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# POST-WAR JUSTICE IN SRI LANKA

RULE OF LAW, THE CRIMINAL JUSTICE SYSTEM  
AND COMMISSIONS OF INQUIRY

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## ABBREVIATIONS

AC	Appeal Cases [a United Kingdom publication of law reports]
AG	Attorney General [the chief legal officer of the State and the Head of the Attorney General's Department of Sri Lanka]
AHRC	Asian Human Rights Commission
AI	Amnesty International
A-L	Advanced Level Examination
ALR	Appellate Law Recorder [a Sri Lankan publication of law reports]
ASP	Assistant Superintendent of Police [upper-rank officers having wide range of powers]
BC Pact	Bandaranaike-Chelvanayakam Pact
CA	Court of Appeal
CAM	Court of Appeal Minutes
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CC	Constitutional Council
CCP Act	Code of Criminal Procedure Act, No. 15 of 1979 (as amended) [a statute]
CCPR	Committee on Civil and Political Rights
CLW	Ceylon Law Weekly
CHRD	Centre for Human Rights and Development
CID	Criminal Investigation Division [of the Sri Lanka Police Department]
CJC Act	Criminal Justice Commission Act
CO	Concluding Observations
COI Act	Commissions of Inquiry Act
CRM	Civil Rights Movement
CSU	Counter Subversive Unit
DDC	District Development Council
DIG	Deputy Inspector General [of Police]
DIU	Disappearances Investigation Unit
DNA	Deoxyribonucleic Acid
DPP	Director of Public Prosecutions
DSCP	Decisions of the Supreme Court on Parliamentary Bills
DSG	Deputy Solicitor General
EMPPR	Emergency (Miscellaneous Provisions and Powers) Regulation No 1 of 2005 as contained in Gazette No 1405/14
EPRLF	Eelam People's Revolutionary Liberation Front
EROS	Eelam Revolutionary Organization of Students
FP	Federal Party
FR	Fundamental Rights
FRD	Fundamental Rights Decisions
HC	High Court [of the Provinces in Sri Lanka]
HCA	<i>Habeas Corpus</i> Application
HCM	High Court Minutes
Hon.	Honourable
HQI	Head Quarters Inspector
HRCSL	Human Rights Commission of Sri Lanka
HRTF	Human Rights Task Force
IATR	International Association of Tamil Research

IBA [HRI]	International Bar Association [Human Rights Institute]
ICC	International Coordinating Committee of National Human Rights Institutions [United Nations]
ICCPR	International Covenant on Civil and Political Rights
IGP	Inspector General of Police
IIGEP	International Independent Group of Eminent Persons
IPKF	Indian Peace Keeping Force
JOC	Joint Operations Command
JSAB	Judicial Services Advisory Board
JSC	Judicial Service Commission
JSDB	Judicial Services Disciplinary Board
JVP	Janatha Vimukthi Peramuna
LST	Law & Society Trust
Lt. Col.	Lieutenant Colonel of Army
Lt. General	Lieutenant General of Army
LTTE	Liberation Tigers of Tamil Eelam
MC	Magistrate Court
MIRJE	Movement for Inter-Racial Justice and Equality
MP	Member of Parliament
MPU	Missing Persons Unit
MSF	Medecins Sans Frontieres
NLR	New Law Reports [a Sri Lankan publication of law reports]
NPC	National Police Commission
NSSP	Nava Sama Samaja Party
OIC	Officer-in-Charge
O Level	Ordinary Level Examination
P.C.	President's Counsel
PCIIRP	Presidential Commissions of Inquiry into the Involuntary Removal of Persons
PLOTE	People's Liberation Organization of Tamil Eelam
PSO	Public Security Ordinance, No. 25 of 1947 (as amended) [a statute]
PTA	Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979 (as amended) [a statute]
QC	Queen's Counsel
RCT	Rehabilitation and Research Centre for Torture Victims
RI	Rigorous Imprisonment
SC	Supreme Court [of Sri Lanka]
SCM	Supreme Court Minutes
SC (FR) No.	Supreme Court Fundamental Rights Application Number
SC Ref No.	Supreme Court Reference Number
SC (Spl.) L.A. No.	Supreme Court Special Leave Application Number
SD No.	Supreme Court Determination Number
SLFP	Sri Lanka Freedom Party
SLMC	Sri Lanka Muslim Congress
SLRC	Sri Lanka Rupavahini Corporation
SPCI Law	Special Presidential Commissions of Inquiry Law No. 7 of 1978 (as amended)
Sri LR	Sri Lanka Law Reports [a Sri Lankan publication of law reports]
SSP	Senior Superintendent of Police [upper rank officers having wide range of powers]

TAB	Trial-at-Bar
TELO	Tamil Eelam Liberation Organization
TUF	Tamil United Front
TULF	Tamil United Liberation Front
TYL	Tamil Youth League
UN	United Nations
UNHRC	United Nations Human Rights Committee
UNP	United National Party
UNWG	United Nations Working Group
US	United States
UTHR	University Teachers for Human Rights

## Executive Summary

Enforced disappearances and unlawful killings shock the conscience of the community and demand a public accounting by the state to its citizens and to victims (meaning, all those harmed by the violation). As with all human rights violations, victims have a right to an independent inquiry and an appropriate remedy. This report addresses the systematic absence of an adequate remedy in Sri Lanka – notwithstanding the establishment of a long line of commissions of inquiry between 1977 and 2001 – a period of widespread disappearances and unlawful killings during waves of violent political unrest and internal armed conflict.

As stated in the title of the report, the focus is on gross violations of non-derogable rights that amount to serious breaches of peremptory (*jus cogens*) international norms, whether the State acted directly or sanctioned these crimes indirectly. Non-state and individual private actors can similarly find themselves subject to prosecution for gross violations such as genocide and killings that amount to serious crimes under international law due to their shocking or systematic nature, whether during or outside of armed conflict. State responsibility for guaranteeing a remedy for such crimes transcends domestic jurisdictions as an obligation of all states (*erga omnes*).

Gross violations of human rights give rise to a clear right of victims (all of those harmed by the violation) to know the truth about what happened to their loved ones, to access a judicial remedy, and to receive reparations.<sup>1</sup> In assessing its fulfilment of these obligations, this report necessarily looks beyond the regular criminal justice system to an assessment of Sri Lanka's many commissions of inquiry, appointed ostensibly to demonstrate the government's commitment to independent inquiry where the nature of harms alleged shocks the public confidence and necessitates extraordinary measures to ensure accountability. In fact, as the report shows, neither the regular criminal justice system nor the commissions of inquiry appointed by successive governments, have been able to satisfy the state's obligations to its citizens.

The objective of this report is to document and learn lessons from this history that will be important in today's post-war environment to finally come to grips with the systemic impunity that plagues Sri Lanka's democracy. While historical in nature, one need only acknowledge the lack of any significant institutional or legal reform since 2001 to realize the importance of these lessons today.

When gross human rights violations occur, governments, victims and the broader domestic and international community often look to the establishment of commissions of inquiry. These commissions are usually intended to achieve three purposes which

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<sup>1</sup> A 'remedy' is often seen as procedural only, separate from substantive 'reparations'. The UN's most clear elaboration of relevant principles in this regard is the (updated) 2006 *United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, A/RES/60/147, 21 March 2006. Article VII describes the three components of a victim's right to a remedy as access to justice, reparations, and truth. For a detailed discussion on international law and principles related to truth, justice and reparations, see International Commission of Jurists, *The Right to a Remedy and to Reparation for Gross Human Rights Violations – A Practitioners' Guide*, December, 2006.

government agencies may be unable or reluctant to pursue, or with regard to which the public may not trust the regular criminal justice system to act: first, they determine as best as possible – usually below the standard of ‘beyond a reasonable doubt’ – the truth about the circumstances in which alleged harms were committed, including the level of state involvement and the disclosure of crimes that merit individual determinations of guilt (beyond a reasonable doubt) and delivery of justice by criminal courts; second, they make their findings public, satisfying the public demand for acknowledgement and clarification of the harms and the level of state responsibility; and, third, they can recommend policy and institutional reform measures to prevent recurrence.<sup>2</sup>

The first two chapters describe the political and historical context, the response of Sri Lanka’s Supreme Court and Court of Appeal to grave human rights abuses and a series of illustrative cases that has shaped the criminal justice system and impacted on the independence of the judiciary. This overview goes beyond 2001 and traces important changes in the role of the judiciary and its relationship to the executive branch up to the present day. No such significant change has occurred in the way the criminal justice system functions as a whole since 2001, and the analysis of this system is limited to illustrative cases prior to 2001. This historical record is one of a failure of all three branches of the state – the executive, legislature, and judiciary – in guaranteeing remedies and reparations for victims of human rights violations. The data is sufficient to establish that the failure of the justice system as well as the patterns of impunity disclosed therein, are systemic. The nature of this failure explains why, without systemic reform, we cannot expect a different response by the legal system to existing patterns of violations.

Chapters three and four describe and assess successive commissions of inquiry in Sri Lanka established between 1977 and 2001 to respond to allegations of gross human rights violations in the form of enforced disappearances and extra-judicial, arbitrary or summary executions. The concept of ‘gross’ human rights violations as used here refers to violations of non-derogable human rights causing irreparable harm that are frequently codified as crimes under international law. In addition to those crimes that are the noted focus of this report, other related categories of gross violations include genocide<sup>3</sup>, crimes against humanity,<sup>4</sup> and war crimes.<sup>5</sup>

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<sup>2</sup> Reparations principles include guarantees of non-repetition, which are particularly important where gross violations have occurred and led to demands by citizens for a public accounting and steps to prevent recurrence. See Art. 23, *United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, A/RES/60/147, 21 March 2006.

<sup>3</sup> Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group – see Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide - Adopted by Resolution 260 (III) A of the United Nations General Assembly on 9 December 1948.

<sup>4</sup> Article 7 of the *Rome Statute* of the International Criminal Court defines crimes against humanity as “any of the following acts [including enforced disappearances and torture], when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack [...]” (Document A/CONF.183/9 of 17 July 1998, corrected by *procès-verbaux* of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The

Successive commissions of inquiry into gross human rights violations have been unable to overcome the systemic weaknesses of the criminal justice system analyzed in the first half of the report. The same analysis can be applied to the commission of inquiry established by the Government of Sri Lanka in 2006 to investigate fifteen (later increased to sixteen) selected incidents of grave human rights violations, all of which occurred due to the conflict in the North and East, was predestined to be a failure right from the start. This most recent commission of inquiry wound up its proceedings in June 2009 prior to completion of its tasks due to its mandate not being extended by the Presidential Secretariat.<sup>6</sup>

Chapter five draws upon the historical record contained in the preceding chapters in analyzing as a whole the state's response to violations of the right to life. This chapter proceeds through a series of categories, from the conduct of investigations and prosecutions to trends in judicial decision-making, and a number of other crucial matters including witness protection and respect for international human rights norms.<sup>7</sup>

What follows is a summary of some of the key themes discussed in more detail in the report.

## 1. Commissions of Inquiry

The following multiple focus is reflected in the analysis:

1) Examination of the establishment, functioning and findings of Commissions of Inquiry from 1977 to 2001, effectively covering the entire gamut of such bodies

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Statute entered into force on 1 July 2002). This definition has also been retaken by the UN Human Rights Committee in its *General Comment No 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para 18.

<sup>5</sup>Article 8 of the *Rome Statute* defines war crimes as "grave breaches" of the laws of armed conflict as codified in the Geneva Conventions of 1949, including acts against protected persons such as wilful killings, torture, denial of fair trial, and attacks on civilian populations. Customary international law requires all states to prosecute or extradite persons alleged to have committed grave breaches of the Geneva Conventions.

<sup>6</sup>The full report of this Commission has yet not been made public. For recent critiques of the Commission's functioning, see Amnesty International's *Twenty Years of Make-Believe, Sri Lanka's Commissions of Inquiry*, June 2009 and University Teachers for Human Rights (Jaffna); *A Travestied Investigation, Erosion of the Rule of Law and Indicators for the Future of Minorities in Lanka*, Special Report No 33, 2009.

<sup>7</sup>Two sets of guidelines are standard references, and are included in full in annexes to this report: *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, A/RES/60/147, Resolution adopted by the General Assembly, 16.12.2005 (hereinafter: *UN Principles on Reparation*); *UN Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, Report of the independent expert to update the set of principles to combat impunity, Diane Orentlicher, E/CN.4/2005/102/Add.1, 08.02.2005 (hereinafter: *UN Updated Principles on Impunity*), also recommended by the Commission on Human Rights Resolution E/CN.4/RES/2005/81, 21.04.2005. The UN Commission has noted in its resolutions on impunity that these principles already have been applied at regional and national levels: E/CN.4/RES/2004/72, 21.04.2004, para 16; E/CN.4/RES/2003/72, 25.04.2003, para 14; E/CN.4/RES/2005/81, para 21

appointed under the Commissions of Inquiry Act, No. 17 of 1948 (as amended)<sup>8</sup> during this period to inquire into grave human rights violations;

2) Examination of credible data in connection with prosecutions for enforced disappearances and extrajudicial executions which were recommended by prior commissions of inquiry

3) Examination of credible data in connection with prosecutions for enforced disappearances and extrajudicial executions which were not initiated by recommendations of commissions of inquiry;

4) Examination of Sri Lanka's justice system in order to identify the systemic causes of its consistent and comprehensive failure in redressing victims of grave human rights violations;

5) Recommendation of overall reforms to the relevant law and practice;

The analysis comprises firstly, a historical overview of the escalation of a culture of violence in Sri Lanka. Reliance placed on commissions of inquiry or ad hoc fact-finding bodies rather than on a properly functioning legal system to restrain abuses forms part of the historical background outlined in this section.

This is followed by a detailed examination of the proceedings, functioning and findings of nine commissions of inquiry (hereinafter, 'COIs') appointed by the executive from 1977 to 2001 to primarily inquire into extrajudicial executions and enforced disappearances<sup>9</sup> which have formed part of the country's political landscape since the 1970s. The recommendations of these COIs in regard to investigations, prosecutions and reforms of the relevant laws and regulations in each factual context are analysed. This precedes a general evaluation based on common issues of concern relating to the establishment of these bodies, their terms of reference, composition, procedures, powers and resources. The 2008 amendment to the COI Act receives specific attention in this regard. The third level of analysis is then contained in examination of the actual prosecutions (or lack thereof) that followed in consequence of these commission reports during later years.

Thereafter, broader patterns of judicial responses to grave human rights violations are examined, taking into account the actual mechanisms of *habeas corpus* and *de facto* impunity granted systematically to alleged perpetrators. At the crux of this impunity is the lack of independence of Sri Lanka's judiciary, itself part of broader weaknesses in the constitutional framework. Constitutionalism in Sri Lanka, meaning the higher-order commitments to principles of governance, including human rights and the rule of law, has been dramatically reshaped by successive captures of executive authority

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<sup>8</sup> Hereafter COI Act of 1948.

<sup>9</sup> The analysis engages in critical scrutiny of state actors, not with the intention of minimising the serious violations of civilian rights by non-state actors such as the Liberation Tigers of Tamil Eelam (LTTE) committed during the past decades of active fighting or by other militant groups including the Karuna Group, but on the premise that, as opposed to terrorist groups, the Sri Lankan State is held responsible for democratic governance within the framework of the law and the due functioning of legal institutions, police, prosecutions and the judiciary. The standard of accountability is therefore wholly different and it is against this necessarily high standard that State actions are measured.

through constitutional amendments, particularly in 1972 and in 1978. Failures in the criminal justice system are comprehensively evaluated and shown to owe a great deal to the politicization of the justice system precisely through the strengthening of executive power at the expense of an independent and effective judiciary.

The assessment underscores some commonly known and uncontroversial characteristics of COIs and their relationship to the criminal justice system and to government and the broader political regime:

1) That some COIs have been used by governments to expose the abuses of a previous political regime for partisan reasons or, conversely, when they have been appointed to inquire into abuses committed during that same administration, to escape accountability.

2) That the recommendations of these bodies - even when they have been functioning credibly - have had negligible impact insofar as actual prosecutions emanating from these findings are concerned. The question of legal accountability for grave human rights violations of civilians of the majority Sinhala ethnicity as well as the minority Tamil and Muslim ethnicity and others has remained unaddressed for decades.

3) That the lack of legal accountability for grave human rights violations has been buttressed by the culpable omissions of the State in failing to amend and reform its laws and regulations. Further, the provision of *de jure* impunity (laws providing cover for violations if done in 'good faith' and attempting to shut out the jurisdiction of the courts in the adjudication of possible violations) and *de facto* impunity (lack of political and prosecutorial will to initiate and pursue cases to an effective conclusion) has ensured that perpetrators of abuses are protected.

4) That the inadequacy of the judicial response to victims at all levels of the legal system, from the Supreme Court to the High Court, has aggravated and formed an integral part of these systemic failures. Even where individual judges have shown greater sensitivity at times, these efforts have been negated by the non-implementation of judicial orders by successive political establishments. The independence of the judiciary – the basis for securing the minimum standards for fair adjudication of these cases - has been persistently undermined.

## **2. Absence of state accountability**

The lack of state accountability for human rights violations in Sri Lanka crosses ethnic divides. Civilians of predominantly Tamil ethnicity were caught up in the conflict in the North and East, which intensified during most of the years from 1983 to 2009. Meanwhile, an estimated 40,000 Sinhalese youth were 'disappeared' during insurrectionist violence in other parts of the country during the 1980s and early '90s. Impunity transcends ethnic boundaries, as did the outcry against some of the gravest injustices in both contexts.

Out of these thousands of extrajudicial killings, only a few cases have been effectively investigated and prosecuted to a successful conclusion. Poignantly, the two most vivid cases in this regard claimed victims from both the minority and majority ethnic

communities. Krishanthi Kumaraswamy was a 17-year-old Tamil schoolgirl who was raped and murdered in 1996 by soldiers attached to the Chemmani checkpoint, together with the murder of her mother, brother and friend who went in search of her. In the second case, 25 Sinhalese schoolchildren of Embilipitiya, a Southern hamlet, were forcibly disappeared in 1989 by soldiers acting in collusion with their school principal, driven by an absurd but ultimately tragic desire for vengeance. In both these cases, junior officers were convicted while their superiors were left untouched, despite evidence (particularly in the Embilipitiya case) that responsibility for these grave crimes lay higher in the chain of command.

Failures in accountability for grave human rights violations have been abetted by emergency laws which have replaced the country's criminal procedure and evidence laws (based on the British legal codes) for most of the past three decades and which allow, *inter alia*, arbitrary arrests, incommunicado detention and the admittance of confessions made to police officers above a particular rank with the (virtually impossible) burden being on the detainee to prove that the confession was made involuntarily. The impact of these emergency laws on the ordinary law enforcement mentality has been so great that even during the intermittent 'ceasefire' periods in the past, when normal criminal procedure laws were restored, police officers continued to use extensive powers of search, arrest and detention earlier permitted under the emergency regime, regardless of the fact that these powers were no longer legally exercised. Practices of torture during these periods, regardless of ethnicity or race and governed only by whether the victim belongs to the socially and economically marginalized classes, have been well documented. The replacement of the normal law with emergency law is now taken for granted; emergency law was not lifted, even in part, after the military decimation of the LTTE in 2009.

### **3. Limitations of the investigative and prosecutorial system**

As this research highlights, Sri Lanka's investigative and prosecutorial system is seriously flawed. Lack of independent investigations and a hostile prosecutorial and overarching legal system has led to victims being penalized at all stages of the process, from the very first instance of lodging a first information in the police station to the protracted and intensely adversarial nature of legal proceedings, resulting in many victims and witnesses being coerced and compelled to change their testimony, again reinforcing the cycle of impunity that prevails. The killing of victims and witnesses has been a persistent feature of the country's troubled criminal justice system for many years.

Particularly in the North and East, the conflict led to the persecution and marginalization of the civilian population at the hands of a range of actors. These include government perpetrators who have been repeatedly and systematically implicated in human rights abuses, the LTTE, as well as by paramilitaries including but not limited to the Karuna faction, the latter acting allegedly in concert with some sections of government security forces in countering the LTTE. These victims have been traumatized at all stages of the legal process, ranging from transfer of cases (from local courts to judicial forums situated in predominantly majority provinces or the capital) to painfully protracted legal proceedings which they are required to attend despite financial and social hardships, with many of them living in refugee camps.

#### **4. Limitations of the Law**

At the level of the criminal law, due to the fact that involuntary or enforced disappearance does not constitute a crime in the Penal Code, the prosecution has had to rely on ordinary criminal offences such as abduction, abetment and conspiracy in order to file indictments. Proving these offences in situations of conflict has been immeasurably difficult. The non-incorporation of the doctrine of command responsibility in the criminal law has also been a serious fetter. Prosecutions on the basis of 'culpable omission', as found in prevailing penal law provisions, have not been effective. Interestingly, the Supreme Court has generally affirmed the doctrine of 'vicarious responsibility' in the context of its fundamental rights jurisdiction, even in regard to the working of emergency regulations. However, the extension of this doctrine to command responsibility in conflict situations has not been evidenced. The reform of the criminal law and prosecutions affirming the responsibilities of senior officers in situations of war, rather than the scattered trials of junior officers, is therefore imperative.

The irony of the status quo is that while grave human rights abuses are allowed, sanctioned and indeed, encouraged under extraordinary emergency laws, the manner of bringing to book those who commit abuses continues to be governed by archaic provisions of criminal law and criminal procedure, the provisions of which remain unsuited for modern day demands of accountability. The fact that acquittals often result in prosecutions of grave human rights violations is therefore not surprising. The perverse combination of extraordinary emergency laws in the modern age of counter-terrorism with the anachronism of Sri Lanka's criminal justice system must be addressed if principles of human rights and rule of law are to have any meaning in Sri Lanka.

#### **5. Limitations of the prosecutorial process**

The lack of political will to prosecute grave human rights violations is evidenced in the systematic patterns of non-indictments, acquittals/withdrawals, absence of appeals from acquittals and inadequate sentencing policy in respect of prosecutions of grave human rights violations that this research investigates.

The Department of the Attorney General has been coloured by clear patterns of politicization, particularly where the State is alleged to have committed a human rights violation that constitutes a crime under international law. Some activists have called for the establishment of a Prosecutor General's office, with a team of dedicated investigators and lawyers at its command. This is based on the reasoning that the investigative function must be legally supervised and that the prosecutorial role must be separated from the office of the Attorney General. However, guaranteeing the independence of such an extraordinary office is by no means assured. Even if the appointment is made by Parliament and the financial independence of the office is secured by payment from the Consolidated Fund as suggested by some past commissions of inquiry, earlier efforts towards securing the independence of such extraordinary offices have been singularly unsuccessful.

There is little doubt, however, that the prevailing system needs to be radically overhauled. Presently, there is no dedicated team of police officers entrusted with an

investigative function that could maintain its independence and effectiveness when investigating alleged human rights violations. Those officers attached to various units established for investigations are liable to be arbitrarily transferred at any given point of time. In an evident conflict of interest and faced with the prospect of arbitrary transfer, these officers are expected at times to investigate the actions of their own colleagues as the basis for the Attorney General Department's decision on whether or not to file an indictment. This practice has resulted in poor investigations and lacklustre prosecutions.

## **6. Conservative judicial attitudes**

It is a trite proposition, no doubt, that justice must be done according to the law. The law, in a criminal case, decrees that the prosecution is obliged to prove its case beyond a reasonable doubt. Reasonably, therefore, the Court cannot be expected to supply omissions on the part of the prosecution, *ex mero motu*, taking into consideration, a socio-political mores of the society at any given time. Yet the prevailing judicial attitude goes beyond this limitation, indicating a distinctly partial tendency to acquit the accused. This is exemplified in several acquittals in prosecutions in regard to the enforced disappearances of persons of both Sinhala and Tamil ethnicity examined in this research. Arguably, common to all these cases is a perception shared by prosecutors and the judges that these have been 'extraordinary times' and it would not be fair to impose strict standards of accountability on police officers and armed forces personnel. The higher judiciary therefore carries the enormous burden of restoring the values and principles of the rule of law as especially important to preserve in times of emergency, when principles of legal accountability have been proven vulnerable to patterns of impunity.

## **7. Restoration of faith in the constitutional process**

Underscoring the above analysis, it is an imperative that public faith in the constitutional process is restored. This requires the restoration of constitutionalism as a measure of the Sri Lankan state's commitment to foundational principles, including human rights and the rule of law. Adherence to the rule of law today in Sri Lanka – meaning adherence to the idea that in a democracy all stand equal before laws that protect fundamental rights - stands at its lowest point in post-independence history. The weakening and politicization of courts through constitutional amendments in 1972 and in 1978, including the Supreme Court, the government's bypassing of the 17<sup>th</sup> Amendment to the Constitution and loss of legitimacy in important monitoring bodies, such as the National Human Rights Commission and the National Police Commission, has resulted in a serious crisis of confidence in the judicial process and in constitutional institutions.

The Constitution itself must be reformed, but without legitimating the practice of constitutional change at executive whim. Despite many decades of enforced disappearances, we do not have a right to life constitutionally enshrined, unlike for example, the Indian Constitution, which has been used to good effect by India's Supreme Court in the voluminous spread of public interest litigation. Very recently, Sri Lanka's Supreme Court, due to the efforts of one or two of its liberal-minded judges, (in marked contrast to otherwise conservative judicial thinking), brought in an implied right to life, using the constitutional prohibition that no one should be

deprived of life unless through court order. However, these decisions remain vulnerable to later courts distinguishing or even departing from the principles so laid down. In any event, even where the Court has been bold in its interpretations, this has had minimal impact due to non-adherence by the political, law enforcement and military establishment. The need for the right to life to be incorporated as part of Sri Lanka's constitutional framework and its protection secured through relevant government policies, institutions, and practices, remains a priority.

## **8. Limitations of Commissions of Inquiry**

In this context, foremost among this report's recommendations is that commissions of inquiry must occupy their proper role vis-a-vis the prosecutorial system, and cease to be partisan mechanisms for punishing political opponents or for shielding perpetrators and institutions from responsibility for human rights violations.

An analysis of the role of commissions of inquiry must begin from an appreciation of the way in which COIs have been used in customary international law, and their specific statutory and customary use in Sri Lanka. In the broadest terms, what is important to understand is that a commission of inquiry is a response to an extraordinary situation in which the regular justice system is unable otherwise to fulfill the State's obligation to its citizens.

In order to understand the way in which commissions of inquiry in Sri Lanka have failed to uphold these purposes and maintain the integrity of the prosecutorial system, one must begin with the statutory framework. As analyzed in more detail below, successive governments in Sri Lanka have relied upon the limited statutory framework of the Commission of Inquiry Act of 1948 ('the COI Act') in order to respond to public demands for accountability where grave harms have occurred. The framers of the statute, however, primarily sought to facilitate much more limited inquiries concerning the administration of any department of Government or the conduct of any member of the public service. In other words, the COI Act 1948 was never contemplated as a legal framework for large-scale inquiries into allegations of gross human rights violations that in which the State is the alleged perpetrator. The Act is therefore silent on ensuring that disclosures of criminal acts lead to prosecutions, and in ensuring victim and witness protection, as well as protecting the rights of those who may be later charged with criminal offences.

