government to reform the law to provide such authority to the courts and to take immediate initiative to train such official with legal knowledge, fair trail procedure and judging skill.

(*Pushpa Bhusal is a member of Constituent Assembly and Central Member in Nepali Congress. She also is an advocate of the Supreme Court of Nepal and Lecturer in Political Science at Tribhuvan University, Nepal.*)

AAATI MEETING OF ASIAN PARLIAMENTARIANS

21-24, July, 2012 – Hong Kong

WHAT WE EXPECTED

OBJECTIVES

1. To promote the role of parliamentarians in their state's accession to the CAT as well as in the implementation, operation and maintenance of a sound legal framework that criminalises and systematically eliminates the practice of torture and ill-treatment;
2. To facilitate and develop cooperation between parliamentarians and civil society groups working against torture and ill-treatment in Asia;
3. To host permanent fora composed of potential and current Asian parliamentarians against torture and ill-treatment and generate opportunities for genuine, critical and constructive feedback and analyses concerning the adoption of the CAT within local-national laws

OUTCOMES

1. Increased understanding of parliamentarians concerning the importance of the CAT and the crucial role they play in the accession by their countries to the CAT;
2. Enhanced ability on the part of parliamentarians to design initiatives that will influence legislature through the active advocacy for legal or institutional reformation geared toward the eventual elimination of practices of torture of ill-treatment in their respective countries;
3. Strengthened formal and informal cooperation between civil society groups and actors of the AAATI, evidenced in particular by the formulation of common strategies and the joint organisation of effective programmes, that aspires to the eradication of torture and ill-treatment in Asian countries

COVER STORY: INDIA

GOVERNANCE WITHOUT TORTURE

BY VT BALRAM

Introduction

Custodial torture as a method to collect evidence and information from a suspected criminal is primitive, tribal, and barbaric and has no relevance in a modern society built up on democratic values. In fact, it goes against the entire noble ethos upon which our human civilisation has been built and progressed. The right of the citizen to protection from torture has to be admitted as part of the fundamental right to life itself and shall not be admitted to any exceptions whatsoever under international and comparative law. In practice, however, it remains one of the most frequently violated rights, worldwide. Of late, ironically, torture has even acquired a more decent name as "enhanced interrogation techniques", thanks to the Bush administration in America.

Torture in India

Despite being the largest democracy in the world, India has a long way to go in order to completely eliminate torture and ill-treatment within its boundaries. There are many studies, official as well as unofficial, which reveal the terrible picture of blatant violations of human rights against individuals in police and judicial custody. The Asian Centre for Human Rights (ACHR) study, based on official data from the National Human Rights Commission (NHRC) of India, indicate that 14,231 people have been killed in the last decade, from 2001 to 2010, while in custody. This would mean that more than 4 people are being killed each day! Out of these deaths, 1504 occurred while in police custody and 12,727 while in judicial custody. The majority of these deaths can be attributed, directly, to be a consequence of torture and other custodial violence. This, itself, is an alarming situation, but we must appreciate the fact that this is probably only the tip of the iceberg. Even today, a large number of custodial deaths are not reported to the NHRC. At the same time, the NHRC, as per Section 19 of the Human Rights Protection Act does not have jurisdiction over the armed forces against, whom many complaints arise frequently.

The experience of Soni Sori, a tribal teacher in the Maoist affected Chhattisgarh state has drawn many criticisms from across the globe against the inhuman practice of torture, practiced even today. She was alleged to have supported the Maoists, was arrested by the local police, and was persecuted and sexually tortured. The heinousness of these acts is beyond words. The more disturbing fact is that she had feared such treatment from the local police before her arrest and had even approached the Supreme Court of India to get her sufficient assurances of being protected, which was blatantly violated by the officials as soon as they got her in custody.

Though India is a very vast country and such incidents may be seen lightly, experiences like this are certainly a reason to worry. Violence is a part of civic life in most of these Maoist areas and the people have, in a way, accepted

violence as their fate. When we normally talk about torture, we mostly do so with regard to torture perpetuated by the state's organs. We may have a feeling that Maoists and other such groups are victims to such atrocities of state. However, the world outside must know that the violence and barbaric acts of torture and ill-treatment practiced by the Maoists themselves are beyond description. They run parallel judicial and law enforcement systems in almost 200 districts in the name of Jan Adalats, or people's courts, where they can order capital punishment for even the slightest of offenses. Torture and sexual violence inflicted by the Maoists upon the poor tribal people on whose behalf they claim legitimacy is a well-known phenomenon. The police and paramilitary organizations in such areas are under pressure to confront such a stressful situation where our normal ideas of rule of law and democracy have absolutely no meaning. The state's torture is primarily a response to the more severe and inhuman culture of violence of those who challenge it.

The inalienability of citizen's rights is the first level of protection against any form of torture. Article 21 of the Constitution of India has made the right to life and personal liberty a fundamental right protecting the people from any infringement upon it by the state. The judiciary, through its various progressive judgments has also done its part quite well, extending the scope of these rights to include protection from torture and ill-treatment.

India is a signatory to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Though around 146 countries worldwide have ratified the Convention, I admit that India has been so far largely reluctant to bring in a separate domestic legislation for the purpose. We realise this has affected our international image and has even raised many questions regarding our claim to be a liberal democracy. It is with this context that the Government of India has decided to come up with the Prevention of Torture Bill, 2010 which was passed by the lower house of parliament, Lok Sabha, and is pending before the Rajya Sabha.

Prevention of torture bill

The law passed by the Lok Sabha came under severe criticism from many quarters. Interestingly, not all criticisms come from the same angle. The right wing Bharatiya Janata Party (BJP) critizises the bill as unwarranted, as according to them, it "handcuffs" police and military officers acting against criminals and terrorists. It is not a matter of surprise at all, as right wingers and fascists always look for a brutal police state to combat their manufactured enemies. However, more reasonable criticisms have come from the various human rights and civil society groups - that the bill in its present form is ineffective to contain custodial torture and punish the wrongdoers. The Rajya Sabha has therefore sent the bill for the consideration of a parliamentary select committee.

There are five major issues regarding the law passed by the Lok Sabha. The first major point of dispute is about the very definition of the term 'torture' as it is included in the bill. Clause 3 of the Bill defines "torture" as an intentional act which causes "grievous hurt" or "danger to life, limb or health". Grievous hurt is defined under Section 320 of the Indian Penal Code to include extremely serious injuries such as permanent loss of eye or ear, emasculation, bone fractures, or hurt which causes severe and debilitating pain for twenty days or more. However, given the nature of torture usually practiced

in the police stations, this definition is far from being effective to book the real culprits. For example: electric shock, water-boarding, sexual assault, deprivation of food, water or sleep, whipping, rubbing chilies on sensitive body parts and other such barbaric acts readily condemned by most reasonable people may not amount to torture as they might not inflict any "grievous injuries". In other words, a very high threshold has been set for an act to qualify as "torture". Additionally, the Bill is cynically silent on "other cruel, inhuman or degrading treatment or punishment", whose prohibition is an essential requirement under the U.N. Convention.

Another criticism is about Clause 4 of the bill, which states that even if an act qualifies as "torture", it will be punishable only if it was committed "for the purpose of extorting any confession or any information which may lead to the detection of an offence." So, if a police officer resorts to torture in order to intimidate a person, to extort money, or to simply "teach her a lesson", or for no reason whatsoever, he cannot be punished under this bill. Unless torture is inflicted for the purpose of extracting some information, the proposed law will refuse to take notice.

Systemic torture stems from discrimination of various kinds. In the Indian context, minority groups like Dalits, Muslims, Tribals or sexual minorities like hijras are more prone to torture than others. The third major area of dispute with regard to the law in its present form is related to the conditions that make the victim responsible to show that the torture inflicted upon him was based on some form of discrimination. Ideally, this should be an independent criterion, rather than an additional one as it is in the UN convention.

The fourth contentious issue is with Clause 5, which requires that a court entertain a complaint only if it is made within six months of the date of the offence. This is totally unacceptable as we know that the victims of torture tend to be vulnerable people, who often need a lot of time to overcome the physical and psychological trauma, find support, organise resources and gather courage to make the complaint. Even as a general rule, criminal laws tend to prescribe no time limits whatsoever.

Finally, Clause 6 prohibits a court from taking cognisance of a complaint without the prior sanction to prosecute from the government. This may act as a powerful shield for the government officials and is against the spirit of the UN Convention.

However, I feel happy to say that the Select committee of the Rajya Sabha, in its report, has asked for a thorough revision of the Prevention of Torture Bill before it is finally legislated. This is despite the fact that the committee was headed by a member from the ruling party, who is presently a minister. This is the actual strength of Indian democracy. Though the government has not opened its mind on these recommendations, I am hopeful that we will soon have a good and effective anti-torture law in place. I congratulate the Asian Human Rights Commission for the valuable interventions they had during this process, and as a young legislator, I offer my full support to make this law a reality.

However, I feel that we should not be contented with a law in place alone. We may tend to find easy answers to eliminate torture through strengthening our legal framework. However, such quick fix solutions may not be the most ideal and is sure to fail us in achieving the desired objective. We may have to go deep into the issue and find out its roots in the overall violence of society. We

need to approach the issue from political, sociological and scientific perspectives too. A feudal and patriarchic society as opposed to a more democratic one intrinsically tends to be violent and this violence may easily be manifested as torture when supported by the power structures operating within it. To what extent a society accepts violence is a test of how far it is democratised in the true sense. Therefore any fight against torture is to be seen as a part of a larger struggle for democratisation of the society.

I come from Kerala, one of the southernmost states in India. Though societies like Kerala have traditionally been more democratic and effectively checked many atrocities against feeble factions like the Dalits, of late there are some alarming signals that need some introspection. There are increasing incidents of religious fundamentalist groups trying to impose their perverted social outlook upon the multi-cultural society, especially when it comes to relationships between men and women and other gender issues. We call this cultural policing and is basically an issue of not being able to change with the times. Such a reactionary tendency is a potential threat to any modern democracy.

Political violence is another matter of disgrace in many parts of India. Far left organizations like the Maoists are not the only ones who resort to political violence. Even the established left parties who take part in elections like the Communist Party of India (Marxist) in their strongholds in states like Kerala and West Bengal have occasionally gone the same way as the Maoists and terrorists in perpetuating political violence. The world outside may be surprised to hear that these parties, who are said to operate in a democracy, have in fact established 'party villages', where one needs the approval of the local party unit to conduct a marriage in your family or to sell your own property. The party systematically eliminates their political enemies either utilizing their own cadres or outsourcing it to mafia gangs.

Though more than four hundred years of foreign rule prevents India from boasting about a democratic culture extending back for centuries, we had the fortune of having a mostly non violent movement to earn our freedom from colonial exploitation. Through this freedom struggle, the country was also enunciated to the modern ideals of democracy and civil liberties. Mahatma Gandhi who led this noble struggle put forward the concept of Satyagraha, meaning steadfastness on Truth as a new way to fight injustices of all kind. This concept is fundamentally different from the idea that the ends justify the means, which was often quoted by the perpetrators of violence as a justification of their acts. Gandhi had a firm conviction that his 'swaraj' or self rule wouldn't be complete unless the most feeble and marginalised citizen feels that they too have a stake in the way this country is being governed. Such an engagement of the ordinary people with the power hierarchies is fundamental to any functioning democracy. The victory of the Indian independence movement opened a new era of democracy and civil liberties for the entire world. I therefore believe that, in any fight against torture and ill-treatment anywhere in the world, the life and message of Gandhi could be an inspiration for us.

After gaining independence, India, under the visionary leadership of Prime Minister Jawaharlal Nehru and Dr B.R. Ambedkar achieved considerable progress in reinventing itself as a modern democratic state with the largest written constitution in the world as its guiding spirit. Over the last six decades democracy stabilised in India in contrast to other countries in the region. Legitimate

political leadership through regular and transparent elections, an independent judiciary, clear division of powers between the various branches of government, a free press and a vibrant and engaging civil society have all added to making Indian democracy dependable and meaningful.

India may perhaps be the most diverse nation in the world in terms of the rich and varied identities of its 1.2 billion people, based on religion, caste, language, ethnicity, colour of their skin, culture, eating habits and so on. Based on what attribute one takes for classification, each Indian can be considered as belonging to a minority. Therefore the ideology that makes the idea of India has to necessarily absorb all these pluralities. The Indian Constitution can be rightly said to be a defender of a minority democracy, with its emphasis to protect various religious, ethnic and linguistic minorities.

To eliminate torture and other forms of violence, we need to hit at the very roots of the social and political contexts fostering violence. The inequity in development is the fundamental challenge. This is caused by things like failure of governance, bureaucratic inefficiency and insensitivity to the rights of minorities. We can see that extremism and insurgency in India is primarily in poverty-stricken areas.

Assurance on an inclusive development can act as a great contributor towards strengthening the social psyche, thereby leading to a more non-violent society that is free from torture and ill-treatment. The larger power sharing between the state and its subjects is very important in this regard. For this, we need to focus on decentralization of power structures and strengthening of local governance systems. This is a political mission for empowering the most underprivileged, honoring their right to access public resources and fruits of development. India rightly understands this and has been pushing forward a variety of social sector and democracy strengthening initiatives. The horizons of the rights of the ordinary citizens are widened through legal entitlements like the Right to Information Act, an employment guarantee programme, the Right to Education Act and is contemplating on the Food Security Act and the Right to Services Act.

Role of science in preventing torture

Science can be of immense help in our fight against systemic torture and ill-treatment, which are basically a manifestation of our tribal instincts. Torture, as a part of criminal investigation, is clearly against the development of science, especially neuroscience and similar advancements towards understanding the human mind. Neuroscientific research indicates that coercive interrogation techniques tend to be unsuccessful and may have many unintended negative effects on the suspect's memory and brain functions. Therefore it is high time policymakers turned to such scientific concepts while formulating policies on criminal investigation and interrogation. Any law is basically concerned with regulating behaviour and therefore neuroscience research that deals with how the brain works to regulate one's behaviour could be of much help in formulating laws. Our police and investigation systems need to be reformed based on scientific concepts and their sociological implications. We need a concerted effort in this regard.

I would wish to conclude this presentation with a wish and an appeal to join our hands together in this fight against torture and ill-treatment. It is a fight to be fought globally

and from different fronts. I earnestly hope that this August gathering of eminent parliamentarians and civil society representatives from across the globe turns out to be a milestone in our pursuit of realising a society free from torture and violence of all forms.

(*V. T. Balram is a member of Kerala Legislative Assembly and General Secretary of the Indian Youth Congress at state level (Kerala)*)

AAATI MEETING: A COMMENT

BY WONG KAI SHING

Torture is among the most abhorrent violation of human rights and human dignity. Unfortunately, the practices of torture are still pervasive and prevalent in many parts of the world. In many Asian countries, the policing systems have been accustomed to the use of torture for ordinary criminal investigations. Torture is also practiced widely by agents of the military and other state agencies. For many years now the Asian Human Rights Commission has documented numerous cases of torture in Asian countries.

Under international law, torture is considered one of the most heinous crimes. The prohibition against torture has attained the status of jus cogens (peremptory norm) of international law from which no derogation is permitted – all countries are obligated to comply with the unconditional prohibition of torture. The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) provides the basic principles and framework for establishing effective legislation for the prohibition of torture as well as legal mechanisms for redress and reparation for those who have been victimised. In this respect, parliamentarians play an important role in the drafting and passage of legislation to criminalise torture and ill-treatment and promote related legal and institutional reforms.

The meeting of parliamentarians is an initiative by the AHRC and the RCT under the aegis of the Asian Alliance Against Torture and Ill-Treatment (AAATI). The Alliance was established last August by a group of human rights activists representing local organizations that work for the elimination of torture in Asian countries. The Alliance aims to strengthen the capacity and cooperation among its members in supporting victims of torture and ill-treatment. It also advocates legal and other institutional reforms to prevent torture and to provide redress and reparation for victims. The construction of a broader movement comprised of progressive forces in Asian societies to support these initiatives is also a primary goal.

This year, the Organisers hope to facilitate dialogue between a group of Asian leaders and parliamentarians who acknowledge existing problems of torture and ill-treatment in Asia and will take interest in and actively work towards the elimination of torture and ill-treatment in their respective countries. Open discourse will permit the development of practical joint or common initiatives that promote the expedient elimination of torture. Your participation and contribution is critical to the success of this meeting. We thank you in advance for your valuable input, suggestions and active participation in this fight against torture and ill-treatment in Asia.

COVER STORY: PAKISTAN

PAKISTAN: WHAT WE NEED?

BY ABBASI NUSRAT BANO

On a Sunday afternoon, (July 22), Abbasi Nusrat Bano, a member of the Provincial Assembly of Sindh, delivered this speech to great applause as part of the Meeting of Asian Parliamentarians in the Asian Alliance against Torture and Ill-treatment. Eight Parliamentarians from Bangladesh, India, Indonesia, Nepal, The Philippines, Pakistan and Sri Lanka, as well as several prominent human rights activists, participated in this four day meeting:

Dear friends and delegates from the different Asian countries,

I am thankful to the Asian Human Rights Commission for inviting me to this conference on torture and ill-treatment and I am happy to represent the legislators from my province of Sindh.

Sindh is the first province in Pakistan that wished for independence from India and passed a resolution in favour of an independent Pakistan. The people of Sindh have remained at the vanguard defending democracy, rule of law and human rights. But with continuous interruptions from unconstitutional forces the dream of democracy and equal rights has not been fulfilled.

As a member of the Provincial Assembly of Sindh, I was honored to be named the third most active member of the Provincial Assembly. It is something that I and my party can be very proud of.

After this short introduction, I will now focus on the bad practice of torture in my country. Torture and ill-treatment of detainees by law enforcement agencies is an endemic problem in Pakistan. In recent years, the perpetrators in most of the reported cases of torture and other ill-treatment are law enforcement agencies. Most often the torture and ill-treatment occurs in pre-trial detention centres.

In Pakistan, law enforcement officials perceive torture as the easiest and fastest way to achieve their goal of extracting information from the accused. Intense interrogation is commonly practiced at police stations, judicial lockups and in jails. If the accused is male, torture is more likely to happen, but Pakistani women also face the worst forms of physical and psychological abuse from police officials. This abuse often takes place at police stations.

From January 2000 to June 2009, 10,241cases of police torture against women were reported in Pakistan. Around 70 percent of the women in detention were subject to physical and sexual abuse by law enforcement officials. In Pakistan, women are not completely safe in jails. Even in shelter homes they are vulnerable. Most of the women in prisons and shelter homes are abused by the police - the very people who are supposed to protect them. Although there are more reported cases of custodial torture against men, women in Pakistan are very vulnerable to abuse by law enforcement

agencies, because of a discriminatory society where women and men are not equal.

A recent report on torture revealed that incidences of torture, especially in pre-trial detention, are on the rise. From January to November 2010, a total of 1,198 cases of torture during pre-trial detention were reported.

My purpose is not to discriminate by only mentioning women's issues, but as you know, only two female Parlimentarians are presenting at this conference and therefore I wish to highlight women's issues. Torture in custody is expressly prohibited by the 1973 Constitution of Pakistan, Pakistan's Penal Code and the Criminal Procedure code. In 2010 Pakistan ratified United Nations Convention on Civil and Political Rights and United Nations Convention against Torture (CAT), but the country has not enacted any law against torture in custody, nor has it taken any other initiative to sensitize law enforcement officials.

