

Regional Briefing Paper

The Legacy of Mass Torture and The Challenge for Reform in Asia

Indonesia, Myanmar, Sri Lanka, Timor-Leste

A joint paper by AJAR, Acbit, KontraS, and NPC



Acknowledgements

Research and publication costs for this paper were supported by the European Union. The contents of this document are the responsibility of AJAR, KontraS, AcBIT, NPC, Legal Clinic Myanmar & Wimutti Volunteer Group, under no circumstances can they be regarded as reflecting the position of the European Union.

About AJAR

AJAR (Asia Justice and Rights) is a regional human rights organization based in Jakarta. AJAR works to increase the capacity of local and national organization in the fight against entrenched impunity and to contribute to building cultures based on accountability, justice and a willingness to learn from the root causes of mass human rights violations in Asia Pacific region.

Please visit: www.asia-ajar.org

About KontraS

KontraS (Commission for the Disappeared and Victims of Violence) was established in 1998 by Indonesian human rights NGOs and student organizations in response to the increase in political violence and abductions committed toward the end of Soeharto's authoritarian regime. KontraS is working toward a democracy based on people's sovereignty, free from fear, oppression, violence, and human rights violations.

Please visit: www.kontras.org.

About AcBIT

Associaaon Chega Ba Ita (AcBIT) aims to promote the values and principles that served as foundation for the work of the CAVR (Comissão de Acolhimento, Verdade e Reconciliação de *Timor-Leste*), including human rights, justice and reconciliation. We are committed to bringing the lessons of the past to guide our decisions and choices as individuals and as a society, working towards the fulfillment of the promise for a better future for all.

Please visit: www:chegabaita.org

About NPC

The National Peace Council (NPC) was established as an independent and impartial national non-government organization on 2 February 1995. The formation of the NPC was the culmination of a process that began with a campaign against election violence in July 1994, launched by an inter-religious group of individuals and organizations. The strategic interventions made by this group during the 1994 Presidential Election campaign specifically, and for a peaceful and permanent resolution to the protracted conflict generally, led to the organization of the first National Peace Conference the same year. The vision and mandate of a National Peace Council were formulated at this conference, leading to the establishment of the NPC the following year.

Please visit: www.peace-srilanka.org

Front Cover: Anne-Cecile Esteve for AJAR

Cover back: Poriaman Sitanggang for AJAR

This paper is a synthesis of four country studies on Indonesia, Timor-Leste, Sri Lanka, and Myanmar, with a special focus on accountability, healing, and gender justice after periods of mass torture. The experience of these countries reveals patterns of torture and impunity, as well as major challenges for accountability, healing, and gender justice. The briefings also allow some brief findings on the impact of torture on democratization, and on the role of human rights institutions, and point to broad but concrete recommendations for these and other states dealing with a legacy of torture.

1. Patterns of torture and impunity

Each of the four countries had some colonial antecedents for torture or arbitrary detention, with the practice increasing after independence during periods of internal conflict, authoritarianism, or both. For example, when Emergency Regulations gave the Sri Lankan armed forces powers to arrest and detain suspects, the army increased the use of torture for punishment and to elicit confessions. In Indonesia, the anti-communist violence of 1965 was accompanied by widespread torture practices that continued during longstanding conflicts in Timor-Leste, Aceh and Papua. In these areas, as in conflict zones in Sri Lanka and Myanmar, the military, police and intelligence personnel used torture, rape, and sexual violence as a strategy to suppress dissent and intimidate others.

The victims fell into three broad groups: those suspected of having links to armed groups, political prisoners, and ordinary criminal suspects abused at the hands of police. Many women in conflict areas were targeted as proxy victims because their husbands had gone to the mountains or jungles (see box). As with other human rights violations, women experienced torture and its aftermath differently than men. In Timor-Leste, for example, the suffering for women was threefold: physical trauma, sexual violence and then ostracism by community and family long after the

conflict ceased. In contrast, many male victims of torture were later recognized by the state for joining the organized resistance struggle. In Indonesia, Sri Lanka, and Myanmar as well, many women victims still face ongoing trauma, stigmatisation from their community, and economic deprivation.

