



## Review

## Implementation of Istanbul Protocol for effective documentation of torture – review of Sri Lankan perspectives

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## ABSTRACT

Documentation of torture is a multidisciplinary, multistage scientific procedure evolved over the past decades through the experience of various strata in medical and related fields. It plays a key role in effective corroboration of facts, providing redress to victims and also has a long term regulatory impact on prevention of torture in a society. The UN endorsed Istanbul protocol serves as the model for effective documentation of torture in the present context and there were many attempts in the recent years to create a systematic and uniform approach among professional bodies to document torture by adopting it to the local medico-legal and legal systems in some less resourced countries.

The post independent Sri Lanka is widely known in international human rights forums for the prevalence of torture and its endemicity since 1970s. The long term struggle to ensure justice to torture victims in Sri Lanka has been greatly enhanced by the submission of detailed medico-legal reports on them to relevant courts. As strengthening of medico-legal and legal reporting strategies were more focused towards the end of twentieth century the medico-legal and legal professionals in consensus attempted to use Istanbul Protocol for documentation of torture since 2004. However Sri Lankan experience on application of Istanbul protocol for documentation of torture signifies that unless and until a political commitment is shown by the government to internalize Istanbul Protocol into legal and medico-legal systems locally the expected outcome of effective documentation would not be evident.

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## 1. Introduction

The practice of torture by police, armed forces and other government allies has been an endemic phenomenon in most South Asian countries for past many decades and Sri Lanka is not exempted from it. In major international forums held during the last decade where the human rights profile of Sri Lanka was a subject, the issue of torture had received high prominence during the discussions. However Sri Lanka has not yet shown significant positive signs of attempting to combat torture through existing legislative and administrative and policing mechanisms. A recent retrospective study performed on torture methods adopted in Sri Lanka has revealed application of 68 different methods of torture.<sup>1</sup> In another recent study the researchers were able to detect 37 physical and psychological methods practised on torture victims.<sup>2</sup> A main international corroboration on broad practice of torture in Sri Lanka was provided by Dr. Manfred Novak the UN Special

Rapporteur on Torture in his press release following the visit to Sri Lanka in October 2007.

“Though the government has disagreed, in my opinion the high number of indictments for torture filed by the Attorney General’s Office, the number of successful fundamental rights cases decided by the Supreme Court of Sri Lanka, as well as the high number of complaints that the National Human Rights Commission continues to receive on an almost daily basis indicates that torture is widely practised in Sri Lanka. Moreover, I observe that this practice is prone to become routine in the context of counter-terrorism operations, in particular by the TID.”<sup>3</sup>

Despite its monarchical and colonial residues the most recent chapter on Torture in Sri Lanka begins with the onset of independence from colonialism in mid twentieth century. The term “torture” is first officially included in the 1978 constitution of Sri Lanka and there exists a lag period of thirty years from the year of independence up to 1978. If this lag period is carefully searched it would be evident that this era was full of events amounted to torture though they were not classified under torture and some

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events were unrecorded. Many public protests occurred in this period and the youth uprising in 1971 were brutally controlled by executing torture through government administrative machinery. Therefore the post 1978 events of torture in Sri Lanka which were widely recorded and publicised locally and internationally have its roots in the pre 1978 events which were distant memories to the present generation.

## 2. Definition of torture

Torture is a crime according to all international standards. According to the United Nations Convention Against Torture (CAT), 1984:

Torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person for any reason based on discrimination of any kind, when such pain or suffering 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. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.<sup>4</sup>

The Istanbul Protocol (IP) also follows the same definition.

## 3. Medico-legal investigation of torture in Sri Lanka

Sri Lanka made its obligations clear at least to the international community with the ratification of UN Convention Against Torture (CAT) and the subsequent enactment of it through local legislation in 1994. However the real strength of this ratification or the local legislation of CAT was never evident in its full capacity in Sri Lanka. The UN special rapporteur has also commented about the failure of the Sri Lankan Torture Act in his press release in 2007.