Under martial law, the police and other agencies gained tremendous powers resulting in the rapid growth of torture, disappearances, extra-judicial killings, rape in custody, child abuse, bribery and corruption. Torture has permeated into everyday life and adversely affects any attempt to boost genuine human development in Pakistan. The negative consequences can hardly be underestimated. The effects of torture and ill-treatment hamper broader developmental goals and tragically influences the daily life of individuals, families and communities. Torture is an instrument especially targeting the poor, the excluded and the voiceless people, but it is also an instrument of terror wielded against the progressive forces of the society to incite fear. There are cases where physical and mental torture is used in public targeting high ranking officers in the judiciary, parliamentarians from opposition parties and to deter courageous lawyers and the media.

My party, the Pakistan Muslim League-Functional, is very concerned with the torture that takes place in police custody. We affirm that we will support any initiative for the eradication of torture in police custody or in the custody of other law enforcement agencies.

I want to remind you that according to the 18th amendment of the Constitution, the provinces were granted the power to legislate. Therefore, I'd like to announce that I will propose a bill in the provincial assembly combating torture and ill-treatment with the help of other colleagues in the assembly and, Insha'Allah, Sindh will be the first province in the country with legislation against torture.

I also participated in the roundtable conference on torture in Karachi, organized by Hamdard University and the Asian Human Rights Commission. At this conference I suggested some changes to the proposed bill on torture drafted by the AHRC. In September 2012, we will have another roundtable conference where the bill will be finalized. I would like to make the commitment that when the bill is finalized I will submit it to the assembly as a private bill and get it passed as early as possible.

I will also work on the issue of rehabilitation of torture victims, together with my party.

(*Nusrat Bano Abbasi is a Member of the Provincial Assembly of Sindh, Pakistan. Politically affiliated with Pakistan Muslim League*)

COVER STORY: PAKISTAN

DEMOCRACY IS THE BEST REVENGE

BY SAEED GHANI

I wish to thank Mr. John Joseph Clancy for chairing this conference on torture and ill-treatment under the auspices of the Asian Human Rights Commission and the RCT. I am also thankful to the AHRC for inviting me here to this conference.

I am a Senator from the ruling party, the Pakistan Peoples' Party, which has passed through political victimisation by the extra constitutional forces, particularly from martial law governments. During these periods and during the periods of nondemocratic governments hundreds of our workers were severely tortured and died the custody. Our leader, the founder of our party and former Prime Minister, Mr. Zulfiqar Ali Bhutto, was tortured during his detention and hanged to death by a military government on the crime of restoring the rule of law in the country and turning it into a democratic nation. Our leader, Benazir Bhutto, twice elected Prime Minister, was also tortured severely when she was only 24 years old and at that time she was leading the movement against military dictatorship. (She has since been assassinated).

The incumbent president of Pakistan and leader of the party, Mr. Asif Ali Zardari, was also physically tortured during the government of Mr. Nawaz Sharif, 1997-1999, when police officers cut his tongue during police custody to confess that he and his wife, Benazir Bhutto, were corrupt. One can imagine the structure of a state, which so depended on the menace of torture that the president himself cannot follow his case of torture. The main perpetrator of torture, a high ranking police officer, was provided protection by a provincial government and the higher courts failed to ask the Punjab government to hand over the perpetrator of torture to the police of Sindh Province where the complaint was lodged.

The courts, even the higher courts, do not see torture as a crime and help in the perpetuation of torture by ignoring the complaints of torture in custody. One example of such indifference towards torture by the courts is of the case of a man who was illegally detained and denied help by the court after his release. It was observed that, when the man was released from police custody, he recorded a statement before the court and complained about his torture. The higher court chose to ignore the matter and never tried to implicate the law enforcement agencies that held him, incommunicado, and tortured him in illegal detention. The weaknesses of the courts have also helped torture to perpetuate in the country.

Torture is used to get confessional statements for bribery and political victimisation. Even the chief justice of Pakistan was tortured when he was dismissed by General Musharraf. Even after his restoration he could not prosecute the police officers, who were promoted for their efforts.

There are many common methods of torture in Pakistan, such as hanging upside down, psychological torture, being made to "ride the mule", (otherwise known as the wooden

horse torture device) keeping prisoners blindfolded for many months, splitting the prisoner's legs, (referred to as "cheera") the piercing of iron nails in the nose, taking out finger and toenails, being restrained on ice slabs, putting blocks on the heads of prisoners and hammering them, and many other methods.

We are seriously concerned with the systematic torture and ill-treatment of prisoners in police custody and are working on criminalising torture, as in Pakistan there is no law against it in the Pakistan Penal Code (PPC). The word 'hurt' is used in the PPC in place of torture, which is in no way a substitute for torture. The Constitution of Pakistan, in Article 14 B, torture is mentioned, but is not prohibited. It says that no one may be subjected to torture, but no definition of torture is provided.

"The present government and parliament is doing wonderful work as far as legislation is concerned but the problem is proper implementation of the law."

Since 2008 we have been trying to make reforms in the laws and uphold the human rights that are necessary for the rule of law. The government has ratified the 18th, 19th & 20th amendments to the Constitution, which abolished many of the powers taken by previous military governments. The power of the Central Government was decentralised and provinces have been given maximum autonomy even for passing legislation. The ban on trade union activities was abolished and freedom of assembly, association and movement was restored. The judiciary was restored and it was made independent, after being snatched by the military rulers. Freedom of expression is fully allowed in accordance with international norms. There is no restriction on the freedom of the media, which has no precedent in the history of Pakistan. Not a single political prisoner is in the jails of Pakistan, something that has never happened before, and our own sitting ministers and parliamentarians are, in some cases, being taken to court.

The Government of Pakistan has ratified, in 2010, the ICCPR, ICESR and the Convention against Torture (CAT). A new era of respect of human rights has been introduced. Some undemocratic forces tried to stop this process by voicing several reservations about the CAT, but the Government realized this and withdrew the reservations in 2011. This is a landmark initiative from the government on its determination to respect the human rights.

Since the inception of the Government, the Parliament has made many laws - particularly on the rights of women, workers, etc. to protect rights like:

- Domestic Violence Prevention & Protection Act 2009 (Aug 2009).
- The Family Courts (amendment) Act 2008 (Aug 2009).
- The Guardians & Wards (amendment) Act 2008 (Aug 2009).
- The Public Defenders & Legal Aid Office Act 2009 (Jan 2010).
- The Protection against the Harassment of Women at Work Place Act (Jan 2010).
- Removal from Services (special powers) Ordinance 2000 (repeal) (Jan 2010).
- Benazir Income Support Programme Act 2010 (June 2010).
- The Sacked Employees Reinstatement Act 2010 (Oct 2010).
- The Prevention of Anti women practices. (Oct 2011).

- The National Commission for status of Women Bill (Jan 2012).
- Industrial Relations Act 2012 (March 2012).
- The National Commission for Human Rights Act 2012 (May 2012).

In all these legislations the most important is the formation of an independent & powerful NCHR. For the first time the in history of Pakistan, the government/Intelligence agencies have been made answerable to a strong NCHR. Despite these reforms, though, the higher Judiciary has failed to deliver much in the cases of disappeared persons, allegedly the army personals involved in these abductions.

Death Sentences:

Since August 2009 this practice has been stopped and our Government is trying to amend the laws to abolish the death penalty, but we are facing strong resistance from extremist groups, right wing parties and the judiciary as well.

Judiciary

The present government restored the judges sacked by General Musharraf. The Judiciary is independent, as they are free to appoint judges of their own choice and the Government has no role in the process.

The present government is facing problems due to Judicial Activism (some people even call it Judicial Martial Law), the judiciary exceeding limitations set by Parliament, and conflicts between Parliament and the courts over whether or not the Supreme Court can overrule articles of the Constitution. We realise that, historically, the Judiciary allied itself with Army rulers and usurpers but we hope that we will overcome the legacies of dictators.

Where is the problem?

The present government and parliament is doing wonderful work as far as legislation is concerned, but the problem is proper implementation of the law. The reason for not implementing new laws is regular interventions from supra-constitutional forces, which strengthen the right wingers (those not in majority and always lost in elections). People with these mindsets are everywhere; in the Judiciary, civil and military bureaucracies, media, etc., and are not ready to accept real democracy. They are continually attempting to derail and defame democracy and democratic forces, but this time they seem a bit weaker, as they could not succeed in the last 4-1/2 years to dislodge the present government, despite their conspiring to do so.

Proposed Law on Torture

We had a meeting in Karachi a few days ago to discuss the proposed law on torture and also discussed it with a few other senior parliamentarians and legal experts to further finalise the draft for introduction to Parliament. We are in touch with our AHRC friends and getting their support in terms of information about the laws in other countries to introduce a better law in Pakistan. On behalf of my party and government, I commit before this August House that we will try our best to save the children from the menace of torture.

(*Saeed Ghani is a senator in the Senate of Pakistan and affiliated with Pakistan Peoples' Party, Sindh, Pakistan*)

COVER STORY: BANGLADESH

TORTURE IN BANGLADESH CONTEXT

BY MOHAMMAD FAZLUL AZIM

It is indeed a great privilege and honour for me to have been invited to participate in this meeting of Asian parliamentarians against torture and ill-treatment, sponsored by the Asian Human Rights Commission. I must thank the organisers for staging this meeting in which parliamentarians from seven Asian Countries are participating. I am hopeful that the objectives of this meeting will be achieved through valuable and meaningful deliberations, discussions and contributions by the participating parliamentarians and other human rights activists in this field.

One of the paramount considerations of the Charter of the United Nation was to reaffirm faith in fundamental human rights, in the dignity and worth of each human being and to encourage respect for universal human rights without exception.

Consequently, human rights, viewed at the universal level, consist of the Universal Declaration of Human Rights, (UDHR) along with the International Covenant of Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights, (ICESCR) all of which provide, in particular Article 5 of UDHR and Article 7 of ICCPR, that no one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment., and that the legal framework of all member countries should be based on that principle .

Thus we can say that the cornerstone of the UDHR is one of the basic principles of democratic statehood and that such states must incorporate into their laws the rights to life, liberty and security of person, including freedom from slavery and servitude, freedom from torture and cruel, inhuman or degrading treatment or punishment.

Recognizing this ideal and considering the obligation of the state to prohibit any form of torture within the nation's legal code, the CAT was adopted by the UN General Assembly (UNGA) on 10 December 1984.

We are all aware of the human rights that have been proclaimed by the world bodies and we adopt those as members of the international community, but these rights can only be safeguarded if we make conscious efforts to fulfill our commitments.

In the background paper of AAATI, it has been correctly noted that the practice of torture is widespread in most countries in Asia, including my country.

I understand that the prime objective of this meeting is to find ways forward in the fight for a torture free Asia and to define the particular role of parliamentarians in promoting the adoption of a sound legal framework for the elimination of torture and ill-treatment in their respective countries.

In the background paper the sponsors have provided a 27 page brief on the state of human rights and the practice of torture in Bangladesh. I am not here to defend our

legal system, but can only add that there are areas where extensive law reforms have been made, which give a context to our needed reforms that should not be ignored.
Few Points (BANGLADESH):

- The Constitution of Bangladesh (Article 35) provides for the protection of the citizen against torture, cruel, inhuman and degrading punishment or treatment.

- Since Independence in 1971, several law reforms have taken place on the state of human rights of the citizens.

- The right to information law, 2011 has been passed, following long standing demands from the media and human rights organizations.

- A law, separating the judiciary from executive branch, was passed in 2011, thus fulfilling a long standing demand.

- In most cases, violation of human rights occurs, not due to absence of relevant laws, but rather due to lack of access to legal redress. Non-implementation of human rights instruments is a major problem.

- Bangladesh has a large number of human rights NGO's who, as human rights defenders, often comment on the lack of government accountability to implement the CAT. Active citizenry has also created a sustained movement to defend human rights.

- The rule of law is often being undermined by government institution due to a lack of adequate funding. Alleged incidents are not being investigated.

- A draft law, formulated to replace the police Act 1861, aimed at improving accountability and quality of service of the police force, has been posted on the government website for public comment.

- A bill titled "Torture and Custodial death (Prohibition) bill-2009" was tabled in the parliament on 10 September, 2009 as a private member's bill seeking to criminalise torture in Bangladesh, in compliance with its international obligations. The Asian Human Rights Commission welcomed the bill. The passage of the bill as law is now dependent on the political will of the government which has a three fourths majority.

Role of Parliamentarians:

- What should be the role of a parliamentarian in a malfunctioning policing system (where the police are out of control, which encourages crime)?

- What kind of law reform is necessary to increase the competence of police in criminal investigation?

- Is it correct to say that laws are designed to protect officials and not citizen (section 46 of the Bangladesh constitution empowers government to extend immunity from prosecution to any state officer on any ground)?

- What should be the role of parliamentarians to repeal laws which are contrary to international norms and standards for human rights?

Parliamentarians can play a critical role in the adoption and implementation of the CAT, i.e. provisions of the CAT that become part of the domestic legal system, establishing the criminalisation of torture in any form. So far, torture is not denied as a crime in any existing laws in Bangladesh.

I see the following as my role as an MP to implement the CAT:

- Drafting legislation

- Calling on the government to fulfill its commitments to implement the CAT, (adoption of article 14 (1)) including turning in a timely report to the UN committee.

- Sensitizing the media and community.

- Building an alliance between civil society and NGOs.

Major Challenges:

- Typical political culture in most Asian countries, including Bangladesh.

- A lack of initiative within ruling parties to introduce needed law reform.

- A lack of training for members of law enforcement agencies.

- The absence of modern and scientific technology in information collection and the gathering of evidence.

- A lack of funding

- A lack of witness protection. There is no law to guarantee an individual's security if they want to give testimony in an open court. This is particularly important where powerful politicians and or state officials are amongst the accused.

Recommendations:

- A judicial reform commission needs to be set up to review outstanding concerns related to the CAT.

- The National Human Rights Commission should work independently, take steps against corruption and propose police reforms to conform with the implementation of the CAT.

- Draft a police bill that may be prepared after extensive public consultation.

- Parliamentarians, civil society groups and NGOs must closely cooperate.

- Existing High Court guidelines and safeguards regarding arrests without warrants and placing individuals in police remand under section 54 and 167 of the code of Criminal Procedure must be implemented.

- It must be Ensured that allegations of torture in previous regimes be independently, impartially and adequately investigated and those found responsible must be prosecuted.

- Specific legislation on redress including compensation for victims of arbitrary arrest and torture needs to be adopted.

- "Declarations" to international human rights instruments (six core human rights treaties) to which Bangladesh is a party including CAT, (Article 14(1)) should be removed.

- The creation of a sound legal framework that can effectively prevent torture can only be achieved through the active involvement of the country's legislators.

- A major objective of this meeting is to develop a permanent forum of Asian parliamentarians for the promotion & implementation of the CAT.

Concluding remarks:

Parliamentarians can definitely play unique roles in construction of a torture free society. I feel that to achieve the objectives of the CAT, the creation of a sound legal framework is fundamental.

To prevent torture, it is equally important to change the mindset of the people involved at various levels of government.

In addition to making legislation, parliamentarians have the responsibility and authority to raise questions on the compliance by the government with the terms of the convention.

As parliamentarians, we also have a role in conflict resolution and peace building at our political constituencies, particularly between powerful and powerless groups which can promote a torture free environment.

Parliamentarians can also play effective roles in information dissemination. Most potential victims of developing countries do not know about the CAT and the rights enshrined within it.

To claim ones rights, one must know about what they are.

(*Mohammad Fazlul Azim is a member of Parliament from Noakhali-6 constituency and Partakes in meetings of the Inter-Parliamentary Unit, Bangladesh.*)

AAATI MEETING: 21-24 JULY 2012

Meeting of Asian Parliamentarians: (L-R) Jack Clancy (Hong Kong), Basil Fernando (Hong Kong), Margaret Ng Ngoi-Yee (Hong Kong) and Bijo Francis (Hong Kong)

Meeting of Asian Parliamentarians: (L-R) Jack Clancy (Hong Kong) and Martin Lee Chu Ming (Hong Kong)

Meeting of Asian Parliamentarians: (L-R) Baseer Naveed (Hong Kong), Nusrat Bano Abbasi (Pakistan), Hasina Kharbhih (India) and Raymond Palatino (Philippines)

Meeting of Asian Parliamentarians: (L-R) Meeting Danilo Reyes (Hong Kong), Raymond Palatino (Philippines), Myrna Reblando (Philippines), Baseer Naveed (Hong Kong)

COVER STORY: BURMA

TORTURE: LONG TERM PRACTICE

BY U AUNG THANE

Torture in Burma is commonly practiced in military facilities and police stations and in special bureaus, like the Special Branch and Bureau of Special Investigation. It is used to force people to confess to crimes. It is found in all types of cases, but is very common in national security cases, and political cases. Most people tortured in police stations are accused of ordinary crimes. They usually will confess quite soon to get out of the torture. People accused in political cases are tortured in special facilities or at prisons.

There are many methods of torture. They begin with ill-treatment. At the very least, the interrogators deny food and water for a number of days. They also prevent detainees from sleeping. They keep people in filthy conditions, deny them the chance to bathe, or in the case of women do not give them anything to cover their bodies with when bathing. Sometimes they lock people in totally dark rooms for weeks at a time. I remember a client of my legal firm who was brutally tortured. He was hit repeatedly on the head and body, burnt on the testicles, had a roller run on his legs, tortured with water and made to stand in stressful positions for long periods of time. Another common method of torture is that the torturers tie the person's hands behind their back and pull them up with a rope, then hit them. Another client was not tortured himself, but his friend was tortured in front of him. The interrogators said they would continue to torture his friend until he confessed to a bombing so he confessed.

Some survivors of torture suffer very serious mental damage. One monk who was a leader of the protests in 2007 was tortured very badly for a long time. He was released at the start of 2012 but his mental condition is now abnormal, and he could no longer stay a monk. In the case of political prisoners especially, officials mentally torture not only the prisoner but also members of their family. Such prisoners are detained in remote jails. Relatives can visit them only once every two weeks. When they meet detainees, the officers present write down what they discuss. Authorities also harass families, threatening to have them removed from their jobs, or that they won't be allowed to visit the prisoner if they talk to the media. After being released from prison, many survivors of torture continue to suffer various problems associated with their ordeal. They cannot get work, some are homeless, and some have family breakdowns. They need counseling and assistance in a range of ways, but up to now in Burma, no programs exist to provide such assistance. We need to consider how we can assist these people, and we need advice on these aspects of the problem from people with experience in other countries. In conclusion, I would like to point out that, despite the political changes seen in Burma, torture and related problems are continuing to the present.

(U Aung Thane is a legal advisor specializing in political trials, human rights violation cases, land confiscating cases and child soldier cases. He also the leader of Lawyers' Network in Burma.)

COVER STORY: BURMA

BURMESE WAYS OF TORTURE

BY U TIN AUNG TUN

Torture is of two types: physical and mental. To close our session, I want to make some brief comments about these two types as they apply to Burma.

After physical torture, someone may require medical treatment. But in Burma, to get even basic medical treatment can be difficult. A survivor of torture may even have to get the permission of the torturers to get treatment. If we take a survivor to hospital and the staff asks how they got the injuries, and if we say they have been caused by the police, the hospital staff wouldn't want to treat the person. We have to get an approval slip from the police themselves. But even if the police do give approval, hospitals lack medical supplies and the staff are poorly trained. Therefore many survivors of torture in Burma suffer for the rest of their lives.

