

**ASIA PACIFIC HUMAN RIGHTS NETWORK (APHRN)  
CONSULTATION ON “NHRI OVERSIGHT ON  
NATIONAL SECURITY LEGISLATION”**

**16 February 2004 – KATHMANDU**

**N H R I ROLE IN MONITORING THE USE OF  
NATIONAL SECURITY LEGISLATION -  
THE SRI LANKAN EXPERIENCE**

**By V.S.Ganesalingam, Home for Human Rights, Sri Lanka**

In Sri Lanka there are two Enactments dealing with National Security – the Public Security Ordinance No. 25 of 1947 and the Prevention of Terrorism (Temporary Provision) Act No. 48 of 1979.

The Public Security Ordinance, passed by the State Council in 1947, with its subsequent amendments, is deemed to be a law enacted by Parliament both under the 1972 and 1978 Constitutions. This Ordinance empowers the President of the Republic to make Emergency Regulations (ER) which have the legal effect of overriding, amending or suspending the operation of any law except the provisions of the Constitution. The ER had to be approved by Parliament monthly and lapsed on 4 July 2001 for the reason that they were not presented to Parliament for approval because the Government was not sure of its majority.

The ER, inter alia, provided for indefinite preventive detention with no provision for a substantial judicial review of detention, conferred sweeping powers of arrest to the police and Security forces on grounds of suspicion and allowed for detention for a maximum period of 90 days for the purpose of investigations without any requirement that the detainee be produced before any courts.

The Prevention of Terrorism (Temporary Provisions) Act No.48 of 1979 as amended by Act No.10 of 1982 and No. 22 of 1988 (PTA) suspends important legal safe guards guaranteed in the Constitution of Sri Lanka and recognized in international human rights instruments such as the ICCPR. The PTA was initially introduced as temporary law but was made part of permanent law by the amendment of 1982.

Under section 6 of the PTA, any Police Officer not below the rank of a Superintendent, or any other Police officers not below the rank of Sub-Inspector authorized in writing by him, can arrest any person suspected of involvement in any unlawful activity. Under section 7, a person so arrested can be detained for a

period not exceeding 72 hours by the Police. The Magistrate before whom he is to be produced thereafter, if further detention is necessary, has to remand him till the conclusion of trial if an application is made to that effect by a Superintendent of Police.

The ER and the PTA have all the salient features of the Indian security law TADA (which had been repealed). Many of the offences created by them were already offences under ordinary law, and what the ER and PTA provided for was increased punishment, with certain provisions of the ordinary criminal law being made inapplicable. They also denied the right to trial by jury and the right to be produced before a Judicial officer within 24 hours of arrest, and the power of the Magistrate to refuse a remand application or to grant bail was severely curtailed. Confessions made to the Police were made admissible at trial with the burden of proving that they were not voluntarily made placed on the accused. There were no minimum standards to govern conditions of detention, no prohibition on incommunicado detention and no provision giving access to lawyers and relatives. These are derogations that are not permitted under Article 4 of the ICCPR.

These provisions provide a ready context for torture, deaths in custody, disappearances and extra judicial executions, as borne out by the wide scale human rights violations that have occurred in the recent past. The arbitrary powers given to the police by the PTA are justly described as amounting to ‘State terrorism’ which is clearly counter productive and feeds the flames of terrorism.

Considering the various provisions of the national security laws that permitted derogation from the rights recognized under international law and guaranteed by the Constitution, which facilitated human rights violations, the expected role of the Human Rights Commission (HRC) gains importance. Quite correctly, the HRC in its annual report 2000/2001 stated:

*“In the prevailing situation in Sri Lanka, the Commission gave highest priority to the protection of rights under the ER and PTA and regarded it as one of its major responsibilities to minimize the derogation of rights that had occurred.”*

Let us analyze whether the Commission “gave the highest priority to the protection of rights under the ER and PTA.”

The Human Rights Commission of Sri Lanka Act, No. 21 of 1996 (HRC Act) by which the HRC was established, confers on the Commission powers of a general nature (Section 11) in addition to special powers in respect of the PTA and ER (Section 28).

Section 11 provides, that for the purpose of discharging its function, the HRC may exercise any or all of the following powers:

- a) investigate into infringement or imminent infringement of fundamental rights;
- b) appoint Sub Committees at Provincial level, to exercise the power of the Commission;
- c) Intervene in any Court proceedings relating to the violation of fundamental rights;
- d) monitor the welfare of persons detained by regular inspection of places of detention;
- e) take steps on matters referred by Supreme Court;
- f) undertake research and promote human rights awareness;
- g) award cost of complaints made to Commission; and
- h) do all such other things as are necessary or conducive to the discharge of its functions.