Commissions of inquiry usually do not make final or binding determinations, nor are they focused on individual criminal responsibility. As a result, these inquiries are not bound by usual rules of evidence. While this allows greater flexibility in receiving testimony and establishing broad patterns and causes, it also can generate a contentious and politicized environment. Without adequate provision to safeguard the rights of alleged perpetrators and the safety of victims and witnesses, the commission can quickly become contentious and paralyzed by controversy and, frequently, threats and intimidation.

In practice, the prosecutorial process in respect of some of the very cases investigated by these commissions has shown no regard whatsoever to the findings of these commissions. Similarly, where prosecutions against army and police officers have been recommended by these commissions, these have been disregarded. Detailed

measures recommended in regard to reparations have also not been implemented beyond paying the victims small amounts of compensation. In addition, important limitations apply to their reports being made public. Consequently, public expectations in regard to the appointment of such commissions are minimal and invoke the most profound cynicism.

## **9. Methodology**

The analysis proceeds on an examination of published commission of inquiry reports together with confidential documentation that were part of these reports. In addition, it uses the vast resource base of information contained in other reports by government bodies (some of which are not easily accessible) and non-governmental organizations. This is supplemented by key interviews with those closely involved with the working of commissions of inquiry as well as with Sri Lanka's justice system.

As anticipated, analysis of the data in this regard was limited by the absence of an up-to-date database of information as well as by inherent difficulties in accessing any information available in the first instance, given that there is no right to public information in court registries and/or information in the hands of the Attorney General. Access to court records in Sri Lanka is fraught with difficulties; court registries only entertain requests for information on a particular case from a lawyer appearing in the case or a party proven to have a sufficient interest. Applications made in the public interest are generally disallowed. A statutory right to information which addressed, *inter alia*, the public's right of access to information held in government departments and courts still remains to be enacted into law though a draft bill was approved by the Cabinet as far back as 2003.

In addition, though statistical information in relation to prosecutions for grave human rights violations is given in the periodic reports that Sri Lanka furnishes to the United Nations treaty bodies through the periodic reporting procedure, this information is, at times, incoherent and disjointed. Consequently, reference to such statistics is based on best available information, supplemented as much as possible through information supplied ad hoc by the Attorney General's Department in the context of previous research engaged in by non-governmental organizations during alternative report writing to the UN treaty bodies.

A further observation is that the alleged perpetrators implicated in many of the incidents of grave human rights violations examined in this report are still serving in official positions, including some who were subsequently promoted. Politicians implicated in these crimes are also still in active politics. Thus, caution has been taken in referring to these alleged perpetrators insofar as specific identification of individuals is concerned.

## Chapter One – The Erosion of Judicial Remedies

This section provides an overview of the history of political conflict in Sri Lanka, its relationship with constitutional developments, and the dynamic and changing independence, impartiality and effectiveness of the judiciary.

### 1. Violence and the Political Process

Two singular legal events marked the early years of Sri Lanka's independence. This was firstly, the passing of the Public Security Ordinance ('the PSO') No. 25 of 1947 by the then State Council, barely hours before Sri Lanka's independence.<sup>10</sup> The PSO was passed not in an effort to suppress minority protests but rather to meet the threat of a general strike organised by leftist trade unions agitating against the failure of the Independence Constitution to secure workers rights. Members of these trade unions, including senior leftist leaders, were met with police violence when they attempted to hold meetings in the course of the protests. A number of protestors were seriously injured with one being killed in police fire.

The second event occurred soon after the country gained independence in 1948 with power being vested in the hands of an elected United National Party (UNP) government comprising the English-educated Colombo elite, when the Ceylon Citizenship Act No. 18 of 1948 ('the Citizenship Act') provided that no person shall be qualified to have his name entered or retained in any register of election if he was not a citizen of the country. The practical effect of the Citizenship Act was to deny citizenship to approximately one-million Indian Tamil estate workers who were summarily deprived of the right to vote which they had been able to exercise since the grant of universal franchise in 1931.<sup>11</sup>

Strong protests were articulated by Tamil politicians, most particularly, by S.J.V. Chelvanayakam who "foresaw in the legislation, dark times ahead for the minorities."<sup>12</sup> In the following year (1949), Chelvanayakam and other Tamil politicians formed the Federal Party, with 'Tamil self-determination within the state', being one of their main demands. Communal divisiveness became more pronounced as both the Sinhala and Tamil political parties resorted to expedient communal politics.

The Sri Lanka Freedom Party (SLFP) was formed by S.W.R.D. Bandaranaike in 1951 with its centre-left political orientation being buttressed by a mainly Buddhist Sinhala rural electoral base. Contesting from an electoral promise to establish the Sinhala language as the sole language of state, a SLFP-led alliance won the 1956 elections

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<sup>10</sup>The Public Security Ordinance (PSO) No. 25 of 1947 was passed on the eve of independence, on 16.06.1947, under the State Council (Order in Council) of 1931 (as amended subsequently by the State Council (Amendment) Orders in Council 1934 and 1935). It was passed under Article 72 of the Order in Council which enabled the Governor, "with the advice and consent of the Council to make laws for the peace, order and good government of the Island." The Preamble to the Act states that it was passed with the advice and consent of the Council.

<sup>11</sup>In the 1947 General Election, seven Tamil members of Parliament were elected by the workers in the hill country, see Sansoni Commission report, Sessional Paper VII – July 1980, at p. 71.

<sup>12</sup>Hoole, Rajan, *The Citizenship Acts and the Birth of the Federal Party*, University Teachers for Human Rights (Jaffna), *Sri Lanka, The Arrogance of Power; Myths, Decadence and Murder*, Wasala Publications, Colombo, 2001, at p. 7.

and Bandaranaike became the prime minister. The Official Language Act No. 33 of 1956 made Sinhala the sole medium of state affairs.<sup>13</sup> Though the other main political party, the United National Party, had first articulated its support for parity of languages rather than a 'Sinhala-Only' policy, it changed its stance after its resounding defeat to the SLFP in the 1956 elections.

The Federal Party opposed the 'Sinhala-Only' policy of the SLFP and staged a 'Gandhian' style non-violent protest at Galle Face Green. However, the protestors were attacked by mobs while the police made no effort to stop them, giving rise to heightened apprehensions by the Tamil minority community that they were being steadily marginalized. The Federal Party resorted to continued protest measures, such as the commencement of Tamil medium schools in the North in opposition to the use of the Sinhala language as a medium of instruction.

In an attempt to make amends for the past and also quell the rising tide of communal violence, S.W.R.D. Bandaranaike entered into the Bandaranaike-Chelvanayakam (B-C) Pact of July 1957 securing the use of the Tamil language as a national minority language and devolving power to regional councils. This sparked massive protests, led in some quarters by the UNP, which had by this time abandoned its earlier stance on parity of languages and was using the B-C Pact as a political weapon to stir up protest against Bandaranaike. Communal riots again took place leading to deaths of Tamils and destruction of their property. The B-C Pact was unilaterally abrogated. Bandaranaike, however, passed the Tamil Language (Special Provisions) Act No. 28 of 1958, which allowed for the Tamil language to be used for 'prescribed administrative purposes' in the North and East without prejudice to Sinhala being the official language and, hence, the language of administration.<sup>14</sup> The Tamil language was declared to be the medium of instruction for students educated in Tamil as well as in public service entrance exams. Administration in the Northern and Eastern Provinces was allowed to be conducted in Tamil.<sup>15</sup> Regulations were stipulated to be made for that purpose.<sup>16</sup>

In 1959, a Buddhist monk and former supporter assassinated S.W.R.D. Bandaranaike. The perpetrator had criticized Bandaranaike's attempts to push through a political compromise to meet the Tamil demands. The nature and circumstances surrounding the assassination were investigated by the first major commission of inquiry to be appointed under the COI Act of 1948 in respect of an assassination of a political leader.<sup>17</sup>

Following, a period of political turmoil consequent to the assassination, S.W.R.D.'s widow, Sirimavo Bandaranaike, assumed power as Prime Minister in the 1960 elections. Thereafter, while the 'Sinhala-Only' policy was implemented, the Tamil

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<sup>13</sup>The Official Language Act No. 33 of 1956 declared by Section 2 that "the Sinhala language shall be the one official language of Ceylon."

<sup>14</sup>Tamil Language (Special Provisions) Act of No. 28 of 1958, Section 5.

<sup>15</sup>ibid, Sections 2(1), 2(2), 3 and 4.

<sup>16</sup>ibid, Section 6(1).

<sup>17</sup>The report of this Commission is not analysed in this report as it relates to a single act of assassination as differentiated from a commission of inquiry into widespread human rights violations.

Language (Special Provisions) Act No. 28 of 1958 was bypassed. Regulations under this statute were delayed when their legal validity was contested.<sup>18</sup>

In protest, the Federal Party embarked on its 'satyagraha' (peaceful protest) campaign that brought the administration of government affairs in the North-East to a halt. The government then declared a state of emergency under the PSO. The purported reason for the declaration was that the activities of the Federal Party and the Satyagraha campaign had resulted in the breaking down of essential services in the Northern and Eastern Provinces, including obstruction to the distribution of the rice ration and delays in the payment of salaries and allowances.

A number of Tamil leaders were detained on security grounds pursuant to the emergency regulations. Amidst the uproar that followed, Tamil politicians openly articulated secessionist demands. This period saw the government using emergency powers to an extent far beyond their original rationale; thus, even after the Federal Party leaders were released and the Government had controlled this situation by the end of 1961, emergency rule continued into the beginning of 1962. The continuation of emergency was declared necessary to address the wave of strikes and civil disturbances incited by leftist and trade union leaders. At the start of 1962, the Government began to censor press publication of information concerning the strikes.

The aborted coup of 27 January, 1962 – an attempt to overthrow the Bandaranaike government by senior army and police officials – took place in this context. The conspirators were arrested, detained and investigated under PSO emergency regulations and later under the Criminal Justice (Special Provisions) Act, No. 1 of 1962 and Act No. 31 of 1962.<sup>19</sup>

In 1965, the UNP returned to power and signed the Senanayake-Chelvanayakam Pact, with the political objective of obtaining the assistance of the Federal Party. The Pact paved the way for the Tamil Language (Special Provisions) Regulations of 1966<sup>20</sup> and the establishing of district councils. When this Pact, too, was abandoned, the Federal Party left the government. The UNP was overthrown in 1970 by an SLFP led coalition of leftist parties led by Sirimavo Bandaranaike. A Constituent Assembly was formed to draft a new Constitution, but a number of Tamil parliamentarians walked out on the basis that their demands for parity of status for languages were not being heeded and that the draft Constitution did not contain any provision, similar to Section 29(2) of the Independence Constitution, aimed at the protection of minorities.

The first armed insurrection by the radical leftist Janatha Vimukti Peramuna (People's Liberation Front - JVP) took place in the South in 1971, based largely on the economic marginalisation of Sinhala rural youth. A state of emergency was declared and the provisions of the PSO were brought into force with full effect. The right to conduct public meetings was restricted, press censorship was imposed and rights to

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<sup>18</sup>Sansoni Commission report, Sessional Paper VII, July 1980, at p. 72.

<sup>19</sup>Enacted to try the alleged conspirators, these were determined, as *ex post facto* laws, to be *ultra vires* by the Privy Council in *Liyanage and others v. the Queen* [1965] 68 NLR 265.

<sup>20</sup>These Regulations were more satisfactory than the provisions in the 1958 Act in that the Tamil language was allowed to become the language of administration in the North and East rather than the far more limited stipulation that the 1958 Act permitted, of being used only for 'prescribed administrative purposes.'

assembly and association of trade unions were severely curtailed. After the insurrection, about fourteen thousand people were arrested. Charges of conspiracy to wage war against the Queen, 'conspiracy to overawe by means of criminal force' the Government of Ceylon, waging war in various places in Ceylon and abetment of the waging of such war were served on the suspects.

A particular feature of this period was the enactment of the Criminal Justice Commission Act No. 14 of 1972 ('the CJC Act'). The drafting of the CJC Act commenced in 1971 and was assented to by the Governor-General on 8 April, 1972, a little over a year after the insurrection. None of the several thousands in custody were brought to trial until the CJC Act had been passed. The principal purpose of the Act was two fold: to deal with the persons involved in the insurrection and with persons who committed offences in relation to currency or foreign exchange on such a scale as to endanger the national economy. In the exercise of these two functions, the CJC sat as the Criminal Justice Commission (Insurgency) and Criminal Justice Commission (Foreign Exchange).

The CJC was brought into being on the basis that the practice and procedure of the ordinary courts were inadequate "to administer Criminal Justice for the purpose of securing trial and punishment of the persons who committed such offences."<sup>21</sup> It was established by a warrant of the Governor-General being of the opinion that the offences against the State committed either during a rebellion or insurrection or exchange control offence could not be dealt with by the normal laws.<sup>22</sup> Section 11 stipulated that an inquiry before a Commission was to be free from the formalities and technicalities of the rules of procedure ordinarily applicable to a court of law and was to be conducted in a manner not inconsistent with the principles of natural justice.

Under Section 25, the findings made or sentence imposed by a Commission were decreed to be final and conclusive and could not be called into question "in any court or tribunal, whether by way of action, application in revision, appeal, writ or otherwise." Section 11(2) (g) permitted the admission of a report of a person pertaining to the committal of the offences in question and made in the course of his official duties, the only restriction being that the report should not contain specific reference to the suspect on trial.<sup>23</sup>

The provisions of Section 11 opened the door to the introduction in evidence, as substantive evidence, of confessionary statements made to police officers by suspects. This constituted a radical departure from the normal law, which had prohibited the leading of evidence of statements made by a suspect to a police officer that even suggested an inference of a confession.<sup>24</sup> The provisions of the CJC Act evoked criticism for politicizing the judicial system.<sup>25</sup>

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<sup>21</sup>Criminal Justice Commission Act, No. 14 of 1972, Section 2(1)(b).

<sup>22</sup>ibid, Section 2(1)(a).

<sup>23</sup>However, at the inquiry the authors of these reports were called as witnesses and after being called upon to read their reports before the Commission, were subjected to cross-examination.

<sup>24</sup>Evidence Ordinance, Sections 24, 25(1) and (2) and 26(1) and (2) shut out, in the normal course of events, three categories of confessions: confessions caused by an inducement, threat or promise, confessions made to a police officer, a forest officer or an excise officer and confessions made by any person while in the custody of these three categories of officers. The old cases went so far in their liberal reasoning as to affirm that the concept of 'police custody' does not 'necessarily connote the

Thousands were tried under the Commission of Inquiry appointed in terms of this Act. Its five judges, presided over by the then Chief Justice H.N.G. Fernando, adhered to self-imposed standards of fairness in their inquiries despite the expansive powers bestowed on them by the statutory provisions. However, enacting an ad hoc law solely for the purpose of trying the 1971 youth insurrectionists set an unfortunate precedent. Many of its undemocratic provisions were reproduced in the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 ('the PTA'), which afforded legal cover for abuses of human rights in the succeeding decades.

On 22 May, 1972, Sri Lanka's First Republican Constitution ('the 1972 Constitution') came into effect. It decreed state patronage for the protection and fostering of the Buddhist religion<sup>26</sup> and constitutionally enshrined the Sinhala language as the single official language of the courts and the administration.<sup>27</sup> The 1972 Constitution declared that the use of the Tamil language shall be in accordance with the Tamil Language (Special Provisions) Act No. 28 of 1958.<sup>28</sup>

The 1972 Constitution represented a radical shift from the past. It displaced the constitutional safeguards specified for minorities under Section 29 (2) of the Independence Constitution (1948-1971) and weakened the judiciary in favour of what was proclaimed to be the overriding power of Parliament. Opposing the 1972 Constitution as anti-minority, the Tamil United Front (TUF) was formed by the Federal Party and the Muslim United Front on the basis that Tamils included all those in Sri Lanka whose mother tongue is Tamil.

Later, the Tamil Youth League (TYL) was formed. One of its main causes of disaffection was the introduction of the 'district quota' system giving rural students an advantage over the urban student population. While this change in education policy adversely affected students of all ethnicities in the main cities, including Colombo and Jaffna, Jaffna-based students reacted with feelings of outrage against what they perceived to be an act of overt discrimination. Hostility between the government and the Tamil community increased when police attacked a gathering of the fourth conference of the International Association of Tamil Research in Jaffna, resulting in nine deaths.

Thereafter, the tide of events turned quickly to open violence. An incipient Tamil militancy declared its first 'victory' by assassinating Jaffna Mayor Alfred Duriappah on 27 July, 1975. Duriappah had been targeted as a 'government collaborator' by the TUF senior politicians, who inflamed communal tensions with their express approval of the assassination. Such rhetoric was used to similar divisive effect by some of the

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immediate presence of police officers so long as the accused persons are aware that the place where they are detained is readily accessible to the police.' *R v. Gnanaseeha Thero* [1968] 73 NLR 154.

<sup>25</sup>In a 1975 Amnesty International report, it was pointed out that the judicial process had been 'diluted to serve political purposes and that there should never have been a 'compromise of justice' of this nature which inflicted a 'second -class system of justice for political offenders.', see Amnesty International, 'Report of An Amnesty International Mission to Sri Lanka,' 9-15 January 1975, May 1976.

<sup>26</sup>Article 7 of the 1972 Constitution.

<sup>27</sup>ibid, Article 11.

<sup>28</sup>ibid, Article 8(1).

majority pro-Sinhala political leadership. A prominent activist has since commented on the failure of senior Tamil politicians at that time to recognise the danger signs.

“Those with nationalist sympathies had little difficulty in swallowing this propaganda [against Alfred Duriappah] and failed to ask where this was leading to. Planted in the minds of youth who were on the threshold of militancy, it was an instigation to kill.”<sup>29</sup>

The senior Tamil leaders were accused by the government of practicing non-violence only in theory whilst encouraging violence against the State. Mainstream Tamil parties joined together to form the Tamil United Liberation Front (TULF). At its first National Convention, held at Vaddukoddai on 14 May, 1976 and presided over by S.J.V. Chelvanayakam, the TULF unanimously adopted a resolution calling for the formation of a separate state of Tamil Eelam.

The politics of violence saw an upsurge after 1977 when the UNP, headed by J.R. Jayawardene, came into parliament on a two-thirds majority. With the electoral decimation of the SLFP, the TULF became the major opposition party after securing the North on a secessionist electoral campaign. Communal violence followed the elections. Tamils were killed in riots across the island, and large numbers were displaced. The killing of a police officer, Inspector Bastianpillai, led to the proscription of the militant movement later to become the Liberation Tigers of Tamil Eelam (LTTE).

Using the COI Act of 1948, the Jayawardene government appointed a Commission of Inquiry into the incidents that took place between 13 August and 15 September, 1977, popularly referred to as the Sansoni Commission. The Second Republican Constitution (‘the 1978 Constitution’) came into effect on 31 August, 1978. It established the Executive Presidency and replaced the first-past-the-post electoral system with proportional representation. The 1978 Constitution recognised both Sinhala and Tamil as national languages while continuing to state that Sinhala will be the official language.<sup>30</sup> Tamil was eventually given official language status through constitutional amendments in the 1980s.<sup>31</sup> The Tamil community’s grievances might have been mitigated had these constitutional provisions been incorporated at the outset. That said, these provisions have been only weakly implemented to date.<sup>32</sup>

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<sup>29</sup>Hoole, Rajan, op. cit, at p. 18. At p. 8, it is observed that “It is difficult not to be moved by Chelvanayakam. But on looking back, it is also difficult to avoid the conclusion that the isolation and exclusive sense of victimhood (that) Federal Party politics brought to the Tamils was unhealthy and ultimately tragic. There was little recognition by him that the Left which was then powerful in the South, took the same stand as the Federal Party on the key issues of the day- the citizenship and language issues. The possibility of an alliance was never taken seriously, if ever contemplated.”

<sup>30</sup>Articles 18 and 19 of the 1978 Constitution in its unamended form.

<sup>31</sup>2<sup>nd</sup>, 4<sup>th</sup>, 13<sup>th</sup> and 16<sup>th</sup> Amendments.

<sup>32</sup>Shanthakumar, B. (ed.), *‘Language Rights in Sri Lanka – Enforcing Tamil as an Official Language,’* Law & Society Trust, 2008. The language issue is key in drawing lines between the Sinhala and Tamil people. A recent study done by the Official Languages Commission covering a population of over 3.5 million of which over 1.1 million were Tamil speaking people living outside the Northern and Eastern provinces found that, of the 6,626 public officials of all grades working there, only 627 or 9.5 per cent were proficient in Tamil. A similar study was conducted in the Northern and Eastern provinces found that (in respect of the over 1.5 million population in these provinces of which the Sinhala speaking population was a little over 365,000), only 98 or 18.1 per cent of the total of 540 public officials serving, were proficient in Sinhala - vide interview with Mr Raja Collure, *‘Official Languages Policy -*

A chapter on justiciable fundamental rights protection was brought into the Constitution, but its impact was crippled by explicit provisions allowing for the continuation of laws enacted prior to 1978 even though unconstitutional. Judicial review of laws enacted after 1978 was disallowed except during a one-week period at bill stage. A number of key rights, including the right to life, were omitted, and it was stipulated that a challenge alleging a rights violation must be brought before the Court within one month of knowledge of such violation.

Purportedly in response to the growing Tamil militancy, the Jayawardene government enacted the Prevention of Terrorism (Temporary Provisions) Act No 48 of 1979.<sup>33</sup> The PTA had a number of objectionable provisions. It prohibited engaging in 'unlawful activity', with retroactive effect; allowed preventive detention up to eighteen months on administrative orders, renewable every three months by detention orders; permitted confessions made to police officers at or above the rank of an Assistant Superintendent of Police (ASP) to be admissible as evidence; and put the burden of proving that confessions to a police officer were involuntary on the suspect.<sup>34</sup> Section 29 of the PTA limited its operation to a period of three years from the date of its commencement, but this provision was repealed in 1982,<sup>35</sup> transforming the 'temporary' law into a permanent statute.

The first to be detained under the PTA in 1979 were not separatists but two Sinhalese activists of the (then) opposition SLFP in Kandy. This confirmed fears that the PTA would be misused to stifle opposition activity. Thereafter the PTA was used primarily in regard to the arrest and detention of alleged Tamil separatists. Meanwhile, ethnic tensions continued to increase. The killing of two police officers and a political candidate for the UNP in the North were followed by reprisal killings by the police. In what has become an eternal symbol of the historic breakdown in trust between the two communities, the Jaffna Public Library was burnt to the ground.

By the early 1980s, Tamil militancy had become more violent and factionalized in competing groups: the Eelam People's Revolutionary Liberation Front (EPRLF), Tamil Eelam Liberation Organization (TELO), the People's Liberation Organization of Tamil Eelam (PLOTE), the Eelam Revolutionary Organization of Students (EROS) as well as the LTTE. Communal tensions were further heightened by the formation of a political party representing explicitly Muslim interests, the Sri Lanka Muslim Congress (SLMC).

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*mere rhetoric?*' The *Sunday Times*, 05.07.2009. This interview also stressed the inefficacy of two circulars issued in early 2007, enhancing incentive payments for public servants acquiring proficiency in both Official Languages and making it necessary for all officers recruited to the public provincial public service with effect from 01.07.2007 to acquire proficiency in the other Official Language within a period of five years in addition to the official language through which they enter the service.

<sup>33</sup>Soon after coming into power in 1977, the Jayawardene government repealed the *Criminal Justice Commission Act No.14* of 1972 (CJC Act) (enacted by the previous United Front government) on the basis that its provisions were draconian. However, the PTA enacted by President JR Jayawardene proved how short lived these ambitions in ushering in a new era were; many of the problematic provisions in the CJC Act, particularly those admitting confessions made to police officers, were replicated in the PTA.

<sup>34</sup> See s. 16, Prevention Of Terrorism Act [PTA], Parliament of the Democratic Socialist Republic of Sri Lanka Prevention of Terrorism (Temporary Provisions) Act No 48 of 1979 [Certified On 20 July, 1979].

<sup>35</sup>Section 4 of Act No. 10 of 1982.

The violence reached a crescendo in the early 1980s when President Jayawardene won a further term at the presidential elections, and postponed general elections for six years through the holding of a referendum. The July riots in 1983 marked a watershed in the country's political history; widespread international outrage was evoked when thousands of ordinary Tamils were killed in riots in which frontline ministers of the Jayawardene government were involved. Thirty-five Tamil prisoners and later, a further eighteen prisoners were butchered inside the Welikada prisons. President Jayawardene refrained from condemning this violence and later pushed through the 6<sup>th</sup> Amendment, which outlawed separatism and resulted in the TULF members forfeiting their seats. The crackdown on legitimate political dissent increased; leftist parties and opposition papers were banned and presses sealed under the emergency regulations. The JVP, Nava Sam Samaja Party (NSSP) and the Ceylon Communist party were proscribed.

Initiatives for ending the conflict, including the Thimpu peace talks, were doomed to failure. This period witnessed the LTTE's massacre of one-hundred and fifty pilgrims and bystanders at Sri Lanka's holiest Buddhist pilgrimage site in Anuradhapura; civilian massacres were to become a trademark of the LTTE thereafter.

The advance of the Sri Lankan armed forces towards the North was halted at the intervention of the Indian Government, which engaged in its infamous 'parippu' (dhal) airdrop wherein essential supplies were parachuted by Indian planes to the Jaffna people. The Indo-Lanka Accord, bringing the Indian Peace Keeping Force (IPKF) to the North, was signed on July 29, 1987, leading to the 13<sup>th</sup> Amendment being passed to Sri Lanka's Constitution setting up Provincial Councils. Not long thereafter, the leader of the LTTE, Velupillai Prabhakaran, who signed the accord under protest, reneged on the agreement and launched a military offensive against the Indian troops.

The JVP commenced its second insurrection in the South, purportedly in protest against the Indo-Lanka Accord. Government politicians, public servants and media persons working in the state sector were killed, intimidated or abducted by the JVP. Key UNP leaders were among those assassinated. With the PSO and the PTA in force during this period, government and paramilitary forces responded by engaging in a systematic practice of extrajudicial killings, enforced disappearances and torture. Thousands of ordinary Sinhalese civilians were killed. Regulations were promulgated under the PSO permitting arbitrary arrest and detention either for preventive or investigative purposes, as well as to give authorized officers the authority to bury or cremate dead bodies.

Lawyers such as Wijedasa Liyanaaratchi, Kanchana Abeyapala and Charitha Lankapura were killed because of their direct involvement with the command structures of the JVP. Other lawyers were killed because they had engaged in the task of filing writs of *habeas corpus* in respect of disappeared persons. The extent to which the police service became militarized was unprecedented. Presidential elections in late 1988 resulted in a new leader of the UNP, Ranasinghe Premadasa, taking over from President Jayawardene. The presidency was to be held by the UNP from 1978 to 1994. The subsequent general elections of February 1989 ensured the continuing parliamentary authority of the UNP, which held the Prime Minister's position from

1977 to 1994. Violence continued unabated following elections in all parts of the country, with dissenters such as journalist and human rights activist, Richard de Zoysa, being extra-judicially executed.<sup>36</sup>

During this period, the LTTE engaged in heightened assassinations of dissenters in the North, including Jaffna academic Rajini Thiranagama and EPRLF MP Sam Thambimuttu as well as senior TULF parliamentarians who were once known as the gurus of the LTTE such as A. Amirthalingam and V. Yogeswaran. From this point on, the LTTE conducted systematic assassinations of members of rival Tamil militant groups.