As for mental torture, it is part of a larger social context in which everyone in Burma has suffered psychologically due to authoritarian rule. To keep a torture survivor in a continuous mental stress is the method used by the government and this practice has been common in Burma for a long time. We have many daily life examples. For instance, under a 1907 law, if we stay at someone's house in a different town, we have to register as a visitor with the local authorities. This year, a new law has been introduced to replace this law. Actually, it is in some ways worse than the old law because now, even if we stay in the same part of a town as another person's house, such as a local friend or relative, we have to register with the local authorities. Such rules give opportunities to authorities to misuse their powers and cause mental stress across the population.

Similarly, in many places, police and local officials protect the organizers of illegal gambling. If someone tries to complain against the gambling brokers, that person is charged with an offense. Even though everyone knows who the real criminal is, an innocent person gets charged and may go to jail. Such practices cause mental anguish to many people. In court, various tactics are used to stress lawyers who work for democracy and justice. Judges use various tactics to obstruct us as lawyers, to delay hearings, to waste our time and also to cause us mental stress.

Such practices are part of a system of control that works especially against the poor and uneducated. The police, local authorities and the wealthy work together to ensure that most people in the jail are poor villagers and townsfolk. Many of these people are tortured before going to jail. For example, I recently handled a case in which the police tortured a debtor to confess to a false criminal charge. Although I finally was able to get one person off the charge, he had been brutally tortured, resulting in damage to his ears and ribs.

(U Tin Aung Tun is a legal advisor in human rights violation cases. He is an activist promoting human rights and rule of law in Myanmar and also a member of Lawyers' Network.)

COVER STORY: INTERVIEW- SRI LANKA

Eran Wicramaratne

HUMAN DIGNITY IS INALIENABLE

Eran Wicramaratne *is an Economist by training and holds a Degree in Economics and Politics and a M.Sc. in Economics from the University of London. A Banker by profession, he has served as Vice President of Citibank and Director/Chief Executive Officer of the National Development Bank PLC (now known as NDB Bank). Later he turned into politics from the main opposition party, the United National Front in Sri Lanka. Eran Wicramaratne, Member of Parliament, who joined the meeting co-organised by the AHRC and RCT, shared his thoughts with* ***Torture Magazine*** *on his reading on the present political situation and his understanding of the prevention of torture.*

TM: Let us start with an introduction about you. How did you become a politician and why did you join the UNP, which is the main opposition party in Sri Lanka, and I would say the oldest political party in the country as well?

EW: By training I am an Economist, but for 25 years I was a banker. I worked for Citibank as a foreign exchange trader, treasurer and corporate bank head. I then joined the National Development Bank of Sri Lanka and gave leadership to the corporate finance business, started the commercial banking business of NDB and became the group chief executive officer of the NDB Group. I utilized my knowledge and professional skills in assisting the United National Party as a young professional. Later I was appointed to serve the Board of Investment as a director and to lead the team that created the e-Sri Lanka ICT development programme, becoming the founder chairman of the Information Communication Technology Agency of Sri

Lanka. The UNP leaders, recognising my contribution, invited me to serve the country through becoming the Mayor of Colombo, which I could not accept at that time, and more recently to take a seat in Parliament. So that's the journey in short.

TM: The UNP has made good as well as bad contributions to the country and her people after independence from British colonialism in 1948. Can you critically explain the role your party played when it was in power, its positive contributions and challenges?

EW: Sri Lanka has two main political parties. Namely, the United National Party (UNP) and the Sri Lanka Freedom Party (SLFP). The UNP is a party with an inclusive philosophy and a record of progressive economic management. It is also a party that valued those who are capable and hardworking over family and clan connection. My personal philosophy in life was closer to the political philosophy of the UNP much more than any other party. So I joined it.

"In Sri Lanka we have frequent elections but no democracy. That is a strong statement. Many countries in the Middle East including Algeria, Egypt, Libya and Syria also had elections but no democracy. On the other hand Hong Kong has no one-person, one-vote election but there is more democracy."

As with all political parties there are positives and negatives. The 1978 Constitution introducing the Presidential System was intended to provide political stability and rapid economic growth. Unfortunately our experience of 30 years is that the Constitution has laid the foundation for the authoritarian slide that we have seen. The present President, by abolishing the provision in the Constitution that provided for independent commissions for finance, elections, appointments to the judiciary, public service, and police has thereby virtually destroyed the rule of law.

The checks and balances, including the term limits on the Presidency, have been blown away. The UNP's achievements in the economic and social sphere were unparalleled and are evident even today. Sri Lanka was an agricultural country. The Mahaweli river project and many other early irrigation projects laid the foundation for the food security we enjoy today. We may be the only South Asian country to have a power supply 24 x 7 due to the many dams and hydro power stations that were built. Our early leaders laid the foundation for universal education and healthcare. In an era when the SLFP bankrupted the country economically, through poor policies and mismanagement, President Jayawardene had the foresight to see that the country's economic prosperity depended on integrating our economy to the world. Opening the path for economic prosperity for all is the legacy of the UNP. We diversified the economy from agriculture to manufacturing and services. Higher incomes and prosperity were possible only through such diversification – a lesson the present government is yet to learn. The private sector and foreign investment propelled growth. A country needs vision, policies, leadership and management. The UNP's economic management was the secret of that prosperity. Even as recent as 2002-04 it was the Ranil Wickremesinghe administration that had the courage to go for the structural

reforms that has kept the economy afloat in the first decade of this century.

TM: The war ended over three years ago, by killing the top leadership of the LTTE. There is no doubt about the elimination of terrorism, but my understanding is that terrorism is not a disease but a symptom. How do you understand this social phenomenon in the context of Sri Lanka?

EW: Sri Lanka is a post–war country but it is not a post–conflict country. People are relieved that there is no military confrontation, but what led to the confrontation? It was the wide spread feeling of the Tamil speaking people that they were not equal before the law and did not enjoy equal political, social and economic rights. The debate whether this is factual or perceived is not relevant. The failure of the State to address these issues led from discontent, to anger, to low intensity conflict, to a full-blown conflict. The Lessons Learnt and Reconciliation Commission Report (LLRC) documents issues relating to the conflict and have come up with several recommendations. The Commission was appointed by the government, but there has been little progress in implementing its recommendations. There has been no progress on political rights. The recommendations deal with political rights, as well as social and economic issues. It appears that the government has been crippled from within and unable to tackle the core issues that were the root cause of the conflict.

TM: Human rights violence like torture, forced disappearances, custodial death, extrajudicial killings, etc. are a part of daily life in Sri Lanka. How do you understand the present situation in Sri Lanka?

EW: There has been a breakdown in the rule of law over a long period of time. When there is a military conflict in a country the rule of law suffers. When the military conflict ends it is a major challenge to reestablish the rule of law. The intolerance of 'dissent' manifests itself in disappearances and extra judicial killings. The country was defamed by the 'white van' phenomena. The most affected were Tamil speaking people, human rights activists, and members of the media. The LTTE and other terrorist groups recruited children in the war effort and killed many unarmed civilians, particularly those in villages that were bordering the Northern and Eastern provinces. It has been over 3 years since the end of the military conflict. Unfortunately, though, there are still disappearances and violations of people's rights and the government has not been able to bring those responsible to justice. In recent weeks the media has reported many cases of rape and child abuse. Many politicians have been implicated in these crimes. There is a culture of impunity that prevails. An alleged murderer who had multiple warrants issued for his arrest was found to be visiting his friends in jail. How can such a thing happen without the connivance of government politicians? The breakdown in the rule of law is reaching dangerous proportions – a cabinet minister threatened a judge and allegedly got a mob to attack and destroy a courthouse. Where in the world does this happen? On the positive side, I am glad to note that senior members of the Bar have courageously petitioned the court and the cabinet minister has to appear before court, shortly.

We need to build institutions that are independent of the Executive. The Judiciary must be protected. Their independence will only be ensured when appointments are apolitical and their remuneration is decided by Parliament rather than the Executive.

"Sri Lanka is a country with an educated and enlightened class which is dissatisfied with the status-quo and wants to see not only economic reforms, but more significantly, political reforms. If reforms through democratic means are stifled, it will with time, give way to a liberation struggle."

TM: Do you think that in this present political situation, which many identify, not as a democracy, but as an "autocratic", "democratic authoritarian", "feudal", or "nepotistic" state there will be any positive political reform in the country?

EW: In Sri Lanka, we have frequent elections but no democracy. That is a strong statement. Many countries in the Middle East, including Algeria, Egypt, Libya, and Syria also had elections but no democracy. On the other hand, Hong Kong has no one-person, one-vote elections, but there is more democracy. So what then is democracy?

It's the people's sovereignty exercised through free and fair elections. Elections are free when an individual is able to vote for whomever he or she wishes without coercion or threat from anyone. An election is fair when the institutions that support the elections are independent from the Executive and uphold the rule of law without fear or favour. It requires a police force that enforces the law equally, irrespective of an individual's social standing. There must be a Justice System that upholds the law, where judges are appointed apolitically and are not dependent on the Executive for their remuneration. An Election Commission which can conduct an election without interference from politicians in power is also necessary.

Sri Lanka does not have the independent institutions that are prerequisites to be called a democracy. The situation drastically deteriorated when President Rajapakse abolished the 17th Amendment to the Constitution, thereby sounding the death knell for the functioning of independent institutions. He also removed the two term limit on the Presidency which was the main check introduced by President Jayawardene in the 1978 Constitution. Sri Lanka is an authoritarian state where nepotism is at its height. I don't like the phrase 'democratic authoritarianism'. That is a contradiction. A country where members of the President's family run the Defense and Economic Affairs Ministries, and hold key positions in Parliament is not a democracy. Some justify it on the basis that it's the performance of the individual that matters. I cannot agree with such reasoning because conflicts of interest will naturally arise when many members of the same family occupy powerful positions in the same organisation, whether in a public quoted company or in politics. Despite this gloomy picture, Sri Lanka is a country with an educated and enlightened class which is dissatisfied with the status-quo and wants to see not only economic reforms, but more significantly, political reforms. If reforms through democratic means are stifled, it will with time, give way to a liberation struggle. Don't forget that since independence there have been 3 major uprisings. The people cannot be suppressed forever.

"The main challenge in eliminating torture is that it's not a priority for governments. In Sri Lanka, despite the continued increase in defense expenditure, the Police Department does not seem to attract sufficient resources and is showing signs of institutional failure."

TM: The war on terror, or as the Sri Lankan Government calls it, a 'Humanitarian Operation', has been used to deter alternative politics. It has opened up tremendous opportunities to undermine alternate political ideas and prevented them from reaching the mainstream. Even three years after the war, it has been used to manipulate every layer of society. In this situation who can believe that an electoral system will work and how will this crackdown on dissenting views change society?

EW: Consequent to the terrorists attack on the twin towers, President Bush used the term 'War on Terror' to go after terrorists and regimes which the United States perceived to be antagonistic to U.S. interests. A declaration of war was the mechanism to simultaneously restrict personal freedom and justify the use of military force to achieve the objectives of the American State. The Sri Lankan government also utilised the same justification to restrict personal liberties and use military force, which has consequences not only for armed terrorists but for unarmed civilians. Most people, whether Sinhala or Tamil speaking, are relieved that the armed conflict is over. The intransigence of the LTTE led to its demise. Now people want to know the truth rather than the propaganda of the protagonists. At the latter stages of the conflict the phrase 'Humanitarian Operation' was coined to refer to those who had been cajoled into becoming a human shield for the LTTE fighters. Ironically, what the government termed a 'Humanitarian Operation' was seen by some as a cynical manipulation of the truth. With time and the emerging evidence a more accurate perspective of these historical events will emerge. It takes time for the public to be informed, to sift the facts from fiction and arrive at a rational conclusion. The electoral system can be manipulated in the short run but over the long haul the will of the people will prevail.

TM: Torture is one of the main subjects with which you have recently engaged. In your speech at the event which was co-organised by the RCT and AHRC, you pointed that you are trying to understand and make your voice heard at the legislative level. Could you please share with us your understanding of this endemic issue?

EW: Firstly, I must thank the AHRC and RCT for focusing on torture and ill treatment of fellow human beings.

I believe that all people everywhere are created equal. Human dignity is inalienable. Inflicting physical pain or pain of mind as a means of breaking the human spirit is unacceptable. Torture has been a widespread phenomenon throughout human history. It is widely used to create a fear psychosis for social control. The battle against slavery succeeded in Europe about 150 years ago and with that, torture also disappeared. A societal norm was established that torture under any condition is unacceptable. In North America or Europe, governments would be overthrown if they engaged in the torture of their own citizens. It's unthinkable that the U.S would torture an American citizen, even though we are fully aware of U.S. excesses in torturing citizens of other countries. However, in Asia and Sri Lanka, government agencies torture their own citizens. There are hundreds of cases documented by the AHRC. There are many victims talking about their torture and ill treatment experiences on YouTube.

Torture has historically been used as a tool of war and conflict, but the endemic nature of torture is evident in police brutality across Asia. In gathering information and resolving crime, the police use torture and

ill treatment to obtain confessions. This is often the primary method rather than the evidence of witnesses and circumstantial evidence. The police, who are poorly paid and with little investment in training and technology, rely heavily on torture and ill-treatment. We are all responsible for this state of affairs; it's not just the police. The prevention and elimination of torture is the primary responsibility of governments. As legislators, it is our responsibility to ensure that the International Convention against Torture and other Cruel Inhuman, Degrading Treatment or Punishment is ratified, and that local laws are enacted to give effect to the ideals of the Convention in all Asian Countries. Sri Lanka has ratified the Convention and enacted Act No. 22 of 1994, giving effect to the UN Convention Against Torture.

However, where we have failed is in the implementation of the law. Only a handful of cases against torture and ill treatment have succeeded, despite the widespread nature of the social disease. As a legislator I will argue for higher allocations to reform the judicial system and it's institutions-particularly for higher salaries for the police force, more investment in training and advanced technology in solving crime as opposed to using torture to elicit confessions. We also need investment in the prison system, where some allege that those incarcerated get criminalised over time. Then there is the need for Parliament to ensure that they remunerate their judges so that they will be financially independent of the Executive arm of government.

TM: What are the challenges that you have been facing, and how are you going to address this issue?

EW: The main challenge in eliminating torture is that it's not a priority for governments. In Sri Lanka, despite the continued increase in defense expenditure, the Police Department does not seem to attract sufficient resources and is showing signs of institutional failure. Militarisation appears to be on the rise, somewhat at the expense of an efficient, professional police force.

Societal pressure on the government to eliminate torture is not as high, as people have been brutalised by war and have a higher threshold for the tolerance of violence. The burden of torture and ill treatment falls more heavily on the poor & powerless. Women are more vulnerable at the police station than men. Many women see the local police more as a threat than protector. So what needs to be done?

In addition to what I have stated that legislators and governments should do, we need to create awareness about the problem among the public. Victims have to be encouraged to go public with their stories which will then influence societal attitudes against torture and ill treatment. This may also have a therapeutic effect on the victims. Some effects of torture may be permanent. Victims need to be compensated financially and also be provided with counseling and other support services. The government could enlist the NGO's in this effort.

In addressing the systemic nature of torture, a multi-party political effort will be of immense value. It's a theme that will bring every political party to a common platform.

TM: What is your message to civil rights movements and the people of Sri Lanka?

EW: The message is that torture and ill treatment is unacceptable. It degrades humanity. It affects the poor and powerless. It demeans women. It must be banished.

There must be a public outcry to invest more in the Justice System. Better pay for judges, better environments in our prisons, and higher salaries and investment in training and technology for the police are all vital.

An investment in the judicial system will make for a better society than an investment in hard infrastructure.

TM: What lessons must we learn from the international community and other countries that have been eliminated torture to some degree?

EW: As I have already stated, the lessons from the abolition of slavery are particularly relevant. The meeting of Asian parliamentarians in Hong Kong was useful for an exchange of information and to explore the way forward on the elimination of torture. We were all agreed that torture and ill treatment is not an Asian value.

COVER STORY: INDONESIA

ELIMINATING TORTURE: WAY FORWARD

AAATI meeting – its significance for the abolition of torture in Indonesia

BY ANSWER C'LLIAH STYARMES

In the last few years, Indonesia has often been praised as one of the countries in Asia with the most progressive record on human rights. Although this praise is somewhat exaggerated in many instances, to be fair, the government of Indonesia has indeed taken measures to improve the state of human rights. Several discriminatory laws and policies have been eliminated, the press is generally free nowadays, and several institutions to ensure the protection of human rights have been established. Yet unfortunately, the pleasant record is not applicable when it comes to the issue of the practice of torture. In 2008, Lembaga Bantuan Hukum Jakarta (Jakarta Legal Aid Foundation, LBH Jakarta) recorded that torture was experienced by approximately 83% of detainees in several parts of Indonesia.

Despite the rampant practice of torture, the law, which criminalises torture, remains absent. Several articles under the current Indonesian Penal Code – such as those on maltreatment or on the prohibition to obtain forced confession - might be used to prosecute and punish the perpetrators. However, those articles do not really fit the definition of torture as stipulated under the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT). It has also been said that punishment, which is carried by such articles, actually reflects the gravity of torture.

The current Penal Code is under revision and the draft includes one article that specifically criminalises the practice of torture. In terms of the definition of torture and the punishment that might be given to the perpetrators – which is between 5 to 20 years of imprisonment - the article meets the standard required by the UNCAT. Yet Parliament, as well as the Government, have failed to show any meaningful effort to revise the Penal Code, at least in the near future. The discussion to revise the Code has been ongoing for about 20 years and it is unlikely that it will be concluded by the current parliament, whose term will end in 2014.

The problem with simply criminalizing torture under the revised Penal Code is not only that there is uncertainty over the enactment of the revised code. In addition, such a criminalisation plan has somewhat been a distraction from the urgent need of a separate anti-torture law. Criminalisation of torture is surely an important and significant start, as the UNCAT also emphasises. Yet it needs to be highlighted that criminalisation is only the minimum step that should be taken by the state to eliminate torture. Much more than that, the establishment of a set of safeguards against torture is equally and urgently needed. As the UN Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, recommended

in his report on the visit to Indonesia in 2008, that those safeguards include the proper maintenance of custody registers, the shifting of burden of proof to the prosecution in torture cases, and the assurance of an access to independent medical doctors.

The absence of a law criminalising torture as well as the lack of safeguards against such human rights violations is followed with and aggravated by a weak mechanism to punish perpetrators of torture. Perpetrators of torture are hardly brought to an independent court that applies criminal law but, instead, are likely to be brought before an internal disciplinary mechanism where they will only receive disciplinary punishments. In cases where they are brought before the court that applies criminal law, the punishment imposed is also likely to be disproportionate and does not reflect the gravity of the crime. For instance, four police officers who tortured a gay couple in Banda Aceh were sentenced to three months imprisonment and fined IDR 1000 – equal to about 6 UK pence. A lack of understanding amongst judges, regarding the grave nature of torture, is another issue that makes torture more prevalent in most of parts of Indonesia.

AAATI meeting with parliamentarians – the significance

On the 20-24th of July 2012, the Asian Alliance against Torture and Ill-treatment (AAATI) conducted a three day meeting in Hong Kong with parliamentarians from various Asian countries, including Indonesia who was represented by Mr. Sayed Muhammad Muliady from Partai Demokrasi Indonesia Perjuangan (Indonesian Democratic Party of Struggle, PDI-P). The aim of the meeting was to encourage cooperation between civil society and the parliamentarians to eliminate torture by introducing legislation against torture in accordance with the UNCAT standard and to ensure the implementation of such law.