Section 28 of the Act states as follows:

“(1) Where a person is arrested or detained under the Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979 or a regulation made under the Public Security Ordinance, (Chapter 40) it shall be the duty of the person making such arrest or order of detention, as the case may be, to forthwith and in any case, **not later than forty-eight hours** from the time such arrest or detention, **inform** the Commission of such arrest or detention as the case may be and the place at which the person so arrested or detained is being held in custody or detention. Where a person so held in custody or detention is released or transferred to another place of detention, it shall be the duty of the person making the order for such release or transfer, as the case may be, to inform the Commission of such release or transfer, as the case may be, and in the case of a transfer, to inform the Commission of the location of the new place of detention.

(2) Any person authorized by the Commission in writing may enter **at any time, any place of detention, police station, prison or any other place in which any person is detained** by a judicial order or otherwise, and make such examinations therein or make such inquiries from any person found therein, as may be necessary to ascertain the conditions of detention of the persons detained therein.

(3) Any person on whom a duty is imposed by subsection (1), and who willfully omits to inform the Commission as required by subsection (i), or who resists or obstructs an officer authorized under subsection (1) in the exercise by that officer of the powers conferred on him by that subsection, shall be guilty of **an offence** and shall on conviction after summary trial by a Magistrate, be liable to imprisonment for a period not exceeding one

year or to a fine not exceeding five thousand rupees, or to both such fine and imprisonment.”

Among other factors, it was the concern of the Government over reported cases of custodial torture, disappearances and extra-judicial killings that led to the government making it mandatory for the arresting authority to report arrests to the HRC within 48 hours, to give unrestricted power of inspection of detention centres to the HRC and to make the failure to comply with the above punishable as offences.

### **Monitoring conditions of detention**

The HRC in its latest report ( 2000/01 ) states that “[r]egular and prompt reporting of arrests followed up by visits from HRC staff is one of the best deterrents of torture, unlawful arrest and disappearances”.

The question arises as to whether the HRC, in the exercise of its powers conferred by Section 28, has made regular visits to places of detention and taken action against those who have failed to report arrest. The HRC, which admits continued lapses and delays in reporting arrest, claims to have satisfied itself that “they are less frequent and on the whole the commission has received the cooperation of the armed forces and the police”. If the lapses in reporting are less frequent, it is not understood as to why the HRC had not yet been able to prepare and maintain a central register of arrests and detention.

It is our view that the HRC has not been making regular visits to monitor conditions of detention. Had it carried out its mandated duty, several violations could have been detected, reported and the perpetrators brought to justice. Interestingly, there is hardly any case of violations being detected during such visits and of the HRC making recommendations or referring cases to appropriate courts. All the reported cases of custodial torture filed in the Supreme Court have been filed by lawyers attached to NGOs or working independently visiting the places of detention. I give below few examples of such cases:

- (i) Anthonipillai Nepolean an internally displaced Tamil youth and a betel seller in Vanni went missing on 5 August 1986. His mother, was in the habit of showing his photograph to those released from prison and inquiring after him. On 5 January.2002, his mother accidentally met a person who was released from Kalutara Remand Prison and who confirmed that a person similar to the one in the photograph was in Kalutara Prisons and was mentally unsound. His mother went to the said prison on 07 January 2002, and having recognized a detainee as her son, sought the assistance of an NGO to have him released. When the mother met him, he could neither talk nor communicate with her any other manner, only tears were flowing from his eyes. The mother states that at the time of

disappearance her son was in perfect health and it is due to torture that he had become mentally unsound and had lost his power of speech.

The NGO that handled this case found from his Committal that his name was given as Napoleon, alias Anna, and that he was arrested in October 2000 and remanded on 27 November 2000 on the orders of a Pollannaruwa Magistrate. On an application made by an Attorney at Law, the said Magistrate had ordered that he should be produced before a psychiatrist. Consequent to the filing of FR No. 317/02 in the Supreme Court, he was discharged on 5 August 2002 and the Court awarded him Rs. 40,000/- as compensation.

- (ii) A 23 years old unmarried young Tamil woman, a casual attendant at General Hospital, Pollannaruwa, was arrested by the Pollannaruwa Police whilst on duty on 24 November 2001. Subsequently she was indicted in four High Court cases, on the basis of a confession made to police under the PTA. Two of the cases have been withdrawn by the State and the other two are pending and for which she is on bail.