The Indian peacekeepers were sent out of the country by President R. Premadasa, who attempted to begin peace talks with the LTTE. However, the LTTE intensified its fight against government troops and rival Tamil parties. Hundreds of police officers who had surrendered to the LTTE on 10 June, 1990 were massacred. One hundred and forty Muslim civilians were killed during prayers at the Kattankudi mosque on 3 August, 1990. The LTTE killed Muslims in other areas and displaced thousands of Muslim villagers from the North.

The war then resumed, with both sides committing mass killings. The Sri Lankan Army killed sixty-seven civilians at Kokkadicholai district on 12 June, 1991.<sup>37</sup> The LTTE embarked on a string of high profile assassinations including Sri Lanka's Defence Minister Ranjan Wijeratne, India's former Prime Minister Rajiv Gandhi and Major General (posthumously promoted to Lt. General) Denzil Kobbekaduwa.

Assassinations of former Minister of National Security Lalith Athulathmudali on 23 April, 1993, and President R. Premadasa on 1 May, 1993 followed. While widely attributed to the LTTE, conspiracy theories abounded of motives being linked to internal party rivalries. The assassination of one of the few remaining senior UNP leaders, Gamini Dissanayaka, then a Presidential election candidate, along with several other senior UNP politicians in 1994, indicated the LTTE's intention to kill members of the Southern Sinhala political leadership.

In 1994, a fresh promise of peace was ushered in with the election of Chandrika Kumaratunge. Contesting from the Peoples' Alliance, comprising the SLFP as well as a number of other coalition partners, Kumaratunge's election victory was supported by the majority community as well as the ethnic minorities. After the election, a ceasefire was declared and peace talks began. However, the negotiations broke down and war was resumed by the LTTE with its strategy of striking at civilian targets, including Colombo's Central Bank. Four years later, the LTTE carried out a blast at the Maradana train station in central Colombo killing hundreds of civilians, and, in a widely condemned attack, targeted the holiest Buddhist shrine known as the Temple of the Tooth in Kandy.

Government forces retaliated with large-scale military operations, resulting once again in killings and enforced disappearances of Tamils in operational areas. Emergency regulations under the PSO and the PTA were invoked. In 1996, 622

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<sup>36</sup>ibid.

<sup>37</sup>see later analysis of the relevant findings of the *Kokkadicholai Commission of Inquiry* and critique of the action taken on the findings.

enforced disappearances were reported in Jaffna consequent to the security forces regaining control of the peninsula from the LTTE.<sup>38</sup>

Commissions of inquiry appointed by President Kumaratunge to inquire into the July 1983 communal riots, the torture chamber at Batalanda and the widespread disappearances of the post-1988 period came to naught,<sup>39</sup> despite exhaustive and time-consuming investigations. More controversially, Special Presidential Commissions of Inquiry<sup>40</sup> were appointed by President Kumaratunge to inquire into the assassinations of political leaders and military leaders during the previous UNP regime, including the posthumously promoted Lt. General Denzil Kobbekaduwa and Minister of National Security Lalith Athulathmudali. Many of these commissions, though headed by judges, concluded that elements of the UNP itself were responsible for the assassinations. The weak evidentiary and legal basis of these findings gave rise to serious doubts.<sup>41</sup> Similarly impugned<sup>42</sup> were the findings of another Special Presidential Commission of Inquiry in regard to the 1988 assassination of Vijaya Kumaratunge.<sup>43</sup>

Investigations into mass graves at Suriyakande, Duriappah Stadium, Chemmani also floundered, reinforcing the climate of impunity. The only serious prosecutions led to unsatisfactory convictions of junior army officers as, for example, in the Krishanthi Kumaraswamy and the Embilipitiya schoolchildren cases. The past pattern of human rights violations recurred without effective inquiry or investigation. No commission was appointed to investigate the enforced disappearances that occurred in the mid-1990s in the Jaffna peninsula. The massacre of rehabilitation camp inmates at Bindunuwewa in late October 2000 did lead to a commission of inquiry but its findings had little impact on the legal process, which culminated in the wholesale acquittal of the accused (on appeal), including police officers whose conviction for culpable inaction had earlier been determined by the lower courts. The reports of

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<sup>38</sup>United Nations Working Group on Enforced or Involuntary Disappearances, *Report of the Working Group on Enforced or Involuntary Disappearances* (25-29 October 1999), E/CN.4/2000/64/Add.1, 21.12.1999; presented to the UN Commission on Human Rights at its 56<sup>th</sup> sessions, March-April 2000.

<sup>39</sup>see later analysis of prosecutions emanating from the findings of the 1994/1998 Disappearances Commissions.

<sup>40</sup>The Special Presidential Commissions of Inquiry are appointed in terms of the *Special Presidential Commissions of Inquiry Law (SPCI Law) No. 7 of 1978* (as amended) ('the SPCI Law') which is different from the *Commissions of Inquiry Act No. 17 of 1948* which is under examination in this report. The SPCI Law gives Commissions appointed under its authority to determine and report whether any person is guilty of any act of political victimisation, misuse or abuse of power, corruption or fraudulent act, in relation to any court or tribunal or any public body or in relation to the administration of any law or administration of justice and in those circumstances, to recommend whether such person should be made subject to civic disability (Section 9 (1)). That recommendation can result in the Parliament taking steps to impose civic disability or expel that person from Parliament if he is a MP (Article 81). The SPCI Law has been consistently and justly criticized as violating basic rules of evidence and fair procedure, resulting in persons being subjected to kangaroo trials. A number of police officers who were interdicted and politicians who were arrested in consequence of the findings of these commissions were able to successfully challenge the interdictions and arrests in the Supreme Court on the basis *inter alia*, that the action taken was arbitrary and devoid of natural justice.

<sup>41</sup>Pinto-Jayawardena, Kishali, *'Lalith Athulathmudali Assassination – A Report and its Discrediting,'* Moot Point, Centre for Policy Alternatives, Legal Review, 1999, at p. 29.

<sup>42</sup>*ibid*, at p. 31. See also, Hoole, Rajan, *op. cit.*, at p. 295.

<sup>43</sup>A charismatic actor cum politician and founder of an SLFP breakaway party, the SLMP, together with his wife and later President of Sri Lanka from 1994 to 2005, Chandrika Kumaratunge, daughter of SWRD and Sirimavo Bandaranaike.

these commissions are examined in detail in this research. Historically, Kumaratunge's presidency is criticized for insufficiently upholding the independence of constitutional institutions, most particularly the institution of the judiciary. These developments are examined later on in the context of discussion regarding Sri Lanka's Supreme Court and its protection of rule of law norms.

In late 2001, popular dissatisfaction with the Kumaratunge administration resulted in the opposition UNP capturing power in general parliamentary elections. In 2002, a ceasefire agreement between the UNP government and the LTTE was signed, leading to the establishment of the Sri Lanka Monitoring Mission (SLMM) to monitor the implementation of the ceasefire. The ceasefire was controversial and much-criticized. Except for arrest, search, and seizure provisions, the PTA remained in effect as long as the government remained committed to the ceasefire. In April 2003, the LTTE announced that it was withdrawing from the ceasefire. Further, the fractious 'co-habitation' arrangement, as it was popularly termed, between a Presidency and a parliament belonging to opposing political forces did not last very long with President Kumaratunge's party re-capturing parliamentary power from the UNP in a coalition grouping in April 2004. Kumaratunge's term as Executive President ended on 17 November, 2005, with the current incumbent, Mahinda Rajapakse, being elected to power from the same party, the Peoples Alliance. Even though there was no formal resumption of active fighting between the government and the LTTE during 2002-2005, human rights violations were committed by both parties to the conflict. Fighting resumed in 2006 with a commensurate rise in killings, extrajudicial executions and enforced disappearances. For its part, the government formally announced the end of the ceasefire in January 2008.

The recent deliberate negation of the 17<sup>th</sup> Amendment to the Constitution, passed by the Parliament in 2001 to remedy the politicization of public institutions and strengthen oversight bodies, has further increased public perception that the law and the Constitution is of minimal importance. This amendment stipulated that Presidential appointments to commissions and important offices must first satisfy approval by a ten-member Constitutional Council (CC) comprising the Speaker as Chairman, the Prime Minister and the Leader of the House, and six persons of integrity and eminence appointed from outside the political arena through parliamentary consensus. The CC was intended to function as an external check over unrestrained presidential discretion in the appointment process. However, its implementation was limited only to the first term in office, 2002 to 2005. Thereafter, the responsible parliamentary groupings failed to nominate candidates to replace members whose despite the lapsing of the three-year terms had lapsed.

After considerable public pressure, the nominations were sent to then President Mahinda Rajapakse in 2008, but the requisite appointments were not made due to the explanation of the government that a Parliamentary Select Committee was studying changes that should be made to the 17<sup>th</sup> Amendment. This Select Committee had been convened for over two years and at times had been unable to gather a quorum. In the meantime, and disregarding the precondition of referral to the CC for nomination and approval, President Rajapakse has made his own appointments to the constitutional commissions as well as to vacancies that had arisen in public offices including that of the Inspector General of Police, the Attorney General and to the appellate courts.

The Court of Appeal dismissed petitions challenging the refusal of the President to make the appointments to the CC in the manner stipulated by the Constitution on grounds that presidential immunity precluded legal challenges to his actions while in office.<sup>44</sup> The immunity bar has been held not to apply to actions of past Presidents<sup>45</sup> or to those public officers who rely on Presidential acts to justify their own transgressions of the law. In some instances, the judicial view has inclined towards holding that even the direct actions of the President are reviewable, as was the case in *Silva v Bandaranayake*<sup>46</sup>, where the majority examined the Presidential act of appointment of a Supreme Court judge though ultimately desisting from striking down the appointment. The law in respect of presidential immunity therefore remains inchoate and efforts have been made to delete this constitutional provision on the fundamental principle that no one should be above the law.

The integrity and independence of several oversight mechanisms meant to supervise rights adherence by government bodies, including the Human Rights Commission of Sri Lanka (HRCSL) and the National Police Commission (NPC) in particular, suffered as a result. In 2007, the Human Rights Commission of Sri Lanka was downgraded from category A to category B by the United Nations International Coordinating Committee (ICC) of National Human Rights Institutions.<sup>47</sup> The several reasons that led to the downgrading included concerns regarding the independence of the Commissioners, given their unconstitutional appointments by the President, the actual practice of the Commission lacking the requisite balance and objectivity, and the Commission's inability to ensure its political independence, and its failure to issue annual reports on human rights as required by the Paris Principles.. In mid-2009, the National Police Commission and the Public Service Commission (PSC) were rendered unable to function due to lack of quorum after the terms of several commissioners lapsed. Reportedly, the duties of the NPC and the PSC are being exercised by the relevant ministry secretaries even though their offices continue to be maintained on public funds. The terms of the current members of the Human Rights Commission have also lapsed.

The President's willingness to bypass democratic checks on his authority, combined with sweeping executive powers under expanded emergency laws, further centralized the power of the Executive Presidency. Against this background of disregarding minimum standards of constitutional governance, it was unsurprising that demands to the government to secure accountability for serious human rights violations were left unattended.

In 2006, a commission of inquiry was established under the COI Act of 1948 to investigate fifteen selected incidents, later increased to sixteen,<sup>48</sup> that had occurred

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<sup>44</sup>Article 35 (1)of the Constitution. In *Public Interest Law Foundation v. the Attorney General and Others*, CA Application No 1396/2003, C.A. Minutes of 17.12.2003. [1997] 1 Sri LR 92 at 95.

<sup>45</sup>The *Waters Edge Case* referred to later on.

<sup>46</sup>[1997] 1 Sri LR 92 at 95.

<sup>47</sup>Report and recommendations of the Sub-Committee on Accreditation, December 2007.

<sup>48</sup>Commission of Inquiry appointed by President Mahinda Rajapakse in November 2006 to inquire into "alleged serious violations of human rights arising since 01.08.2005" (hereafter, the 2006 Commission) to Inquire into Serious Human Rights Violations. These cases include the assassinations of Minister Lakshman Kadirgamar, MP Joseph Pararajasingham, Kethesh Loganathan, the execution style shooting of 17 aid workers in Mutur and killings in Mutur, Trincomalee, Sancholai, Pesalai Beach, Keyts Police area, Pottuvil, Kebithagollawa, Welikanda, Digapathana and the disappearance of Rev Jim Brown.

during 2005 and 2006 as a result of the conflict in the North and East. Responsibility for these crimes had been attributed to one or the other of the warring parties: government forces, the LTTE and paramilitary forces, specifically, the Karuna faction. The fact that the Commission was 'observed' by eleven 'eminent persons' known as the International Independent Group of Eminent Persons (IIGEP) on a mandate issued by the Presidential Secretariat was considered to be an innovative part of this process.

The Commission commenced its formal sittings in March 2007 and the team of observers, including many well-known international jurists, commenced their work thereafter. While the Government maintained that the Commission would be an effective force in ensuring accountability for rights violations, the investigations were systematically undermined by the lack of political will to secure responsibility for the violations under investigation.<sup>49</sup> The IIGEP's queries were directed towards the integrity of the Commission process as well as the conflict of interest posed by the officers of the Attorney General's Department assisting the Commission, given the fact that the Attorney General is a key defender of the government's policies and often accompanied government delegations to international fora. These queries were met by indifference or hostility by government authorities, and as a result the IIGEP terminated its involvement with the Commission process in April 2008.<sup>50</sup> The Commission's investigations were hampered by an absence of legal protections for witnesses and victims; a bill drafted for this purpose, though unsatisfactory in several respects<sup>51</sup>, has been pending in Parliament for two years. In June 2009, the Commission wound up its proceedings prematurely when its mandate was not extended by the Presidential Secretariat.

This experience dealt a blow to what began as an innovative effort to uphold principles of accountability. Meanwhile, the government's military offensive had continued unabated, leading to the decimation of the senior leadership of LTTE and its military forces by the end of May 2009 amidst allegations of widespread human rights violations by both parties to the conflict.

What remains, despite the end to active fighting, is the question of justice for victims of decades of past violations that have shattered lives, families, communities and the society. This report sets out in detail the undermining of both the prosecutorial

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<sup>49</sup> Apart from Amnesty International's *'Twenty Years of Make-Believe, Sri Lanka's Commissions of Inquiry'*, June 2009 and University Teachers for Human Rights (Jaffna) *'A Travestied Investigation, Erosion of the Rule of Law and Indicators for the Future of Minorities in Lanka'* Special Report No 33, 2009, see also Civil Society letter to Chairman of the Commission of Inquiry to Investigate and Inquire into Alleged Serious Violations of Human Rights Re Retirement from the Commission by Civil Society with Standing in Case No 2, 06.11.2008 and Centre for Policy Alternatives, *'Commission of Inquiry and the International Independent Group of Eminent Persons; Commentary on developments'*, CPA Policy Brief No 2, Colombo, 2007.

<sup>50</sup> IIGEP public statement of 15.04.2008, <http://www.iigep.org/prerelease/estatement7.pdf>

<sup>51</sup> For an analysis of the deficiencies in the Bill see 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 p.142 and Law & Society Trust, *'Objections to the assistance and protection to Victims of Crime and Witnesses Bill'*, Position Paper, 17.06.2008.

process and commissions of inquiry through malfeasance as well as institutional failings.

## 2. Emergency and Security Measures

Sri Lanka has been in an almost constant 'state of emergency' since 1971. Emergency law remains in force today even after active fighting between the LTTE and government forces ceased in May 2009. Under this emergency regime, normal guarantees of fundamental rights have been progressively eroded through the misuse of exceptional powers granted under the PSO, the PTA and their implementing regulations. These exceptional powers facilitated an enabling environment for gross violations such as enforced disappearances. The army was authorized to dispose of bodies without post mortem or inquest. Confessions were admitted in court provided that they are made to a police officer above the rank of an Assistant Superintendent of Police (ASP), with the burden being put on the accused to prove that they are not voluntary.

The 1982 Indemnity Act No. 20 is emblematic of the growth of a culture of *de jure* impunity in the early 1980s under a Parliament stewarded by first Executive President under the 1978 Constitution, J.R. Jayawardene. This Act provided immunity in respect of certain acts and matters done or purported to be done with a view to restoring law and order during the turbulent period of 1 to 31 August, 1977. Persons so indemnified included Ministers, Deputy Ministers, officers of the services, police officers and indeed 'any person acting in good faith under the authority of a direction of a Minister, Deputy Minister or a person holding office.' Acts done in the execution of duty, enforcement of law and order, for the public safety 'or otherwise in the public interest' were indemnified. The period during which this wide-ranging indemnity applied was extended to 16 December, 1988 by the Indemnity Amendment Act No. 60 of 1988.<sup>52</sup>

"There was much opposition in the country to the proposed indemnity. The Bar Association of Sri Lanka characterized it as 'Making Criminal Acts lawful'. 'Don't make laws to suit some individuals, this only encourages acts of personal revenge. It is we who will suffer' says a Local Government councillor introducing a condemnatory resolution at the council."<sup>53</sup>

The currently applicable emergency regulations, particularly 2005 and 2006 regulations,<sup>54</sup> reinforce this decades-long practice of facilitating abuses by allowing arbitrary arrests without the condition of prompt production before a magistrate.

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<sup>52</sup>Amnesty International, 'Sri Lanka, Implementation of the Recommendations of the UN Working Group on Enforced or Involuntary Disappearances following their visits to Sri Lanka in 1991 and 1992', AI Index, ASA/37/04/98, February 1998, at p. 9. The Government's defence was that the provisions of this Act were never actually implemented. However, the message that the law conveyed to the military/police establishment in regard to the laxity with which human rights abuses would be viewed, was unmistakable. Section 26 of the PTA contains similar impunity provisions generally.

<sup>53</sup>Final report of the 1994 Western, Southern and Sabaragamuwa Disappearances Commission, Sessional Paper No. V, 1997, at p. 62.

<sup>54</sup>See; Emergency (Miscellaneous Provisions and Powers) Regulation No 1. of 2005 as contained in Gazette No 1405/14 (EMPPR 2005) and the Emergency (Prevention and Prohibition of Terrorism and Specified Terrorist Activities) Regulation No 7 of 2006 as contained in Gazette No 1474/5, 06.12.2006 (Emergency Regulations, 2006).

Reasons need not be given for arrest. Regulation 21(1) of EMPPR 2005 stipulates that persons arrested in terms of Regulation 19 (preventive detention) should be produced before a Magistrate “within a reasonable time having regard to the circumstances of such case and in any event, not later than thirty days from the date of such arrest.” To appreciate the deviation that this represents from normal law, it is worth noting that the Code of Criminal Procedure Act No 15 of 1979 (as amended) which prescribes that production of a person arrested before a Magistrate having jurisdiction in the case should be without unnecessary delay (Section 36) and that such period shall not exceed twenty-four hours exclusive of the journey from the place of arrest to the Magistrate (Section 37).

Suspects may be kept in preventive detention under the current emergency regulations up to one year. In practice, they are often kept for much longer periods of time. A similar permissibility is evident in the PTA.<sup>55</sup> Incommunicado detention in unauthorised ‘places of detention’<sup>56</sup> is a pervasive feature of this legal regime. The admissibility of confessions continues to be allowed even though, given the circumstances in which confessions are often extracted in secret and as a result of torture, it is virtually impossible for the accused to prove that the confessional statements were not voluntary.

These emergency regulations and provisions of emergency law violate international standards relating to the protection of life and liberty.<sup>57</sup> Moreover, they afford cover to abusers by immunity for actions taken under the emergency<sup>58</sup> in a continuation of the same political intention that propelled the Indemnity Act in the 1970’s and 1980’s. Sri Lanka has been in almost a constant state of emergency since 1971. These are fundamental and vexing questions for Sri Lanka’s judiciary, just as counter-terrorism measures have challenged judicial institutions globally.

International human rights law to which Sri Lanka is bound allows states to respond to security threats effectively, including the right to limit and suspend certain rights in a state of emergency while other rights remain non-derogable, but it also requires the maintenance of the rule of law. A state of emergency should be an extension of the rule of law in difficult circumstance, and not an abrogation of it. The ICJ Berlin

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<sup>55</sup>Section 7(1) of the PTA states that suspects arrested under Section 6(1) (“connected with or concerned in or reasonably suspected of being connected with or concerned in any unlawful activity”) may be kept in police custody for a period of seventy-two hours. Thereafter, if a preventive detention order under Section 9 has not been made, such suspect should be taken before a Magistrate, who is then compulsorily (“shall”) required to remand the suspect until the conclusion of the trial. In the case of preventive detention orders are made under Section 9 of the PTA by the Defence Secretary, the suspect may be kept for a period of eighteen months with detention orders being extended three months at a time.

<sup>56</sup>“Places of detention” authorised by the Inspector General of Police (EMPPR 2005 19(3) in which suspects may be detained must be distinguished from reference to the regular prisons but as having a wider ambit, including police stations or unauthorised and undisclosed detention centres.

<sup>57</sup>International Commission of Jurists: *Sri Lanka Briefing Paper; Emergency Laws and International Standards*, April 2009.

<sup>58</sup>Regulation 19 of Emergency Regulations 2006 provides immunity for actions taken under the Regulations: “No action or suit shall lie against any Public Servant or any other person specifically authorized by the Government of Sri Lanka to take action in terms of these Regulations, provided that such person has acted in good faith and in the discharge of his official duties.” Similar immunity provisions are contained in Regulation 73 of the EMPPR 2005, and the PSO (Sections 9 and 23) and the PTA (Section 26).

Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism<sup>59</sup> affirms that states must take measures to protect persons within their jurisdiction while maintaining the obligation to respect and ensure the fundamental rights and freedoms. It also affirms that there is no conflict between the duty of states to protect human rights and their responsibility to ensure security.<sup>60</sup>

In violation of clear international law, Sri Lanka's byzantine emergency laws:

- are overreaching and vague;
- shield perpetrators of human rights violations from accountability;
- permit illegal and arbitrary detention (for example, by allowing up to 18 months detention or longer without review pending trial under the Prevention of Terrorism Act);
- violate fair trial and due process rights (for example, by improperly allowing for use of confessional evidence and establishing "duty" to answer police questions);
- arbitrarily restrict:
  - freedom of expression (allow restrictions and prosecutions for vaguely defined threats to national security);
  - freedom of movement (provide unfettered and unreviewable discretion to restrict movement and to displace populations);
  - freedom of assembly (fail to distinguish peaceful assembly from those that incite violence); and
  - violate the right to privacy (search and seizure without warrant).

Impunity has been afforded in practical terms by the lack of effective prosecutions. Police officers found responsible by the Supreme Court for the violation of fundamental rights were not only promoted, but their compensation and costs were paid by successive governments. This refusal to acknowledge enforced disappearances as a serious problem is evidenced most recently in the failure of domestic legislation intended to give effect to the International Covenant on Civil and Political Rights - the ICCPR Act No 56 of 2007 - to include the right to life.<sup>61</sup>

### 3. The Role of the Judiciary

A historical review of the difficulties that have beset Sri Lanka's judiciary is important to understanding its role and limitations as a guarantor of fundamental rights. If constitutionalism is taken to be a measure of a state's commitment to higher-

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<sup>59</sup> The ICJ Berlin Declaration was adopted on 28.08.2004 by a gathering of 160 jurists, from all regions of the world, convened by the ICJ at its Biennial Conference.

<sup>60</sup> *Sri Lanka: Briefing Paper: Emergency Laws And International Standards*, International Commission of Jurists, March 2009, pp 1-2.

<sup>61</sup> Purporting to give effect to the International Covenant on Civil and Political Rights (acceded to by Sri Lanka in 1980), this legislation only parodies the ICCPR as it merely incorporates a limited number of rights; namely the right of every person to recognition as a person before the law, several rights of fair trial as well as securing the rights of a child and the right of access of every citizen to take part in the conduct of public affairs, either directly or through any representatives and to have access to benefits provided by the State. The Act also prohibits the propagation of war, religious hatred and so on. Jurisdiction lies in the High Court against executive or administrative action that violates these rights and should be invoked within three months of the alleged infringement either by the person whose rights have been or are to be infringed or by a person on his behalf.

order principles, and the rule of law as the means to uphold that commitment, then the question remains as to the content of those higher-order rules. Sri Lanka has seen a gradual erosion of fundamental rights – including the right to life. This section examines the part that the judiciary has played in weakening constitutional guarantees and protections.

The pre-independence period had seen some assertive decisions cautioning the executive in regard to the limits of its powers with regard to fundamental rights:

- the celebrated *Bracegirdle Case*,<sup>62</sup> in which a *habeas corpus* application was decided in favour of the petitioner with Chief Justice Abrahams famously rejecting the argument that an order of arrest made in the public interest by the government could not be reviewed by court;
- the *Thomas Perera alias Banda Case*,<sup>63</sup> in which the Court affirmed its authority to order the discharge of a prisoner where a warrant of a Commissioner of Assize remanding a prisoner to custody was found to be *ex facie* defective.

It is worth noting that in the earlier *W.A. De Silva Case*,<sup>64</sup> in an application for a writ of *habeas corpus* for the production of the body of W.A. de Silva, the court did not venture beyond deciding on its right and duty to consider whether an “actual state of war” existed or not, on basis that domestic disturbances presented all the features of warfare and posed a threat to public security. Citing the Privy Council’s order in *Ex parte Marais*,<sup>65</sup> it was held by the Court that once it is of the view that ‘an actual state of war’ existed, then the acts of the executive, in this case the military authorities, in the exercise of their martial law powers cannot be questioned in a court of law.

### 3.1. The Independence Constitution

The Independence Constitution in 1947 was rigorous in its rationale that the judiciary must be established as a body separate from the executive and the legislature. The Chief Justice and the Judges of the Supreme Court were appointed by the Governor General, held office during good behaviour 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 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 authorized to appoint, transfer, dismiss and exercise disciplinary control over all judicial officers, except a judge of the Supreme Court and a Commissioner of Assize. The appointments of judges of the apex court were in the hands of the Governor General, a representative of the Queen and as such, the appointments were sought to be distinguished from considerations that may govern national politics.

From 1947-1972, when this Constitution was in place, the illegality of any usurpation of judicial power by the executive or the legislature was affirmed in unequivocal

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<sup>62</sup>[1937] 39 NLR 193.

<sup>63</sup>[1926] 29 NLR 52.

<sup>64</sup>[1915] 18 NLR 277.

<sup>65</sup>(1902) AC 109.

terms,<sup>66</sup> and clear guidelines laid down for the restrictions of life and liberty.<sup>67</sup> However, the Sri Lankan judiciary generally refrained from authoritative pronouncements on the protection of minorities.