The AAATI meeting was an important reminder for the parliamentarians about how they, as lawmakers, have a critical role in combating torture in their own countries. The aforementioned problems that cause torture in Indonesia – the absence of laws criminalising torture, the lack of safeguards, and the weak mechanism to punish the perpetrators can be partially, if not mostly, addressed by the active role of parliamentarians in taking measures to eliminate torture. In his welcoming speech at the AAATI meeting, the Director of the Rehabilitation and Research Centre for Torture Victims (RCT) rightly pointed out that one of the role parliamentarians can take up in the elimination of torture is putting the necessary legislation into place. This is especially relevant in the context of Indonesia – not only in terms of the absence of laws criminalising torture or the revision of the penal code or the criminal code, but also in terms of revision of other laws that undermine any efforts to abolish torture. Those laws include Law No. 31 Year 1997 of the Military Law, which stipulates that military officers conducting 'ordinary' crimes such as rape, murder or assault should be brought before the military tribunal – which is an internal mechanism. Therefore, the process is unlikely to be transparent and the perpetrators are likely to be given light, disciplinary measures.

Another important role that might be played by the Indonesian parliament is allocating an adequate budget for the institutions related to the criminal justice system including the police. It has to be ensured that the police are equipped with the latest investigation technology as well as to provide them with training on scientific interrogation, as torture in many instanced happens when trying to

gather evidence. An adequate budget is also essential to reform the prison and detention facilities condition.

As a civilian who attended the meeting, the discussion with the parliamentarians on the issue of torture has also brought my attention to several issues that have been forgotten by most of Indonesia's civil society. The need for a separate anti-torture law is only one of the examples. In the last few years, many advocacy campaigns conducted by human rights organisations or networks in Indonesia have been too focused on the criminalisation of torture under the Penal Code revision. In addition, the sharing of experiences by the MPs and civil society from countries which have adopted a separate anti-torture law, such as the Philippines and Sri Lanka, has provided me with challenges that might be found ahead, even after the enactment of an anti-torture law, and to think about what the Indonesian anti-torture law should look like to overcome those challenges.

In the meeting, the member of the Provincial Assembly of Sindh, Abbasi Nusrat Bano, put heavy emphasis on the issue of torture of women in detention facilities. This is another issue that rarely gets attention from civil society in general, in Indonesia, and even, I have to humbly admit, the Indonesia desk of the Asian Human Rights Commission for which I work. There have not been many individual cases of women being tortured in detention that have been heard or been published for the urgent appeal mechanism of the AHRC. This might give the misleading impression that torture does not happen to women in detention in Indonesia, whilst the facts say otherwise.

Surely, the meeting alone did not and could not end the practice of torture in Asian countries, there is much more work left for us. However, it is an important start for further cooperation between civil society and the parliaments who have significant roles and power in abolishing the practice of torture. The meeting might have ended, but the cooperation between these two groups has not.

(Answer C'lliah Styarmes is head of Indonesia Desk, Asian Human Rights Commission.)

ANNIVERSARY

AHRC AND RCT COLLABORATION

APPRECIATION ON THE OCCASION OF THE 30TH ANNIVERSARY OF THE RCT

(Photo Courtesy: Janasansadaya)

BY BASIL FERNANDO

On the occasion of the Rehabilitation and Research Centre for Torture Victims (RCT) celebrating its 30th Anniversary, the Asian Human Rights Commission (AHRC) wishes to record its appreciation for the RCT and recognize the contribution it has made to the development of the AHRC's work relating to torture and ill-treatment. It is perhaps a happy coincidence that the meeting with parliamentarians, organized by the Asian Alliance against Torture and Ill-treatment, (AAATI) occurred in the same year. The AAATI emerged as a joint venture, started in 2011 and co-sponsored by the AHRC and RCT, after several years of collaboration, to develop a contextually relevant approach to dealing with the widespread use of torture and ill-treatment in Asian countries.

The AHRC and RCT collaboration, which started in Sri Lanka, has been a unique experience. Sri Lanka, in the period around the 1950s, was thought of as a rapidly emerging democracy and an example to the rest of Asia and Africa. The expectation was based on realistic estimations of social indicators, which showed remarkable achievements in the areas of reducing the child mortality rate, dramatic improvements of literacy and education levels, significant improvements in overall healthcare, and skill development in many fields.

However, this dream began to shatter in the late 1970s with the adoption of a constitutional model that placed all power on the executive president, thus displacing the judiciary and the parliament. This was accompanied by a wholesale experiment into the market economy with aggressive undermining of all aspects of welfare and severe attacks on the trade union movement. By around 2002, when the AHRC and RCT collaboration started, Sri Lanka's rule of law system had suffered an exceptional collapse and grave abuses of human rights, by way of

forced disappearances, extrajudicial killings, and the use of torture and ill-treatment, manifested a serious deterioration of public institutions in the country. Globally, this situation in Sri Lanka was misunderstood as a result of an ethnic crisis, which has developed into a military conflict between the LTTE and the Sri Lankan government.

The AHRC rejected this assessment of the Sri Lankan crisis as being purely based on the ethnic conflict, and instead described the crisis as one of a collapse of public institutions, giving rise to violence in many aspects of the country, including the conflict between the military and the LTTE. It was the view of the AHRC that this overall crisis, arising out of the authoritarian political model introduced by the 1978 constitution, needed to be highlighted as the fundamental cause of violence in Sri Lanka. The AHRC's work on forced disappearances, torture and ill treatment has begun on the basis of these overall initiatives.

The AHRC concentrated on the exposure of torture and ill-treatment as taking place in all parts of Sri Lanka rather than as confined only to the record of violence in the North and East, which was the usual habit of other international organisations and most of the local organisations in Sri Lanka. It is the AHRC's view that the totality of the crisis needs to be exposed if violence taking place in Sri Lanka is to find a comprehensive explanation, leading to the possibility of working towards the recovery of the rule of law system and the democratic institutions, which is the only real overall solution to the crisis. In addressing the crisis of the basic structure, the AHRC was of the view that exposure of police torture and ill-treatment, taking place in areas which were not the conflict areas, would lead to a clarification of the nature of the crisis in Sri Lanka.

Jesudasan Rita and Lalth Rajapakse

Concentrating on police torture was the AHRC's approach. It was this approach that the AHRC explained to the RCT and they agreed to a collaboration in terms of developing the prevention of torture project in Sri Lanka.

In the years that followed, this project encountered a large number of victims of torture, and the stories of their struggles are the most important aspect of this project. The number of victims is far too many to be mentioned individually. However, all of their cases are documented in detail and the documents have been published over and over again, and are available online and in various research publications. A few cases may be mentioned, cases that are quite well-known in Sri Lanka, and the lessons learned have become a part of the discourse on torture and ill-treatment in Sri Lanka.

There is the case of Lalith Rajapaksha, a seventeen-year-old boy, who was arrested and severely beaten all over his body, including on his head, on which books were placed and then hit with rods, resulting in his being unconscious for several weeks. The doctors identified his condition as edema on the brain, a condition that creates similar symptoms as encephalitis. The boy came from an extremely poor family and without very active support from human

rights organisations he could not face up to the many problems that came as a result of this attack. He was continuously threatened by the police, who wanted him to withdraw his complaints. Dealing with this case led to very comprehensive ways of supporting torture victims, which combined protection of the victim for many years outside his home territory, community support to help him adjust to his new circumstances, a protracted legal struggle going from the Magistrates Courts to the High Court, to the Appeals Court, and finally to the United Nations Human Rights Committee. The UNHRC's view expressed on this case, critiquing the delay in the adjudication process in Sri Lanka and issuing a recommendation for the adoption of legislative and judicial measures to ensure speedy justice, is by now referred to in several other cases. The incident happened in 2002 and the litigation still isn't over. However, the victim was supported throughout this period and now he is living in stable conditions.

Another case is that of Rita Jesudasan, a fourteen-year-old girl from the poorest sections of Sri Lanka, from a family of tea estate workers, who was raped in 2001 while on her way to school by a youth from an affluent family in Kandy. As usual, the police were neglecting the investigation. It was at this stage that the Home for the Victims of Torture came to her assistance. She was given medical and psychological care and was also admitted to a school run by nuns. Her education for several years thereafter was taken care of by the Home for Victims of Torture and the most difficult part they faced was to support her in pursuing her case in the courts. She was determined to seek justice. However, when she went to court, she was insulted by the lawyer and others from the perpetrator's side, who publicly shouted at her, calling her a prostitute. At this stage, a strategy was developed for a large number of persons from the community, including several nuns, to accompany her. There had been severe delays in the case as the perpetrators approached various authorities. She said that because she was a Tamil she was harassed at the police station and that initially they even refused to record her statement. Throughout her ordeal she was treated badly by the police when she tried to get her complaints registered. She had been subjected to humiliation and constant harassment.

Despite all these hazards, the case has continued for over ten years. Meanwhile, she has acquired skills and found employment. As of now, she is married and expecting her first child.

The next cases show the harsher side of fighting police torture.

The cases of Gerald Perera and Sugath Nishantha Fernando

Gerald Perera, a cook and a trade unionist, was arrested purely on mistaken identity. He was so harshly beaten that he suffered kidney failure and remained unconscious for nearly three weeks. Feeling deeply insulted and wounded, he was uncompromising in trying to seek justice. The Supreme Court of Sri Lanka gave a landmark judgment, in his favour, in a fundamental rights application and awarded the highest sum of compensation for torture so far. The Attorney General of Sri Lanka, in response to the Supreme Court judgment, filed an indictment under criminal charges under the CAT Act (Act No. 22 of 1994) against several police officers, and if the charges were proved they were subjected to a mandatory sentence of seven years rigorous imprisonment and a 10,000 rupees fine. A week before Gerald Perera was to give evidence in this trial he was fatally shot while travelling to work on

a bus. Later, the first accused in the torture case, a police Sub Inspector, and one of his assistants, were charged for murder in this case. Both the cases of torture and murder are still continuing in the courts.

Gerald Perera and Sugath Nishantha Fernando

Sugath Nishantha Fernando was a businessman who bought a lorry from a police inspector and later found that the vehicle sold by the inspector was stolen. He complained about this matter to police authorities, as a result of which the inspector was dismissed from his position. Later, the authorities also pursued bribery charges against this police officer and some others. While this inquiry was proceeding, about 12 police came to his house and assaulted him, his wife, and their two children. He filed a fundamental rights application against police officers for the torture of his whole family. He was threatened, demanding that charges against the police officers be withdrawn. A short while later, he was fatally shot, in broad daylight, while sitting in his vehicle next to his son. To date, no inquiries have been conducted into this assassination. His wife was also threatened and pursued from place to place for several months because of her continued demands for inquiries. Finally, she and her children had to flee the country and now have obtained asylum in Europe.

The narratives of 323 cases of police torture from Sri Lanka were published by the AHRC in 2011.[1]

Working on these cases required the development of local organisations that could be easily accessed by the victims. Six such groups have emerged and established themselves in Sri Lanka, forming a hopefully permanent part of the human rights landscape within the country. These groups are Janasansadaya (Panadura), Home for Victims of Torture (Kandy), SETIK (Kandy), Right to Life (Negambo), Gampaha People's Committee (Gampaha) and Rule of Law Forum (Colombo). All these organisations have now developed leaders with competence in human rights theory and practice, and have a firm commitment to fight against torture and ill-treatment with a comprehensive approach, combining assistance to victims in complaint making, pursuit of cases in the courts, trauma counseling, and other forms of psychological support. The most remarkable aspect of their development is in the documentation of all aspects relating to the redress and rehabilitation for victims of torture and ill-treatment. This documentation remains as a contribution to the study of the subject from many different points of view.

The work on this issue has led to a serious critique of Sri Lanka's criminal justice system, beginning from the complaint mechanisms, investigation systems, prosecutions under the Attorney General's department, and all aspects of adjudication. Heavily supported by detailed case studies, a solid argument has been developed on the need for radical reforms on policing, prosecutions

1 Narratives of 323 cases of police torture from Sri Lanka can be viewed at http://www.humanrights.asia/countries/sri-lanka/resources/special-reports/AHRC-SPR-001-2011/view

and adjudication in Sri Lanka. In articles analyzing this aspect, the situation has been described as a dysfunctional system. Many articles and public speeches in many forums have been made on the subject and this analysis is now well known locally as well as internationally.

Understanding the psychological impact of torture and ill-treatment, and thereby helping the victims to deal with the psychological consequences of their torture, has been one of the major aims of this project. This issue has been pursued in many different ways. With the help of competent psychologists, there was training for the activists involved in this work. The training program helped some people to take a greater interest in the psychological assistance for victims. As a result, several counselors have emerged, some of who have academic qualifications in psychology. There are also para-psychologists, trained as counselors who attend to victims and, when necessary, they refer the victims to professional counselors. These activities have added to taking the work of torture beyond the area of a mere legal search for redress. One of the most important contributions in this area is the introduction of testimonial therapy. Professionals from the RCT have devoted considerable time to introduce this concept, helped with the training of local counselors, and also directly engage with victims in various stages of testimonial therapy. Now, this idea has been well understood by many counselors and the human rights activists themselves. Many victims who have participated in this activity have found the testimonial therapy quite useful. The gradual communication of their suffering with a large group of attentive individuals has helped them to understand themselves better and the publication of their private story to a larger community group has also helped them to deal with their problems better. It can be said without exaggeration that testimonial therapy has now been accepted as a quite useful tool and it is likely to remain part of the way torture and ill-treatment is dealt with in Sri Lanka.

The street movement against torture, ill-treatment and the failures of the criminal justice system in Sri Lanka is one of the more colourful activities that has developed as a result of this project. A large group of activists, with banners depicting various problems relating to the absence of justice and various recommendations on to deal with it, come to street junctions where large crowds usually move about. They remain on the pavements exhibiting the placards, talking to the passersby and also distributing leaflets and pamphlets. This practice has been repeated over and over again in many parts of the country. Often, former victims themselves come as volunteers to participate in this activity. Some groups have also extended this activity to house-to-house campaigns, where a group of victims and activists visit houses and encourage people to participate in the campaign against torture.

A further aspect of this project was the very active involvement of women in every facet of dealing with torture and ill-treatment. In all cases of torture, it is quite often the women who play the more active role in supporting the victims, including in community support groups, as well as in highlighting and fighting against the deep injustices that are the root causes of torture and ill-treatment. Quite often, women themselves are the direct victims. Women as victims of torture have shown remarkable resilience in continuing their fight, both for redress for themselves, as well as on the overall issue of exposing and fighting against the basic injustices involved in the relationship between the people and authorities, particularly the people and the police.

The project in Sri Lanka clearly demonstrates that almost all torture victims are from among the poorest sections of society. The very reason why they are selected for mistreatment by way of torture and ill-treatment is their defenseless situation in terms of their social power within society. Individuals from stronger social groups who have the capacity to protest and gain support from lawyers and the media are not subjected to this treatment due to the possible repercussions. It is often assumed that attacks on the poor will not lead to serious retaliation. What this project has demonstrated is that, when supported by human rights groups and community organisations, the poor retaliate against injustice as much as anyone else. In fact, the victims who have participated in this project have shown their capacity to withstand enormous pressures that come by way of harassments and threats, which are very often quite acute.

The working model developed in Sri Lanka[2], regarding accountability and prevention of torture and ill-treatment has now been adopted in several countries in Asia. Several volumes from countries such as the Philippines, Bangladesh, Pakistan, Thailand, India, Indonesia, Myanmar, Cambodia and Nepal have been published on the basis of work done in these countries. The pattern emerging on police torture in all these countries has very close resemblances. It manifests as a policing system that relies on torture as the most important tool for investigations into crime. There is a quite open defence of torture and ill-treatment by the governments, police authorities, prosecutors, and even some judges, claiming that without the use of torture it is not possible to conduct effective criminal investigations.

2 For an assessment of this project, kindly see http://www.ethicsinaction.asia/archive/2009-ethics-in-action/vol.-3-no.-6-december-2009/EIAV3N6.pdf

In a remarkable thesis on Myanmar entitled, "Politics of Law and Order in Myanmar" Nick Cheesman, a long term colleague of the AHRC, describes the country's criminal judicial system as a marketplace. The same description can be applied to the criminal justice systems in most countries in Asia. The all pervasive corruption turns arrest, detention, trial and everything that is associated with "justice" as things with which bargains can be made for the advantage of everyone except the citizens.

He notes, "*As the object of the judicial process was the implementing of a specific policy agenda, the legal view of a case was only one factor in its final outcome: political, economic, social, and administrative viewpoints all had equal relevance. And because policy goals took precedence over strict legality, official exhortations to the systems functionaries had an increasingly administrative charter. Furthermore, these exhortations were backed by a coercive power over the judiciary that previous governments lacks*."

What the extensive work done in the prevention of torture project has taught us is that the international project on human rights, if it desires to achieve changes on the ground level in eliminating torture and ill-treatment, needs to approach the subject with a new understanding of the political, social, and legal realities of less developed countries, where torture and ill-treatment continues to remain quite widespread.

One of the most vigorous activities in this project has been in relation to the use of modern communication technologies for campaigning. All the activists in the project have been trained in the use of modern technology for fast communication. Daily, activists interview people at the grassroots level, faithfully take down their narratives, and communicate those narratives to their organisations. At each organisation, these

narratives are rechecked and new interviews are conducted in order to complete the reports. Thereafter, the reports are written and communicated to the AHRC, based in Hong Kong. At the AHRC, Sri Lanka desk officers and the Urgent Appeals desk work together to check all facts and also to develop a readable narrative. This thereafter is communicated to the Urgent Appeals network through the AHRC, through e-mails, to a large number of people and organisations in Sri Lanka and abroad, including the media. In each case, letters are written to the Sri Lankan authorities and the UN agencies dealing with torture and ill-treatment. The narratives about torture are also supported by constant statements issued by the AHRC, which expresses views on the causes of torture and ill-treatment and advocates policies for change. The idea of such communications is to engage in public opinion making in favour of changes in all aspects that give rise to torture and ill-treatment. Periodically, these reports are collected and, with case illustrations, extensive analysis is published by the regular AHRC publications such as Article 2, a quarterly magazine, Ethics in Action, and also Torture: Asian and Global Perspectives. From time to time, books in English and in local languages are published, covering basic themes related to the rule of law and human rights protection. Besides these, with the use of video technology, local organisations publish stories directly told by the victims onto Youtube. From time to time, professional documentary filmmakers have also produced films on the basis of information gathered through this project.

It is to the great credit of the RCT that it open mindedly attempted to deal with torture and ill-treatment with the perspective to develop new knowledge about the objective conditions that produce such abuses, and to find ways to support victims who had virtually no support from state agencies, while at the same time trying to create comprehensive documentary evidence for a scientific understanding of the problem, with the view to develop perspectives to fight against the violations in a more effective manner. Had it not been for the strong and unfailing support of the RCT staff to the AHRC, this project would not have made the contribution it has made up to now. It is the AHRC's hope that the RCT and AHRC's collaboration in Asia, and the lessons learned, will contribute to a better global understanding of the problem and give rise to new efforts to deal with this age-old problem.