In her complaint to the HRC, filed by way of an Affidavit dated 20 November 2002, she stated the following:

After her arrest on 2 November 2001, she was put in a Jeep and assaulted. She was kicked with boots and was handed over to CID who took her to a room made her nude, assaulted her with clubs and rope and trampled over her body with their boots and burnt her over her body with cigarette butts.

Then she was raped by 12 persons, one after the other, all of whom were smelling of liquor. She fell unconscious and was given a cup of tea. When she regained conscious one CID personnel threw water mixed with chilli powder on her face and when she shouted in pain they closed her mouth by force using some cloths .

Thereafter, they threatened her with more torture, recorded a statement in Sinhala and forced her to sign it. She was raped again on the same day by the same 12 persons by about 10.p.m. Then she was produced before a Pollonnaruwa Magistrate who made an order of remand until the conclusion of a trial under the PTA. She was initially held in remand at Anuradhapura and later transferred to Welikade Prisons. Whilst in detention and remand she did not meet with any HRC official. When her case came up before High Court in Batticaloa, torture was disclosed by her to the Court, and

on the orders of Court she was medically examined. The medical report was supportive of her allegations of torture and rape.

She made a subsequent complaint to the HRC by affidavit dated 8 February 2003, stating that on 7 February 2003, while she was on her way to an NGO, at Sorruvil security point she was stopped by a policeman whom she identified as being one of those who had sexually abused her during her detention. He wanted her to come to the CID office behind the Court and offered Rs.20. When she declined to accept, he pulled her purse and forcibly inserted the money and warned her that if she didn't respond she would be arrested again. He also inquired as to the whereabouts of her twin sister. She is now living in fear.

The complaint, No. BC/02-11/04, has been pending for the last ten months before HRC.

The cases cited above raise questions as to the efficacy of the regular visit of the HRC officials and the various mechanisms said to be in force to protect the rights of detainees. It is not understood as to why the HRC officials, in their regular visits, did not come across these detainees, especially when they had been in police stations and prisons for considerable periods. Were these arrests reported? If not, what action has been taken on the failure to do so, especially when one detainee became of unsound mind due to torture, and another was subjected to rape and torture while in custody? What happened to the several appeals to the ICRC, the HRC and the Committee on Missing Persons?

### **Referral to Courts**

Under Section 15 of the HRC Act, if any infringement or imminent violation of Fundamental Rights is disclosed during investigations the commission can,

- a) recommend to the appropriate authorities to prosecute or make such other recommendations as it thinks fit;
- b) refer the matter to any Court; or
- c) recommend that the act or omission that gave rise to the violation be reconsidered or rectified.

There are several instances where the HRC, even after investigating complaints of violations, has not make any recommendations or referred matters to court. Such cases have involved complaints from internally displaced persons (IDPs), complaints about the restrictions imposed on travel for Tamils traveling from Jaffna, complaints of disappearances in Jaffna after the army took control in 1956 and complaints of custodial torture and rape .

In these cases, the victims of violations were the Tamil minority and the HRC could be accused of discriminating against a minority in violation of Article 12(1) of the Constitution and Article 26 of ICCPR

### **Internal Displacement and the High Security Zone**

Since 1983, there has been systematic forced evictions of Tamils in the northern and eastern provinces by means of military operations. Following the MOU between the LTTE and the Government, the displaced were willing to return to their original villages. However, the security forces have prevented 26,378 families, consisting of 130,000 people, from resettling in their original homes in 69 villages in Jaffna, claiming that those areas are “High Security Zones” and that resettlement cannot be permitted. According to security forces, there are 14 High Security Zones covering a land area of 160 square kilometers of the total land area of 880 square kilometers of Jaffna. The displaced continue to live elsewhere hoping for the day they can return.

At the inquiry held by the Regional Coordinator of the HRC into the complaints received by him that the security forces have no legal basis to declare High Security Zones and to deny the right of resettlement, it is reported that army officials claimed that they had the power under Regulation made under the PTA. Despite the fact that forced evictions and denial of the right to return constitute a violation of a series of rights recognized by international human rights law and guaranteed by the constitution, the HRC did not pursue the matter either by making recommendation or referring it to the appropriate court.

While avoiding action to address the core right of the IDP's, the right to resettlement, a right recognized in the Deng Principles, the HRC is working on a UNDP funded project to protect the rights of the IDPs and on UNHCR funded project to protect the property rights of the IDPs.