There are noticeable examples of this judicial caution. In 1948, the Citizenship Act was passed, disenfranchising Tamils of Indian origin, most born in Sri Lanka and living in the hill country tea plantations, and lacking Indian or any other citizenship. The Act was ruled invalid in the District Court on the basis of constitutional protections under Section 29(2), but its constitutionality was upheld by the Supreme Court in *Mudanayake v. Sivanandasunderam*.<sup>68</sup> The Court stated obiter that even if it was the intention of the framers of the Independence Constitution to have included Section 29(2) as a safeguard for minorities, such intention has not been manifested in the words chosen by the legislature. Section 29(2) decreed that Parliament could not enact any legislation that made persons of any community or religion liable to disabilities or restrictions to which persons of other communities or religion were not made liable and similarly for privileges and advantages. Considering this question in the Privy Council,<sup>69</sup> the Councillors pointed out that it was a perfectly natural and legitimate function of a legislature of a country to determine the composition of its nationals and that the Citizenship Act No. 18 of 1948 could not be said to be legislation intended specifically to disenfranchise the Indian Tamils. Whatever may be the legal mores of these decisions, there is no doubt that the psychological and political effect of the Citizenship Act No. 18 of 1948 on the minorities was tremendously negative.

Further attempts to utilize Section 29(2) to practically benefit the minorities also came to naught. It was argued in *AG v. Kodeeswaran*<sup>70</sup> that the Official Language Act was invalid due to Section 29(2) of the Independence Constitution and that a treasury circular stopping all payments to public servants who could not pass a proficiency test in the Sinhala language was consequently also invalid. The Supreme Court avoided the main question in issue in the case and decided the matter on the principle that the petitioner, being a public servant, could not sue the Crown for arrears of salary.

This ruling was reversed by the Privy Council,<sup>71</sup> wherein an earlier assertion in *Bribery Commissioner v. Ranasinghe*,<sup>72</sup> was affirmed that section 29(2) of the Independence Constitution “represented the solemn balance of rights between the citizens of Ceylon, the fundamental conditions on which inter se they accepted the Constitution and are therefore unalterable under the Constitution”. The Privy Council sent the case back to the Supreme Court for determination of its constitutionality. However, the matter was not pursued further. In 1972, the interpretation of Section 29(2) of the Independence Constitution became an academic matter with the enactment of the First Republican Constitution, which eliminated Section 29(2) in its entirety.

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<sup>66</sup>*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.

<sup>67</sup>*Muttusamy v Kannangara* [1951] 52 NLR, 324; *Corea v. the Queen* [1954] 55 NLR 457.

<sup>68</sup>*Mudanayake v. Sivanandasunderam*, [1951] 53 NLR 25.

<sup>69</sup>*Koddakkan Pillai v. Mudanayake* [1953] 54 NLR 433.

<sup>70</sup>[1967] 70 NLR 121.

<sup>71</sup>[1969] 72 NLR 337.

<sup>72</sup>[1964] 66 NLR 73, at p. 78.

In the early 1970s, several judicial decisions validated executive actions restricting liberty rights during emergency in what was to be a troublesome precursor of things to come.<sup>73</sup>

### **3.2. The First Republican Constitution of 1972**

With the enactment of the First Republican Constitution in 1972, even the minimum guarantees of judicial independence in the 1948 Independence Constitution were swept away and the judiciary was openly subordinated to the political structures of the day. The National State Assembly was declared to be the sole and supreme repository of power. Article 3 stated 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 right of appeal to the Privy Council was done away and by Article 122, the appointment of judges of the higher courts was vested in a non-elected President acting on the advice of the Prime Minister.

The earlier Judicial Service Commission was replaced by a politicized Judicial Services Advisory Board (JSAB) and a weak Judicial Services Disciplinary Board (JSDB). The JSAB was not mandated to appoint judges of the minor courts but could merely recommend their names. The appointment was by the Cabinet of Ministers. The JSDB meanwhile exercised disciplinary control and dismissal of judges of the minor courts and state officers exercising judicial power but two members of this five-member commission were the Secretary to the Ministry of Justice and the Attorney General, thus effectively ensuring executive control over the judiciary.

Even more significantly, judicial review of enacted laws was abolished. Instead, a Constitutional Court was established with the limited power to scrutinize bills within twenty-four hours when the bill was certified as being urgent in the national interest. The declaration of a state of emergency was allowed to be passed without a debate. Though the protection of specified rights was constitutionally declared, these provisions were rendered nugatory by the absence of an enforcement procedure.<sup>74</sup> Clashes between the judiciary and the executive became common. Illustratively the judiciary and the Bar united to protest against “invitations” being sent out by the then Justice Minister Felix Dias Bandaranaike on the inauguration of a subordinated Supreme Court under the 1972 Constitution. The newly set up Constitutional Court clashed head-on at the first sitting of the Court over the Press Council Bill when the legislature decreed that the court had no discretion to give a liberal interpretation to a specified time limit within which to determine the constitutionality of the Bill. The entire court resigned and a fresh court had to be appointed.

### **3.3. The Second Republican Constitution of 1978**

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<sup>73</sup>*Hidramani v. Ratnavale*, [1971] 75 NLR 67; *Gunasekera v. Ratnavale*, [1972] 76 NLR 316 - where the disallowing of a *habeas corpus* application against the Secretary of Defence was made all the more ironic by the fact that earlier, in *Gunasekera v. De Fonseka* ([1972] 75 NLR 246), a similar plea on behalf of the same corpus (but this time with the important distinction that it was made against a lower ranking Assistant Superintendent of Police) was judicially allowed on the basis that the police officer was not personally aware of the actual offence of which the person arrested.

<sup>74</sup>Only a single case alleging violation of fundamental rights was filed during this time in the District Court, *Ariyapala Guneratne v. The Peoples Bank*, [1986] 1 Sri LR 338. This case was in fact decided after the 1972 Constitution was replaced by the 1978 Constitution.

Though the drafters of second Republican Constitution of 1978 professed to right the wrongs of the past where the independence of the judiciary was concerned, this promise was only theoretical, and the opposite result ensued. The 1978 Constitution established the Supreme Court as the highest and final superior court with special jurisdiction in respect of, *inter alia*, election petitions, appeals, constitutional matters, fundamental rights and breach of the privileges of Parliament.<sup>75</sup> The appointment of judges of the superior courts was by an elected President “by warrant under his hand”.<sup>76</sup> The security and tenure of the judges were guaranteed and judges of the superior courts held office during good behaviour and could be removed only by a majority of the total numbers of Members of Parliament. The address for removal should be on grounds of proved misbehaviour or incapacity, with the full particulars of such allegations set out.<sup>77</sup> The JSAB and the JSDB were replaced by a Judicial Service Commission vested with the same powers. The JSC was to consist of the Chief Justice and two other judges of the Supreme Court, named by the President, who could be removed only for cause assigned.<sup>78</sup>

These changes notwithstanding, the subordination of the judiciary deepened. The appellate courts were reconstituted by President Jayawardene using a constitutional clause that specified that all judges of the appellate courts shall, on the commencement of the new Constitution, cease to hold office.<sup>79</sup> Three months after the promulgation of the 1978 Constitution, the government-dominated legislature reversed through constitutional amendment the Court of Appeal’s decision against vesting retrospective power to a Special Presidential Commission of Inquiry appointed to look into the actions of former Premier Sirimavo Bandaranaike. The shift in the status of the judiciary was evident in public abuse and official statements.

“Procedural difficulties in judicial officers taking the oath of allegiance under the Sixth Amendment resulted in the police locking and barring the Supreme Court and the Court of Appeal and refusing entry to judges who reported for work. Following unpopular decisions, judges’ houses were stoned and vulgar abuse was shouted at them by thugs.”<sup>80</sup>

At every stage thereafter, the judiciary was intimidated by executive authority. One such illustration was the attempted impeachment of then Chief Justice Neville Samarakoon allegedly due to criticism of the government by him during the course of a speech at a school prize-giving day. The findings of a Select Committee appointed to investigate his conduct decided that there was no proven misbehaviour that could justify the Chief Justice’s removal.

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<sup>75</sup>Article 118.

<sup>76</sup>Article 107.

<sup>77</sup>Article 107 (2).

<sup>78</sup>Article 112.

<sup>79</sup>Seven out of the nineteen judges holding office were not re-appointed in what was widely interpreted as a warning to those judges who were spared this humiliation.

<sup>80</sup>The Daily News, 05.02.1981, cited in Pinto-Jayawardena, Kishali ‘*Protecting the Independence of the Judiciary: A Critical Analysis of the Sri Lankan Law*’ State of Human Rights Report 1999, Law & Society Trust, 1999, at p. 178. One such decision which attracted executive anger was the seminal *Vivienne Goonewardene’s Case* (1983 (2) FRD 426) where the police were reprimanded by the Court for excessive force in exercising their powers of arrest.

During this period, judicial interventions to protect rights were few and far between. In 1982, the government substituted a referendum for the general election that was then due but the courts upheld this substitution.<sup>81</sup> In the Thirteenth Amendment case, a slim majority of the Court confined itself to approving constitutional amendments on the technical basis that they did not violate the unitary nature of the state.<sup>82</sup> In a later judgment, the expulsion of former key Ministers of the government was upheld on the problematic basis that observance of the rules of natural justice did not apply on the facts of the case.<sup>83</sup>

This period saw some of the worst of the excesses committed by the government in response to the systematic killings and assassinations of government politicians and public servants by the LTTE in the North and East and the JVP in other areas in the country. Despite these excesses by state forces and bolder jurisprudence concerning procedures for lawful arrests and detentions,<sup>84</sup> the Court was generally reluctant to intervene in contentious issues where the state was directly challenged.

“It is well recognized that individual freedom has in times of public danger to be restricted when the community itself is in jeopardy, when the foundations of organized government are threatened and its existence as a constitutional state is imperilled.”<sup>85</sup>

However, this abdication of judicial responsibility changed for the better by the late 1980s. Decisions began to be delivered articulating constitutional rights and the judicial expansion of such rights protections began even before the then UNP government was overthrown in the 1994 elections. The Court’s fundamental rights jurisdiction was expanded in several exemplary decisions during these pre 1994 years:

- *Mohammed Faiz v. The Attorney General*,<sup>86</sup> in which a ranger obtained relief from the Supreme Court not only against the police officers who violated his rights but also against two Members of Parliament and a Provincial Council member who had “instigated” this violation;
- *Joseph Perera v. The Attorney General*,<sup>87</sup> which struck down an emergency regulation as being unconstitutional;
- *JanaGosha Case*,<sup>88</sup> where the Court admonished police officers for interfering in a non-violent citizen protest against the Government;

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<sup>81</sup> 4<sup>th</sup> Amendment to the Constitution Bill (1978/83) DSCP/B, 157.

<sup>82</sup> *In Re the Thirteenth Amendment to the Constitution and the Provincial Councils Bill* [1987] 2 Sri LR 312.

<sup>83</sup> *Dissanayake v. Kaleel*, [1993] 2 Sri LR 135.

<sup>84</sup> *Kapugeekiyana v. Hettiaratchi* [1984] 2 Sri LR 153 (affirming that a suspect cannot be kept longer than 24 hours in police custody; *Kumarasinghe v Attorney General*, SC Application No 54/82, SCM 06.09.1982.

<sup>85</sup> per Soza J. in *Kumaranatunge v. Samarasinghe*, 1982 (2) FRD 347 where it was stated that reasons for arrest and detention under a Detention Order made by the Secretary, Defence need not be stated at the time of arrest. In *Yasapala v Wickremesinghe* (1982 (1) FRD 143, at p. 155) it was stated that the existence of a state of emergency was not a justiciable matter that the Court be called upon to examine and that the Court cannot be called upon to examine the reasonableness of an emergency regulation in this context. Both views were later categorically dismissed in judicial orders of the Court in the 1990’s.

<sup>86</sup> [1995] 1 Sri LR 372, at p. 383.

<sup>87</sup> [1992] 1 Sri LR 199, at p. 230.

<sup>88</sup> *Amaratunge v. Sirimal*, [1993] 1 Sri LR 264.

- *Perera v. AG*<sup>89</sup> and *Wickremebandu v. Herath*,<sup>90</sup> in which finality or ouster clauses in respect of emergency regulations were held not to preclude the power of courts to scrutinize the constitutionality of the same;
- *Premachandra v. Jayawickreme*, in matters of political decision-making was distinguished from a case in which the appointment of a Chief Minister by a Governor was declared not to be a purely political act and therefore open to judicial review.<sup>91</sup>

In 1994, the new Kumaratunge administration was expected to cement the foundation of its electoral mandate for a changed political culture by preserving the independence of the judiciary. What actually occurred was quite the reverse. Immediately after the elections, several judgments of the Court offered a glimpse into what may have been possible made if the judiciary had been allowed to continue to work unhindered.<sup>92</sup> In particular, attempts by the executive to abuse emergency powers were consistently struck down.<sup>93</sup> This was the high point of the Court's integrity and determination to assert its independence in regard to safeguarding the liberty of citizens.

However, by the late 1990s, increasingly assertive judgments by the Court had begun to anger President Kumaratunge and her Ministers. An International Commission of Jurists' Mission to Sri Lanka in 1997 observed these worrying trends.

“There are (however) some matters of concern. [...] [We] are worried that the President has made a number of public statements critical of the judiciary – for example- after the Cooray case,<sup>94</sup> she made what was described to us as intemperate remarks about the judiciary during a question and answer session on television.”<sup>95</sup>

Also relevant in this context was the open disparagement of judges by senior Ministers of the Government following adverse judgements by the Supreme Court.<sup>96</sup>

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<sup>89</sup> [1992] 1 Sri LR 199.

<sup>90</sup>[1990] 2 Sri LR 348.

<sup>91</sup>*Premachandra v. Jayawickreme* [1993] 2 Sri LR 294 - CA) and [1994] 2 Sri LR 90 at p. 105 - SC). The Court claimed the power to decide whether the Governor's action was reasonable and stated that in the instant case, the appointments should be set aside and fresh appointments made. ‘*This case, in particular, is interesting as the court could have chosen an easier option by pleading political discretion as a reason for non interference*’ see Pinto-Jayawardena, Kishali in ‘*Protecting the Independence of the Judiciary: A Critical Analysis of the Sri Lankan Law*’, op. cit.

<sup>92</sup>See for example, among a plethora of decisions in this regard, the *Broadcasting Authority Bill case*, (*Atukorale v. The Attorney General, SD no 41-15/97*) in which a bill which sought to set up a state - aligned broadcasting authority with extensive powers to grant or refuse licenses to private broadcasters was declared unconstitutional; *Fernando v. Sri Lanka Broadcasting Corporation*, [1996] 1 Sri LR 157 declaring an infringement of the freedom of speech of a participatory listener to a radio programme when this was abruptly cancelled.

<sup>93</sup>The landmark *Wadduwa Case*, (*Channa Peiris v. AG* [1994] 1 Sri LR 1) and the *Sirisena Cooray Case* (*Sunil Rodrigo v. de Silva* [1997] 3 Sri LR 265) both of which upheld *inter alia* the rights of freedom from arbitrary arrest and detention under emergency rule.

<sup>94</sup>*Sunil Rodrigo v. De Silva*, [1997] 3 Sri LR 265.

<sup>95</sup> ‘*Judicial Independence in Sri Lanka*,’ Report of a Mission, 14-23 September 1997, International Commission of Jurists, 1998, at p 54.”

<sup>96</sup> Remarks made by the late Jeyaraj Fernandopulle following the Court's decision in *De Silva & Others v. Jeyaraj Fernandopulle and Others*, [1996] 1 Sri LR 22. Immediately prior to the deliverance of the judgement in *Silva v. Bandaranayake* (1997 1 Sri. L.R. 92) where the Presidential appointment of a Supreme Court judge was challenged, then Minister of Justice G.L. Peiris speaking in Parliament at the

President Kumaratunge in late 1999 chose to bypass the senior-most judge in appointing the new Chief Justice following the retirement of Chief Justice G.P.S. de Silva's retirement. The Court then entered a period of unprecedented political turmoil.

Observers pointed to the unprecedented decision by President Kumaratunge to bypass senior-most justice on the Supreme Court, Justice Mark Fernando, who had delivered several rights-conscious judgments. Appeals by several senior lawyers to the President requesting her to abide by the rule of seniority and appoint Justice Mark Fernando to the post of Chief Justice went unheeded. Petitions had also been delivered to her by concerned citizens of the country to appoint an individual of high repute to the post of Chief Justice whose integrity is seen by the public to be above suspicion as well.

At the time of the appointment, Attorney General Silva had two motions pending against him, alleging misconduct and seeking to remove his name from the roll of Attorneys-at-Law. A judicial committee of Supreme Court judges had been appointed to probe into the allegations by then Chief Justice G.P.S. de Silva. His appointment was made notwithstanding these ongoing inquiries, setting a controversial precedent in this regard. Dato Param Coomaraswamy, then United Nations Special Rapporteur on Independence of the Judiciary, advised President Kumaratunge not to proceed with the appointment pending the conclusion of the inquiries on the misconduct of the Attorney General. The advice was disregarded.<sup>97</sup>

In the years thereafter, continuing allegations of the lack of impartiality of the Supreme Court were made against the former Chief Justice, who retired in early June 2009. These allegations included the 'fixing' of benches to hear important cases<sup>98</sup> and the bypassing of senior judges in the constitution of the relevant Benches.<sup>99</sup> According to former Supreme Court Justice, C.V. Wigneswaran:

"...in the Supreme Court, none of us knew how the allocation of cases was done. If the junior most judge was in charge of allocation of cases, I must confess that I never got a chance to be involved in the process, when I entered the Supreme Court in 2001. More often only selected judges were in charge and that too for a long time. And it was a fact that Justice Mark Fernando was kept out of important cases. Since I was more often accommodated with him, I

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Committee stage of discussions of the votes of his Ministry stated that *'It is very important for the Court to confine itself to the proper sphere and not to overreach itself and not to arrogate to itself the functions that belong to the Executive and the Legislature.'*

<sup>97</sup>Though this was the first time that a Chief Justice was appointed in such contentious circumstances, this was not the first time that a departure from precedent in appointing the senior-most Supreme Court to the office of Chief Justice was evidenced; one such notable instance was when then President J.R. Jayawardena declined to appoint the senior-most judge of the Supreme Court R.S. Wanasundera as the Chief Justice following the retirement of the incumbent Chief Justice, S. Sharvananda in 1988. This was commonly attributed to Justice Wanasundera's dissent in the *13<sup>th</sup> Amendment Case- In Re the Thirteenth Amendment to the Constitution and the Provincial Councils Bill* [1987] 2 Sri LR 312.

<sup>98</sup>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.

<sup>99</sup>Justice Fernando retired two years prematurely in early 2004, stating on record that he was unable to serve honourably in his judicial office. From the point of the appointment of Chief Justice Sarath Silva, Justice Fernando (along with some other senior Supreme Court judges) was not nominated to hear key constitutional matters, see *'Corruption in Sri Lanka's Judiciary'* op. cit.'

was also spared the distinction of hearing socially or politically sensitive cases. Even if I was accommodated on a bench at the leave stage, once my views were known to be contrary to certain others, I would never be given that case thereafter. Therefore I am unable to refer to any rational basis except to come to the conclusion that particular objectives were the only rational basis adhered to!"<sup>100</sup>

The nomination of junior judges in the constitution of benches to hear important matters was a particularly troubling feature of the judicial culture during this period. This practice was vividly illustrated in *Victor Ivan v. Hon. Sarath Silva*,<sup>101</sup> in which Chief Justice Silva, contrary to judicial practice hitherto held sacrosanct, nominated a Divisional Bench of the most junior judges on the Court to hear the petitions that had been lodged alleging that he was not competent to hold judicial office. The Court<sup>102</sup> decided that the impeachment was a question to be determined by Parliament and not by the Court as the constitutional remedy was in Parliament.

This decision appeared to contradict an earlier case when Parliament was about to debate the first impeachment motion against the Chief Justice in 2001. On that occasion, the Supreme Court issued a stay order on Parliament seeking to restrain it from debating on the matter. In an order handed down by then Speaker Anura Bandaranaike, Parliament refused to accept the Court's stay order. The impeachment motion was defeated by the President's unilateral dissolution of Parliament.

Beyond these specific matters that raised questions regarding the impartiality of the judiciary, a pattern of intimidation, unfair dismissal, and disciplinary action against subordinate judges of High Courts, District Courts and Magistrates Courts also became evident. International monitors warned that the independence of Sri Lanka's judiciary was being seriously undermined.<sup>103</sup> Impeachment motions filed against the Chief Justice in 2001 and 2003 were prevented by the summary dissolution and prorogation of Parliament by President Kumaratunge. These developments had a deleterious impact on the Court's jurisprudence.

A further dimension of these developments was the marked shift in the Supreme Court's relationship with the executive. From late 1999 onwards up to about late 2005, the Court, under then Chief Justice Sarath Silva, was characterized by deference

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<sup>100</sup>'Justice on a razor's edge' *The Sunday Leader*, 31 Oct.2004.' and also "Top judge hits out at judicial process" *Daily Mirror*, 20.10.2004.

<sup>101</sup>[2001] 1 Sri LR 309.

<sup>102</sup>per Justice S.W.B. Wadugodapitiya.

<sup>103</sup>See 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 and among several relevant press releases of the Special Rapporteur, see releases dated 27.02.2003 and 28.05.2003. See also 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. A more recent report following a second mission of the IBAHRI reiterated these concerns regarding the need to secure the independence of Sri Lanka's judiciary, see "*Justice in Retreat: A report on the independence of the legal profession and the rule of law in Sri Lanka*" May 2009. This second report of the IBAHRI takes note of the fact that though Chief Justice Silva had, during the last two years of his ten year term, presided over several judgments critical of the Rajapakse government's record of good governance, some of these judgments raised concerns that the judicial reasoning thereof was not based on 'any proper rationalization of the law in this area but appears to be a tool to provide the Chief Justice with the opportunity to pronounce on populist issues', see at p. 35. .

to the government of the day, led by President Chandrika Kumaratunge.<sup>104</sup> In abrupt contrast, during the last three-and-a-half years of this Chief Justice's term, he himself appeared to take the court in unpredictable directions. While this period was marked by several judgments holding the government to account,<sup>105</sup> other decisions were criticized for trespassing on legislative and executive authority. The government, further undermining the credibility of the judiciary, ignored the orders in many of these cases.

For example, *Rodrigo v. Imalka*,<sup>106</sup> the right to be free from arbitrary arrest was upheld by the Chief Justice with the further, less predictable decision that all permanent checkpoints in the capital ought to be demolished as due process had not been followed in erecting them. This Court order led to consternation as the order came amidst the escalation of the war between the government and the LTTE. The authorities ignored the decision without apparent consequence. In *Ashik v. Bandula*,<sup>107</sup> popularly known as the 'Noise Pollution Case,' the Chief Justice prohibited the early-morning use of loudspeakers by religious institutions. The practice continued unchanged. In the 'petroleum prices decision', the Court ordered that petrol prices for consumers should be reduced, with no effect.<sup>108</sup>

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<sup>104</sup>One such explicit example was in relation to Supreme Court Fundamental Rights Application No 633/2001, filed by the Free Media Movement against the Commissioner of Elections and main state electronic media, the Sri Lanka Rupavahini Corporation (SLRC) in regard to a forthcoming General Election scheduled to be held on 05.12.2001. The doctrine of Public Trust was invoked by the petitioners in urging that the state television channel should not be used for party propaganda purposes for a forthcoming election as it was run with state money and was therefore held in trust by the government for the public. However, when the matter was called for hearing on 26.11.2001, (ten days before the scheduled elections) the then Chief Justice refused to give an early date for the respondents to report back to court prior to the elections despite request of counsel, given the urgency of the matter. Costs were threatened to be awarded against the petitioner for coming before Court and the Chief Justice made the extraordinary observation that the petitioner should turn off the state television channel and switch to another channel if he found the former to be biased in its coverage. This case, and several other cases, had been listed in the aborted impeachment motions filed against the then Chief Justice during this period. Despite these orders rejecting the Doctrine of Public Trust during Kumaratunge's term, the Chief Justice however, (during the last year of his term in particular), went on to deliver several decisions against Kumaratunge's presidential successor, Mahinda Rajapakse precisely on this same doctrine of Public Trust.

<sup>105</sup>*Centre for Policy Alternatives v. Victor Perera* (SC, FR Application No 177/2007, SCM 05/05/2008) where the mass scale evictions of lodgers of Tamil ethnicity from lodging houses in Colombo was halted and a case filed by the Ceylon Workers Congress (SC Fr Application No 428/2007, SCM 19.12.2007) in relation to arbitrary arrests and detentions where the Court made several orders relating to the formulation of a scheme to be adhered to in respect of arrests and detentions and a new Court to be established to consider these arrests and detentions (SCM 27.02.2008 and SCM 02.04.2008).

<sup>106</sup>SC, FR Application No. 297/2007, SCM 03.12.2007.

<sup>107</sup>SC, FR Application No. 38/2005, SCM 07.11.2007.

<sup>108</sup>In this instance, the government publicly stated that it would not fully implement the initial order as this would be 'contrary to the war effort' see IBAHRI *Justice in Retreat: A report on the independence of the legal profession and the rule of law in Sri Lanka* May 2009, at p. 37. In early 2009, the Court was again rendered impotent when the government refused to implement its order in an oil hedging contract that was legally impugned. In another set of decisions, the Supreme Court appeared to enter into direct conflict with the President. In the "*Waters Edge*" Case, the actions of former President Chandrika Kumaratunge regarding a land acquisition during her term of office were impugned. The President was forced to pay a fine under a decision of the Chief Justice. Many observers related this decision, in marked contrast to the earlier deference shown the President, to a disputed judgment relating to the President's term of office, as a result of which the presidential elections were held in November 2005 rather than (as Kumaratunge would have preferred) in 2006, reducing her term in office by one year.<sup>108</sup> In the *Water's Edge* case, in addition to imposing a fine for

The Court's reasoning at times appeared to stretch the limits of a constitutional bar against petitions unless filed within one month of the occurrence of the alleged infringement (Section 126(2) of the Constitution).<sup>109</sup> In *NWM Jayantha Wijesekera and Others v. Attorney General and Others*,<sup>110</sup> the Supreme Court ignored the 20-year delay in bringing the petition on the questionable basis that the alleged infringement was a 'continuing violation.'<sup>111</sup> Such flexibility in disregarding the constitutional time bar was not evidenced by the Court in relation to allegations involving torture and other such violations to life and liberty. Judgments on arbitrary arrests and detentions during the years 2000-2006 were rare and failed to articulate significant principles in the protection of these rights.<sup>112</sup>

An international investigation commented on the personalized and politicized nature of the Court's jurisprudence:

"The judiciary is currently vulnerable to two forms of political influence: from the Government and from the Chief Justice himself. The nature and degree of influence oscillates between the two and depends on the relationship between them at the time. The perception that the judiciary suffers from political influence has arisen in recent years due to the excessive influence of the Chief Justice, the apparently inconsistent jurisprudence of the Supreme Court in relation to certain issues and through tensions between the judiciary and the executive... The perceived close relationship between the Chief Justice and the Government has from time to time made individual judges reluctant to return judgments that may be perceived to be critical of the executive. This may be illustrated by the scarcity of dissenting judgments during his tenure in office."<sup>113</sup>

The exceptions to the above negative trend by one or two judges known to be consistent in their judicial approach in this regard included bringing in an implied right to life<sup>114</sup> as well as efforts to further rein in emergency laws<sup>115</sup> and the

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unconstitutional actions, the Court directed that the hotel which had been built on the acquired land should be used for government institutions and for a research institute.