This project has led to a gathering of a large amount of data, directly from the victims and other direct sources. Some work has already been done to draw conclusions from this factual data. However, there is a need for systematic studies utilizing this data so that more concentrated academic and other publications could emerge out of the work that has already been done. It is hoped that the United Nations agencies dealing with human rights and other international organizations will pay greater attention to the work done outside the territories of developed countries and come to a greater understanding of the obstacles that stand in the way of the implementation of norms and standards that the global human rights project has developed since the adoption of the Universal Declaration on Human Rights in 1948. The gap of realization and implementation has led to desperate cries everywhere that while we talk more about human rights now, in real life there is hardly any possibility of enjoying these rights; this could be responded to in a more conscientious manner than is done now.

TURNING A PILLOWCASE INSIDE OUT

AN EDITORIAL

August 3rd 2012, Divaina (a daily Sinhala newspaper)

A forty year old woman, Samantha Nandani, from Madirigiriya, (North-Central province Sri Lanka) climbed on top of a 60 foot high water tank to start a protest. Her son worked in the army. His name has been left out from the electoral registry. When she went to get that corrected, the village head (grammasevaka) make an improper suggestion to her. He tried to sexually abuse her. When that happened, she went to the Madirigiriya police and made a complaint. The police did not investigate the complaint. In fact, they will not investigate the complaint. She got on top of the water tank in order to protest against this.

This is a short summary of a long story, some of which can be told and some of which cannot be told. It is not only at Madirigiriya police station; rather, it has been the situation in all police stations in this country for a long time now. We have often seen women, who had been going to a police station to make a complaint, made to visit teashops with police constables or sergeants. If the person who is making the complaint is a woman, she is likely to face harassment and abuse at the police station. Women facing domestic problems are even more vulnerable to abuses by the police officers. As a result, a woman who goes to a police station to make a complaint is facing a high risk of being abused. The spreading of this harassing behavior to the village officers is dangerous. It is all the more dangerous that they can go to the houses in the village several times a week to do their official duties. Handing over the electoral list, making reminders to fill those lists quickly, going to

collect the list later, giving advice on how to prevent dengue mosquitos, and on many other issues, they have the opportunity to visit houses. If the officer uses these opportunities for good, then it is good. However, if he uses it for bad purposes, then things become really bad. The village officer linked to the Madirigiriya incident is one such wretched officer. By not investigating into the complaint of this helpless woman, the officers of the Madirigiriya police have also acted in a wretched manner.

Bureaucrats are using their positions of power and influence to force women to go to bed with them. This exploitative behavior comes down from feudal times, continued through the reign of the British and subsided after the Independence. However, after the government that came into power in 1970, this restarted. During that period, ministers and permanent secretaries were found to sexually harass women who had applied for posts in the civil service and force them to go to guesthouses with them to obtain a job.

Now, in spite of talks of female liberation, women still get beaten up by men. Men often have illicit affairs but their wives are reluctant to leave them because of shame. This wretched state has been created by the social system. Do you think that society should be the creation of men? No. It is not like that anymore. Today, society is created by a handful of rich people and a handful of powerful politicians. Due to this, in every police area and village, at least two water tanks would have to be built for protests.

The protest of Samantha Nandini is a good beginning. All women who have been subjected to injustice should support the cause Samantha Nandini has taken. They should show solidarity with her protest. In a country that has had over 30 years of war, the society is highly disorganized. Sorting out the large mountain of problems is not easy. To make a beginning, government services, police and civil institutions should be reorganized. This reorganization will be difficult in a country like ours. However difficult it may be, it has to be done. The society has been turned inside out like the way a pillowcase is turned inside out. When a pillowcase is turned inside out, the dirt that was outside goes in. However, this is not a problem, since very soon the pillowcase would be put in for washing.

[Note: This article, (translated from Sinahala) from a popular newspaper, reflects some of the frustration of the general public in Sri Lanka, particularly regarding the sexual abuse that takes place at the police stations. Though the article is about Sri Lanka, the situation of the other countries around is similar.]

ESSAY

THE WEAKNESS OF THE PRO-TORTURE POSITION

BY J. JEREMY WISNEWSKI

Several recent defenses of torture claim that those who advocate an absolutist position on torture, or on the role psychologists might play in interrogation, should change that position. As Peter Suedfeld puts it, "I believe that the arguments raised so far concerning psychologists' participation in interrogations have been simplistic…I propose that we consider these topics as matters that require complex trade-off thinking rather than authoritarian pronouncements demanding conformity and threatening punishments" (1-2).[1] This position is hardly unique to Suedfeld. Indeed, recent work by philosophers like Fritz Allhoff and Uwe Steinhoff make essentially the same claim: absolutist positions are 'simplistic,' and ignore the complexities involved in torture cases.[2] Similar comments are made frequently in the media, as well as by world leaders. This view has also been expressed in popular publications such as *The Atlantic* and *Newsweek*.[3] In what follows, I will concentrate on Suedfeld's particular articulation of this stance on torture. My objections to his analysis have wide-ranging applications.

I do not take issue with the need for complex thinking. Likewise, I do not take issue with the call for abandoning the 'authoritarian.' What I take issue with, rather, is the characterization that Suedfeld has offered of those who take an absolutist stance on torture, as well as on the relationship organized psychology should have with it. In what follows, I want to articulate what I regard as serious oversimplifications in Suedfeld's analysis. While people take absolutist stances about the involvement of psychologists in torture and interrogation for a number of reasons (as they can for any position), I am here only concerned with those who base this conclusion on the view that torture is absolutely immoral, under all circumstances (I presume that this is the

1 Peter Suedfeld, "Torture, Interrogation, Security, and Psychology: Absolutistic versus Complex Thinking," *Analyses of Social Issues and Public policy*, Vol. 7, No. 1, 2007, 1-9.

2 See Fritz Allhoff, Terrorism, *Ticking-Bombs, and Torture* (Chicago: University of Chicago Press, 2012; and Uwe Steinhoff, "Defusing the Ticking Social Bomb Argument: The Right to Self-Defensive Torture," *Global Dialogue* 12:1, 2010.

3 The expression of the pro-torture position, and the attendant view that anti-torture views are 'simplistic,' has been found with regularity on news networks from CNN to Fox. Dick Cheney, John Yoo, and many others have frequently defended this view in such for a, as well as in public addresses. Mark Bowden has defended a similar kind of view (though with a bit more nuance) in a 2003 article in *The Atlantic*. Michael Levin published a defense of torture as early as 1983 in *Newsweek*. Needless to say, these are a drop in the bucket.

most common explanation for the absolutist position in psychology). When Suedfeld calls this view simplistic, he is also asserting that the absolutist view of torture—that it is always wrong, no matter the context—is a simplistic view. I will argue that Suedfeld has not paid enough attention to the complexities of the issues involved in torture generally, and in the absolutist position in particular. I will also argue that Suedfeld ignores a good deal of empirical literature to make his case. As I suggested above, I contend that these criticism are endemic to many pro-torture arguments. My target here is thus much broader than one representative advocate. To reiterate, Suedfeld's claims are endemic to those who want to be 'flexible' in our thinking about torture.

The title of Suedfeld's article states his position. Suedfeld compares his own 'complex' thinking to that employed by those who have an 'absolutist' position on torture—i.e., those who claim that torture should never be permitted, and who claim that psychologists must never become accomplices in torturous interrogation. As will be obvious to everyone, the natural contrast of 'complex' is 'simple.' So, in the very title of his article, Suedfeld has already begged the question against his opponents: to advocate an absolute ban on torture is 'simplistic'; his position, apparently by fiat, is better, as it is more complex.

Suedfeld argues that his view is the more complex one because it acknowledges "the inescapable trade-off with which we need to deal" between "human rights of prisoners and the human rights to life and freedom of the much larger number of people whom blind protection rights might put at lethal risk" (4). He goes on to claim, with no argument whatsoever, that "a truly moral decision requires that these be assessed on a more mature level than whether they conform to some absolutistic criterion" (4).

The only thing that Suedfeld has shown here, it seems to me, is a lack of familiarity with the ethics literature surrounding torture. *No one* claims that something is right or wrong simply in virtue of whether or not it fits some absolutist rule. Even absolutists (like myself) do not think that something is right simply because there is a rule in place that makes it so. Absolutists have a variety of positions on torture, and they reflect differing kinds of normative commitments. Some absolutists are so because of utilitarian concerns, arguing that the immediate rights to life and liberty of those endangered do not outweigh the significant costs incurred by engaging in torture (e.g., Arrigo 2004, Fiala 2007, Matthews 2008, Rejali 2007, Wolfendale 2006). Others argue that to even be capable of successful torture requires institutionalizing torture as a practice (Brecher 2007, Bufacchi, and Arrigo 2006, Shue, 2006). Only trained torturers will be capable of extracting information. Moreover, there is a significant moral price to pay for this training (Wolfendale, 2007). There are also those who defend the view that something like human dignity is at stake in the torture debate (Gilead 2005; Jeffreys, 2009; Perry 2005; Tindale 2005; Wisnewski and Emerick 2009; Wisnewski 2010). Still others argue that there simply are no actual cases of torture in which torture will actually produce any benefits that could not be produced in other ways, and hence that the standard kinds of ticking bomb arguments are over-simplifications (Rejali 2007; Wisnewski 2010; Intelligence Science Board 2006).

There is nothing 'simple' about the literature surrounding the ethics of torture. The idea that the debate will be settled by simply applying one's preferred moral theory (deontological, utilitarian, virtue theory, or whatever) is itself an extreme oversimplification of the landscape of moral dialogue. Even those who are moved by utilitarian considerations

recognize that the issue will not be solved simply by an appeal to the numbers (Allhoff, 2012; Bagaric and Clarke 2006). We must assess probabilities and intensities, long-term effects and their likelihoods. When moral theorists offer up rules for moral decisions, these rules are 'absolute' only in the sense that they have faced the gauntlet of critique and come out ahead. To have an absolutist position in philosophical ethics is the conclusion of a sincere grappling with the issues, not merely the slap-dash application of some principle which is itself questionable (Fiala 2008, Lercher 2008).

Suedfeld shows a similar oversimplification when he addresses the so-called 'ticking bomb' scenario

The argument in favor of torturing the hypothetical terrorist is intuitively persuasive: the utilitarian guideline is 'the greatest good for the greatest number.' Nevertheless, absolutist opponents of torture have vehemently attacked the scenario. Some, ignoring the definition of 'hypothetical,' attack the scenario as unrealistic (5).

Virtually no one in the philosophical literature would appeal so blindly to the scenario. It is widely recognized that intuitions can be trained and manipulated. Likewise, actual poll data suggests that it is not obvious what most people actually think about this situation. Results differ in different countries. Moreover, there are plenty of utilitarian arguments *against* torture (Arrigo 2005, Brecher 2007, Matthews 2009; Rejali 2007, Wolfendale 2006). There are also arguments that suggest that the ticking time bomb is not merely unrealistic, but logically impossible given the nature of successful interrogation (Matthews 2009; Wisnewski 2008). There are also arguments that claim that even if there are ticking bomb cases, we should not believe someone who claimed that she was in one (Lercher 2008).

So, when Suedfeld appeals to the numbers who would be endangered by failing to torture, this seems to me to be an oversimplification of the issues we face. Moreover, it is decidedly question-begging. Suedfeld claims that a 'truly moral' decision will pay attention to the numbers, and that this represents a 'mature' moral view. But notice that he has allowed his adverbs to do all of the argumentative work. 'This decision takes into account the numbers, therefore is *truly* moral.' This is not an argument. It is mere assertion. Such assertions, even when we honor them by calling them 'complex,' do not advance the moral conversation. In fact, pretending that counting up heads is how to solve moral problems strikes me as a disastrous oversimplification of the many issues at stake: how will using torture affect international relations? How will it affect the person *ordered* to torture? (Huggins et al, 2002) How will this affect the trust that citizens have regarding their nation and its relation to international law (Card, 2008)? How are we certain of the danger posed by the person in custody? (Some detainees later admitted to inventing stories for their interrogators—see Intelligence Science Board 2006, Rejali 2007). How are we certain that the person to be tortured is not simply innocent? (Some military personnel at GITMO and Abu Ghraib estimated that up to 90% of those detained there were innocent).

This is only the beginning of the questions that we should raise about torture. In thinking specifically about the relation of psychologists to torture, even more questions arise. How does complicity in interrogation affect the general perception of those in the psychological sciences? How might psychology be undermined by its practitioners either failing to engage in government interrogation or by engaging in it?

Admittedly, Suedfeld could not possibly address all of these questions in the space provided to him. Nor should we expect him to. What we should expect, however, is a more nuanced analysis of the positions held in the torture debate—one that did not reduce advocates on both sides of the debate to sophomoric head-counters and rule-pushers.

This directly relates to another oversimplification in Suedfeld's position—one that is shared by many who advocate considering torture as a means of information extraction. The claim made is that torture 'works,' where 'works' is understood to mean that people comply when sufficient physical and psychological force is used. The reason this is an oversimplification is that this is not a sense of 'working' that is sufficient to justify torture. Justifying torture requires more than people providing accurate information (something that cannot itself be taken for granted). It requires that the information provided is actionable, and that it cannot be gained in other ways with equal ease. So, despite the fact that torture has produced information in the past, there is very little evidence that this information has ever been such that it could not have been gained with equal ease using alternative interrogation techniques (Alexander 2008; Bell 2008; Intelligence Science Board, 2006; Janoff-Bulman 2007; Rejali 2007; Wisnewski 2010).

Thus, when Suedfeld claims that "there is considerable historical…and autobiographical evidence that torture can be effective" (6), we should raise at least two questions. First, what is the sense of the word 'effective' here? Second, how selective is the historical evidence? After all, torture was used for centuries in the law courts of Europe as a means of extracting confession (Langbein 2006, Peters 1985). We have no problem conceding that there were those who confessed who were innocent, and some who were guilty who never confessed. Where does this evidence stand in relation to the evidence Suedfeld mentions (but does not cite)? As noted above, there is also ample evidence (and more of it) that torture is *not* effective (in a sense that would justify it, as specified above).

Suedfeld appeals to the standards of science in assessing whether or not individuals have been involved in torture. I find this ironic given that Suedfeld has ignored empirical literature regarding the ineffectiveness of harsh interrogation techniques. Most trained interrogators reject the idea that force accomplishes anything that could not be accomplished in other ways. "Beyond the moral imperative, the competent interrogator avoids torture because it is counter-productive and unreliable. "In my two decades of experience as an interrogator, I know of no competent interrogator that would resort to torture. Not one" (Bennett 2006, 430, cited in Janoff-Bulman 2007). This opinion is shared by "a substantial majority of law enforcement officials," (Goldstone 2006, 345). It is also shared by experienced interrogators in the US Military. Twenty interrogators made this clear to Congress in July of 2006, claiming that, "[T]rained and experienced interrogators refute the assertion that so-called "coercive interrogation techniques" and torture are necessary to win the "War on Terror." Trained and experienced interrogators can, in fact, accomplish the intelligence gathering mission using only those techniques, developed and proven effective over decades, found in the Army Field Manual 34-52 (1992). You will also see that experienced interrogators find prisoner/detainee abuse and torture to be counter-productive to the intelligence gathering mission." (Bauer 2006)

In November of 2006, Jean Maria Arrigo, along with seven other psychologists and four trained interrogators, came to an identical conclusion as the result of a seminar investigating the psychological realities of torture:

Torture interrogation does not yield reliable information. The popular belief that "torture works" conflicts with effective non-abusive methodologies of interrogation and with fundamental tenets of psychology. These were the conclusions reached at a meeting of recently retired, senior U.S. Army interrogators and research psychologists who met to rethink the psychology of torture. (Arrigo and Wagner 2007, 393)

This is also one of the central lessons of Marine major Sherwood F. Moran's famous report, "Suggestions for Japanese Interpreters Based on Work in the Field"[4] : force alienates the subject, and produces an incentive to remain silence. Above all, one should have "sympathetic common sense," and treat the interogatee with the respect all human beings deserve. (Moran, 250, in Schulz 2007). Empirical studies back this up in no uncertain terms.

Research in both North America and in Asia (China) has shown that using coercive influence strategies causes targets (or sources, in the context of educing information) to feel disrespected, whereas persuasion strategies communicate respect…coercion creates a competitive dynamic that facilitates rejection of the other party's position where persuasion creates a cooperative dynamic that facilitates rejection of the other party's position where persuasion creates a cooperative dynamic that facilitates greater openness to the other party's position and productive conflict resolution. (25)[5]

As this indicates, torture is not simply ineffective, it actually makes things worse—not only because it produces an uncooperative dynamic, but also because it produces useless, distracting information—information that must be further investigated, and which thus can waste already limited resources.[6]

While there are a few other things that I take exception with in Suedfeld's analysis, these pale in comparison to the problems outlined above. In my view, the so called 'complex' position is anything but complex. It represents several instances of serious oversimplifications that may well lead us astray as we attempt to think through this most dark of subjects.

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4 This document is available at various sites on the internet. It is considered a classic in the interrogation literature.

5 Randy Borum, "Approaching Truth: Behavioral Science Lessons on Educing Information from Human Sources," *in Educing Information*.

6 The CIA's bible of interrogation, *The Human Resource Exploitation Training Manual*, makes precisely this point.

Press, 2010). He has also recently edited (with Mark Sanders) Ethics and Phenomenology (Lexington Press, 2012).

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THE NEGATION OF SEPERATION OF POWERS AND THE ENTRENCHING OF THE EXECUTIVE IN SRI LANKA

Sri Lanka police respond to a peaceful demonstration in Colombo.

BY KISHALI PINTO-JAYAWARDENA*

Some Preliminary Observations

The nature of Sri Lanka's accountability problem has its roots in the past, the understanding of which is crucial in contextualizing the nature of current dilemmas relating to the country's legal system and which has a direct bearing on the violations alleged to have occurred during the final stages of the war between the government and the Liberation Tigers of Tamil Eelam (LTTE) in the North and East.

Two periods in time are particularly important in this regard. The first period runs from 1971 to 1977 during which time the *Janatha Vimukthi Peramuna* (JVP – Peoples' Liberation Front) consisting primarily of radicalized Sinhalese youth attempted to overthrow the government through armed force. The second period, from 1979 to 2009, (comprising three decades) was defined by two violent conflicts:

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1. The second uprising by the Janatha Vimukthi Peramuna (JVP) with its counter reaction by the government and the killing of the JVP leader, Rohana Wijeweera along with his senior commanders in December 1989;
2. The intensification of the conflict between the LTTE and the government until the military decimation of the LTTE and the killing of its leader V. Prabhakaran in May 2009.

During these times, thousands of extrajudicial killings and enforced disappearances of people belonging to both the majority and the minority communities became a matter of recorded history due to excesses on the part of the government and non-state actors. The country was governed by emergency law rather than by ordinary law, which continues to be the case.[1] Consequently when examining the functioning of the country's legal system, the impact of emergency law on legal safeguards embedded in the criminal justice system is paramount.

Further, in assessing the present day dilemmas of legal accountability for human rights abuses, the impact of the 1978 Constitution, (the Constitution), is fundamental to an assessment of the ineffective functioning of the criminal justice system.