### **Freedom of movement**

Despite the fact that freedom of movement is constitutionally guaranteed, several restrictions, not authorized by law, have been imposed only on the Tamils from the northern province. To travel to other parts of the country, the Tamils from the northern province must obtain passes from the Police at Vavuniya, which are issued at the discretion of the Police. There were as many as 13 categories of passes. There is no doubt that the legality of the pass system and the denial of freedom of movement has been inquired into by the HRC. In its report it claims that it inquired into this problem and had discussed it with the Ministry of Defence and had impressed on them that it has no legal validity. However, it had thought that it is not a fit case for referral to Supreme Court. In an application subsequently filed by a lawyer, the Supreme Court held that the pass system is invalid.

## **Jaffna Disappearances**

Following the Army take over of Jaffna in 1996, well over 600 Tamils disappeared, alleged at the hands of the security forces after being arrested. An army corporal, Corporal Rajapakse, who was charged with the killing of Krishanthi Kumaraswamy, one among the 600, disclosed that there were mass graves in Chemmani about 5 kilometers from Jaffna town. This led to the exhumation of 15 human skeletons at Chemmani, confirming that the disappeared had been killed and buried by the army.

The Government ignored a request for an independent commission and instead an inquiry was held by officials of the Ministry of Defence under whose orders the military operation had been undertaken. Even though, several requests were made to the HRC, followed by a demonstration in front of its Regional office in Jaffna, it remained silent. In December 2002, after a lapse of 6 years, the HRC appointed a three member committee, under section 11(b) of the HRC Act, to inquire into 327 complaints. However, the committee investigated only 281 complaints, excluding those in which the complainant could not be reached or failed to respond to its summons. A summary of its report was published and the publication of a detailed report is awaited. The committee has done some commendable work and has come out with some excellent recommendations. So far there has been no response from the Government to the recommendations.

## **Custodial Torture and rape**

A Tamil woman aged 27 was arrested by the Police on 21 June 2000. She was detained in Police custody until she was remanded by the Magistrate under the PTA and sent to Negombo Prisons on 20 September 2000. Following a complaint to the HRC dated 31 October 2000, made on her behalf by an Attorney at Law, an HRC officer recorded her statement at Negombo Prison in which she complained of torture and rape. Since no action was taken by the HRC, lawyers attached to an NGO filed a fundamental rights application in the Supreme Court alleging torture and rape and she was awarded Rs. 250,000/- as compensation and was released. In this case, the HRC failed to refer this violation to court, a violation described by the Supreme Court as “barbaric, savage and inhuman”. The HRC also did not comply with the order of Court to submit the statement recorded by its officer from the victim. (S C.FR No.186/2001).

## **Torture**

For years, torture has been among the most widespread of the human rights violations reported in Sri Lanka. It has often resulted in the death or disappearance of the victim. For those victims of torture who survive, the filing of the FR has been the legal remedy available in Sri Lanka. The use of this procedure has been limited. The 1978 Constitution of Sri Lanka recognizes an individual's right not to be tortured and not to be subjected to arbitrary arrest,

detention and punishment, among others rights, and provides for recourse to the Supreme Court when rights are violated.

However, there are several constraints in invoking these rights. The time limit imposed by Article 126 of the Constitution requires that a FR must be filed within one month of the alleged infringement. In the past, this has prevented the victim from utilizing the legal remedies. It is a matter of solace that the Supreme Court has interpreted the provisions liberally in some cases and has allowed cases to be heard which fell outside the one month period. In its annual report of 1994, the Human Rights Task Force, in its recommendation for the prevention of torture, recommended the extension of the time limit for filing a Petition to six months.

The exclusive jurisdiction given to the Supreme Court in Colombo has presented difficulties to victims, especially those in the North East; who cannot travel to Colombo due to travel restrictions, the pass system and the difficulty in finding food and accommodation in lodges.

On 25 November 1994, a law was passed by Parliament to give effect to the Convention against Torture. However, several provisions which are stipulate in the text of the Convention against Torture are not provided for in the law. For instance, the Convention defines “torture” as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for purposes such as obtaining from him or a third person information or a confession...” However, is subsection (1) of Article 2 of the new law “suffering” is not explicitly made part of the definition of torture, and the purposes for which torture is inflicted is vested in an exclusive (rather than inclusive) way by the use of the words “for any of the following purposes’.

Impunity is a major problem and is a contributing factor to the continuance of torture. So far there are no reports of anyone have been charged under the Torture Act, despite several reports of torture and Supreme Court findings in several FR applications that victims have been tortured.