<sup>109</sup>Where knowledge on the part of the petitioner is required in the circumstances of the case, time would begin to run from the point that the requisite knowledge and intention come together - *Gamaethige v Siriwardene* [1988] 1 Sri LR 385. Also, *Hewakuruppu v GA de Silva, Tea Commissioner et al.* (SC FR No 118/84 SCM 10.11.1984), *Mahenthiran s AG* (SC FR No 68/1980 SCM 05.08.1980). These cases are authority for the principle that it is only in exceptional circumstances that the time limit can be relaxed, including *inter alia*, where there is no delay on the petitioner's part and applying the principle of *lex non cogit ad impossibilia* where, for example, a petitioner has been held *incommunicado*.

<sup>110</sup>FR Application Nos 243-245/06, SCM 16/10/06, judgment of Chief Justice Sarath Silva.

<sup>111</sup>*ibid*, at p. 22 of the judgment.

<sup>112</sup>Pinto-Jayawardena, Kishali and Kois, Lisa in '*Sri Lanka – the Right not to be Tortured; A Critical Analysis of the Judicial Response*', Law & Society Trust, 2008, at pp. 7-9.

<sup>113</sup>See "*Justice in Retreat: A report on the independence of the legal profession and the rule of law in Sri Lanka*" IBAHRI Report May 2009 at p.7. The socio-religious impartiality of the Chief Justice's office was further affected during this period by Sarath Silva commandeering a television programme to himself where he proceeded to regularly pronounce on Buddhist religious precepts.

<sup>114</sup>*Sriyani Silva v. Iddamalagoda*, [2003] 2 Sri LR 63 per Justice Mark Fernando and *Wewalage Rani Fernando (wife of deceased Lama Hewage Lal) and others v. OIC, Minor Offences, Seeduwa Police Station, Seeduwa and eight others*, S.C. (FR) No. 700/2002, SCM 26.07.2004, per Justice Shirani A. Bandaranayake). Both decisions are important for the Court's recognition that (in the absence of an

application of the doctrine of vicarious liability to hold officers of higher rank responsible for the actions of their subordinates who commit gross human rights abuses.<sup>116</sup> The responsibility and liability of these officers were declared not to be restricted to participation, authorization, complicity and/or knowledge. On the contrary, such officers were under a duty to take all reasonable steps to ensure that persons held in custody were treated humanely and in accordance with the law. That included monitoring the activities of subordinates, particularly those who had contacts with detainees. While this liability was applied by the Court primarily to police officers and prisons officers, some decisions applied this rule to commanding officers in respect of detainees governed by emergency regulations.

In *Banda v. Gajanayake*,<sup>117</sup> the Court considered a case in which several persons were detained under the Emergency Regulations and subsequently killed by a mob. The petitioner was one of the Officers-in-Charge. The Court accepted the principle that the inaction of the police constituted an illegal omission. In *Deshapriya v. Weerakoon*,<sup>118</sup> the commanding officer of a naval establishment was held liable for the torture of a person in custody even though there was no record of the officer's participation in the act of torture. These decisions provided a salutary expansion of the law from an earlier judgment of the Court in which a commanding officer in charge of an army camp where several children were imprisoned and tortured by his subordinates was declared not to have been responsible for any violation of human rights. His subsequent promotion had been deemed legal.<sup>119</sup>

Further, the implicit right to life recognised by the Court was expanded to an explicit recognition of the right not to be 'disappeared.'<sup>120</sup> The fact that this latter development occurred in the context of an ordinary appeal from a dismissal by the Court of Appeal of a *habeas corpus* application<sup>121</sup> was particularly significant. In this instance, a father had complained that his sons had been involuntarily removed in 1990 by soldiers attached to the Plantain Point Army camp. The dismissal in the Court of Appeal was on the basis that the petitioner had not succeeded in discharging the requisite burden of proof to establish that the army officer named as respondent in the petition had, in fact, been responsible for the abduction. The Supreme Court

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express right to life) an implied right logically stemmed from the constitutional right not to be punished with death or imprisonment except by court order (Article 13(4)). Also (in the context of a *habeas corpus* application), these same principles were reiterated in *Kanapathipillai Matchavallavan v. OIC, Army Camp, Plantain Point, Trincomalee and others* S.C. Appeal No. 90/2003, S.C. (Spl) L.A. No. 177/2003, SCM 31.03.2005, per judgment of Justice Shirani Bandaranayake.

<sup>115</sup>In *Thavaneethan v Dissanayake*, [2003] 1 Sri LR 75, (per Justice Mark Fernando) it was judicially opined that unlike regulations issued in terms of the PSO, regulations made under the PTA cannot be justified in restricting constitutional rights as they are not encompassed within the ambit of 'regulations made under the law for the time being relating to public security' as declared by Article 15(7) of the Constitution which is the definitive constitutional article by which such restrictions can be imposed.

<sup>116</sup>*Sanjeewa v. Suraweera* [2003] 1 Sri LR 317; *Sriyani Silva v. Iddamaligoda* [ibid] and the *Wewalage Rani Fernando case*, [ibid].

<sup>117</sup>[2002] 1 Sri LR 365.

<sup>118</sup>[2003] 2 Sri LR 99.

<sup>119</sup>*Liyanage v. de Silva* [2000] 1 Sri LR 21.

<sup>120</sup>*Kanapathipillai Matchavallavan v. OIC, Army Camp, Plantain Point, Trincomalee and others* S.C. Appeal No. 90/2003, S.C. (Spl) L.A. No. 177/2003, SCM 31.03.2005.

<sup>121</sup>Generally, the writ remedy of *habeas corpus* available in the Court of Appeal (and from 1987, in the Provincial High Courts) has proved to be an ineffective remedy primarily due to the extended delay in these cases being finally determined as would be discussed later.

however, linked the *habeas corpus* application with the disclosed violation of a fundamental right in terms of Article 13(4) of the Constitution and, reversing the order of the Court of Appeal, held the State liable in the absence of individual responsibility being proven. Justice Shirani Bandaranayake stated:

“Considering the contents of Article 13(4), this Court has taken the position that no person should be punished with death or imprisonment except by an order of a competent court. Further, it has been decided [...] that if there is no order from Court no person should be punished with death and unless and otherwise such an order is made by a competent court, any person has a right to live. Accordingly Article 13 (4) of the Constitution has been interpreted to mean that a person has a right to live unless a competent court orders otherwise. [...] It is reasonable to conclude that the corpora were kept in the Army Camp with the knowledge and connivance of the Army officers. Hence, Army authorities are responsible to account for the whereabouts of the two sons of the appellant...”<sup>122</sup>

These decisions by a few judges committed to the protection of rights were, however, overshadowed by contrary tendencies that undermined the integrity of the Court. In response to the Court’s failure to consistently protect fundamental rights, the United Nations Human Rights Committee accepted a number of individual communications filed under the First Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR). Up to mid-2009, twelve Communications of Views had been delivered in which the Committee found that Sri Lanka had violated its obligations in terms of the ICCPR,<sup>123</sup> effectively meaning that Sri Lanka’s Supreme Court had failed in its constitutionally-vested jurisdiction to protect rights. In fact, in two Communications, the Court’s own actions were put in issue when the Committee declared that the use of contempt powers by the Supreme Court abused civil liberties and called upon Sri Lanka to enact a contempt of court legislation.<sup>124</sup> In one Communication pertaining to the judicial process in particular, the Committee found that the Judicial Service Commission was engaging in the arbitrary disciplining of

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<sup>122</sup> Justice Bandaranayake, *Kanapathipillai Matchavallavan v. OIC, Army Camp, Plantain Point, Trincomalee and others* S.C. Appeal No. 90/2003, S.C. (Spl) L.A. No. 177/2003, SCM. 31.03.2005. The State was ordered to pay a sum of Rs.150,000 for each of the two sons of the appellant, who had disappeared in detention as compensation and costs.

<sup>123</sup> *Anthony Michael Emmanuel Fernando v. Sri Lanka*, CCPR/C/83/D/1189/2003, adoption of views, 31.03.2005; *Nallaratnam Singarasa v. Sri Lanka*, CCPR/C/81/D/1033/2001, adoption of views, 21.07.2004; *Jegetheeswaran Sarma v. Sri Lanka*, CCPR/C/78/D/950/2000, adoption of views, 31.07.2003; *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 Aratchige Laliith Rajapakse v. Sri Lanka*, CCPR/C/87/D/1250/2004, adoption of views, 14.07.2006; *Raththinde Katupollande Gedara Dingiri Banda v. Sri Lanka*, CCPR/C/D/1426/2005, adoption of views, 26.10.2007; *Dissanayake Mudiyansele 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*, CCPR/C/93/D/1436/2005, adoption of views, 08.07.2008, *Soratha Bandaranayake v. Sri Lanka*, CCPR/C/93/D/1376/2005, adoption of views, 24.07.2008 and *Weerawansa v. Sri Lanka*, CCPR/C/95/D/1406/2005, adoption of views, 17.03.2009).

<sup>124</sup> *Anthony Michael Emmanuel Fernando v. Sri Lanka*, CCPR/C/83/D/1189/2003, adoption of views, 31.03.2005; *Dissanayake Mudiyansele Sumanaweera Banda v. Sri Lanka*, CCPR/C/93/D/1373/2005, adoption of views 22.7.2008.

subordinate judicial officers, often not affording them a fair hearing or informing them of what the charges against them were.<sup>125</sup>

The Government of Sri Lanka has not acted on Human Rights Committee's recommendations. In some cases, such as *Fernando v Sri Lanka*, which involved a violation of ICCPR 9(1) as a result of the arbitrary sentencing for contempt by the Supreme Court, the government replied to the Committee saying that it could not implement the Views since it would be construed as an interference with the judiciary. In a 2006 judgment, *Nallaratnam Singarasa v. Attorney General and Others*,<sup>126</sup> a divisional bench of the Supreme Court ruled that Sri Lanka's accession to the Optional Protocol to the ICCPR was unconstitutional. The opinion was based on the misconception that Human Rights Committee Views are binding on states.<sup>127</sup> A later advisory opinion of the Court,<sup>128</sup> again presided over by Chief Justice Silva, pronouncing that Sri Lanka's legal regime conformed to international standards, was an indirect result of the furore caused by the Singarasa decision.<sup>129</sup>

### 3.4. Writs by the Court of Appeal

Insofar as the Court of Appeal is concerned, it has on occasion intervened proactively. One such instance was in 2002 when the Court quashed a circular issued by the DIG, Personnel and Training, dated 5 January 2001, directing all DIGG Ranges, SSPP Divisions (Territorial and Functional) to reinstate all officers who have been interdicted following the inquiries conducted by Disappearance Investigation Unit (DIU) and charged in courts but subsequently bailed out in connection with the cases of the enforced disappearance of persons.<sup>130</sup>

Although the decision was undoubtedly important in the context of judicial developments pertaining to accountability for enforced disappearances, it applied only to a selection of police officers who had actually been indicted in connection with alleged crimes of enforced disappearances. Large numbers of police officers who had managed to escape the reach of the law remained unaffected; many of them serve in senior positions in the police force currently.

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<sup>125</sup>*Soratha Bandaranayake v. Sri Lanka*, CCPR/C/93/D/1376/2005, adoption of views, 24.07.2008.

<sup>126</sup>S.C. SpL (LA) No. 182/99, SCM 15.09.2006, per Chief Justice Sarath N. Silva who summarily brushed aside the views of the Committee in *Nallaratnam Sinharasa v. Sri Lanka*, (Communication No. 1033/2001, CCPR/C/81/D/1033/2001, adoption of views, 21.07.2004) which called upon Sri Lanka to amend Section 16(2) of the Prevention of Terrorism Act in order that the burden is not passed upon an accused to prove that his/her confession was involuntary.

<sup>127</sup> Human Rights Committee Views issued in response to individual communications under the Optional Protocol are of normative and institutional significance as advisory opinions to States parties to the ICCPR and Protocol, but are not legally binding (which is the precise reason that the word "Views" is used in the Covenant).

<sup>128</sup>In the Matter of a Reference under Article 129(1) of the Constitution, SC Ref No 01/2008, hearing on 17.03.2008.

<sup>129</sup> Article 27(15) of the Directive Principles of State Policy (instructions binding on legislature and executive) in Chapter VI of Sri Lanka's 1978 Constitution mandates the State to "[...] endeavor to foster respect for international law and treaty obligations in dealings among nations."

<sup>130</sup>*Pathirana v. DIG (Personnel & Training) and others*, C.A. Writ Application No. 1123/2002, C.A. Minutes 09.10.2006, per judgment of Justice S. Sriskandarajah. The court order was on the basis that the circular was *ultra vires* the Establishments Code which stipulated that where legal proceedings are taken against a public officer for a criminal offence or bribery or corruption the relevant officer should be forthwith interdicted by the appropriate authority.

The ineffectiveness of the writ remedy in this context is most clearly seen in the *habeas corpus* remedy, which conceptually incorporates the recognition of every person's right to freedom from arbitrary and other unlawful arrest and detention. The remedy has been historically evidenced in Sri Lanka in respect of applications challenging powers vested in the Commissioner of Immigration and Emigration in cases of deportation or in cases of custody battles over minor children. Its use in cases of enforced disappearances is however, more complex. Statistics furnished to the *1994 Western, Southern and Sabaragamuwa Disappearances Commission* showed the distinct increase in these applications being filed from 1988.<sup>131</sup> The jurisdiction of the Court of Appeal in writ applications of *habeas corpus* invoked in terms of Article 141 of the Constitution was primarily sought during the period 1988 – 1990, which was at the height of the violations.<sup>132</sup> The Court of Appeal was empowered to either order that the individual concerned be produced in person in court or alternatively, to order a court of first instance to enquire and submit a report on the alleged detention.

The increased resort to the *habeas corpus* remedy from the 1980s evidenced the desperation of family members whose loved ones had been disappeared.<sup>133</sup>

These cases constitute a poignant aspect of the efforts of relations to trace disappeared loved ones, understood by them to have been taken away by the State security forces. The poignancy lies in the fact of the denial to these petitioners of the recourse to the ordinary procedures of law enforcement, i.e. reporting to the area police, the reports being followed by an investigation by the police, the contemporaneous police record of the incident of disappearance and statements from witnesses and police reports to courts with the attendant safeguards for witnesses including the complaints and assistance in evidence regarding finger prints, blood samples, etc. and Court's assistance in obtaining such records... In the face of this denial of the right of access to the system of

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<sup>131</sup>Final report of the *1994 Western, Southern and Sabaragamuwa Disappearances Commission*, Sessional Paper No V, 1997, at pp. 98-110. The Register, Court of Appeal furnished the Commission with a total number of *habeas corpus* applications registered annually in the years 1988 to May 1996, and the numbers awaiting disposition by CA as at May 1996. These figures showed a total of 2755 cases with 330 of these cases pending. However, the statistics in these respects often contradict each other. For example, the government, in the Fourth Periodic Report of Sri Lanka to the United Nations Human Rights Committee, CCPR/C/LKA/2002/4, 18.10.2002, at para. 47, offers a different statistical record. The Report states that from 1996 to June 2001, some three hundred and seventy four applications had been filed. The statistics do not indicate how many of these applications were still pending at the time of the report, and how many had been adjudicated.

<sup>132</sup>Later, the remedy was also available from 1990 before the Provincial High Courts. The High Court of the Provinces (Special Provisions) Act No. 19 of 1990 gave the High Courts authority to issue orders in the nature of writs of *habeas corpus* in respect of persons illegally detained within the province and to issue orders in the nature of writs of *certiorari*, prohibition, *procedendo*, *mandamus* and *quo warranto* against any person.

<sup>133</sup>*The capital city was not only an alien place to most of the Petitioners, but was so far away that many of them could barely afford the bus fare to get to the metropolis... (this)indicated the sense of desperation that moved them to brave their way to Colombo.* - Final report of the *1994 Western, Southern and Sabaragamuwa Disappearances Commission*, Sessional Paper No V, 1997, at p. 99. The remedy was also available from 1990 before the Provincial High Courts. The High Court of the Provinces (Special Provisions) Act No. 19 of 1990 gave the High Courts authority to issue orders in the nature of writs of *habeas corpus* in respect of persons illegally detained within the province and to issue orders in the nature of writs of *certiorari*, prohibition, *procedendo*, *mandamus* and *quo warranto* against any person.

administration of justice, the fact that so many petitioners sought the assistance of courts via its *habeas corpus* jurisdiction bears witness to their faith, that if they could only access the Judge of the land, they would have their attention, which would in turn get them the required attention from all official quarters.<sup>134</sup>

A number of general patterns are evident in these *habeas corpus* cases. In almost one-third of the applications analysed by the Commission, the petition had been dismissed or suspended for want of appearance of the petitioners. In the majority of cases, the respondents themselves had not attended courts throughout the inquiry but had been legally represented by counsel. The court had, in turn, accepted the applications made on their behalf that they were unable to be physically present due to service demands, thereby avoiding the risk of positive identification by the petitioner.<sup>135</sup>

The indigence of the petitioners in these applications was demonstrated by the fact that in the majority of the cases, they had been represented by legal aid organisations. In several instances, the petitioners had themselves “disappeared” or their lawyer had been killed and the case had been abandoned through fear for the safety of the remaining members of the family. The problem of the financial cost is also an important factor. In some cases, the Commission observed that the petitioners were unable to even gather sufficient money for the bus fare to attend the court hearings.<sup>136</sup>

The Attorney General had, meanwhile, consistently appeared on behalf of the Army Commander and the Inspector General of Police, as the respondents in these applications. However, the Commission observed that the Attorney General had apparently abstained from appearing in instances where there was likelihood of a charge of an offence under the Penal Code to be tried later. In those cases, private counsel had been retained by the respondents.<sup>137</sup>

Undue delay at every stage of the process is a further notable factor affecting *habeas corpus* writs. It was found in most of the cases that the application had been filed long after the date of the “disappearance” of the person, with the delay amounting to over one year in some instances. Once the matter had been taken to court, there was again excessive delay at all stages of the inquiry. In the first instance, the respondents often delay in filing their objections. These applications have been rarely been filed within three months of the filing of the petition and, in some cases, have taken as long as one year. Thereafter, once the case is ordered referred to Magistrate Court (MC) for a preliminary inquiry, as per the ordinary procedure, the inquiry itself has taken at least two years to complete.

The reasons for the delay in the MC proceedings were explained in detail by a former Chief Magistrate and are here reproduced verbatim given their importance in indicating why the *habeas corpus* remedy in Sri Lanka has lost its effectiveness.<sup>138</sup>

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<sup>134</sup>Final report of the 1994 Western, Southern and Sabaragamuwa Disappearances Commission, Sessional Paper No V, 1997, at p. 99.

<sup>135</sup>ibid, evidence of a former Chief Magistrate as given to the Commission.

<sup>136</sup>Final report of the 1994 Western, Southern and Sabaragamuwa Disappearances Commission, Sessional Paper No V, 1997, at p. 104.

<sup>137</sup>ibid, at p. 99 – evidence of a former Chief Magistrate as given to the Commission.

<sup>138</sup>ibid.

The Court of Appeal when sending the case to the Magistrate Court does not notify parties of a possible date when this case will be inquired into thereby leaving the MC to notify parties all over again. In some cases, although the Court of Appeal has identified the location of the respondents more fully than is described in the petition (which very often only contains an address of the temporary camps). This is not notified to the MC and the MC has to take steps to find the Respondents all over again. If the petitioner dies during the pending of the inquiry, there are no provisions under which the MC can act of its own volition and the case has to be referred to the CA and sent back to the MC.

Further, both the Chief Magistrate and the Registrar of the High Court gave evidence as to the volume of work already handled by the MC and the difficulty in accommodating the large influx of cases of the High Court that were sent to the Chief Magistrate in one go.

When the cases are returned to the Court of Appeal by the Magistrate's Court, there is usually a delay of several months before the Court hears the arguments based on the findings of the Magistrate. In fact, in several cases, although reports have been sent to the Court of Appeal in 1995, no final decision of the Court of Appeal is available as yet.

Thus, in cases where a magisterial inquiry has been ordered and findings made by the Court of First Instance against the respondents, there is a time lag of approximately 7 years from the date of disappearance to an order from the Court of Appeal regarding this disappearance. In this period, petitioners have died or left the country seeking employment or have lost interest in the case; The respondents have also died and several have left the service before the completion of the action against them thereby rendering impossible any disciplinary action that can be taken against them in cases where there are findings against them.<sup>139</sup>

These problems, although though pointed out at least since the 1990s, persist. Currently, even though this remedy is now being resorted to primarily before the Provincial High Courts, the problems of delays that plagued the Court of Appeal processes are reflected in the Provincial High Court processes as well.

The delays are most particularly seen in 'sensitive cases' emanating from the conflict in the North-East. For example, in one *habeas corpus* application filed in the High Court of Jaffna in 2003, the matter has been continuously postponed following its referral to the Magistrates' Court for preliminary inquiry. The relevant journal entries indicate that in most instances, postponements have been at the instance of the state counsel appearing for the respondent army officers.<sup>140</sup> Other general reasons for postponements include the inability of witnesses to be present; absence of a competent interpreter; and unspecified 'personal grounds' of counsel appearing in the applications. In addition, the tense security situation continually prevalent in these areas has also resulted in the postponements of hearings.

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<sup>139</sup>ibid.

<sup>140</sup>HCA No. 08/2004, Minutes of the Magistrate's Court of Chavakatcheri, 12.02.2007.

In many cases, requests are made by the respondent army or police officers to transfer the cases from the relevant Provincial High Court to the Colombo High Court or to the Court of Appeal for hearing. However, the problem with this transfer process is that witnesses are compelled to travel all the way from their places of residence to the capital city to attend the case. Where *habeas corpus* applications are transferred from the High Courts in the North-East such as Jaffna, Trincomalee or Batticaloa, travelling becomes especially problematic for petitioners of Tamil ethnicity, who are unable to withstand the rigorous security checks prevalent in the city, quite apart from the financial constraints involved.<sup>141</sup>

Further, the judicial response to the writ remedy of *habeas corpus* has been inconsistent and unpredictable, as recent studies have shown.<sup>142</sup> A positive trend was evidenced in the 1980s and early 1990s in holding the authorities responsible where the victim, upon being arrested and detained by the police or army, thereafter “disappeared”.<sup>143</sup> Later applications however, (particularly concerning cases from the North and East), were dismissed, *inter alia*, for technicalities such as errors in spelling the name of the abductor or the particular army camp which an aggrieved person has named in his or her petition. The mere denial of the allegations of the petitioner by the head of the police or the head of the army, has resulted in dismissal of the application.<sup>144</sup>

The extreme delay and frustration affecting petitioners in *habeas corpus* applications was also commented upon by the 1998 All-Island Disappearances Commission.

We filed a *Habeas Corpus* application in the Court of Appeal. The Bar Association’s Human Rights Committee helped us to file the case. The cases were postponed several times up to 1997. After 1997, we have not heard

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<sup>141</sup>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 p. 131.

<sup>142</sup>See De Almeida Guneratne, Jayantha and Pinto-Jayawardena, Kishali in ‘*Liberty Rights at Stake; The Virtual Eclipse of the Habeas Corpus Remedy in Sri Lanka*’ Law & Society Trust and ARD Inc. (forthcoming). This study examines more than 880 decisions of the Court of Appeal and the Supreme Court from the pre-independence period to the present date and critiques the judicial response in that regard. A particular aspect of the study is its focus on the continuing inefficacy of the *habeas corpus* remedy in the Provincial High Courts with over 50 pending matters examined for this purpose.

<sup>143</sup>*ibid.* For example, *Dhammika Sriyalatha’s Case*, CA (HC) 7/88- C.A. Minutes of 7<sup>th</sup> July, 1988 (the burden rests on the respondents to justify the arrest and detention of the petitioners and the respondents must show that the regulations which gives them the power to arrest/detain is covered by one of the constitutionally permissible grounds of restriction, eg. interests of national security or public order); *Violet and others v. O.IC Police Station, Dickwella and Others*, [1994] 3 Sri LR 377 (establishing a presumption of liberty for disappearances against the authorities last seen or found to have had the custody of detenus rendering them liable to be cast in exemplary costs) – this legal principle was followed in several cases thereafter, for example, *L.S. Perera v. I G P and Others*, HCA/13/91, C.A. Minutes 15.09.1995; *Kasthuri Nandawathie v. Commander of Army and Two Others*, HCA/103/91, C.A. Minutes 15.09.1995; *G.D. Ranjani v. Commanding Officer, Army Camp Panala and Three Others*, HCA/255/89, C.A. Minutes 13.01.1995. These cases concerned corpus of Sinhala ethnicity ‘disappeared’ during the JVP’s violent uprising in the South during the UNP administration. Many of these judgments were handed down by Justice of the Court of Appeal (as he then was) Sarath Silva. The consistent trend of the judicial thinking during this period was in abrupt contrast with his later inconsistencies as Chief Justice.

<sup>144</sup>De Almeida Guneratne, Jayantha and Pinto-Jayawardena, Kishali *op. cit.*

anything. We have received information that these cases have been transferred to the Chief Magistrate Colombo for hearing. Due to non-availability of transport I could not travel to Colombo, but Mrs. M. went every month by flight in connection with the case of her son R HCA No. 290/94. Mrs. M has given evidence before the Magistrates in respect of her son, I do not know what has happened in my case. This is the first time I have had opportunity to give evidence.<sup>145</sup>

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<sup>145</sup> Report of the *1998 All-Island Disappearances Commission*, Sessional Paper No 1, 2001, at p. 59.

## Chapter Two – Illustrative Cases

This section provides an analysis of a series of emblematic cases of unlawful killings, rape, and enforced disappearances in Sri Lanka. The identification of these illustrative cases and the environment in which they arose provides further context for the analysis of commissions of inquiry appointed during the same period to respond to similar cases.

### 1. The Krishanthi Kumaraswamy Case

In 1996, the rape and murder of an 18-year-old girl near Jaffna by eight on-duty soldiers and a police officer galvanised public opinion in the country. A Tamil school girl named Krishanthi Kumaraswamy, a bright student with several academic distinctions and a promising future, was cycling back from sitting exams at her high school on 7 September, 1996 when she was stopped at a checkpoint near Kaitadi by Sinhala security personnel, detained, repeatedly gang raped, and murdered. Her mother, brother, and neighbour went in search of her and were also killed. The bodies of the four missing persons were later discovered and exhumed from a clandestine grave near Chemmani.

The case was brought to the courts because of the sheer weight of public pressure, leading to the arrest and remand of eight army soldiers and three police officers. An indictment was filed directly in the High Court against the 8 soldiers and one policeman<sup>146</sup> and a trial-at-bar was nominated to hear the case.<sup>147</sup> The charges included abduction with intent to force illicit sexual intercourse, rape, and murder.<sup>148</sup> The prosecution had to establish a common intention to commit these offences, including the cover-up of the crimes. One accused died during the trial, one was acquitted, and the other six were convicted on various counts.<sup>149</sup>

The support of witnesses and friends of the murdered schoolgirl and active involvement by Sri Lanka's activist community generated public support for accountability. The political will to punish the perpetrators was evidenced at the highest level of the Presidential Secretariat. As a result, this trial was distinguishable from many other similar incidents of that period. It was also notable that the evidence of Sinhalese witnesses played a major part in securing the convictions of the accused. For example, the testimony of an independent witness, Samarawickreme, who confirmed the arbitrary detention of the young girl at the checkpoint, was crucial to

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<sup>146</sup>The Attorney-General decided to pardon two suspects who were not directly involved, on condition that they testify against the others.