The following preliminary observations are therefore important;

a) Fundamental rights specified in Chapter III of the Constitution broadly comprise the right to equality, freedom from arbitrary arrest and detention, freedom of speech, assembly, association, occupation and movement, freedom from torture, and freedom of thought, conscience and religion. All the above rights, excepting the last two rights, (namely freedom from torture and the right to freedom of thought, conscience and religion which are absolute), may be restricted by emergency law but cannot be negated *in toto*.[2] The Constitution privileges emergency law over ordinary laws, including the normal criminal procedure, penal law and evidentiary rules, and in so doing, bypasses the principle of the presumption of innocence in favour of emergency law.[3]

1 The Emergency Regulations referred to in the Advice are the Emergency (Miscellaneous Provisions and Powers) Regulation No 1. of 2005 as contained in Gazette No 1405/14 (as amended particularly on May 2nd 2010 by Gazette No 1651/24 and the Emergency (Prevention and Prohibition of Terrorism and Specified Terrorist Activities) Regulation No 7 of 2006 as contained in Gazette No 1474/5 of 6 December 2006. These are the primary regulations impacting on personal liberties even though the ambit of regulations promulgated under the Public Security Ordinance, (PSO) No 24 of 1947 (as amended) are wider than these. Relevant sections of the Prevention of Terrorism Ordinance (PTA), Act No 48 of 1979 (as amended) will also be referred to.

2 Article 15, subsections (1) to (8) of the Constitution.

3 Article 15(1) of the Constitution expressly declares that, 'the exercise and operation of fundamental rights declared and recognised by Articles 13(5) (i.e. the principle relating to the presumption of innocence) and 13(6) ('No person shall be held guilty of an offence on account of any act or omission which did not, at the time of such act or omission, constitute such an offence and no penalty shall be imposed for an offence more severe than the penalty in force at the time such offence was committed'), shall be subject to such restrictions as may be prescribed by law in the interests of national security. For the purposes of this paragraph, 'law' includes regulations made under the law for the time being to public security'. Judicial interpretation has limited the meaning of 'law' in this paragraph to emergency regulations (ER) made under the PSO. "*It is clear that "the law relating to public security" has been used in a narrow sense, as meaning the Public Security Ordinance and any enactment which takes its place, which contain the safeguards of Parliamentary control set out in Chapter XVIII of the Constitution….. Other regulations and orders which are not subject to those controls, made under the PTA and other statutes, are therefore not within the extended definition of "law" Thavaneethan v Dayananda Dissanayake Commissioner of Elections and Others* [2003]1 Sri LR p. 74.

b) In a wider constitutional context, the head of the executive is effectively placed above the law by virtue of Article 35(1) of the Constitution[4] and therefore cannot be called to account for any omission or commission even in respect of rights violations. This constitutional bar has been primary to the denial of accountability in decades of serious human rights violations, both in times of emergency as well as in normal times.

Judicial interventions attempted to limit the negative impact of these two constitutional barriers but were unsuccessful in their long term impact. Regarding the privileging of emergency law, a cursus curia of the Supreme Court was established that emergency regulations (ER) must not be inconsistent with fundamental rights and consequently must be intra vires regulations.[5] The State must show a proximate or reasonable connection between the nature of the action that it prohibits and constitutionally permitted restrictions. Any indirect or farfetched connection between the two would make the regulation invalid.[6] Flowing from such judicial reasoning, the Court, in several hundreds of cases from the late eighties onwards, struck down emergency regulations as unconstitutional and in so doing, overrode statutory clauses in emergency laws prohibiting judicial review of ER.[7] In the second case of immunity for presidential actions, the Supreme Court has stated that this bar does not apply after a President has left office. Further, subordinate officers, as for example, an Inspector General of Police or a Commissioner of Elections, cannot use the immunity principle to shield himself/herself from responsibility for unconstitutional actions.[8]

Yet Sri Lanka's constitutional history evidences that even when the Supreme Court was at its most active in protecting rights in the eighties and early nineties, the existing constitutional structure precluded vigorous interventions that actually changed state policy. Judicial interventions were of little impact in deterring gross violations by the State and redress was restricted to the facts of the particular case/s in question. State policies did not change. Judicial pronouncements were disregarded even in ordinary times as well as in emergency, (as a matter of practice), by all successive governments.

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 nevertheless 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……[9]

At one time, the police department established a separate fund to retain private lawyers to appear for the respondent police officers and decided, in some cases, to pay compensation, ordered to be paid by court, personally from the implicated officers. There has been no

4 The President of the Republic has immunity in regard to "anything done or omitted to be done by him either in his official or personal capacity," while he/she holds office as President

5 *Joseph Perera v. The Attorney General* [1992] 1 Sri LR 199, 230, vide also the principle that though due weight would be given to the opinion of the President as to whether a particular regulation was necessary or not, the power to question the necessity of the regulation and whether the required proximity exists, rested in the Court.

6 Ibid.

7 *Perera v. AG*, [1992] 1 Sri LR 199; *Wickremebandu v. Herath* [1990] 2 Sri LR 348.

8 *Karunatilleke vs Dissanayake* [1999] 1 Sri LR 157, *Senasinghe vs Karunatilleke*, SC 431/2001, SCM 17/3/2003 and recently, *Perera vs Balabatabendi and Others*, SC(FR) No 27/2002, SCM 19.10.2004.

9 *Nalika Kumudini, AAL (on behalf of Malsa Kumari) v. N. Mahinda, OIC, Hungama Police & Others*, [1997] 3 SriLR, 331.

significant use of contempt powers to hold errant custodial officers responsible for the violation of rights. This undermining of the Supreme Court has effectively filtered down to the subordinate judiciary, including most particularly the High Courts and Magistrate's Courts which administer the criminal justice system.

In relation to the constitutional immunity bar, here again, the Supreme Court has hinted at boldness[10] but actually declined to hold the Office of the President accountable. In recent times, this judicial impotence was most strikingly evidenced in respect to the executive bypassing of the 17th Amendment to the Constitution (2001), probably the most important constitutional amendment in recent times in relation to rule of law norms. Judicial reluctance to intervene was evidenced when former President Chandrika Kumaranatunge brushed aside her constitutional duty of appointing the Chairman of the Elections Commission, as nominated by the Constitutional Council (CC) under the 17th Amendment,[11] as well as later, in the year 2006, when her successor, President Mahinda Rajapakse, declined to make appointments to the CC despite nominations being sent to him by the relevant bodies and political parties.[12]

After the January 2010 Presidential elections and April 2010 General Elections, the office of the Attorney General has been shifted out from under the Ministry of Justice, where it traditionally belonged, and was brought under the Presidential Secretariat. The relevant gazette Notification,[13] which lists the Subjects and Functions under each Ministry, conspicuously omitted the Department of the Attorney General under the Ministry of Justice. This omission had specific constitutional implications in terms of Article 44 (2) of the Constitution which is to the effect that, "The President may assign to himself any subject or function and shall

10 *Silva v Bandaranayake*, [1997] 1 Sri LR 92 at 95, where the majority decision went on to examine the Presidential act of appointment of a Supreme Court judge despite the constitutional bar relating to presidential immunity. However, the appointment itself was not struck down.

11 Under the 17th Amendment, key public officers and judicial officers and members to constitutional commissions had to be first nominated/approved by a ten member Constitutional Council (CC) consisting of non-political public personalities together with political leaders sitting *ex officio*. In a petition filed against then President Chandrika Kumaratunge's (1994-2005) refusal to comply with the CC"s nomination of the Chairman of the Elections Commission in 2003, the Court of Appeal held that Article 35(1) of the Constitution conferred a 'blanket immunity' on the President, except in limited circumstances constitutionally specified in relation to *inter alia* ministerial subjects or functions assigned to the President and election petitions in *Public Interest Law Foundation v. the Attorney General and Others*, CA Application No 1396/2003, CA Minutes of 17.12.2003.

12 The CC functioned during its first term only (2002-2005) and performed its task for the most part creditably, comprising as it did predominantly of eminent retired judges. In 2005, after the terms of office of members of the CC expired, President Mahinda Rajapakse refused to make fresh appointments of nominated members to the CC until one remaining member was also nominated, despite the quorum of the CC being already satisfied. He thereafter made his own appointments to key public positions, judges and to the commissions without the approval of the CC. After the terms of these appointments in turn expired in late 2009, no new members were appointed at all to the National Police Commission and the Human Rights Commission. Petitions filed against this Presidential refusal to bring a new CC into being were kept pending in the Supreme Court for over two years. They have now been effectively rendered academic when in September 2010, the government passed the 18th Amendment to the Constitution which which replaced the Constitutional Council with a recommendatory Parliamentary Council that has no actual powers over the President's appointments. Sri Lanka has therefore returned to the previous status quo in terms of a politicised public, judicial and police service.

13 Gazette Notification No 1651/20 – Friday April 30, 2010.

remain in charge of any subject or function not assigned to any Minister…." It is under this constitutional article that the Department of the Attorney General has now been situated under the President.

Many other government departments,[14] earlier located under various ministries, were also not specified in this Gazette Notification with the inevitable inference that they too, were located under the Presidential Secretariat. In addition, the Department of the Police continued to be situated under the Ministry of Defence,[15] contrary to the explicit recommendation to the contrary of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, in regard to which he made special reference in 2008.[16]

More than two years later,[17] the Government has completely failed to implement the Special Rapporteur's recommendations for improving police respect for human rights, police effectiveness in preventing killings, and police accountability. Indeed, there has been significant backward movement…Rather than improving the investigative and crime prevention capacity of the police, the Government has even more completely subordinated the police to the counterinsurgency effort. Since the Special Rapporteur's visit took place, the Government has required the Inspector General of Police to report to the Minister of Defence.[18]

A theoretical separation of powers is constitutionally guaranteed in Sri Lanka's constitutional structure.[19] However, as is apparent above, the entrenching of the authority of the Executive Presidency through the Constitution, taken together with the gathering of all effective power under him by the incumbent in this Office to an extent unprecedented since 1978, has resulted in the negation of the rule of law and justice processes, including that of the criminal justice system.

14 Including the Legal Draftsman's Department tasked with the primary duty of drafting new laws.

15 Ibid, at p2A.

16 Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston (Follow-up Recommendations) (2008), A/HRC/8/3/Add.3, 14 May 2008, Eighth session of the Human Rights Council.

17 In respect of his initial Recommendations in 2006, see Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, Mission to Sri Lanka, 28 November – 6 December 2005, E/CN.4/2006/53/Add.5, 27 March 2006

18 Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston (Follow-up Recommendations) (2008), A/HRC/8/3/Add.3, 14 May 2008, Eighth session of the Human Rights Council, at paragraphs 56 and 57. The Secretary to the Ministry of Defence is the incumbent President's brother. In 2008, the Special Rapporteur noted just one police-related development that was positive, namely a 'proactive programme of recruitment' in the course of which 200 new Tamil speaking police officers had been trained.

19 Article 3 of the Constitution "In the Republic of Sri Lanka Sovereignty is in the People and is inalienable. Sovereignty includes the power of government fundamental rights and the franchise." Article 4 -"The sovereignty of the People shall be exercised and enjoyed in the following manner: a) the legislative power of the People shall be exercised by Parliament consisting of elected representative of the People and by the People at a Referendum;b) the executive power of the People, including the defence of Sri Lanka, shall be exercised by the President of the Republic elected by the People; c) the judicial power of the People shall be exercised by Parliament through courts, tribunals and institutions created and established, or recognized by the Constitution or created and established by law, except in matters relating to the Privileges, immunities and powers of Parliament and of its Members, wherein the judicial power of the People may be exercised directly by Parliament according to law; ……

Practical Deficiencies in Constitutional Protections

Apart from the broad concerns outlined above, there are longstanding problems with the way that the constitutional remedy is secured in terms of Article 17 and Article 126 of the Constitution. Petitioners need to go to the Supreme Court within one month of the alleged violation (Article 126(2)) with only limited exceptions to this rule as, for example, where a person is held incommunicado without access to legal counsel.[20] Moreover, Article 126(2) of the Constitution gives the right to move court only to a person alleging the infringement of any right 'relating to such person', or an attorney at law on his behalf.[21] While there has been some relaxation of this *locus standi* rule in cases alleging corruption, cases impacting on political imperatives and prisoners' rights, the extending of similar liberality to matters involving torture or enforced disappearances has not been evidenced. Further, Sri Lanka's Court does not have the power to strike down enacted laws that are violative of the Constitution, (Article 16 of the Constitution) but can only examine a draft law at the bill stage and that too within a limited one week period of the Bill being placed on the Order Paper of Parliament (Article 121 (1) of the Constitution).

"The history in regard to the independence of Sri Lanka's judiciary from that point onwards may be divided into three phrases. From 1978 to 1992, the judiciary was marked by excessive caution and a clear reluctance to interfere with the executive or with the deprivation of liberty under emergency law."

The Constitution lacks a guaranteed right to life. In 2003 (after more than two and a half decades of this fundamental rights remedy being in place), Sri Lanka's Supreme Court belatedly inferred an implied right to life in a limited context as implied in Article 13(4) of the Constitution, that 'no person shall be punished with death or imprisonment except by order of a competent court made in accordance with procedure established by law.'[22] The right to life as so implied was confined to the physical right to life rather than its positive affirmation in all other aspects of liberty and due process. This implied jurisprudential extension was also affirmed by only two judges in just three judgments[23]; so, it is by no means a principle that has pervaded the Court's jurisdiction.

20 *Yogalingam Vijitha v. Mr. Wijesekara and others*, SC (FR) App. No. 186/2001, 23.08.2002 (citing *Saman v. Leeladasa and another*, [1989] 1 SLR, 1 ("the period of time necessary would depend on the circumstances of each case…") and *Namasivayam v. Gunawardena* [1989] 1 SLR 394 at 400 ("to make the remedy under Article 126 meaningful to the applicant the one month period prescribed by Article 126(2) should be calculated from the time that he is under no restraint."). *See also, Nesarasa Sivakumar v. Officer in Charge, Special Task Force Camp, Chettipalayam and others*, SC (FR) App. No. 363/2000, 01.10.2001 ("the delay in filing this application should be excused on the basis that is was due to circumstances beyond the petitioner's control.")

21 Article 126(2). Rules of Sri Lanka's Supreme Court formulated in 1990 permit some relaxations, as for example Rule 44 (2) which allows a putative petitioner who is unable to sign a proxy appointing an Attorney-at-law to instead authorise a person (whether orally or in any other manner, whether directly or indirectly) to retain an Attorney-at-law to act on his/her behalf and such person may sign proxy on his/her behalf.

22 *Perera vs Iddamalgoda* 2003 [2] SriLR, 63), *Wewalage Rani Fernando case, SC(FR) No 700/2002, SCM 26/07/2004; Kanapathipillai Machchavallavan vs OIC, Army Camp, Plantain Point, Trincomalee and Others* (SC Appeal No 90/2003, SC (Spl) L.A. No 177/2003, SCM 31.03.2005.

23 Ibid.

As a recent study analyzing fifty two Article 11, (right to freedom against torture and cruel, inhuman or degrading treatment), judgments of the Sri Lankan Supreme Court between the years 2000 and 2006[24] has shown, the judicial response thereto has been contradictory and inconsistent;

Strong victim-centered decisions, awarding high levels of compensation and unequivocally condemning police abuse, represent a relatively small number of judgments. Overwhelmingly, compensatory awards to victims are low. Article 11 decisions seem to be influenced strongly by the personality of the individual justice who writes the judgment. Consequently, it appears that once a victim brings a fundamental rights petition, the petitioner is subjected to a legal process that is, to some degree, arbitrary and unpredictable.[25]

The absence of democracy in civil life and the intimidation and fear experienced by lawyers appearing in fundamental rights applications perceived as unpopular to government interests and policy inhibits a vibrant utilisation of constitutional remedies.[26] Constitutional reforms redressing some of the outstanding procedural limitations, which are apparently being contemplated by the government, will only go halfway towards solving the public's loss of faith in the Constitution. To compel an actual change in state practice and policy, vis-à-vis accountability, the current constitutional structure must be radically overhauled, the Office of the Executive Presidency constrained by rule of law safeguards, and the independence of the judiciary secured in practice.

The Independence of the Judiciary, undermining of Justice and judicial institutions

The undermining of the Supreme Court and the gradual subordination of the lower courts has been progressively evident over the years. Sri Lanka's Independence Constitution (1947) was a classic example of a Westminister model of government where the office of the president was ceremonial. Effective executive

24 Pinto-Jayawardena, Kishali and Kois, Lisa '*Sri Lanka – the Right not to be Tortured; A Critical Analysis of the Judicial Response*', Law & Society Trust, 2008.

25 Ibid, at p9. A further pertinent finding was the fact that access to the Court requires access to resources, financial and legal, as well as geographic access to Colombo, as petitions to the Supreme Court can be filed only in Colombo. Out of the petitions surveyed, 'the majority of the cases under review emerged not only from the South, but also from within a 30-mile radius of Colombo. Of those cases that arose in the North and East, of which there was a total of eight, seven petitions were brought only after the victim-petitioners were transferred to Kalutara in the South. Thus, all but one of the 39 cases had a Southern nexus.', see ibid, at p14.

26 For example, threats issued against Amitha Ariyaratne on 27 January 2009 who was appearing for a torture victim (see AHRC-PRL-007-2009; **SRI LANKA**; ***Human rights lawyer and activist facing death threat***), **the throwing of a grenade** at attorney-at-law, Mr J.C. Weliamuna's house on 27 September 2008, the distributing of a letter by a group calling itself the Mahason Balakaya (Battalion) on Oct. 22, 2008 which threatened lawyers who appeared for suspected terrorists as well as the naming of lawyers who appeared for petitioners arrested under emergency as terrorists on the official website hosted by the Ministry of Defence. No state officer has been held responsible for the threats and the intimidation. On 24th October 2008, attorney-at-law D.W.C. Mohotti, while accompanying his client to the Bambalapitiya Police Station, was abused by the Headquarters Inspector. In a later fundamental rights case filed by Mr Mohotti, the Supreme Court, in consultation with the Inspector General of Police (IGP) commenced drafting rules of conduct in respect of the rights of lawyers to accompany clients and to visit and confer with them.

power was exercised by the Prime Minister presiding over a Cabinet of Ministers collectively answerable to Parliament. The independence of the judiciary was secured by several safeguards. The Chief Justice and the judges of the Supreme Court were appointed by the Governor General, held office during good behavior and could not be removed from office except by the Governor General upon an address of the Senate and the House of Representatives. A Judicial Service Commission, (JSC) consisting of the Chief Justice, a judge of the Supreme Court, and any other person who shall be or shall have been a judge of the Supreme Court was established.[27] This period was characterised by some of the best decisions by the Supreme Court[28] in regard to the upholding of liberty and the independence of the Court even though the Court was perhaps somewhat timorous in pronouncing on the rights of minorities.[29]

Many of these constitutional safeguards were dispensed with, in 1972 with the enactment of an 'autochthonous' or 'homegrown' Constitution (1st Republican Constitution) which unequivocally declared in Article 5 (c) that the judicial power of the people through courts and other institutions created by law may be exercised directly by the National State Assembly. The Judicial Service Commission (JSC) was replaced by a weakened Judicial Services Advisory Board (JSAB) and a Judicial Services Disciplinary Board (JSDB).[30] The 1972 Constitution abolished judicial review, established a Constitutional Court with the limited power to scrutinize bills, (this, too, in 24 hours when the bill was certified as being urgent in the national interest), and allowed the declaration of a state of emergency to be passed without a debate. Fundamental Rights were included in the Constitution but made impotent by open ended restrictions and no specific enforcement procedure.[31]

In theory, the 2nd Republican Constitution which replaced the 1972 Constitution and remains Sri Lanka's current Constitution brought back some of these safeguards by prescribing a stringent removal process for appellate court judges,[32] by re-establishing the Judicial Service Commission (JSC)[33] and by stipulating a parliamentary approval process for the passing of the emergency.[34] However in practice, the removal of checks and balances between the executive, the legislature and the judiciary by the installation of an all powerful Executive President only worsened the problem. Immediately upon the coming into effect of the new Constitution, seven of the nineteen sitting judges who were 'unpopular' with the incoming government of then President Junius Richard Jayawardene were summarily 'retired' by using a craftily drafted Article 163 of the transitional provisions, which compelled all appellate court judges to

27 The JSC was vested with the authority of appointing, transferring, dismissing and exercising disciplinary control of all judicial officers, except a judge of the Supreme Court and a Commissioner of Assize.