“

The soldiers ... labeled me and a few other women as rebel sympathizers. Almost every day we were forced to join their operations to look for ... our husbands in the forest and mountains. We often rode in trucks and were ordered to walk in front. They didn't care if it rained or was hot; they still forced us to join them. We were also questioned, beaten and forced to cook. If they tortured us they played a tape recorder really loudly with the speakers placed outside the building, placed on the treetops, so that those living close by could not hear our screams and cries.

Once I was taken in a helicopter to look for my husband in the mountains. I was forced to yell out to my husband to surrender while they said that they would drop me out of the helicopter into the sea if my husband could not be found.”

—Saranah, Aceh, Indonesia, in *Enduring Impunity*, pp. 123-4



Photo: Anne-Cecile Esteve for AJAR



Maria Fernandes escaped from Maubessi in 1975 when Indonesian military reached her town. She was detained in 1982 and tortured at the district military command. **“There are many things that I can’t forget because they still hurt me when I remember them. However since independence I do feel better. Many people in the community know how I suffered from the violence I experienced”**

Both male and female survivors in the four countries reported profound physical and psychological consequences: long-lasting physical injuries, psychological trauma, social exclusion, and economic consequences, including disruptions to their livelihood, health problems, and official harassment.

2. Major obstacles

Accountability

In the Myanmar briefing paper, the case of Aung Kyaw Naing, aka Ko Par Gyi, a freelance journalist allegedly tortured and killed in military custody in Myanmar’s Mon State in 2014, crystallizes the major obstacles to accountability across the region: a closed military justice system, an ineffective national human rights institution, failure to prosecute despite physical evidence of torture, and harassment of victims and their families.

Across the region, weak legal and judicial systems stand in the way of holding torturers accountable. Because legal codes lack a definition or criminal offense of torture, prosecutors either fail to act or must use other, less effective charges if they pursue action at all. For example, neither Indonesia’s criminal code, not the military penal code, includes specific legal provisions that criminalize torture.

In all four countries, and in many others around the world, separate military justice systems pose a second major obstacle to accountability. They tend to

be ineffective and opaque, manufacturing impunity and obstructing victims’ search for justice. In Myanmar, military courts have competence over all defense personnel with no civilian oversight, while police are allowed to handle their own torture cases through opaque internal administrative procedures. In Indonesia, the Law on Military Courts maintains impunity by blocking external oversight, while the absence of a vetting policy means that personnel linked to serious crimes continue to serve, receive promotions, and sit in elected office. Although the armed forces and the police issued regulations prohibiting torture, they are administrative in nature, and do not carry a criminal penalty.

As noted in the Indonesia briefing, much more could be done even within the existing legal framework, but a lack of political will to prevent torture and punish those responsible have left victims with little hope for justice. Even where laws and institutions exist to hold perpetrators accountable, they are not effectively used. In Sri Lanka, according to the civil society shadow report to the UN Committee against Torture, of 95 cases of torture referred to the Attorney General by 2012, only six have been filed against perpetrators. Timor-Leste has ratified a criminal code that criminalizes acts of torture, and its procedural law does not recognize the validity of evidence obtained through torture, but these mandates have yet to be tested in court.

Rehabilitation and Healing

Torture victims in these four Asian countries live within societies that already suffer from inadequate social safety nets. Compounding this problem is the lack of special programs for victims. In Timor-Leste, victims of torture must try to get assistance through existing programs for “vulnerable persons” or veterans, for which they may have difficulty qualifying. In addition, it takes funds and family support to travel from remote areas to access resources, particularly for those with a physical disability. In Myanmar, torture survivors largely lack access to basic support services such as health and medical care, psychological support, legal assistance, and livelihood opportunities.

With almost non-existent government programs, the gap is filled by local civil society organizations who are small, under-resourced, and mostly clustered in the urban areas. What's more, especially in ethnic areas, provision of services by civil society groups remains risky in cases of torture by military or police. This same pattern is found also in the three other countries.