<sup>147</sup>The impact of a trial-at-bar in prosecutions of this nature is examined in Chapter 5 of this report.

<sup>148</sup>“Abduction with intent that the victim may be compelled or knowing it to be likely that she will be forced or seduced into illicit sexual intercourse,” s. 357 of the Penal Code; rape, s. 364; and murder, s. 296.

<sup>149</sup>*Krishanthi Kumaraswamy Case*, H.C. Case No. 8778/1997, High Court of Colombo, H.C. Minutes 03.07.1998, Bench of three judges, Analysis of judgment of Judge Gamini Abeyratne, High Court judge Negombo. The bench of three judges was appointed by the Chief Justice in order to dispense justice and equity in the shortest time in terms of sub-section (2) 450 of the Criminal Procedure Code Act No. 15 of 1979 as amended by Act No. 21 of 1988 as a result of the information submitted by the Attorney General under subsection 450(4) of the Criminal Procedure Code, No. 15 of 1979 (as amended) in order to conduct a special judicial hearing in the High Court before a three judge bench without a jury. Their appeals against the convictions were dismissed in the appellate process.

the findings of guilt against the accused. The trial was sensationalized when the main accused in the case, Corporal Rajapakse, publicly disclosed details of hundreds of bodies which had been buried in the Jaffna peninsula following extrajudicial executions carried out by, as he alleged, state military forces.

The confessions of the accused, which had been made during questioning by military police investigating the crimes and which led to discovery of the bodies, were of central importance to the convictions. The three judges composing the trial-at-bar ordered that those confessions were admissible if they were made freely and voluntarily, without inducement, threat or promise, under the terms of Section 24 of the *Evidence Ordinance*. Upon a *voir-dire* inquiry being held to test the admissibility of the confessions, the judges held that they could be admitted in evidence. It was specifically ruled that a military police officer would not come within the definition of a police officer in terms of Section 25 of the *Evidence Ordinance*.

In appeal to the Supreme Court, this portion of the trial-at-bar was overturned while other grounds of appeal were rejected. The Court relied on precedent to liberally interpret the term ‘police officer’ in order to protect the liberty of the subject, by including within its ambit a ‘Mudliyar’ (military official) who had held an inquiry.<sup>150</sup> The Court did not find that this was sufficient grounds, however, to overturn the convictions and sentences. The impact of this decision is analysed later within the general context of confessions given its central importance to trials of this nature.<sup>151</sup>

While only junior soldiers were prosecuted and convicted despite “very definite pointers to culpability at a much higher level,”<sup>152</sup> the *Krishanthi Kumaraswamy Case* generated hope that the impunity afforded to security personnel was not without limits. However, rather than being emblematic of judicial integrity, this rare instance of a high-profile successful prosecution appears to have been the exception that proved the rule of impunity.<sup>153</sup>

From this perspective, legitimate questions may be raised about whether national and international pressure resulted in important steps in the criminal justice process being bypassed.<sup>154</sup> It has been observed that the speed with which the case was brought to the trial phase, with limited opportunities for investigation and discovery, resulted in a case with weak evidence and restricted the complexity of the truth in terms of the “larger issues of accountability and command responsibility for the abuses that were being committed in Jaffna at the time of the murders.”<sup>155</sup>

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<sup>150</sup> *ibid.*, at p. 13.

<sup>151</sup> Re the patent contradiction between the strict application of the ‘normal law’ to military suspects and extraordinary emergency laws that permit the admissibility of confessions to police officers above a particular rank in relation to civilians arrested under the Public Security Ordinance and the Prevention of Terrorism Act. The bar imposed on confessions to military police officers in the Supreme Court judgment in the *Krishanthi Case* was used later in the *Mirusovil Case* to shut out a similar confession, see analysis in section 4.7 below.

<sup>152</sup> University Teachers for Human Rights (Jaffna), ‘*Gaps in the Krishanthi Kumaraswamy Case; Disappearances and Accountability*,’ Special Report, Wasala Publications, Colombo, 1999.

<sup>153</sup> The other single successful prosecution concerning enforced disappearances from the South (the *Embilipitiya case*) is discussed immediately below.

<sup>154</sup> Kois, Lisa, ‘*Beyond the Rhetoric: Human Rights and Breakdown of the Rule of Law – The Krishanthi Kumaraswamy Case*,’ unpublished outline for a paper.

<sup>155</sup> *ibid.*

As noted in the next chapter with regard to the *Kokkadicholai Commission*, Sri Lanka's criminal justice system must take into account the decisive impact that omissions by military and civilian commanders (as much as their actions) have in enabling gross violations of human rights by their subordinates. This decisive influence is well understood within the security forces, and the basis for its rigid disciplinary regime, but this influence is ignored by the justice system when the state's accountability is demanded.

## 2. The Embilipitiya Case

The enforced disappearance of more than fifty Sinhalese students from Embilipitiya between 8 September, 1989 and 30 January, 1990 was due to the determination of a school principal whose son was being bullied to teach a lesson to his son's tormentors. What converted an ordinary story of discord between an authoritarian principal and mischievous schoolchildren into a crime of systematic enforced disappearances was the principal's collusion with soldiers at the nearby Sevana army camp to abduct the children and keep them in custody. Many of these children were thereafter disappeared and their bodies never recovered. The accused soldiers as well as the abducted and disappeared schoolchildren were all of Sinhalese ethnicity.

Testimony from a number of abducted students who managed to escape from the camp, as well as teachers of the school, established that the principal harbored enmity towards students in the school whom he saw as flouting his authority. He arranged for a list to be made so that "he could ask the army to take care of them." He also kept weapons on his desk at school, including a gun and a grenade. The disappearances of the schoolchildren failed to attract official attention despite appeals written by the distraught parents to the authorities, from the President to the local area army personnel. Reports by the Human Rights Task Force (HRTF),<sup>156</sup> with support from international and national activist pressure, led to the initiation of investigations and prosecutions in some of the disappearances.

The findings of the *1994 Western, Southern and Sabaragamuwa Disappearances Commission*, analyzed in detail in the next chapter, are important in this regard. A Special Report on the Embilipitiya incidents was submitted by the *Commission* to President Chandrika Kumaratunga.<sup>157</sup> The *Commission* received complaints of the disappearances of 53 schoolboys from Embilipitiya and also considered the cases of eleven other disappearances which were relevant to the cases under investigation. The findings of the *Commission*, however, did not feature prominently in the assessment by the trial judge of the criminal culpability of the accused.

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<sup>156</sup>The HRTF was established under Regulations made in terms of the enabling provisions of Section 19 of the Sri Lanka Foundation Law No. 31 of 1973 as expanded by Emergency Regulations, Gazette Extraordinary 673/2, 31.07.1991 in pursuance of regulations made under the PSO by then President R. Premadasa. The HRTF functioned from 1991 to mid 1994 and was re-established in terms of the Emergency (Establishment of the Human Rights Task Force) Regulations No. 1 of 1995, Gazette Extraordinary 874/8, 07.06.1995. The HRTF concluded its work on 30.06.1997 and its staff was absorbed into the newly established Human Rights Commission of Sri Lanka (HRC). The Human Rights Task Force, Annual Report, 10.08.1991 – 10.08.1992, at p. 27, makes specific findings against a soldier and the school principal as being implicated in the abductions of the schoolchildren.

<sup>157</sup>Volume 11 of the Special Report of the *1994 Western, Southern and Sabaragamuwa Disappearances Commission*, 'Some Reports of Cases' dated 31.05.1997 (unpublished).

The Embilipitiya case is unique in that it presents perspectives at three different levels: first, from the prosecutions in the High Court; second, from the findings of the magisterial inquiry in the *habeas corpus* applications;<sup>158</sup> and, thirdly, from the report of the 1994 *Western, Southern and Sabaragamuwa Disappearances Commission*. Each of these stages possessed distinctive features and proceeded on different legal principles relating to the burden of proof. The *Commission* heard evidence of those affected *ex parte* while in accordance with established law. The magisterial inquiry in the *habeas corpus* applications established responsibility for the ‘disappearances’ on the civil standard of balance of probability. The High Court considered the specific question as to whether those particular army officers specified in the indictment were responsible beyond all reasonable doubt for the detention of those particular schoolboys named before court as having been disappeared.

Six soldiers accused in the case as well as the school principal were convicted in the High Court of conspiring to abduct and actual abduction and kidnapping of the students in order to murder and/or with intent to secretly and wrongfully confine them. However, the most senior army officer, then Lt. Col. R.P. Liyanage, district coordinating secretary for the area, was acquitted on the basis that no evidence could be found linking him to the charges of abduction with intent to kill.<sup>159</sup> This was despite a strong finding by the *Commission* that the schoolchildren had been detained for a long period at the army camp and that Liyanage, who was in charge of the camp, bore a measure of responsibility.<sup>160</sup> Several aspects of this emblematic case will be commented upon later in this report.

### 3. Two Political Killings

Two cases are emblematic of political killings of Sinhalese activists by the government or paramilitaries linked to the government during the period 1988-1990, covering the span of the presidential terms of J.R. Jayawardene and R. Premadasa. Both cases revealed police responsibility for the killings at an institutional level, and disclosed major flaws in the investigative and prosecutorial processes. The Attorney General’s complicity in not pursuing the cases will be specifically examined in this regard.

The first case involves Wijedasa Liyanaarachchi,<sup>161</sup> a lawyer by profession, who was arrested on 25 August, 1998 on suspicion of being a JVP sympathizer and kept in illegal police custody until he died on 2 September of that same year of multiple injuries resulting from torture. Tremendous public outrage ensued, particularly from

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<sup>158</sup>In terms of Article 141 of the 1978 Constitution, once a *habeas corpus* application is filed, the case is referred to the magistrate’s court for inquiry and specifically to ascertain whether the named respondent is responsible for the disappearance.

<sup>159</sup>Embilipitiya Case, H.C. Case No. 121/1994, High Court of Ratnapura, H.C. Minutes 23.02.1999.

<sup>160</sup>The convictions were upheld on appeal but the convictions of some the accused were varied and the 7<sup>th</sup> accused –appellant (effectively the 9<sup>th</sup> accused at the trial) was acquitted. The appeal court judgment was affirmed by the Supreme Court declining to grant special leave to appeal, with however the direction that the period in which the accused were in custody after conviction pending the determination of the appeal should be taken into account as having been served as part of the sentence, Embilipitiya Case S.C. (Spl) L.A. Nos. 15-20/2002, SCM 14.02.2003.

<sup>161</sup>During this period, at least ten lawyers were killed for attending to their professional duties and the total number of lawyers killed amounted to at least twenty.

the legal profession. The Bar Association decided to boycott the ceremonial sitting of the Supreme Court in the new Courts Complex and determined that no member should appear for any police officer until the matter was settled and the killers charged in court. Public pressure resulted in police investigations and the prosecution of three junior police officers from a police station in Sri Lanka's Southern province, where Liyanaaratchi had been kept and tortured.

Three police officers, including then Senior Superintendent of Police, Tangalle Division SP Karawaitage Dharmadasa, were charged and tried in the High Court of Colombo in 1989. They were convicted of wrongfully confining Liyanaaratchi but were acquitted of his torture and murder on the basis of insufficient evidence. DIG Udugampola, who had given orders for the arrest, was not charged. His evidence at the trial was roundly disbelieved by the Colombo High Court, which noted the "highly incriminating circumstantial evidence"<sup>162</sup> against the DIG. The orders authorising Liyanaaratchi's detention were found to have been fabricated after the mutilated body of Liyanaaratchi was moved from Tangalle to Sapugaskande. He was admitted to hospital on the next day, where he died.

Meanwhile, notwithstanding the Court's view of his role and testimony, Udugampola continued to serve as head of the Bureau of Special Operations in Colombo. It was only in 1992, when he learnt that his contract was not going to be renewed, that he went underground and released a number of affidavits on death squad killings.<sup>163</sup> The government's response was to bring a case in the High Court against him and against the newspapers that published the interviews on the basis that the government was brought into disrepute. After returning to the country subsequent to a period overseas and being assured an amnesty under the caretaker government of President D.B. Wijetunge, Udugampola filed a further affidavit retracting the disclosures in his earlier affidavits. This was prompted by the understanding that if the allegations made by him were withdrawn, the charges against him would also be withdrawn. The allegations were then withdrawn and never investigated. Later, he was appointed as Vice-Chairman of the Ports Authority.

The second case involves the extrajudicial killing of Richard de Zoysa, a journalist acclaimed for his reporting on human rights abuses. He was abducted from his Welikada, Rajagiriya home in the early hours of February 18, 1990. A day later, his mutilated body was washed up on the Moratuwa beach. He had been shot twice at close range in the neck and in the head. The police investigations into his murder were negligible. Crucial documents such as the report of the investigations and a summary of witness statements were not filed at the magisterial inquiry despite repeated requests by the magistrate.

In a sworn affidavit, De Zoysa's mother, Dr Manorani Savaranamuttu, identified a Senior Superintendent of Police as having been among those who had abducted her son. The magistrate ordered the arrest and detention of the named police officer, SSP Ronnie Gurusinghe. However, with the backing of the Attorney General's office, the

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<sup>162</sup>Wijedasa Liyanaaratchi's Case, H.C. Case No. 3718/88, High Court of Colombo, H.C. Minutes 18.03.1991.

<sup>163</sup>Ludicrously, this police officer also appeared on national television, affirming that his conscience is clear, that he had done his duty by his country and that he would act in the same way again if called upon for the sake of the nation.

police did not carry out the arrest. The investigation was abandoned after a brief gesture of further interest on the part of the Attorney General. The recommendations of the 1994 *Southern, Western and Sabaragamuwa Disappearances Commission* that the case be investigated further were also disregarded.

The complicity of the AG in not prosecuting the case diligently and his refusal to proceed against the accused police officer on the basis that the evidence was not sufficient for him to frame charges against the accused police officer drew critical commentary.<sup>164</sup> The perceived cover-up at all stages of the investigation led to protests by de Zoysa's lawyer as well as by others.<sup>165</sup> Members of the Liberal Party expressed their consternation at what this prosecution signified for the justice system.

An all too clear impression has been created of the obstructionism of the police. In addition, the suspicions of partisanship and lack of commitment to an impartial pursuit of justice by the Attorney General's Department gravely undermine the credibility of what should be, in a functioning democracy, impartial institutions of the State. The unhelpful attitude adopted in this case by the relevant agencies of the police and by the Attorney General's Department only serves to confirm the recent deplorable trend in Sri Lankan public affairs that the distinction between the armed forces and the administrators has all but disappeared.<sup>166</sup>

The Attorney General was reminded by the Liberal Party members that he was the law officer of the State, not the 'partisan counsel of any particular persons in authority.'<sup>167</sup> Both de Zoysa's mother and her lawyer received death threats warning them that if they continue to press the case, that they would be both killed.<sup>168</sup> Years later, the case remains unsolved.<sup>169</sup>

The overwhelming majority of extrajudicial executions and enforced disappearances of Sinhalese civilians during this period suffered the same fate.<sup>170</sup>

#### 4. Prosecutions Relating to Sexual Violence and Conflict

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<sup>164</sup>Weerakoon Batty, *The Attorney General's Role in the Extra-Judicial Execution of Richard de Zoysa*, Star Press, Published by the author, 1991.

<sup>165</sup>Civil Rights Movement, *The Next Step in the Richard de Zoysa Case*, E-01/9/90. The Bar Association also found the inquiry to be thoroughly unsatisfactory.

<sup>166</sup>Amaratunge, Chanaka and Wijesinha, Rajiva, op.cit, *Statement on the Murder of Richard de Zoysa*, at p.30.

<sup>167</sup>ibid. The commentary continues, noting that justice must not only done but seen to be done in "an outrageous and obvious case of political murder," public confidence in the processes of justice and the law will be greatly compromised.

<sup>168</sup>Civil Rights Movement, *Death Threats in the Richard de Zoysa Case*, E-01/6/90.

<sup>169</sup>The SSP implicated in the de Zoysa killing was himself killed in a bomb blast engineered by the LTTE and aimed at a prominent UNP politician, Gamini Dissanayake in 1994.

<sup>170</sup>Most notably, on 4 April 1997, a Colombo Magistrate ordered the release of Assistant Superintendent of Police Sumith Edirisinghe and Chief Inspector Anton Sisira Kumara who had been accused of abducting and murdering a number of people in the Hokandara area in 1989 and having them buried along a roadside. The site was later excavated and skeletal remains found, some of which were sent for forensic examination. On 5 April 1997, charges were also dropped against suspects in the Wawulkeley murder case in which six persons including four police officers had been accused of abducting and murdering six youths in 1989. In both instances, the charges were dropped due to lack of evidence. See Human Rights Watch World Report 1998, at p. 13.

Several cases demonstrate the deeply entrenched impunity for sexual violence committed during Sri Lanka's conflict with the LTTE. In *Yogalingam Vijitha's* case<sup>171</sup>, the Supreme Court ordered compensation and costs to be paid to a Tamil woman who had been arrested, detained, and sexually tortured by custodial officers. Those culpable were not prosecuted.<sup>172</sup>

Generally cases of sexual violence are poorly investigated and prosecuted or not pursued at all. Medical examination of the rape victim, when it is carried out, usually occurs long after the initial incident<sup>173</sup>, depriving the medical report of any evidentiary value. The Sri Lankan Army officially has reported detention and dismissal of soldiers accused of sexual crimes, but this is rare and difficult to confirm.<sup>174</sup> Two cases analyzed below are indicative of a general pattern.<sup>175</sup>

#### **4.1. The Ida Carmelita Case**

On 12 July, 1999, a 21 year-old Tamil woman named Ida Carmelita was gang raped and killed by two Sinhalese army officers after surrendering to the police as a former LTTE member. Though the inquest commenced and forensic inquiries matched the bullets found in the killing with that of the weapon used by one of the accused, the trial petered out as the witnesses, after being intimidated by the security forces, left the country one by one. The case was transferred to Colombo on the motion of the accused, who were subsequently released on bail.<sup>176</sup>

#### **4.2. The Mannar Women Rape Case**

On 19 March 2001, Sinhalese police belonging to the Counter-Subversive Unit (CSU) raped and tortured a pregnant woman, Vijikala Nanthakumar, and a mother of three, Sivamani Weerakoon, both of Tamil ethnicity. After sustained pressure by non-governmental organisations and church leaders, the women were medically examined. Since 18 days had passed, the medical officer found "no positive findings to establish

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<sup>171</sup>*Yogalingam Vijitha v. Wijesekera, Reserve Sup. Inspector of Police S.C. (FR) No. 186/2001, SCM 23.8.2002.* The judges said; 'the facts of this case have revealed disturbing features regarding third degree methods adopted by certain police officers on suspects held in police custody. Such methods can only be described as barbaric, savage and inhuman. They are most revolting and offend one's sense of human decency and dignity particularly at the present time when every endeavour is being made to promote and protect human rights.'

<sup>172</sup>See letter written by co-ordinator of the urgent appeals programme of the AHRC to then Minister of the Interior dated 09.09.2002, asking that the relevant police officers be indicted. – quoted in Asian Human Rights Commission, 'A Special Report on Torture', Nick Cheesman (ed), *article 2*, Vol. 1, No. 4, Hong Kong, August 2002, at p. 52.

<sup>173</sup>As in the *Mannar Women Rape Case*, discussed immediately below.

<sup>174</sup>United Nations Working Group on Enforced or Involuntary Disappearances, Report of the Working Group on Enforced or Involuntary Disappearances (25-29 October 1999), E/CN.4/2000/64/Add.1, 21.12.1999; Presented to the UN Commission on Human Rights at its 56<sup>th</sup> sessions, March-April 2000, at para. 33.

<sup>175</sup>The three cases of the rape and murder of Rajini Velayuthapillai, Koneswari Murugesupillai and Sarathambal committed at varying points during the 1990's were also investigated but did not proceed even as far as the cases that have been analysed in this segment.

<sup>176</sup>University Teachers for Human Rights (Jaffna), 'From Welikade to Mutur and Pottuvil: A Generation of Moral Denudation and the Rise of Heroes with Feet of Clay,' Special Report, No. 25, 2007.

sexual intercourse [...].”<sup>177</sup> He did find several injuries consistent with the allegations of torture. Police investigations commenced and twelve police officers and two navy officers were arrested but were later released on bail.<sup>178</sup>

The women were intimidated repeatedly by the police and the trial was fixed not in Vavuniya, a Tamil area, but in Anuradhapura, a mainly Sinhalese area, at the request of the accused. It was not until 25 August, 2005, more than four years after the crime but closely following a rights petition filed with the Supreme Court, that an indictment was filed in the Anuradhapura High Court. The accused included three CSU police officers and nine Navy officers. The trial is still pending. Unable to bear the pressure after so many years, one of the complainants fled to India.<sup>179</sup>

These cases share elements of a common pattern. The possibility of successful prosecutions is slim.

### 4.3. Cases of Mass Killings of Civilians

This section examines what is now referred to as the ‘old cases’ of killings during conflict in order to demonstrate a common feature in all these cases, namely the failure of the investigative and prosecutorial machinery to secure justice for the victims, in addition to clear indications of a ‘cover-up’ in many instances. The post-2005 cases which were the subject of inquiry before the 2006 *Commission of Inquiry to Inquire into Serious Human Rights Violations* are not dealt with in this analysis as they are recent in their occurrence with the relevant court cases still in a preliminary stage of inquiry.

From data made available for this research, certain patterns are evident in the handling of these cases. In the majority of cases, when pressed by public opinion or external pressure, the most that has been done is to hold a military inquiry in the course of which the offender is warned, in some cases discharged and in one or two instances, sentenced to a short term of imprisonment. In the rare cases that were taken to court, proper procedures have not been adhered to: identification parades have not been held, forensic procedures not followed, and the chain of custody compromised. Though suspects of junior rank have been arrested, they have been almost immediately released on bail. Meanwhile, the trial has dragged on for years with the witnesses being threatened and further, compelled to travel to Colombo consequent to the transfers of their cases from the courts of the North and East upon application of the accused.

The nature of the cases is also relevant. The Kumarapuram Case (1996), the Thambalagamam Case (1998), and the Mylanthanai Case (1992) were reprisal killings in which members of the Sri Lankan army massacred civilians following the killings of fellow soldiers by the LTTE. The Kokkadicholai Case, which became the subject of a commission of inquiry examined in the next chapter, is another example of such a reprisal massacre.

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<sup>177</sup> Amnesty International, ‘Sri Lanka; Rape in Custody,’ AI Index, ASA 37/001/2002, 2002.

<sup>178</sup> *ibid.*

<sup>179</sup> University Teachers for Human Rights (Jaffna), ‘From Welikade to Mutur and Pottuvil: A Generation of Moral Denudation and the Rise of Heroes with Feet of Clay,’ Special Report, No. 25, 2007.

The indiscriminate nature of these reprisal attacks have been generally attributed to the isolated, tense and fearful context in which soldiers operate in the conflict areas, prevented from associating with the civilian population and compelled to contend with the brutal tactics of the LTTE.<sup>180</sup> In certain instances however, the names of the same perpetrators emerge repeatedly in the records, thus suggesting the existence of a small band of soldiers who are moved with official sanction from place to place in order to carry out such attacks with the intention of causing the same amount of terror as the LTTE. The other cases concern periodic mass killings that had occurred during the course of the conflict in the North and East.<sup>181</sup>

#### 4.3.1. The Kumarapuram Case

Unlike in many other areas, the army detachment near the Kumarapuram village in Trincomalee District had been co-existing amicably with the nearby villagers who were of Sinhalese, Muslim and Tamil ethnicity.<sup>182</sup> However, tensions had arisen in the mid-1990s following the posting of a senior army officer to that detachment. On 11 February, 1996, 24 Tamil civilians were massacred, including six women amidst and thirteen children, ostensibly as a result of the killing of two soldiers at Dehiwatte junction by the LTTE. Senior officers did not intervene during this reprisal massacre, which lasted for about two hours.

Once the details of the massacre emerged, widespread public anger<sup>183</sup> led to the formation of a military board of inquiry.<sup>184</sup> The inquiry recommended the punishment of senior officers for their acts of culpable omission in standing idly by while the villagers were massacred. Sixteen army personnel were arrested and an identification parade was held. However, there were errors in the conducting of this parade. Many of the witnesses from whom original statements were recorded were not called to participate. Further, some accused were not summoned to participate in the line-up.<sup>185</sup>

Subsequent to the parade, eight army personnel, seven of Sinhalese ethnicity and one of Muslim ethnicity, were identified and remanded. However, they were released before the non-summary inquiry commenced. Indictment was not served on the

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<sup>180</sup>Hyndman, Patricia, *'Democracy in Peril'*, Report to the Law Asia Human Rights Standing Committee, 1985, at p. 65.

<sup>181</sup>United Nations Working Group on Enforced or Involuntary Disappearances, *Report of the Working Group on Enforced or Involuntary Disappearances* (5-15 October 1992), E/CN4./1993/25/Add.1, Presented to the UN Commission on Human Rights at its 50<sup>th</sup> sessions, at p. 3. The cases examined in this section are illustrative of systemic patterns of impunity. An exhaustive compilation of relevant cases would be much longer. Other instances of killings, such as the reprisal killings of Tamil civilians by Muslim home guards on 29 April, 2002 at Karapola and Muthugala resulting in the killing of 88 civilians, did not lead to anything beyond a brief inquiry.

<sup>182</sup>University Teachers for Human Rights (Jaffna), *'Trincomalee District in February 1996: Focusing on the Killiveddy Massacre.'* Information Bulletin No.10, 02.03.1996.

<sup>183</sup>ibid. *'We also assert here that the Sinhalese in the area (were) very much upset by the incident and were full of sympathy for the people of Kumarapuram. Buddhist monks in Trincomalee who were contacted had also expressed their grief. It is also noteworthy that among those who visited Kumarapuram and consoled the people was a Buddhist monk from the area.'*

<sup>184</sup>Established on 15.02.1996 headed by Major-General E.H. Samaraturunge and comprising the late Brigadier Parami Kulatunge and Lt. Colonel Asoka Padeniya.