28 *Queen v. Liyanage* [1962] 64 NLR 313; *Liyanage v. the Queen* [1965] 68 NLR 265; *The Bribery Commissioner v. Ranasinghe* [1964] 66 NLR 73; *Senadheera v. the Bribery Commissioner* [1961] 63 NLR 313; *Muttusamy v. Kannangara* [1951] 52 NLR, 324; *Corea v. the Queen* [1954] 55 NLR 457.

29 *Mudanayake v. Sivanandasunderam*, [1951] 53 NLR 25; *Koddakkan Pillai v. Mudanayake* [1953] 54 NLR 433.

30 The JSAB had no right to appoint judges of the minor courts but only to recommend their appointment to the Cabinet of Ministers. The JSDB had the power to exercise disciplinary control and dismissal of judges of the minor courts and state officers exercising judicial power. (Articles 126 and 127).

31 Only one case alleging violation of fundamental rights was filed during this time in the District Court. *Ariyapala Guneratne v. The Peoples Bank*, 1986 SriLR 338.

32 Article 107 (2) of the Constitution.

33 Ibid, Article 112.

34 Ibid, Article 155.

cease office upon the commencement of the Constitution. This was a clear indication as to what would happen if the judges who were fortunate enough to be reappointed were so unwise as to clash with the government.

The history in regard to the independence of Sri Lanka's judiciary from that point onwards may be divided into three phrases. From 1978 to 1992[35], the judiciary was marked by excessive caution and a clear reluctance to interfere with the executive or with the deprivation of liberty under emergency law.[36] From 1992 to 1999[37] a far more courageous Supreme Court definitively pronounced on the protection of liberty rights and imposed fetters on the exercise of executive power.[38] This trend came to a halt in 1999 when the senior-most judge of the Supreme Court who had handed down many consistently rights conscious judgments in the preceding years[39] was passed over by then President Chandrika Kumaratunge in her appointment of former Attorney General, SN Silva (a personal friend of Kumaranatunge's) to the office of Chief Justice. The appointment was made at a time when two motions seeking to disenroll Attorney General SN Silva were pending in inquiry before a Bench of the Court itself. During the ten year term of this Chief Justice, the Sri Lankan judiciary was politically subverted from within, as well as from without, as documented both domestically and internationally.[40] The third period, namely from 1999 to the present day, has therefore been one of extreme turmoil where the Sri Lankan judiciary has been deprived of even the vestiges of independence, a development that did not end with the retirement of Chief Justice SN Silva in 2009.

In all this history, Sri Lanka's justice system has not worked to the detriment of the minorities alone. Instead, it has proved itself to be singularly incapable of responding to the needs and demands of the poor and the marginalised within the majority community as well. Incidents of torture and cruel, inhuman or degrading treatment in respect of ordinary Sinhalese people by law enforcement officers and in some instances, by prisons and army officials are reflected by patterns of similar behaviour against the minority communities, though the motives for the incidents may differ. As documented research studies have shown, individuals of Sinhalese ethnicity have been/are at risk due to, among other reasons, increased public pressure on the police to arrest the steep rise

35 The period when the United National Party was in power.

36 *Kumaranatunge v. Samarasinghe*, 1982 (2) FRD 347; *Yasapala v Wickremesinghe* (1982 (1) FRD 143.

37 By 1992, signs of extreme public discontent with the United National Psrty as a result of which thousands had died during the 2nd JVP insurrection, became evident. In 1994, the Peoples Alliance headed by former President Chandrika Kumaranatunge came into power, heralding what many thought was a genuine change for the better. This promise however proved to be illusionary.

38 To name a few of such decisions, *Joseph Perera v. The Attorney General* [1992] 1 Sri LR 199, at p. 230; *Amaratunge v. Sirimal*, [1993] 1 Sri LR 264; *Premachandra v. Jayawickreme* [1993] 2 Sri LR 294 - CA) and [1994] 2 Sri LR 90 at p. 105 - SC); *Mohammed Faiz v. The Attorney General* [1995] 1 Sri LR 372, at p. 383.

39 The late Justice Mark (MDH) Fernando who prematurely retired from judicial office in 2004 citing inability to honorably continue in his post.

40 Report by the United Nations Special Rapporteur on the Independence of the Judiciary, (April 2003), E/CN.4/2003/65/Add.1, 25.02.2003; releases dated 27.02.2003 and 28.05.2003; Report of the Human Rights Institute of the International Bar Association, (IBAHRI) '*Sri Lanka: Failing to protect the Rule of Law and the Independence of the Judiciary,' November 2001 and "Justice in Retreat: A report on the independence of the legal profession and the rule of law in Sri Lanka*" May 2009 and International Crisis Group; *Sri Lanka's Judiciary: Politicised Courts, Compromised Rights*, 30 June 2009; Pinto-Jayawardena, Kishali and Weliamuna, J.C. '*Corruption in Sri Lanka's Judiciary*' Global Corruption Report 2007, Corruption in Judicial Systems, Transparency International Global Corruption Reports, Cambridge University Press, at p. 275.

in crime.[41] Individuals of Tamil ethnicity face similar risks from police as well as army officials due to alleged links with terrorist networks in the wake of the military decimation of the Liberation Tigers of Tamil Eelam in May 2009.

Indeed, the negation of the Constitution and of legal safeguards afforded by law, whether in terms of the constitutional remedies (fundamental rights jurisdiction of the Supreme Court and the *habeas corpus* jurisdiction of the Court of Appeal) or of the criminal law remedy is uncannily similar when comparing and contrasting different periods of emergency in Sri Lanka. During the second insurrection of radicalised Sinhalese youth in the eighties and early nineties, the patterns of torture, extrajudicial executions, and enforced disappearances accompanied by the summary disposal of bodies, the chilling of the media, and killing of journalists, activists, and trade unionists replicated what the country saw in the various stages of, and certainly in the final, Eelam Wars between the Liberation Tigers of Tamil Eelam and the government. The question of justice for Sri Lanka's victims is relevant therefore, not just in relation to abuses committed during the ethnic conflict.

The treatment of prisoners in international humanitarian law under the Geneva Conventions underpinned one of the earliest - and a rare prosecution - of two soldiers for torturing and killing a girl during the first JVP insurrection.[42]

Prior to 1999, the Supreme Court had consistently conformed to Article 27(15) of the Constitution containing the Directive Principles of State Policy which required the State to "endeavour to foster respect for international law and treaty obligations in dealings among nations."[43] The Court brought in provisions of the International Covenant on Civil and Political Rights, (ICCPR, Sri Lanka accession 1980) to strengthen personal liberties.[44] Other judicial citations included ICCPR Article 9 rights to freedom from arbitrary arrest and detention,[45] views of the United Nations Human Rights Committee in expanding the writ of *habeas corpus*[46] and in

41 Pinto-Jayawardena, Kishali '*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*', The Rehabilitation and Research Centre for Torture Victims (RCT) Denmark, 2009, at p12., hereafter RCT Study.

42 *Wijesuriya v the State*, 77 NLR, 25

43 '*The Directive Principles of State Policy herein contained shall guide Parliament, the President and the Cabinet of Ministers in the enactment of laws and the governance of Sri Lanka for the establishment of a just and free society.' Article 27(1) of the Constitution*. The judicial position of Directive Principles was explained in one decision thus; "*True, the principles of State Policy are not enforceable in a court of law but that shortcoming does not detract from their value as projecting the aims and aspirations of a democratic government. The Directive Principles require to be implemented by legislation*" [1987] 2 Sri LR 312, p. 326.

44 '*Should this Court have regard to the provisions of the Covenant [i.e. the ICCPR]? I think it must. Article 27(15) [of the Sri Lankan Constitution] requires the State to "endeavour to foster respect for international law and treaty obligations in dealings among nations". That implies that the State must likewise respect international law and treaty obligations in its dealings with its own citizens, particularly when their liberty is involved. The State must afford to them the benefit of the safeguards which international law recognizes' in Weerawansa v Attorney General and Others* [2000] 1 Sri LR. 387. Also *Centre for Policy Alternatives v Dissanayake* (SC 26/2002, SCM 27/5/2003) for similar citation of the Directive Principles of State Policy in the context of referring to ICCPR, Article 25 in affirming the right to vote.

45 *Sirisena v Perera*, [1991] (2) SriLR, 97.

46 *Leeda Violet and Others v Vidanapathirana, Officer in Charge, Police Station, Dickwella and Others* [1994] 3 Sri LR 377.

affirming the rights of prisoners,[47] and ICCPR Article 25 in expanding the right to vote[48] and in expanding the constitutional right to freedom against degrading treatment.[49] Reliance of the Court on international and regional standards was common in cases involving media freedom and broadcasting standards.[50]

This admirable past precedent suffered a turn for the worse when on 15 September 2006, the Supreme Court ruled that the State's act of accession to the First Optional Protocol to the ICCPR on 3 October 1997 (which enabled the United Nations Human Rights Committee (UNHRC) to receive and consider individual communications from any individual subject to Sri Lanka's jurisdiction) was an unconstitutional exercise of legislative power as well as an equally unconstitutional conferment of judicial power on the Committee.[51] The Court's reasoning is summarised as follows:

The President of Sri Lanka acceded to the ICCPR and the Protocol by virtue of the powers in terms of Article 33(f) of the Constitution which allows the President to "do all such acts and things, not being inconsistent with the provisions of the Constitution or written law as by international law, custom or usage he is required or authorised to do."

However, the act of accession was "an act of legislative power" (which ought to have been exercised by Parliament), as "judicial power" has been conferred upon the UNHRC, which power could only have been conferred by the legislature and not by the executive.

A key assumption of the Court was that the UNHRC had been conferred with "judicial power" as a result of acceding to the Protocol. This was clearly contrary to international law which rests on the position that the rights in the ICCPR should be given effect as part of the International Bill of Rights and that the UNHRC is the appropriate mechanism under

47 *Wewalage Rani Fernando (wife of deceased Lama Hewage Lal) and others v OIC, Minor Offences, Seeduwa Police Station, Seeduwa and eight others* SC(FR) No 700/2002, SCM 26/07/2004. The Court referred to *Thomas v Jamaica* (Communication No 266/1989, views of UNHRC, 2 November 1993 and number of United Nations General Assembly Resolutions.

48 *Mediwake v Dissanayake* [2001] 1 SriLR 177; *Centre for Policy Alternatives v Dissanayake* SC 26/2002, SCM 27/5/2003. Note that this judgment incorrectly cites ICESCR Article 25

49 *Shahul Hameed Mohammed Nilam and Others v K Udugampola and Others*, SC(FR) Applications Nos 68/2002, 73/202, 74/2002, 75/2002, 76/2002, SCM 29.01.2004. Court cited *Tyrer vs UK* (1978, 2 EHHR, 1), *the Greek case* (127 B (1969) Com. Rep. 70, *Campbell and Cosans v UK* (Case law of the EUCT, Vol. 1, pg 170). Similar judicial citations of international law standards are evidenced in the sphere of economic, social and cultural rights as well; *Farwin v Wijeyasiri, Commissioner of Examinations and Others* [2004] 1 SriLR 9;Wickremesinghe v de Silva (SC 551/98, SCM 31.8.2001) and *Hewage v UGC*, SC 627/2002, SCM 8.8.2003.

50 For one seminal decision, see Determination Re. The Broadcasting Authority Bill, S.D. No 1/97 – 15/97, delivered on 5th May 1997.

51 *Singarasa v. AG & Others*, S.C. SpL (LA) No. 182/99, SCM15.09.2006, by a Divisional Bench of the Court presided over by former Chief Justice SN Silva. The State's accession to the Covenant itself was dtermined to be constitutional though having no internal effect, given that Sri Lanka embodies a dualist system (which envisages municipal law and international law as being two distinct systems) rather than a monist system (in which international law has direct and immediate internal effect without the necessity of their transformation into municipal law). For critically argued commentaries on this decision, see *Comment on the Singarasa Case relating to the status of the International Covenant on Civil & Political Rights,* John Cerone and *The Singarasa case – A Brief Comment*, RKW Goonesekere in *LST Review*, Volume 17 September & October 2006, Joint Issue - 227 & 228, pp. 25-33 as well as Sir Nigel Rodley, *Singarasa Case;Quis Custodiet…? - A test for the Bangalore Principles of Judicial Conduct*, LST Review, Vo. 19, Issue 257, March 2009, at p1 (originally published in 41 (3) Israel Law Review (2008) at pp 500 -521.

the Covenant vested with that authority. The claiming of 'judicial power' within a domestic legal system by the UNHRC has never been in issue. Further questions arise concerning differentiation of the principle of sovereignty of the People from the principle affirming the sovereignty of the State. The expansion of the rights already included in Sri Lanka's Constitution by reference to international standards in the ICCPR, as interpreted and declared by the Committee, stands to the gain of all those subjected to Sri Lanka's jurisdiction and not to their detriment. The following observation by a former respected Justice of the Court is pertinent in this regard:

"Such rights[52] even if not expressly incorporated in Chapter III of the Constitution, can be considered nevertheless to be fundamental rights. That view is supported by Article 3 which does not purport to vest Sovereignty in the People, or to confer rights on the People. Article 3 instead proceeds on the basis that Sovereignty is already (and independently of the Constitution) vested in the People: accordingly, the People already possess certain rights. Article 3 refers to fundamental rights without any restriction or qualification, unlike Article 4(d) which refers to the narrower category of fundamental rights which are "by the Constitution declared and recognized". Therefore "Sovereignty" does include other rights besides those specifically enumerated, and among them are the ICCPR (and ICESCR) rights. This is no different to the position under the Ninth and Tenth Amendments to the US Constitution, which recognize that the enumeration in the Constitution of certain rights must not be construed to deny that the People do have other rights as well."[53]

52 That is, flowing from the ICCPR and other international covenants.

53 *Judicial Development of Human Rights; Some Sri Lankan Decisions*, Justice Mark (MDH) Fernando, Sri Lanka Journal of International Law, Volume 16, 2004, Faculty of Law, University of Colombo, also LST Review, Volume 15 Issue 211 May 2005, p. 15.

It was common knowledge that the Singarasa Case was occasioned by judicial pique at the increasing number of Communications of Views being handed down by the UNHRC in respect of Sri Lanka's non compliance with provisions of the ICCPR[54] thereby impugning decisions of the Court, in the term of former Chief Justice SN Silva. As discussed previously, consequent to this Chief Justice assuming office in 1999, the legitimacy and credibility of the Supreme Court took a downward trend. Some of these Communications are relevant for the principle of accountability; for example, the principle that the army is indisputably an organ of that State and an enforced disappearance at the hands of any member of

54 The Human Rights Committee has, delivered eleven communications of views against the Sri Lankan State; *Anthony Michael Emmanuel Fernando v Sri Lanka*, CCPR/C/83/D/1189/2003, adoption of views, 31-03-2005; *Nallaratnam Sinharasa v Sri Lanka*, (PTA prisoner) CCPR/C/81/D/1033/2001, adoption of views, 21-07-2004; *S. Jegatheeswara Sarma v Sri Lanka*, (enforced disappearance) CCPR/C/78/D/950/2000, adoption of views, 16-07-2003; *Jayalath Jayawardena v Sri Lanka*, CCPR/C/75/D/916/2000, adoption of views, 22-07-2002; *Victor Ivan Majuwana Kankanamge v Sri Lanka*, CCPR/C/81/D/909/2000, adoption of views 27-07-2004 Sister Immaculate Joseph and 80 Teaching *Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka v Sri Lanka*, CCPR/C/85/D/1249/2004, adoption of views, 21-10-2005. *Sundara Arachchige Lalith Rajapakse v Sri Lanka*, (torture) CCPR/C/87/D/1250/2004, adoption of views, 14-07-2006, *Raththinde Katupollande Gedara Dingiri Banda vs Sri Lanka*, (torture) CCPR/C/D/1426/2005, adoption of views 26-10-2007, *Dissanayake Mudiyanselage Sumanaweera Banda v Sri Lanka* CCPR/C/93/D/1373/2005, adoption of views 22-7-2008, *Vadivel Sathasivam and Parathesi Saraswathi v Sri Lanka* (torture) CCPR/C/93/D/1436/2005, adoption of views 8-7-2008, *Soratha Bandaranayake v Sri Lanka* CCPR/C/93/D/1376/2005, adoption of views 24-7-2008. However, there has been no implementation of these Views by the Sri Lankan Government.

the army is imputable to the State party.[55] The State party defence that this was an isolated act initiated solely by a minor officer without the knowledge or complicity of other levels within the military chain of command was rejected by the Committee. Implementation of this Communication of Views has been disregarded by the State, as is the case with all the others. Following the Singarasa case, an advisory opinion was handed down by the Court, upon a Presidential Reference two years later, declaring the domestic legal regime to be in conformity with international law and the ICCPR.[56]

The Role of the State Prosecutor and an Assessment of its Independent Nature

The Attorney General is the state prosecutor and has the sole authority in the framing of indictments[57] as well as the prosecution of offences. In the case of certain offences triable in the Magistrates' Court, the police have the authority to frame charges and conduct the prosecution with the sanction of the Attorney General, but the Attorney General[58] may intervene in any of these prosecutions. Indictments under the CAT Act are filed by the Attorney General directly in the High Court.[59] Prosecutions in terms of emergency laws are initiated by the Attorney General who has the power to consent or refuse bail to an accused who has been indicted and remanded under the PTA.[60] Generally, the courts have been reluctant to interfere with the Attorney General's powers even though judicial authority to do so has been asserted in theory.[61] As discussed earlier, unlike the Independence Constitution, the 1972 Constitution situated the office of the Attorney General under the Ministry of Justice, diminished the authority of the judiciary and politicised the public service. The current Constitution continued this trend and the appointment of the holder of the office remained by the executive alone. From 1972 onwards, there was a pervasive politicisation of the Office of the Attorney General which detracted from the eminence of the office, a fact indeed acknowledged as such by past holders of the Office.[62]

The 17th Amendment to the Constitution

55 *Sarma v Sri Lanka* concerning a complaint filed by a father from Trincomalee, whose son had disappeared in army custody in 1990.

56 *In the Matter of a Reference under Article 129(1) of the Constitution*, SC Ref No 01/2008, hearing on 17.03.2008. This advisory opinion was handed down by a Divisional Bench presided over by the Chief Justice.