Meeting these needs, as discussed in the recommendations, requires a three-pronged approach, with adequately funded and targeted government programs, support to civil society and self-help groups, and an end to the stigma and impunity that traps survivors in fear and isolation.

Gender justice

In these four countries, as in many others, the failure to acknowledge sexual violence serves as further obstacles to both accountability and healing. In Myanmar, authorities have reportedly interfered in efforts to address sexual and gender-based violence, blocking victims' access to justice and to support services. In Indonesia, the Committee against Torture's first Concluding Observations noted inadequate protection against rape and other forms of sexual violence allegedly used as forms of torture and ill-treatment.

Even in Timor Leste, with an internationally-backed justice mechanism, the Special Panels for Serious Crimes, only eight of 95 indictments involved gender-based crimes. Although one of those resulted in a conviction on a charge of rape as a crime against humanity, an important legal milestone, the court did not address sexual slavery and other forms of gender-based violence. Many women torture survivors remain vulnerable, and are unable to obtain proper documentation for their children who were born of rape, barring access to education, inheritance, and other legal rights. In all four countries, women who have lost husbands due to torture and women whose husbands were disappeared face poverty and loss of access to land due to legal and cultural bias.

3. The impact of impunity on democratization and the rule of law

The briefings indicate that a lack of accountability, official recognition and political space to discuss the history of torture is not just a problem for the victims of past crimes. These failures can contribute to an ongoing situation of impunity. In Timor-Leste, the need to end impunity for past violations was felt to be essential to a functioning judicial system and security sector today. With no effective court procedure to prosecute perpetrators of torture, both police and members of the military continue to punish detainees with ill-treatment and beatings.

In Sri Lanka, decades of emergency conditions significantly undermined the rule of law. To rebuild the rule of law, as well as create conditions for lasting peace and reconciliation, accountability for past torture will be essential. Similarly, in Myanmar, a torture survivor and CSO leader named Khin Mi Mi Khine, explained:

It will be very dangerous if we do not learn from the past about how to build the best systems and policies for our country. Human rights violations are still ongoing and widespread. If we do not solve the root causes of the problems, how can we go through national reconciliation? How can we reform the country to move towards positive peace and democracy?¹

The Indonesian government's failure to acknowledge widespread torture, or to prosecute perpetrators, prevent recurrence, and offer reparations, has allowed torture to become embedded within the state security apparatus even after a transition to democracy. Democracy does not ensure an end to torture, while such torture can undermine a transition by restricting basic freedoms and damaging the credibility of such essential institutions as the police and the judiciary.

¹ AJAR, Myanmar Legal Center and Wimutti Volunteer Group, "The Legacy of Mass Torture and Challenges for Reform," 2016.

4. The role of national, regional, and international human rights mechanisms in strengthening accountability

National human rights institutions can and should play an essential role in monitoring torture, as well as assisting states to fulfill the recommendations below by supplying technical expertise and public pressure.²

All four countries have national human rights institutions, though none have realized their full potential to monitor or prevent torture. Under its current enabling law, Myanmar's commission does not yet meet international standards and lacks the independence and political will to act. In Indonesia, a major obstacle is the Attorney General's failure to prosecute despite recommendations of the National Commission on Human Rights on a wide range of violations. In Sri Lanka there is a long history of appointing committees and commissions to look into and report on atrocities with few concrete results. In Timor-Leste, the Ombudsman for Human Rights and Justice has the power to conduct inquiries on human rights violations, monitor and advise on policy. However, it has yet to pursue current cases of alleged torture or ill-treatment, or to pressure the government to provide rehabilitation to thousands of torture survivors.

Especially where national mechanisms are weak, international mechanisms such as Special Rapporteurs, the Committee against Torture, and the Universal Periodic Review of the Human Rights Council take on especially important roles. The UN Special Rapporteur on Torture visited Indonesia in 2007, and Universal Periodic Review for all four countries have raised concerns about the incidence of torture, with

² See *Preventing Torture: An Operational Guide for National Human Rights Institutions*, Asia Pacific Forum of National Human Rights Institutions, Association for the Prevention of Torture, Office of the United Nations High Commissioner for Human Rights, May 2010.

recommendations to address the issue. In 2008 the Committee against Torture expressed deep concern in Indonesia over widespread torture and ill-treatment, insufficient safeguards during detention, and the disproportionate use of force during military operations.