<sup>185</sup>Movement for Interracial Justice and Equality, *'Kumarapuram Massacre and Legal Proceedings,'* April 1997, at p. 2.

accused even though the relevant documents in this respect were expeditiously sent by the court to the Attorney General. Indictment was served on the accused only on 3 June, 2002 on 120 charges including murder, attempted murder and unlawful assembly. Trial commenced in the High Court of Trincomalee.<sup>186</sup> The matter remains pending.<sup>187</sup>

#### **4.3.2. The Thambalagamam Case**

In another alleged reprisal killing, several police and home guards killed eight Tamil civilians on 1 February, 1998 to avenge the LTTE bombing a week earlier of the Temple of the Tooth, a sacred place of worship for Buddhists. The alleged perpetrators had acquired a reputation in the area for abducting and killing people and reporting such killings as that of LTTE cadres to qualify for promotions.<sup>188</sup> Fifteen suspects were arrested but released on bail thereafter. This trial too is pending.<sup>189</sup>

#### **4.3.3. The Mylanthanai Case**

This is one rare case of investigations into a reprisal killing resulting in a full-length prosecution, which however culminated in the acquittal of all the accused. On 9 August, 1992, 18 Sinhalese soldiers attached to the Poonani army camp in Batticaloa were charged with the killing of 35 unarmed Tamil civilians in the village of Mylanthani. The killings were believed to be in retaliation for the assassination of senior army officer Denzil Kobbekaduwa at Arali Point in Jaffna.

On 25 November, 2002, ten years after the incident, the accused soldiers were acquitted following a jury trial. General patterns prevalent in such cases were present here as well. The case was transferred from the Batticaloa High Court, near where the incident occurred and the witnesses lived, to the High Court in Polonnaruwa in the largely majority-dominated North-Central Province. This was on the request of the counsel for the accused, who contended that conducting the trial in Batticaloa would jeopardize the security of the accused. Though this motion was heeded, the security of the witnesses was ignored. They were compelled to travel to Polonnaruwa, passing security barriers, a cause of great fear.<sup>190</sup> Even worse, the matter was later transferred yet again to the Colombo High Court. This trip was impossible for many witnesses, who were already displaced.

The implications of the acquittal in the Mylanthanai Case is analysed in detail immediately below. The analysis is important as it illustrates the role that jury trials play in such prosecutions and highlights the Attorney General's refusal to appeal against the acquittal despite requests by lawyers appearing for the victims.

#### **4.4. The Chemmani Case**

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<sup>186</sup>Interviews with lawyers associated with the case, 10.06.2008.

<sup>187</sup>ibid. One significant reason for the delay was the fact that all material evidence including weapons allegedly used in the massacre, were apparently destroyed in a fire that had occurred at the Government Analyst's Office in Colombo in 2005.

<sup>188</sup>Interview with attorneys-at-law monitoring the case, 09.06.2009.

<sup>189</sup>ibid.

<sup>190</sup>Centre for Human Rights and Development, 'CHRD in 2002; CHRD provides legal assistance to those without help,' Sentinel Special Issue, Colombo, 2002, at p. 9.

Lance Corporal Somaratne Rajapakse was convicted in July 1998 of the rape and murder of Krishanthi Kumaraswamy, and the killing of her mother, brother, and a neighbour. The disclosures that he made during the trial regarding the burial of hundreds of Tamil civilians extra judicially executed by state forces in the Jaffna peninsula during 1996 shocked the conscience of the country. The government promised an inquiry and the exhumation of the bodies took place in June 1999 with overseas forensic expertise. Specific security personnel were named by Rajapakse as being responsible for the executions; five army soldiers named by Rajapakse as the alleged perpetrators were arrested. They were subsequently released on bail. Years later, the case still remains at the preliminary stage.

Six years after the exhumation of the graves, the police were only able to tell the court that as there have been no instructions forthcoming from the Attorney General's department, they have been unable to proceed with the case. Under any other justice system, the next step would be the filing of indictments at a high court. [...] [T]he office of the Attorney General, the agency responsible for such matters, has given no reason for the long delay in the proceedings. This situation raises radical concerns regarding its accountability and responsibility.<sup>191</sup>

Later, Rajapakse voluntarily communicated his desire to testify as a witness in the *habeas corpus* applications filed in the Jaffna courts by family members of the victims. Though the preliminary inquiry before the magistrate had recorded army involvement in the extrajudicial executions and enforced disappearances, the cases remained pending. Alleged perpetrators named as the respondents in these applications were on active duty in the (then) ongoing conflict in the North and East.<sup>192</sup>

#### 4.5. The Mirusuvil Case

Eight Tamil civilians were arrested, tortured and killed in Mirusuvil in December 2000. Five Sinhalese soldiers, including a lieutenant, were indicted. The case was ordered to be heard before a trial-at-bar of the Colombo High Court in 2003 but was postponed for almost four years due to the assassination of one of the judges, Sarath Ambepitiya, in 2004. Later, another judge was removed from the judiciary on disciplinary grounds resulting in the fresh constitution of the Bench. Delays were also occasioned by the reluctance of the witnesses to travel to Colombo for the court hearings.<sup>193</sup>

A question of law then arose due to one of the five accused soldiers appealing to the Supreme Court on the basis that his confession was inadmissible under the *Evidence Ordinance* since it was recorded by the military police. This was on the basis that a

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<sup>191</sup>See press release of the AHRC (05.01.2006) which pointed to the failure on the part of the Attorney General to effectively prosecute this case.

<sup>192</sup>Interview with attorneys-at-law monitoring the case, 09.06.2009.

<sup>193</sup>Interviews with attorneys-at-law monitoring the case, 12.04.2009. In January 2003, warrant was, in fact, issued on four witnesses who had not come for the hearings due to fear. The witnesses were brought to Colombo and kept in safe custody thereafter on the intervention of a non governmental organisation; the Centre for Human Rights and Development (CHRD).

confession made to the military police amounted to a confession made to a police officer and was therefore inadmissible as held previously by the Court in the Krishanthi Kumaraswamy Case.<sup>194</sup> This appeal was upheld and the trial-at-bar directed by the Court to exclude the confession. Trial is pending.

#### 4.6. The Bolgoda Lake Bodies Case

Several police officers were arrested and remanded consequent to the discovery of 21 partly decomposed bodies of persons of Tamil ethnicity, in Alauwva, Bolgoda and Diyawanna Oya during 31 May, 1995 to 14 August, 1995. Here too, overseas forensic assistance was obtained but the investigations remained pending years later. The suspects were granted bail with critical magisterial observations being made in regard to the conduct of the police.<sup>195</sup> The suspects were reported to have been restored to their posts.<sup>196</sup> The prosecution of these cases was also lackadaisical.<sup>197</sup> This case has been effectively forgotten in public memory.<sup>198</sup>

#### 4.7. The Bindunuwewa Case

In the more recent Bindunuwewa Case, the question was as to whether the accused police officer could have been held criminally responsible for two specific instances of illegal omissions: failure to 'arrest miscreants' and failure to 'take action' when certain detainees were attacked inside a truck.

This case offers as good an example as the Embilipitiya Case in illustrating the inherent inconsistencies and systemic biases that impede the prosecutions of grave human rights violations. The High Court had ruled that the accused police officers on guard duty at that time<sup>199</sup> were criminally responsible on the basis that they had the ability and the means by way of troops to control and prevent the situation which led to the killing of twenty seven detainees and injuring fourteen others. The officers were found guilty on the basis of the illegal omissions and illegal acts for having aided and abetted the commission of offences set out in the indictment and thereby rendered themselves to be members of an unlawful assembly resulting in criminal liability.

Departing from this reasoning, a Divisional Bench of the Supreme Court<sup>200</sup> held that intentional actions had to be proved on the part of the fourth accused police officer in order to find him liable. The insufficiency of evidence in respect of the illegal omissions or illegal acts on the part of the accused police officer was held to preclude

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<sup>194</sup> As per the judgment of the Court in the *Krishanthi Kumarasawamy Case* looked at above.

<sup>195</sup> INFORM, Sri Lanka Information Monitor, Colombo, February 1996, at p. 9.

<sup>196</sup> INFORM, Sri Lanka Information Monitor, Colombo, August 1996, at p. 9.

<sup>197</sup> U.S. Department of State, '*Sri Lanka Country Report on Human Rights Practices for 1997*,' Bureau of Democracy, Human Rights, and Labour, 30.01.1998.

<sup>198</sup> Other such cases also cast into the pale of the forgotten include the discovery of skeletal remains discovered near the Duriappah Stadium (Jaffna) in March 1999 which were assumed to be the remains of civilians extra judicially executed by the Indian peace keeping force who had been occupying the Jaffna peninsula for some years, consequent to the 1987 Indo-Lanka Peace Accord. These cases were not even brought to the stage of preliminary legal inquiry.

<sup>199</sup> For the facts of the case, see preceding analysis.

<sup>200</sup> Bindunuwewa Case, S.C. Appeal 20/2003 (TAB), SCM 21.05.2005. See Keenan, Alan (2005), '*Making Sense of Bindunuwewa - From Massacre to Acquittals*,' '*Binudunuwewa & Embilipitiya: Questions of Substantial Justice*,' LST Review, Volume 15 Issue 212, Law & Society Trust, June 2005, at p. 19, for an incisive commentary on the Court's reasoning.

criminal liability. The Court overruled the conviction by a trial-at-bar and acquitted the accused. The judges stated that:

[...] if the officer in charge has exercised his discretion bona fide and to the best of his ability, he cannot be faulted for the action he has taken even though it may appear that another course of action could have proved more effective in the circumstances.<sup>201</sup>

The Court further commented that while police officers are bound to prevent the commission of offences<sup>202</sup>, the manner in which they may respond in an emergency situation is left to the discretion of the most senior police officer present.<sup>203</sup> Interestingly, senior police officers, including Headquarters Inspector Jayantha Seneviratne and Assistant Superintendent of Police A.D.W. Dayaratne, who were also implicated in their failure to take effective action, escaped the reach of the criminal law while their junior officers were taken to court. None of the officers was subjected to disciplinary action.

The manner in which the hearing before the Court was conducted gave rise to trenchant criticism. Human Rights Watch observed:

Impartial observers of the Supreme Court hearing said the justices were openly hostile to the prosecution, and seemed to have decided beforehand that the accused were unfairly sentenced. One justice publicly reminded the courtroom to remember that the inmates who had died were members of the LTTE, suggesting that this might mitigate the guilt of the accused... The judgment of the Supreme Court calls into question its impartiality in dealing with cases related to the Tamil Tigers. The Court must put aside politics and personal feelings when dealing with criminal offences involving Tamils.<sup>204</sup>

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<sup>201</sup>ibid.

<sup>202</sup>See Chapter VIII of the Code of Criminal Procedure and to *inter alia*, preserve the peace (See Section 56 of the Police Ordinance).

<sup>203</sup>See Departmental Order No. A 19 Rule 29.

<sup>204</sup>Human Rights Watch, '*Sri Lanka: Failure of Justice for Victims of Massacre*,' New York, 02.06.2005.

## Chapter Three - Commissions of Inquiry from 1977 to 2001

The preceding chapters set the stage for an examination of the role played by commissions of inquiry in Sri Lanka in addressing fundamental questions relating to truth, justice and reparations. The decision to confine the analysis to commissions operating between 1977 and 2001 is aimed to complement work undertaken already in this area with historical analysis that is free from current controversy, for example, that surrounding the 2006 Commission of Inquiry.<sup>205</sup> The central objective is to record an important part of Sri Lanka's quest for truth, justice and reparations and to draw lessons from that history.

From a political-historical perspective, commissions of inquiry established by successive government reflect the exigencies of the day, in which governments have faced demands for accountability. However, as demonstrated below, the same governments have not had the unambiguous intention or capacity to come to grips with the causes of the crimes investigated. From a legal-institutional perspective, commissions of inquiry are also a mechanism to address the systemic weaknesses discussed above, in order, for example, to overcome conflicts of interest as well as to look beyond the narrow focus of criminal courts on individual criminal responsibility to broader questions of truth and reparations. Commissions of inquiry should prompt accountability, including through prosecution, as well as remedial measures for victims and should provide as basis to reform institutions to prevent a repetition of crimes. Again, as shown below, commissions of inquiry have also failed to fulfil these purposes.

### 1. Background

The history of appointment of commissions of inquiry dates back to the passing of the *Commissions of Inquiry Ordinance No. 9* of 1872, which may be regarded as the legislative precursor to the present *COI Act* of 1948. Prior to the adoption of this ordinance, such Commissions were appointed pursuant to Article VII of the Letters Patent constituting the office of Governor and Commander in Chief of the island of Ceylon, then a crown colony.

With the coming into operation of the *Independence Constitution*, power formerly vested in the Governor stood conferred on the Governor General as the representative of the Monarch in England, the nominal Head of State. The President *de facto* assumed the Governor General's role with the entry into force of the 1972 Constitution, which preserved the "Westminster" model of cabinet government. The promulgation of the *1978 Constitution* gave the newly established Executive President the power to appoint such commissions (The continuation of the *COI Act* of 1948 was preserved *mutatis mutandis* in terms of Article 16(1) of the 1978 Constitution).<sup>206</sup>

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<sup>205</sup> See Amnesty International, *Sri Lanka: Twenty years of make-believe. Sri Lanka's Commissions of Inquiry*, ASA 37/005/2009, 11 June 2009.

<sup>206</sup> See Section 2(1) of the *COI Act* of 1948.

Before and after 1948 and even after Sri Lanka gained republican status, commissions of inquiry were used for the purpose of inquiring into the conduct of persons holding public office. Receipt or disposal of tenders received in respect of the grant of leases<sup>207</sup>; allegations of bribery and corruption among the members of the Colombo Municipal Council<sup>208</sup>; allegations of abuses in relation to or in connection with relevant tenders for government contracts<sup>209</sup>; conduct of a naval officer alleged to have participated in smuggling liquor<sup>210</sup>; alleged unlawful interception of telephone messages<sup>211</sup>; administration of categories of local authorities<sup>212</sup>; among others, cover a wide range of alleged errant public activities which were put under inquiry through the appointment of such commissions of inquiry. Employing such commissions for the purpose of inquiring into political incidents impacting on rights and later, into the specific purpose of grave human rights abuses, including mass disappearances, are of relatively recent origin.

The following analysis of commissions established to inquire into serious human rights violations is divided into three parts. The first part relates to Commissions appointed prior to 1994 to inquire into abuses committed either wholly or partly during the same period in which they were established. These bodies were, namely, the *Sansoni Commission*, the *Kokkadicholai Commission*, the *Commission of Inquiry into the Incident alleged to have occurred on the Palampiddi-Iranai Iluppaikulam-Vavuniya Road on 03.05.1991* and the *Presidential Commissions of Inquiry into the Involuntary Removal of Persons* (1991-1993).

Generally, these bodies were appointed for the purpose of investigating specific incidents of human rights violations, rather than wide scale disappearances which would be a feature of the Commissions grouped in the second stage. The one exception to this rule was the 1991-1993 *Presidential Commissions of Inquiry into the Involuntary Removal of Persons*, which, as will be discussed below, lacked the necessary elements, including political will, to constitute an effective inquiry that would lead to remedies.

The second part of the analysis relates to the key commissions appointed during the post-1994 period to inquire into generalized patterns of enforced disappearances or involuntary removals primarily during a previous political regime. These comprise the three *1994 Disappearances Commissions* and the *1998 All-Island Disappearances Commission*. Though not classic 'truth commissions,' the establishing of these commissions reflected widely prevalent expectations of truth, healing and reconciliation.

The creation of these commissions was identified with the impetus for reform that swept the government of Chandrika Kumaratunge into power in 1994 on a political platform aimed at negotiating a peace settlement and an emphatic rejection of the

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<sup>207</sup> *Wickramasinghe v. Crossette Thambyiah*, 29 CLW 69.

<sup>208</sup> *De Mel v. De Silva*, [1949] 51 NLR 105 (Divisional Bench), on a question reserved by a single Justice [1949] 51 NLR 282.

<sup>209</sup> *In Re Ratnagopal* [1968] 70 NLR 409 and in appeal to the Privy Council, [1969] 72 NLR 145.

<sup>210</sup> *AG v. Channugam* [1967] 71 NLR 78.

<sup>211</sup> *Dias v. Abeywardene* [1966] 68 NLR 409.

<sup>212</sup> *Silva and others v. Siddique and others* [1978-79] I Sri LR 166 and *Mendis, Fowzie and others v. Goonewardene*, [1978-79] II Sri LR 322.

excesses that had preceded the actions of the previous government, resulting in egregious rights violations both in the North and East as well as in other parts of the country.

However, although these commissions were somewhat more effective than the bodies that had preceded them in terms of their commitment to a balanced and rigorous inquiry into past abuses, certain aspects of their functioning raised concerns as to whether they had been established as part of a political tactic to discredit the previous regime. Such questions regarding the mandate of these commissions were creditably deflated largely due to the integrity of the commissioners who were appointed to these bodies. The promise of closure and healing with the past that the *1994/1998 Disappearances Commissions* held out, proved largely illusory, as the government paid little attention to their recommendations concerning reform of Sri Lanka's justice system and remedy and reparations.

The third section pertains to post-1994 commissions of inquiry constituted to look into specific incidents of human rights violations. These comprise the Batalanda Commission, (1995) the Presidential Truth Commission on Ethnic Violence (1981-1984) and the Bindunuwewa Commission (2001). These commissions were established at a more contentious point of the Kumaratunge administration, in the backdrop of the resumption of the armed conflict and a rising tide of political opposition. The integrity of the Batalanda Commission in particular was greatly impugned in the public perception, in part due to the manner in which the Commission functioned as well as due to the perceived political purposes for which its findings were used by the Kumaratunge administration.

## **2. Pre-1994 Commissions of Inquiry**

### **2.1. The Sansoni Commission**

Date of Appointment: 9 November, 1977

Date of Report: 2 July, 1980

Mandate: regarding the incidents that took place between 13 August and 15 September, 1977, to ascertain:

- the circumstances and the causes that led to the incidents that took place between 13 August, 1977 and 15 September, 1977, resulting in death or injury to persons, the destruction or damage of property of any person or state property;
- whether any person or body of persons or any organisation or any person or persons connected with such organisation, committed or conspired to commit, aided or abetted or conspired thereto to aid or abet or assisted and encouraged or conspired thereto or encouraged the commission of such above mentioned acts; and
- to recommend such measures as may be necessary to rehabilitate or assist such affected persons and to ensure the safety of the public and prevent a recurrence of such incidents.

To place the discussion regarding the findings of this Commission of Inquiry in their proper perspective, it is necessary to refer to the historical events that led to the communal violence of 1977 (see Chapter One). The stance of the TULF in openly professing a policy of non-violence while approving or even encouraging sections of the militant youth to engage in acts of violence was strongly condemned by Commissioner Sansoni. He relied on evidence of police officers given before the Commission to establish the conventional wisdom of the establishment at that time; namely, that certain actions of the Federal Party were the principal cause for the outbreak of ethnic rioting and civil disorder in 1977.

In particular, the Sansoni Report advanced the view that the disruption by the police of the fourth conference of the International Association of Tamil Research (IATR) in Jaffna (which was a key turning point in the spread of militancy in the North) was justified in as much as the maintenance of law and order demanded expansive police action.<sup>213</sup> In regard to the deaths of nine persons who were electrocuted when electric wires were dislodged during the disruption of the meeting, Commissioner Sansoni placed implicit faith in the magisterial verdict that this dislodging did not result from intentional firing by the police but instead was accidental.<sup>214</sup>

Substantial doubts have been raised as to Commissioner Sansoni's rendition of this event, as concisely detailed by Hoole when he refers to the (unofficial)<sup>215</sup> de Kretzer Commission Report that also examined the disruption of the IATR conference, but came to different conclusions.<sup>216</sup> The de Kretzer Commission, for example, unequivocally maintained that the overhead electric wire was brought down by the police shooting,<sup>217</sup> and did not justify police actions as did the Sansoni Commission.

Commissioner Sansoni did lend a sympathetic ear to the root problems associated with communal unrest, as for example, in his acknowledgement that the Tamil language should have been recognised as a national or 'even as an official' language before 1978.<sup>218</sup> His exhaustive relating of the nature of the riots that occurred at various parts of the country in Chapter 111 of his report is highly effective, given its minute detailing of the loss to life and property of persons of Tamil origin during the 1977 communal violence.<sup>219</sup> His report also detailed loss and damage caused to

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<sup>213</sup>ibid, at p. 64.

<sup>214</sup>ibid.

<sup>215</sup>This was a citizens commission appointed by a section of the Jaffna citizenry. Its value and credibility was enhanced by the quality of its members; it comprised retired Supreme Court judges O.L. de Kretzer and V. Manickavasagar (both fellow judges with Sansoni on the Supreme Court Bench) along with Bishop Kuvendran.

<sup>216</sup>Hoole, Rajan, op. cit, at p. 24.

<sup>217</sup>ibid, at p. 25. Hoole pointed to a further element: "Although contained in the de Kretzer report, Sansoni who was eager to justify the police, paid no attention to the police going berserk after the incident, assaulting civilians on the streets and the Central Bus Stand."

<sup>218</sup>The *Sansoni Commission* report, Sessional Paper No. VII, July 1980, at p. 73. Sansoni took the somewhat optimistic view however, that this lacunae has now been remedied by the 1978 Constitution recognising Tamil as a national language (Article 19) while further providing for its use as a medium of instruction, as a language of legislation, administration and of the Courts. (Articles 21 to 25 ) and exhorted the government to take steps to implement these provisions without delay lest it be thought that the recognition given to Tamil is 'an empty thing.'

<sup>219</sup>The violence apparently started after a false message was radioed from a police station in Jaffna on 07.08.1977 purporting to be from the Superintendent of Police to the Inspector General of Police

property of Sinhalese persons domiciled in the North during the violence (though no Sinhalese person lost his or her life).<sup>220</sup>

However, despite a general condemnation of 'unruly' behaviour of the police, his disposition to accept police versions of particular incidents solely on the basis that no complaint had been made to the police,<sup>221</sup> and to dismiss eye-witness accounts of 'a reign of police terror' during the 1977 communal violence,<sup>222</sup> raises unresolved questions about the Sansoni Report.

In a few instances, specific police officials were named as originators of the violent action as was the case in respect of the violence that took place in Anuradhapura when a number of Tamil passengers in trains arriving at the station were assaulted and some were killed.<sup>223</sup> A senior police officer, Superintendent of Police, Anuradhapura G.W. Liyanage, was particularly implicated along with several of his subordinates.<sup>224</sup> In this instance, the unequivocal evidence that was placed on record by Sinhalese government officers attached to the Railways Department confirming the culpability of these police officers was a distinguishing factor.

Undoubtedly, the Sansoni Commission Report remains an important reference point for the events of that period. However, the political context in which it was delivered as well as the manner of its functioning are relevant issues for the purpose of this analysis. There is no doubt that there was tremendous political pressure on Commissioner Sansoni to avoid giving a prejudicial impression of the actions of the Sinhalese political leadership in bringing about the outbreak of communal violence. One commentary points to obstacles faced by the Commission in its functioning as when the Police Information Books in Kandy were not furnished to it, purportedly on grounds of national security,<sup>225</sup> and the Commission faced threats during its sittings.<sup>226</sup> Unsurprisingly, these obstacles are not publicly recorded and were denied in later years.

The interaction of the officers of the Attorney General's Department with the Commission was also not without controversy. At the inception, Deputy Solicitor General G.P.S. de Silva (who became Sri Lanka's Chief Justice on 14th October 1991) had been assisting the Commission, only later to withdraw.

Those who defend Sansoni point out that the Commission and Sansoni himself were handicapped in many ways. The powerful team of Tamil lawyers led by Sam Kadirgamar QC and P. Navaratnarajah QC who appeared at the beginning of the sittings in Jaffna then dropped off, leaving the Tamil side weak on cross examination. The State decided to intervene when it thought

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stating that government buses were being set on fire and that crowds had gathered to attack incoming passengers. Though a second message was sent fifteen minutes later, canceling the first message as a false message, the damage had been done and communal attacks had started on Tamils in other parts of the country.

<sup>220</sup>The *Sansoni Commission* report, Sessional Paper No. VII, July 1980, at p. 100.

<sup>221</sup>*ibid*, at p. 93.

<sup>222</sup>*ibid*, at pp. 97 and 98.

<sup>223</sup>*ibid*, at p. 145.

<sup>224</sup>See later analysis for the impact of these findings in regard to prosecutions.

<sup>225</sup>Hoole, Rajan, *op. cit.*, at p. 35.

<sup>226</sup>*ibid*, at p. 37.

that things might get out of hand. Deputy Solicitor General GPS de Silva who appeared for the State at the beginning later dropped out citing personal reasons. He was considered a person who would have been uncomfortable about lowering his ethical standing. His place was taken by State counsel ADTMP Tennekoon.<sup>227</sup>

Victims' lawyers objected to State counsel ADTMP Tennekoon's manner of leading the police witnesses. Commissioner Sansoni dismissed these criticisms as unjustified.<sup>228</sup> However, the question of the politicisation of the Sansoni Commission continues to raise no small measure of debate.

Former Chief Justice Miliani Claude Sansoni was a man fighting a battle with himself. During the later stages of the Commission hearings, he remarked to a confidante gravely "I have never before headed a political commission."<sup>229</sup>

This quotation as well as the fact that threats were levelled at the Commission during its sittings has been vehemently contested in recent times.<sup>230</sup> More generally, revelations of information that raise questions regarding the integrity of Sri Lanka's commissions of inquiry – whether due to internal motives or external pressures - are typically strenuously contested.

Private conversations with legal personalities of the day intimately connected with these events (but who understandably prefer to remain anonymous) indicate the subtle pressures at play in such contexts. In this particular instance, the police hierarchy supported by key political figures of the day, made known its displeasure with the efforts of then Deputy Solicitor General (DSG) G.P.S. de Silva to lead evidence fairly, which meant that the actions of certain police officers were liable to get exposed. It is confirmed on the most impeccable of testimony that (then) DSG de Silva's withdrawal from the Commission sittings was not as had been portrayed for personal reasons.

Insofar as the functioning of the Sansoni Commission was concerned, Commissioner Sansoni allowed lawyers to cross-examine witnesses. He also admitted confessions, using Section 7(d) of the COI Act of 1948 and overruling objections raised in that regard.<sup>231</sup> His rationale was that the makers of such confessions were not being charged in a court of law and that therefore there was no valid reason to disallow their admittance.<sup>232</sup> The objection that the makers of such confessions should be noticed to

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<sup>227</sup> *ibid*, at p. 36.

<sup>228</sup> The *Sansoni Commission* report, Sessional Paper No. VII, July 1980, at pp. 19 and 20.

<sup>229</sup> Hoole, Rajan, *op. cit.*, at p. 37.

<sup>230</sup> See Secretary to the Sansoni Commission, Tissa Devendra's rebuttal of this writer's column *Focus on Rights* titled 'Further Reflections on Commission Inquiries and Rights Violations, Part 111' *The Sunday Times*, 17.02.2008. Mr Devendra stated that (then) Deputy Solicitor General GPS de Silva withdrew from the Sansoni Commission not due to his disillusionment with the proceedings but because 'he had to go back to the Department which just could not spare the services of the Deputy Solicitor General to assist a long term Commission.' See also 'Rebutting a Defence of the Sansoni Commission' in *Focus on Rights, The Sunday Times*, 24.02.2008 and 'More on the Sansoni Commission' *The Sunday Times*, 02.03.2008 for the somewhat acrimonious dialogue that took place on this matter.

<sup>231</sup> The *Sansoni Commission* report, Sessional Paper No. VII, July 1980, at p. 5.