57 Sections 393 to 400 of the Code of Criminal Procedure Act, No 15 of 197 (as amended). In certain instances as in reference to Section 193 of the CCP Act relating to trials before the High Court and in Section 400 relating to prosecution before a Magistrate, the prosecution could also be conducted by a pleader 'generally or specially authorised by the Attorney General in that behalf. Chapter XVII of the CCP Act also allows the prosecution of offences that are triable summarily by the Magistrates' Court to be conducted by the complainant on occasion that the Attorney General or his officers or a pleader authorised by the Attorney General does not appear. Sections 164 to 181 of the CCP Act detail *inter alia*, the manner in which charges must be framed, an important part of which relates to the requirement that an accused must be informed of the precise particulars of the offence that the accused is charged with.

58 Sections 135 and 136 of the CCP Act. Certain specific statutes such as the Excise Ordinance also give prosecutorial powers to police officers.

59 Section 4, Convention Against Torture, CAT Act.. An offence under this Act is a non-bailable and cognizable offence acording to 2(5) of the CAT Act.

60 Section 7(1) of the Prevention of Terrorism Act, PTA.

61 *Victor Ivan Vs Sarath N. Silva, Attorney General*, [1998] 1 Sri LR, 340. See discussion of the impact of this judgment in *LST Review*, Vo. 15, Issue 211, May 2005, Law & Society Trust, Colombo.

62 See interviews given by former Attorney General, Thilak Marapana in *The Sunday Times*, 28th August, 1994 and former Attorney General, Shibley Aziz in *The Sunday Island*, March 1996. It is generally acknowledged that political interference with the office of the Sri Lankan Attorney General increased from the eighties.

attempted to infuse new life into a politicised public service and revised the mode of appointment of holders to the office of the Attorney General by providing that such an appointment needed to be approved by the Constitutional Council upon a recommendation made to the Council by the President. Consequential legislation to the 17th Amendment mandated that the holder of the office of the Attorney General shall not be removed from office except by the President on specified grounds as set out in the law.[63] These amendments were theoretically an improvement from the former *status quo*.

"Sri Lanka should ensure the establishment of the office of an independent Prosecutor (appointed by consensus of the Government as well as civil society organisations in the country) who would have specially trained staff under his/her command to inquire, investigate and prosecute grave rights violations."

However, the effective discarding of the Constitutional Council under the 17th Amendment by the 18th Amendment has meant that the President again has unfettered power in respect of the appointment. Further, the bringing of the Office of the Attorney General directly under the President, as referred to in the earlier section of this Advice,[64] has meant that even the trappings of independence have been discarded. The performance of the Attorney General has generally been poor. In regard to ordinary crimes, the rate of conviction has been 4%.[65] In cases of enforced disappearances, assessed against the most recently available formal statistics, the conviction rate is abysmal.[66]

Under a special law meant to act as a deterrent to torture and cruel, inhuman or degrading treatment, the conviction rate has been merely 3% since 1994.[67] Judicial reprimands have been delivered in regard to lack of prosecutorial diligence.[68]

Conclusion

The failure of Sri Lanka's prosecutorial and legal processes is not limited to extraordinary crimes during times of emergency; rather, these failures manifest a pervasive problem with inadequate legal mechanisms that are in

63 Where the removal is on grounds of misconduct or corruption, abuse of power, gross neglect of duty or gross partiality in office, this had to be after the presentation of an address of Parliament supported by a majority of the total number of Members of Parliament (including those not present) for the appointment of a Committee of Inquiry, Vide section 5 of the Removal of Officers (Procedure), Act, No 5 of 2002.

64 Gazette Notification No 1651/20 – Friday April 30, 2010.

65 '*The Eradication of Laws Delays*', Committee Appointed to Recommend Amendments to the Practice and Procedure in Investigations and Courts, Final Report, 2nd April, 2004, pg. 5. This is a committee established by the Ministry of Justice and headed by a former Attorney General.

66 CAT/C/48/Add.2 06/08/2004.

67 *Republic of Sri Lanka vs Madiliyawatte Jayalathge Thilakarathna Jayalath*, HC Case No: H.C 9775/99, Colombo High Court, HC Minutes, 19.01.2004; *Republic of Sri Lanka vs Edirisinghe* HC Case No; 1392/2003, Colombo High Court, HC Minutes 20.08.2004; *Republic of Sri Lanka vs Selvin Selle and Another*, HC No; 966/2002, Colombo High Court HC Minutes 20.07.2007.

68 *Republic of Sri Lanka vs Suresh Gunasena and Others*, Negombo High Court, HC Minutes 02.04.2008,. The adverse comments were made in relation to the Attorney General withdrawing the name of the officer-in-charge of the police station who had, in the wrods of the Supreme Court in the relevant fundamental rights application "consented and acquiesced" in the torture perpetrated upon the victim (Vide *Sanjeewa v Suraweera*, [2003] 1 Sri LR 317) from the indictment.

force in times of peace as well as (obviously, in a more aggravated manner) in times of war. At the minimum, a broader vision of the role of prosecution processes in meeting victim needs for information and reparation, as well specific avenues for victim participation in trial processes is undoubtedly needed. A revised trial process in Sri Lanka should give the victims the right to initiate investigations and invoke the jurisdiction of the Court. They should have the right of access to all documents and necessary information including legal documentation at any stage of the trial. Where requested, the trauma of facing in open court, the very persons accused of causing immeasurable agony to themselves and their loved ones should be minimized.

Sri Lanka should ensure the establishment of the office of an independent Prosecutor (appointed by consensus of the government as well as civil society organisations in the country) who would have specially trained staff under his/her command to inquire, investigate and prosecute grave rights violations. A Witness Protection system handled by competent officers with security of tenure and complete independence from the normal police structures is crucial in this context

The United Nations treaty based bodies, in their periodic reporting procedures, have also expressed concerns regarding the inability of the State to identify and/or inaction in identifying the perpetrators responsible for the large numbers of enforced or involuntary disappearances of individuals. Taken together with the reluctance of victims to file or pursue complaints, this has been observed 'to create an environment that is conducive to a culture of impunity.'[69]

This still remains a most apt indictment of the current state of Sri Lanka's legal system

69 In Concluding Observation No 10 of the UN Human Rights Committee (CCPR/CO/79/LKA) Human Rights Committee, seventy ninth session, November 2003. Though the Committee directed that Sri Lanka should respond on this particular question together with three other questions considering to be of overriding importance within one year, namely by October-November 2004, there has been no perceptible adherence by the government to this direction. In this same context, see also Committee Against Torture, Concluding Observations on Sri Lanka in 2005, (CAT/C/LKA/CO/1/CRP.2. 7-25 November 2005) at paragraph 12.

COLUMN

NO ACCOUNTABILITY FOR TORTURES

The Obama administration has closed the books on prosecutions of those who violated our laws by authorizing and conducting the torture and abuse of prisoners in U.S. custody. Last year, Attorney General Eric Holder decided that his office would investigate only two incidents, in which CIA interrogations ended in deaths. He said the Justice Department "has determined that an expanded criminal investigation of the remaining matters is not warranted." With that decision, Holder conferred amnesty on countless Bush officials, lawyers and interrogators who set and carried out a policy of cruel treatment.

Now the Attorney General has given a free pass to those responsible for the deaths of Gul Rahman and Manadel al-Jamadi. Rahman froze to death in 2002 after being stripped and shackled to a cold cement floor in the secret Afghan prison known as the Salt Pit. Al-Jamadi died after he was suspended from the ceiling by his wrists, which were bound behind his back. MP Tony Diaz, who witnessed al-Jamadi's torture, said that blood gushed from his mouth like "a faucet had turned on" when he was lowered to the ground. A military autopsy concluded that al-Jamadi's death was a homicide.

Nevertheless, Holder announced that "based on the fully developed factual record concerning the two deaths, the department has declined prosecution because the admissible evidence would not be sufficient to obtain and sustain a conviction beyond a reasonable doubt."

Amnesty for torturers is unacceptable. General Barry McCaffrey declared, "We tortured people unmercifully. We probably murdered dozens of them during the course of that, both the armed forces and the CIA." Major General Anthony Taguba, who directed the Abu Ghraib investigation, wrote that "there is no longer any doubt as to whether the [Bush] administration has committed war crimes. The only question that remains to be answered is whether those who ordered the use of torture will be held to account." Holder has answered Taguba's question with a resounding "no."

Marjorie Cohn

Some have suggested that Holder's decisions have been motivated by political considerations. For example, Kenneth Roth, director of Human Rights Watch, wrote that "dredging up the crimes of the previous administration was seen as too distracting and too antagonistic an enterprise when Republican votes were needed." And closing the books on legal accountability for Bush officials may remove one more Republican attack on Obama in the next two months before the presidential election.

But the Obama administration's decision to allow the lawbreakers to go free is itself a violation of the law. The Constitution says that the president "shall take Care that the Laws be faithfully executed." When the United States ratified the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, we promised to extradite or prosecute those who

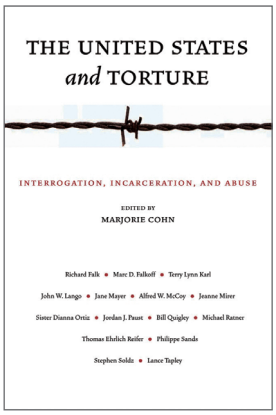
commit, or are complicit in the commission, of torture. The Geneva Conventions also mandate that we prosecute or extradite those who commit, or are complicit in the commission of, torture.

There are two federal criminal statutes for torture prosecutions—the U.S. Torture Statute and the War Crimes Act; the latter punishes torture as a war crime. The Torture Convention is unequivocal: nothing, including a state of war, can be invoked as a justification for torture.

By letting American officials, lawyers and interrogators get away with torture – and indeed, murder – the United States sacrifices any right to scold or punish other countries for their human rights violations.

Marjorie Cohn is a professor at Thomas Jefferson School of Law in San Diego, California, where she teaches criminal law and procedure, evidence, and international human rights law. She is the author of Cowboy Republic: Six Ways the Bush Gang Has Defied the Law and co-author of Rules of Disengagement: The Politics and Honor of Military Dissent and Cameras in the Courtroom: Television and the Pursuit of Justice. Her most recent book is The United States and Torture: Interrogation, Incarceration and Abuse (NYU Press).

RECENT PUBLICATIONS



Waterboarding. Sleep deprivation. Sensory manipulation. Stress positions. Over the last several years, these and other methods of torture have become garden variety words for practically anyone who reads about current events in a newspaper or blog. We know exactly what they are, how to administer them, and, disturbingly, that they were secretly authorized by the Bush Administration in its efforts to extract information from people detained in its war on terror. What we lack, however, is a larger lens through which to view America's policy of torture — one that dissects America's long relationship with interrogation and torture, which roots back to the 1950s and has been applied, mostly in secret, to "enemies," ever since. How did America come to embrace this practice so fully, and how was it justified from a moral, legal, and psychological perspective?

The United States and Torture opens with a compelling preface by Sister Dianna Ortiz, who describes the unimaginable treatment she endured in Guatemala in 1987 at the hands of the Guatemalan government, which was supported by the United States. Then, a psychologist, a historian, a political scientist, a philosopher, a sociologist, two journalists, and eight lawyers offer one of the most comprehensive examinations of torture to date, beginning with the CIA during the Cold War era and ending with today's debate over accountability for torture. Ultimately, this gripping, interdisciplinary work details the complicity of the United States government in the torture and cruel treatment of prisoners both at home and abroad, and discusses what can be done to hold those who set the torture policy accountable.

Contributors: Marjorie Cohn, Richard Falk, Marc D. Falkoff, Terry Lynn Karl, John W. Lango, Jane Mayer, Alfred W. McCoy, Jeanne Mirer, Sister Dianna Ortiz, Jordan J. Paust, Bill Quigley, Michael Ratner, Thomas Ehrlich Reifer, Philippe Sands, Stephen Soldz, and Lance Tapley.

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VIEW POINT

CURSE OF THE INDIAN CASTE SYSTEM

BY ZUBINA AHMED

"Liberty, Equality Fraternity"; at the time of the French Revolution these posthumous terms were the primary mottoes in use. Looking back at times, if we take out the word 'equality' and emphasize on its significance, little will we find its reach. The term equality in literal term means evenness. In practical sense it means that everyone should have the same rights. Ironically, the term has just remained to be a literal facet. Equality in class and culture is as fragmented as the streams of a river. A society is socially stratified when its members are divided into categories which are differentially powerful, esteemed, and rewarded. Louis Dumont, in his modern classic 'Homo Hierarchicus', maintains that the entire sociological notion of stratification is misleading when applied to South Asia. And if we come to India, its origins are as varied as its extent.

The origin of the caste system in India dates back to the times of the Aryans when they crossed the mountain passes from the steppes of Central Asia and settled in Northern India around 1500 BC. Once the Aryans invaded India, they divided communities into hereditary groups called Jātis. The Jātis were grouped under the four well-known caste categories known as Varnas. The Varnas were formed into the descending order format starting from the Brahmins, Kshatriyas, Vaishyas to the Shudras. The Varnas were classified according to their occupation and economic standard of living. Brahmins were to be the spiritual and temporal guides, as well as teachers and exponents of law. Kshatriya were the warriors, princes and kings, Vaishya, took on the tasks of agriculture and merchantry. Finally, Shudras performed service communities -- manual and agricultural laborers, artisans, masons, etc. The Sudra's were further subdivided. Those who did the polluting job of manual scavenging; cleaning up after funerals or killing animals fell into the untouchable or outcast category. They were ostracized by the Brahmins and treated with contempt and filth. The untouchables were not only disallowed to touch the high caste communities but they also had to stand at a certain distance from the high castes. Over the centuries the Brahmins attained immense power, upholding the law as well as dispensing it.

The caste system is propagated and misused by the people in power. Torture in ancient India began with the inception of the caste system. It soon spread to the entire Indian society following the struggle of class and caste divide. The caste strata in India are decided by birth. One cannot change it. Being born a Brahmin wasn't a sin. But if one was born as a Sudra or a Dalit (untouchables) then a life of constant struggle and suffering awaited. . In the traditional caste system, members of the lower caste were strictly discriminated against. The high ranking members of the caste system such as the Brahmins, Kshatriyas and Vaishyas, were deemed as the clean caste and enjoyed

many privileges while the low ranking, the Untouchables, were labeled as 'unclean' and lived in abject poverty serving the Brahmins. Dalits could not even step into the dining area of the Brahmins. Rape, torture, and killings continued to take place in the name of the caste system. Poverty, helplessness, and lack of support were the most common ways to torture the lower rung. The children were born to 'slavery' where they had to work in the worst possible conditions until they died. The most complex question that arises is the policy of descendants. How does one explain to a child that they are born unclean or a Dalit? They were discriminated right from the womb and lived a life of adversity once born.

"The caste system is propagated and misused by the people in power. Torture in ancient India began with the inception of the caste system. It soon spread to the entire Indian society following the struggle of class and caste divide. The caste strata in India are decided by birth. One cannot change it."

If we discuss the most common caste-related violence and torture in India, one cannot ignore the 2006 gruesome murders of a Dalit family where its members were slaughtered to death by people of the politically dominant caste. The killings took place in a small village in India named Kherlanji, located in the state of Maharashtra. The women of the family were paraded naked in public, before being murdered. The Kherlanji massacre instigated the 2006 Nagpur riots by the Dalits. During the violent protests, the Dalit protestors set three trains on fire, damaged over 100 buses and clashed with the police. In the Indian province of Rajasthan, between the years 1999 and 2002, crimes against Dalits were at an average of about 5024 a year, with 46 killings and 138 cases of rape. According to a report by Human Rights Watch, "Dalits and indigenous peoples (known as scheduled tribes or adivasis) continue to face discrimination, exclusion, and acts of communal violence. Laws and policies adopted by the Indian government provide a strong basis for protection, but are not being faithfully implemented by local authorities." Some of the other forms of violence meted out to the Dalits include the 1996 Bathani Tola Massacre in Bihar where 21 Dalits were slaughtered by a caste-supremacist fringe militia group called Ranvir Sena who were known to perpetrate violent acts against Dalits and other scheduled caste tribes. Among the dead were 11 women, and 9 children. In the 1969 Kilvenmani massacre, in Tamil Nadu, a group of 42 Dalit village laborers were murdered by a gang, allegedly sent by their landlords. On 1 December 1997, the militia group Ranvir Sena gunned down 58 Dalits at the Laxmanpur Bathe. Charges were framed in the case against 46 Ranvir Sena men on December 23, 2008. Countless such stories have been harrowing the Dalits over the years. Phoolan Devi, the notorious 'Bandit Queen', famed for her sheer defiance against India's age-old racist and sexist caste customs, established her reputation as a champion of the oppressed in India. She had been victimized by the caste system her entire life, treated as either a slave or a sex object. She said that she represented people who, like herself, were exploited and abused by their social betters.

In dealing with caste issues that have been arising, the role of the caste councils, called Khaps in India, is another gruesome reality. Honour killings are a condemnable phenomenon that is rapidly on the rise in rural India. The meaning of the act itself is

pretty self-explanatory. It involves homicide of a member of a family by other members for the sake of community pride. Honour killings are directed mostly against women and girls, but have been extended to men too. The dishonor mainly comes in the form of marrying outside the caste or marrying within the same clan or Gotra. Such killings are sadly on the rise as more and more couples marry outside their caste or against their family's wishes. Hair-raising incidents of daylight murder of lovers, castration, and strangulation are a common affair. In one such incident in Rajasthan, the caste panchayat stripped and thrashed down a woman in front of the entire village. The married woman and her partner were tied to a tree, stripped half-naked and severely beaten up for nearly three hours before a crowd of 1,000 people under orders of a caste panchayat. The two were 'punished' for having illicit relations. The woman's husband himself stripped the woman and the youth. Later their hair was cut. When a police team tried to intervene, the villagers hurled stones at them, injuring two cops. One can easily perceive that there are legal ways to settle matrimonial disputes, but the dominance of caste panchayats and their diktats are turning out to be a major bane for the society at large. In the age of caste-driven politics, no party has shown the willingness to come out openly and minimize the role of such panchayats, whose principles are not only archaic, but devastating for the society. The government needs to act and launch campaigns on the redundancy of such acts. Torture, oppression, victimization and colonization have weighed down generations of the Indian ethnic class. If we look from the practical point of view, even the British colonization of India was another form of torture. The British rule oppressed the Indian class on the basis of race, while the Indians continued this discrimination on the basis of caste.

With globalization, the caste system has begun to change and, as a result, new conflicts between traditions, science, faith, and modernism are emerging. One needs to know what their role is in modern day India. Noted sociologist Dr. Upadhyay says "Yes, they exist. And with the fast changing social order, they are trying to be in control and to make themselves relevant for society". The new caste system is made of Haves and Haves Nots. It depends on the economic status and power of the individual; however, the old system of castes continues to hold influence. Many years after the independence of India, caste based discrimination goes on. India's feudal caste system is so powerful that although some progress is being made, challengers of tradition often face upper-caste revenge. What is the Indian government doing? What about social movements and the international community. The caste-based system cannot survive forever in the modern world, but the political parties and religious 'lords', as religious leaders are called, want it to continue in order to promote their own ethnic interests. They want to use it to fuel sectarianism. The very concept of caste based polarization is flawed. These are things that breed conflicts. We as individuals need to buckle down and ask whether it is socially and morally acceptable in Modern India to let the curses of the caste system persist. If, even after 60 yrs of independence, we are not able to break the shackles of caste discrimination and torture, then what is the guarantee that it will be broken in the next decade?

Zubina Ahmed is a journalist based in New Delhi. She is currently a programming producer with a leading News Channel TIMES NOW in New Delhi, India.

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