"I appreciate that by enacting the 1994 Torture Act, the Government has implemented its obligation to criminalize torture and bring perpetrators to justice. I am also encouraged by the significant number of indictments filed by the Attorney General under this Act. However, I regret that these indictments have led so far only to three convictions. One of the factors influencing this outcome is reportedly because of the Torture Act's high mandatory minimum sentence of seven years; it is effectively a disincentive to apply against perpetrators. Other factors are the absence of effective *ex-officio* investigation mechanisms in accordance with Art 12 CAT, as well as various obstacles detainees face in filing complaints and gaining access to independent medical examinations while still detained."<sup>3</sup>

The CAT act is now considered as a part of the criminal law in Sri Lanka. Hence it is well apparent that detailed crime scene investigation and victim examination procedures must be followed in all investigations pertaining to allegations of torture. However unlike in other criminal offences one crucial factor stands between the torture victim and the final investigation report in Sri Lanka. That is the investigative mechanism which is obviously the police to which the perpetrator often belongs to. The absence of an independent special investigations unit within the government to inquire about allegations of torture levelled against armed forces, police and other officials has certainly aggravated the circumstances over the years. Therefore the attempts of flawed investigations, delayed investigations, false accusations made against victims and threatening victims and their families have been necessarily a part of the routine investigation procedures into the alleged torture incidents. In such a deteriorating pre trial situation the effective medical

reporting of torture in Sri Lanka was responsible to a greater extent for effective corroboration of facts to establish liabilities of alleged perpetrators in fundamental rights cases during last 25 years. The reported Supreme Court cases in Sri Lanka on Article 11 of the constitution will bear witness for this fact.

The present medico-legal system in Sri Lanka has many of its roots in the British system acquired through the colonial relationship. However the full time specialist forensic practitioners in Sri Lanka, known as consultant Judicial Medical Officers (JMOO) are performing both clinical forensic and forensic pathological work simultaneously unlike in UK and Australia. Thus the routine case-load of a Judicial Medical Officer (JMO) has significant impact on his/her performance. This is more relevant when it comes to examination and documenting findings of a torture victim which is generally a time consuming procedure. In a situation where the increasing number of torture victims need to be examined routinely, the JMOO have to be vigilant regarding the maintenance of the standards of documentation procedure.

## 4. Istanbul Protocol: contents and its significance

It has been verified by previous international experience that effective documentation is one realistic method of reducing and preventing torture in a given community.<sup>5</sup> In this background, the Istanbul Protocol provides a strong platform to conduct scientific investigation of torturous practices adopted and record findings for courts to follow in the future proceedings. The requirement for proper medical documentation of torture has been evolved over the years as a part of the core concept of necessity for effective investigation into torturous practices. The main developments related to investigation of torture over the last 50 years were observed in following areas:

- Standard medical examination methods
- International legal standards
- Ethical codes

The Istanbul Protocol<sup>6</sup> (IP) is the condensed version of all the above. The IP is a consensus document finalised in a meeting in Istanbul in 1999 and subsequently endorsed by the (then) UN High Commissioner for Human Rights. It was set up as a protocol for investigations by a commission of enquiry into past allegations of torture, and the sections on medico-legal assessment are less than half of it. It did also allow an NGO to challenge official reports that did not comply with the IP by providing alternative reports. Although Sri Lanka was represented in the initial meetings of formulating IP it is still not incorporated to official medico-legal practice in Sri Lanka.

Its main contents are:

### Introduction

- 1) Relevant International Legal Standards
- 2) Relevant Ethical Codes
- 3) Legal Investigations of Torture
- 4) General Interview Considerations
- 5) Physical Evidence of Torture
- 6) Psychological Evidence of Torture

### Appendices

- Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Diagnostics Tests
- Anatomical Drawings for the Documentation of Torture
- Guidelines for Medical Evaluations of Torture and Ill Treatment

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