However, these international mechanisms are still not maximally effective, due in part to the failure of these states to ratify crucial tools for enforcement and oversight such as the Second Optional Protocol to the ICCPR or the Optional Protocol to CAT, and Myanmar has yet to sign the CAT itself.

Another major problem is the absence of an effective regional human rights body. The relatively young ASEAN Intergovernmental Commission on Human Rights, which includes Myanmar and Indonesia (and perhaps Timor-Leste in the near future), does not have a mechanism for complaints or country visits, despite lobbying efforts by civil society, and has been criticized for lack of independence and staff. Sri Lanka's regional body, SAARC, has no human rights mechanism.

5. Concrete recommendations for promoting accountability and preventing torture in Asia

While the country briefings contain specific recommendations, it is also possible to identify some broad areas requiring action in these and other countries dealing with transitional justice and a legacy of torture.

Legal reform for accountability and prevention

- 1. Define and criminalize torture** in the national legal code, without exception for emergencies and incorporating the main elements of the UN Convention against Torture.
- 2. Conduct a comprehensive review** of any other laws, orders, directives, procedures, rules, regulations, by-laws and notification regarding torture, in

order to improve prevention, monitoring, and remedies. Include prohibitions on using evidence obtained through torture in court, and protection of witnesses and complainants against intimidation.

3. **Lift repressive laws** that permit the prolonged, arbitrary, or incommunicado detention on broad charges, politically motivated charges, or no charges at all, as these are major risk factors in the incidence of torture.
4. **Dismantle separate and ineffective justice systems** for the military or police for criminal behavior, such as torture. Uniformed officials are responsible for most cases of torture, due not only to the lack of training and safeguards, but also the failure to hold perpetrators and their superiors responsible.
5. **Strengthen legal aid** programs, with a special focus to assist victims of torture to bring perpetrators to justice.
6. **Ratify, incorporate into domestic law, and comply with** relevant international instruments:
 - Ratify the Convention against Torture (Myanmar only)
 - Ratify the Optional Protocol to the Convention against Torture to allow country visits (all four countries)
 - Ratify the first Optional Protocol to International Covenant on Civil and Political Rights
 - Support development of an effective regional human rights mechanism
 - Promptly implement all recommendations from UN mechanisms, particularly the Universal Periodic Review, the UN Human Rights Committee, the UN Special Rapporteurs, and Committee against Torture.

Healing and other reparations

1. **Support local efforts:** AJAR's experience shows that community-based healing strategies that facilitate peer support can be very effective, and that survivors of torture living in extreme conditions have an

extraordinary capacity for resilience and self-help.

2. **Acknowledge past torture:** official recognition and acknowledgement is a first step in providing justice for victims, encouraging individual healing and reconciliation at a societal level.
3. **Include victims' voices in high-level political dialogue:** Discussions about reconciliation must reflect the will of survivors, addressing victims' rights to truth, justice, reparations and guarantees of non-repetition
4. **Create and fund national rehabilitation programs** that address survivor's medical, psychological and material needs. Such reparative measures for torture survivors must be discussed in peace process discussions, national budgeting, and social policy. These measures must address the urgent needs of torture survivors, including:
 - access to health care for resulting injuries and illnesses.
 - psychosocial support in the form of mental health counseling, appropriate to the context and accessibility, including community-based trauma healing strategies that facilitate peer-to-peer support.
 - livelihood needs, including access to education or vocational training, employment opportunities, and capital.

Gender justice:

- **Increase women survivors' access to services and programs that improve their social and economic** standing, and therefore their ability to access justice.
- **Assist women survivors to form self-help groups** as a platform for accessing information and services, sharing and documenting their stories, and empowering themselves to combat discrimination.
- **Focusing on survivors of sexual violence, provide long-term rehabilitation** through appropriate services and support for women and their children, combined with community-based education to overcome deeply engrained discrimination and challenge social norms