<sup>232</sup> *ibid*.

appear before the Commission was also dismissed on the basis that the whereabouts of such persons could not be traced and that this fact should not anyway prevent the confessions being admitted.<sup>233</sup>

While evidentiary rules in Sri Lanka's commissions of inquiry are relaxed for the purposes of fact-finding (rather than determining criminal culpability), the admittance of confessions without further corroboration of their nature or right of reply, threatened to bring into disrepute the inquiry and judicial system as a whole.<sup>234</sup> Moreover, the possibility of such 'confessions' being induced or coerced by law enforcement officers or through external influence is high.

Given the reputation that the late Justice Sansoni had enjoyed, not merely by virtue of holding the post of Chief Justice, but rather by the high calibre of his discharge of his judicial functions, these apparent departures from otherwise high standards guiding Commission proceedings raise questions that are partly addressed in the following comment.

In judging Sansoni's Report, we must go beyond the individual and take into consideration the milieu in which he was working. In a context where the politics of the nation is wayward and the executive both too powerful and thoroughly unscrupulous, to expect a good commission report on a matter involving high stakes, is to expect too much from individuals.<sup>235</sup>

These observations remain relevant in relation to the appointment and functioning of commissions of inquiry in the present day context in Sri Lanka as well.

## **2.2. Inquiry into attack on MSF Vehicle (Palampiddi-Iranai Road Inquiry)**

Date of Appointment: 9 May, 1991<sup>236</sup>

Date of Report: June, 1991<sup>237</sup>

Mandate: to inquire into the shooting and attack by aircraft which caused injury and damage to personnel and property of Medecins Sans Frontieres (MSF) on 3 May, 1991 and to ascertain whether the firing upon of the MSF vehicle by a government helicopter was intentional or accidental.

The Commission found that the MSF officers had not obtained the requisite permission regarding route clearance from the Joint Operations Command (JOC) to

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<sup>233</sup> *ibid.* To quote verbatim: 'Nobody, not even the attorneys at law who raised this objection, considered it fit or necessary to move for notices on the makers. I made it clear that if they wished to appear before the Commission, I would be willing to hear them; and I have no doubt that the publicity given to the proceedings of the Commission would have brought that intimation of my decision, to hear them if they appeared, to the notice of any of the makers who were desirous of appearing.' Those whose confessions were so admitted included P. Sathyaseelan (arrested as a suspect in terrorist activities who later escaped) and the son of TULF frontliner, the late A. Amirthalingam.

<sup>234</sup> See Annex 'A' to this report: Principle 9,

<sup>235</sup> Hoole, Rajan, *op. cit.* at p. 37.

<sup>236</sup> Appointed by President R. Premadasa. L.H de Alwis functioned as the one-man Commissioner. This is commonly referred to as the *MSF Commission* report.

<sup>237</sup> Sessional Paper No. 11, 1991.

use the Palampiddi-Iranai road which route was, at that point, near an ongoing military operation with a curfew having been declared in Vavuniya.<sup>238</sup> The Commission concluded that though JOC had approved a particular route on the main Mannar-Vavuniya road, MSF had not taken that route but had followed the Palampiddi-Iranai road. This conclusion was reached through sole reliance on the statements of the JOC officer with whom the MSF officer had conducted a telephone conversation regarding the route that should be taken.<sup>239</sup> It also concluded that the firing was accidental, that the shooting or attack was not conducted without due care and precautions for the safety of persons, but was due to a mistake made in good faith.<sup>240</sup>

The Commission's finding, however, was contrary to evidence from the injured MSF personnel that after the first shot was fired at their vehicle (which was clearly marked from all sides with the MSF emblem) from the army helicopter, the four personnel had commenced to wave the MSF flags in order to establish identity. However, despite their doing so, the shooting continued, followed by the dropping of bombs on the vehicle. It was at that point that the MSF personnel were injured.<sup>241</sup>

The testimony that the shooting was deliberate and intentional was refuted by the evidence of the air force and army officers who stated that they had been informed that the MSF vehicle had been taking the main Mannar-Vavuniya road and not the Palampiddi-Iranai road, which was about two kilometres from an ongoing military operation and that they had been unable to see the markings on the vehicle or the flashing blue light on the hood as it was daylight and they were flying above an altitude of 2,500 feet. No movements around the vehicle were seen by them. Previous incidents in which the LTTE had used vehicles with red-cross markings were cited.

It is worth providing some detail to illustrate the kind of evidence before the Commission and how its handling of it could generate controversy. In the evaluation of contested testimony, this Commission report appears uncritically to favour government over MSF testimony. This apparent lack of impartiality appears, for example, in the Commission's consideration of the question as to why, even assuming that the MSF vehicle was travelling along an unauthorized route and was therefore mistakenly attacked by government forces, the attack was not called off when the military authorities were contacted on the phone and informed of the firing.<sup>242</sup> The shooting had started at 1.00 pm on 3 May, and the fact that an MSF vehicle was being fired on was almost immediately notified to the Anuradhapura air force base as well as the army camp by the Colombo based administrative officer of MSF who was in radio contact with the MSF personnel being fired upon. Thereafter, the Air Marshall's office in Colombo had been contacted at around 1.20-1.25 pm and informed of the incident with the repeated pleas that the shooting be stopped. However, the testimony of the MSF personnel under attack was that the shooting and attacks had continued till 3.00 pm.<sup>243</sup>

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<sup>238</sup>ibid, at pp.7-9.

<sup>239</sup>ibid, at pp.7-9.

<sup>240</sup>ibid, at pp. 13 and 14. No further action was taken against any army/airforce personnel consequent to the Commission's finding.

<sup>241</sup>ibid, at p. 10.

<sup>242</sup>ibid, at pp. 14 and 16.

<sup>243</sup>ibid, at p. 16.

Notwithstanding these considerations, the Commission decided to conclude that the actual attack upon the vehicle by the air force helicopter and fixed wing aircraft had lasted only 26 minutes in total while the remaining period had witnessed only different attacks on targets some 500 yards near the MSF vehicle but not directly at it. Consequently, it concluded that no person or persons in the service of the Sri Lanka government were responsible for any wrongful act or omission? and the question of what action should be taken against such person does not arise for consideration.<sup>244</sup> Interestingly, the precise time of the last point of radio contact that the Colombo MSF office had with the MSF personnel is omitted in the Commission report. (That contact was some time after 1.25 pm when one of the doctors had confirmed that a bomb had fallen ten or twenty metres from the vehicle, stating further that ‘we can’t say anymore. We are going to hide ourselves.’<sup>245</sup>) This omission is material and highly significant if one independently evaluates as to whether the shooting and attacks on the vehicle had continued intentionally, even after the responsible command had been notified that it was an MSF vehicle that was being fired upon.

Even with this omission however, the time period of 26 minutes (from 1.00 pm to 1.26 pm) that the Commission defines as being the limited period during which the MSF vehicle was fired upon (based on the evidence of the air force officers and their records) does not accord with the recorded radio message from the MSF doctor under attack to the MSF Colombo office at some point after 1.25 pm. As stated previously, the uncritical acceptance of the evidence of the relevant air force personnel leads this Commission to its inevitable conclusion that no blame can be attached at all to government personnel.

According to the Commission report, the next radio contact that MSF Colombo had with their injured personnel was at 3.00 pm when the nature of the injuries caused to the passengers were described. This part of the Commission’s report is also quite confusing, given that the term ‘radio contact was on right throughout’ is used in this paragraph contradicting its earlier claim that radio contact was lost between MSF Colombo and its personnel under attack at an unspecified time.<sup>246</sup>

### 2.3. The Kokkadicholai Commission of Inquiry

Date of Appointment: 18 June 1991<sup>247</sup>

Date of Report: 9 March 1992<sup>248</sup>

Mandate: to report on whether there was any connection between the two incidents of the explosion of a device on 12 June 1991 resulting in the deaths of two soldiers and the injury to another and the killing of sixty-seven civilian inhabitants of nearby villages in Batticaloa. It was also required, *inter alia*, to report on whether the civilian deaths resulted from actions of the armed forces

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<sup>244</sup>ibid, at p. 16.

<sup>245</sup>ibid, at p. 15.

<sup>246</sup>ibid, at p. 15.

<sup>247</sup>Appointed by President R. Premadasa. The Commissioners comprised K.D.O.S.M. Seneviratne, Sivanathan Selliah and Abdul Majeed Mohammed Sahabdeen. Sessional Paper No. 11, 1992.

<sup>248</sup>Sessional Paper No. 11, 1992.

and, if so, the reasons for such killings. Further, it was called upon to recommend whether criminal proceedings, if any, against any members of the Armed Forces, should be under military law or the normal civil law.

Dispassionately viewed, the Kokkadicholai massacre is a textbook illustration of the horror and tragedy of Sri Lanka's conflict. On 12 June 1991, the explosion of a device buried under the surface of the road on the Kokkadicholai-Manmunai Ferry Road in the Batticaloa District resulted in the deaths of two soldiers and the serious injury of a third soldier. Shortly thereafter, it was alleged that rampaging army soldiers killed sixty-seven civilian inhabitants of the villages of Makiladitivu, Muthalaikuda and Munaikaidu located near the Kokkadicholai army camp in the Batticaloa district. Property was looted and some was destroyed.

The Commission was established by then President R. Premadasa, responding to public pressure to identify the perpetrators of the massacre. The Commission, in its Final Report, found the killings of the civilians directly attributable to the soldiers stationed in the Kokkadicholai army camp. The actions were stated to disclose penal offences; namely murder, arson, robbery, unlawful assembly and similar offences. However, in an assessment of the context and circumstances surrounding the massacre, it was concluded that the civilian killings were the result of unrestrained behaviour of soldiers after the explosion and death of two of their colleagues and the injury of yet another.

In its observations, the Commissioners stressed as follows:

[...] that the witnesses from the villages involved were questioned as to whether before this incident, there was any harassment by or bad conduct of the soldiers. The villagers were unanimous in stating that since the Camp was established at Kokkadicholai about 6 months prior to June 1991, there had been no harassment from the soldiers and that it appears there had been cordial relations with the soldiers.<sup>249</sup>

Accordingly, the killings were not found to be the result of military action but rather, offences committed by soldiers who ran amok. The Commission opined that the offences were punishable in terms of the Penal Code but that, due to the finding that there was no evidence against any particular soldier or soldiers as such, it was determined that "the offenders cannot be brought before a criminal court of law."<sup>250</sup>

It was recommended therefore that the army undertake its own investigations and sanctions be imposed under military law<sup>251</sup> against those responsible.<sup>252</sup> The Commission also ordered that military authorities be required to give clear instructions to soldiers not to indulge in or execute extra-military or non-military acts.

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<sup>249</sup>Final report of the Kokkadicholai Commission of Inquiry, Sessional Paper No. 11, 1992, at p. 6.

<sup>250</sup>ibid.

<sup>251</sup>In case of a summary trial before a military court, the punishment is of a disciplinary nature, such as reduction in rank, withholding of promotions or delay in promotions-See Section 42 of the Army Act. In case of a court martial, the punishment can extend to death, imprisonment of both kinds or discharge from service-See Section 96 to Section 147 of the Army Act in regard to the various categories of offences and punishments.

<sup>252</sup>As would be pointed out later, the inability to prove individual responsibility led to the acquittal of the implicated soldiers by a Military Court.

The Commission's recommendation that an inquiry be undertaken by a military court is problematic. The use of military courts for the purpose of inquiry into extrajudicial executions and enforced disappearances is not sanctioned by international law.<sup>253</sup>

The mandate of this Commission was to determine the facts and recommend criminal prosecutions accordingly. In this regard, the decision of the Commission not to examine the responsibility of senior officers in command at the Kokkadicholai army camp is inexplicable. The impact of this self-imposed restriction on the mandate was starkly highlighted by the verdict of the army-initiated court martial, which ruled against the senior army officer in command at the camp, precisely on the charge of failing to control his subordinates and failure to dispose of dead bodies. In this light, the failure of the Commission to examine the responsibility of the senior officer in command at the time of the massacre is all the more questionable.

Other concerns were evidenced in regard to the functioning of the Commission, including specifically the fact that the Commission had not subjected the military suspects to cross-examination, contrary to international principles relating to such inquiries.<sup>254</sup> Civilian witnesses had, however, been subjected to cross-examination.<sup>255</sup> Further, the seventeen implicated soldiers appeared before the Commission in civilian dress and only the commander-in-charge gave evidence; that, too, in the form of unsworn testimony.<sup>256</sup>

Responding to these concerns, the government merely replied that the commission had acted 'in keeping with the norms of criminal procedure that are recognised by the legal system of Sri Lanka never to compel a person suspected of any offence to give evidence at the inquiry and stated that it would not be in the interests of justice to compel these army men to give evidence.'<sup>257</sup>

This explanation missed the essence of these concerns, which is that any commission of inquiry must carry out its investigation in accordance with criteria that will ensure the possibility of full accountability. These criteria have been developed in detail

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<sup>253</sup>This issue is revisited in detail below (see Ch. 5, s. 8). See also para. 9 of United Nations Human Rights Committee, Comments on Egypt's second periodic report under the International Covenant on Civil and Political Rights, CCPR/C/79/Add.23, 09.08.1993, where the Committee stated that 'military courts should not have the faculty to try cases which refer to offences committed by members of the armed forces in the course of their duties.' As pointed out pertinently, 'if special or military courts have jurisdiction over serious human rights violations where these are rife, it is extremely unlikely that the perpetrators will be brought to trial or – if brought to trial – that they will be convicted. Such courts often use truncated procedures and lack the professional competence and independence of the civilian courts. Military courts tend to lack independence and impartiality because they are under the military command structure – often the same structure which is suspected on carrying out human rights violations', Amnesty International, *'Disappearances and Political Killings. Human Rights Crisis of the 1990's, A Manual for Action'*, abbreviated version published by the Nadesan Centre, Colombo, 1994, at p. 27.

<sup>254</sup>Amnesty International, *'Sri Lanka; An Assessment of the Human Rights Situation'*, AI Index, ASA/37/1/93, 1993, at p. 4. See also Principle 10 of the *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Execution*, adopted by the Economic and Social Council Resolution 1989/65, 24.05.1989, endorsed by the United Nations General Assembly, 15.12.1989, <http://www.un-documents.net/a44r159.htm>.

<sup>255</sup>Amnesty International, *'Time for Truth and Justice'*, AI Index, ASA 37/04/95, 1995, at p. 21.

<sup>256</sup>*ibid.*

<sup>257</sup>Amnesty International, *'When will Justice be Done?'*, AI Index, ASA 37/15/94, 1994, at p. 8.

internationally and are examined systematically later in the study (see Chapter Four). It is in this sense that, while it was an accepted principle of law that no one can be required to testify against oneself, the challenge of the Commission was to use its powers to secure all relevant testimony, determine the facts, and recommend prosecutions where crimes were disclosed, while taking care to protect the rights of alleged perpetrators.<sup>258</sup>

The further question arises as to whether, by referring the incident to a military court, the Commission took into its own hands the decision to sacrifice justice by means of accountability through prosecution for a convenient version of the truth that resulted ultimately in a lone “scapegoat” being found responsible by the military court, i.e., the senior army officer in command at the camp. This could be argued to amount to explicit political expediency in granting immunity for acts of gross human rights violations and usurping the criminal jurisdiction thereto.

#### **2.4. The 1991-93 Presidential Commissions (1991-1993)**

*Commissions appointed by President R. Premadasa*

Date of Appointment: 11 January 1991; 13 January 1992; 25 January 1993<sup>259</sup>

Date of Report: Not Published

Mandate: to inquire into and obtain information and report in respect of the period commencing 11 January 1991 (thereafter 13 January 1992 and 25 January 1993) until twenty-four months following upon the date hereof. The Commission was to inquire into allegations “that persons are being involuntarily removed from their places of residence by persons unknown” and report on the following:

- (i) any complaints of such alleged removal, and/or the subsequent lack of information of the whereabouts of the person or persons so removed;
- (ii) the evidence available to establish the truth of such allegations;
- (iii) the present whereabouts of the person or persons so removed;
- (iv) the identity of the person or persons or groups responsible;
- (v) the evidence available to establish the truth of such allegations;
- (vi) the steps at law to be taken against such persons responsible;
- (vii) whether such illegal acts took place by reason of any lack of legal provision in the present laws relating to law enforcement;
- (viii) the remedial measures necessary to prevent the future occurrence of such illegal activity.<sup>260</sup>

*Commission Appointed by President D.B. Wijetunge*

Date of Appointment: 13 September 1993<sup>261</sup>

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<sup>258</sup>ibid.

<sup>259</sup>Warrants of the Commissions Gazette No. 644/27, 11.01.1991, Gazette No. 697/5, 13.01.1992, Gazette No. 751/1, 25.01.1993.

<sup>260</sup>The Gazette of the Democratic Socialist Republic of Sri Lanka, Extraordinary, No. 644/27, 11.01.1991, Schedule A. Warrants of the Commissions Gazette No. 644/27, 11.01.1991, Gazette No. 697/5, 13.01.1992, Gazette No. 751/1, 25.01.1993.

Date of Publication of Report: not published

Mandate: to inquire into past involuntary removal of persons during 1991-1993 and

(i) whether such illegal acts took place by reason of any lack of legal provision in the present laws relating to law enforcement;

(ii) the remedial measures necessary to prevent the future occurrence of such illegal activity.<sup>262</sup>

and:

(i) any complaints of such alleged removals, and/or the subsequent lack of information of the whereabouts of the person or persons so removed;

(ii) the credibility of such complaint;

(iii) your recommendation as to whether or not further investigations into such complaint are warranted for the purpose of the institution of legal proceedings<sup>263</sup>

## 2.5. Reflections on the 1991 Presidential Commissions

An analysis of the historical context and conduct of these commissions shows them to be, in relative terms, unworthy predecessors to the post-1994 Disappearances Commissions. The 1991 Presidential Commissions<sup>264</sup> are difficult to characterize in any other way than as efforts to deflect international criticism of Sri Lanka's human rights record. The mandate, proceedings and procedures of the Presidential Commissions were seriously defective. Their hearings were held in secret, their reports on some individual cases reported to it were not made public, and their mandate did not include the thousands of cases reported prior to 1991.<sup>265</sup> Apparently, 3,669 cases had been reported to the PCIIRP which were before the mandated time period.<sup>266</sup> It was during this time period, namely 1987-1990, that the worst of the abuses perpetrated by government and paramilitaries linked to the government had occurred in response to the attempts by the JVP to overthrow the United National Party government.

The findings of the 1991 Presidential Commissions were not made public at any stage. However, it has been observed that the Commissions "had submitted reports on at least 142 cases of disappearance to successive presidents between January 1991

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<sup>261</sup>The Gazette of the Democratic Socialist Republic of Sri Lanka, Extraordinary, No. 784/1, 13.09.1993. This fourth Commission was appointed by President D.B. Wijetunge upon assuming the office of the Executive Presidency shortly following President R. Premadasa's assassination by an LTTE suicide bomber on 01.05.1993.

<sup>262</sup>ibid. Schedule "A".

<sup>263</sup>ibid. Schedule "B".

<sup>264</sup>Coining of the phrase 'involuntary removals' in relation to Commissions of Inquiry was first evidenced by these Commissions. This terminology was later followed by the 1994/1998 *Commissions of Inquiry into Involuntary Removal or Disappearances of Persons* consequent to some discussion on the exact parameters of this term as would be seen in the later analysis in this section.

<sup>265</sup>This was criticized strongly by Amnesty International. See Amnesty International, 'Sri Lanka, Implementation of the Recommendations of the UN Working Group on Enforced or Involuntary Disappearances following their visits to Sri Lanka in 1991 and 1992', AI Index, ASA/37/04/98, February 1998, at p. 6.

<sup>266</sup>Amnesty International, 'Sri Lanka; An Assessment of the Human Rights Situation', AI Index, ASA/37/1/93, 1993, at p. 4.

and the end of 1994. In some cases at least, the reports are believed to contain evidence implicating individual officers in perpetrating disappearances.<sup>267</sup>

### 3. Post-1994 Commissions of Inquiry into Widespread Disappearances

Sri Lanka, in the recent past, has undergone several traumatic experiences, two insurrections in the South and a war in the North and East, with disastrous repercussions on the social psyche of the nation. While a particular society may have developed means to absorb or cushion these shocks, special mechanisms should be evolved to help cope with such problems.<sup>268</sup>

#### 3.1. The 1994 Commissions of Inquiry into Disappearances

Date of Appointment: 30 November 1994.<sup>269</sup>

Date of Report: September 1997.<sup>270</sup>

Mandate: to inquire into and report on the following matters:

- (a) whether any persons have been involuntarily removed or have disappeared from their places of residence in the [Central, North Western, North Central and Uva Provinces/Northern & Eastern Provinces/ Western Province, Southern Province and the Sabaragamuwa Province] at any time after 1 January 1988;
- (b) the evidence available to establish such alleged removals or disappearances;
- (c) the present whereabouts of the persons alleged to have been so removed, or to have disappeared;
- (d) whether there is any credible material indicative of the person or persons responsible for the alleged removals or disappearances;
- (e) the legal proceedings that can be taken against the persons held to be so responsible;

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<sup>267</sup>Law and Society Trust, "Impunity," in State of Human Rights Report 1994, 1995, at p. 114.

<sup>268</sup>Final report of the Commission of Inquiry into the Involuntary Removal or Disappearance of Persons in the Western, Southern and Sabaragamuwa Provinces, Sessional Paper No. V, 1997, at p.167.

<sup>269</sup>Appointed by President Chandrika Kumaratunge. The 1994 Western, Southern and Sabaragamuwa Disappearances Commission comprised Manouri Kokila Muttetuwegama (Attorney-at-Law) functioning as Chairperson along with Amal Jayawardene (University of Colombo) and Jayantha de Almeida Guneratne (Attorney-at-Law). The other two Regional Commissions were headed by K.Palakidner (Retd. Court of Appeal President) and T. Sundaralingam (Retd. High Court Judge).

<sup>270</sup>See Final report of the Commission of Inquiry into the Involuntary Removal or Disappearance of Persons in the Central, North Western, North Central and Uva Provinces, Sessional Paper No VI-1997 (at Appendix 1, p. 7); the Final report of the Commission of Inquiry into the Involuntary Removal or Disappearance of Persons in the Western, Southern and Sabaragamuwa Provinces, Sessional Paper No. V, 1997, at p.179); and Final report of the Commission of Inquiry into the Involuntary Removal or Disappearance of Persons in the Northern and Eastern Provinces, Sessional Paper No VII-1997at p. 1). This Study also examines the Special report of the 1994 Western, Southern and Sabaragamuwa Disappearances Commission titled 'Some Reports of Cases' dated 31.05. 1997 (unpublished).

(f) the measures necessary to prevent the occurrence of such alleged activities in the future;

(g) the relief, if any, that should be afforded to the parents, spouses and dependents of the persons alleged to have been so removed or to have disappeared; and

(h) to make such recommendations with reference to any of the matters that have been inquired into under the terms of this Warrant.

In view of the importance of these Commission Reports, the following analysis deals with different aspects of their establishment, functioning and recommendations.

### 3.1.1. General Reflections

The Commissions were each assigned a specific geographical area of the country:

- Western, Southern and Sabaragamuwa ('the 1994 Western, Southern and Sabaragamuwa Disappearances Commission');
- Central, North Western, North Central and Uva Provinces ('the 1994 Central, North Western, North Central and Uva Disappearances Commission');
- Northern and Eastern Provinces ('the 1994 Northern and Eastern Disappearances Commission').

These three Commissions investigated a total of 27,526 complaints out of which 16,800 cases were established to amount to enforced disappearances. Out of the 16,800 cases, the three Commissions were of the opinion that, there was evidence indicative of the identities of those responsible for the relevant involuntary removal of persons and their subsequent disappearances in respect of 1,681 cases.<sup>271</sup>

Some specific patterns relating to the occurrence of violations emerge from analysis of the Commission Reports. The extreme poverty of the affected persons, the intense pressure exerted by police and army structures to cover up the incidents, the collaborative and even participatory role of politicians in encouraging the abuses and the poignant reality that, as revealed by the 1994 Western, Southern and Sabaragamuwa Disappearances Commission,

[...] out of the 8739 cases reported to the Commission, 1296 cases concerned the involuntary removal of children aged below 19 years, effectively therefore 14.82% of the total number of disappearances.<sup>272</sup>

Another 2,451 (28.05 percent) were from the 20-24 age group. Thus 3,747 (43 percent) of disappearances reported to the Commission were of persons aged 24 and

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<sup>271</sup>United Nations Human Rights Committee, Fourth Periodic Report of Sri Lanka, CCPR/C/LKA/2002/4, 18/10/2002, at para. 156.

<sup>272</sup>ibid.

below; 63 percent of those who disappeared were below the age of 30.<sup>273</sup> Women were also intensely victimised.

Not only were personal scores settled but some of the personal scores seem to be directly linked with the femaleness of the victim. Further, all parties to the civil conflict had an established pattern of warning off potential members of the other side by killing or harassing relatives of known members of the opposite camp. This practice obviously affected the persons who were most at home – women and children.<sup>274</sup>

The nature of the liability on the part of the government is a strong and common factor in all three Commission reports. Large numbers of senior politicians were implicated in the findings of the Commissions, some of them ministers of Cabinet rank at the time, as disclosed in the annexes to these Commission reports, the contents of which though sent under confidential cover to President Kumaratunge, were leaked to the media.

In the annexes to the report of the 1994 *Central, North Western, North Central and Uva Disappearances Commission* for example, the then Justice, National Integration, Law Reform & Buddha Sasana was implicated in three disappearances, the then Minister of Central Regional Development in nine disappearances, the then Minister of Water Development in four disappearances, the then Minister of Irrigation in one disappearance and a particularly controversial member of parliament was alleged to be implicated in thirty disappearances in his area. Many of these individuals are still very much present in the political arena.

Apart from these individuals, some twenty-seven members of parliament, fourteen provincial council members, twelve *grama niladharis* (local level administrative officers) and a Buddhist priest, along with twenty police superintendents, fifty-one police officers-in-charge (OICs), twelve army captains and four majors, were implicated in this Commission Report.<sup>275</sup> A notable fact is that two police OICs (one posted in the Central Province and the other in the North-West Province) were implicated (between them) in fifty-four disappearances. This is a good illustration of the climate of impunity that prevailed.

In proceedings before the 1994 Western, Southern and Sabaragamuwa Disappearances Commission, the following telling evidence was given by then senior army and police officers as to the political pressure that was brought to bear upon them in the performance of their duties:

While I was co-ordinating officer Ratnapura, certain political pressures were brought to bear upon me. I was given a list of names with the directions to take them into custody, that they were JVPers. I received the list from a former Minister. When I checked the list with the police, I came to know that they

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<sup>273</sup>ibid.

<sup>274</sup>Final report of the *1994 Western, Southern and Sabaragamuwa Disappearances Commission*, Sessional Paper No V, 1997, at p. 125.

<sup>275</sup>Imran Vitatchi, 'Disappearances Commissions point finger at UNP Politicos and Security Officers,' *The Sunday Times*, 15.03.1998.

were SLFPers. I was told, that area could be cleared, if I were to catch them.<sup>276</sup>  
(Evidence by then Commander Sri Lanka Army, Lt. General Rohan Daluwatte)

Promotion of police officers said to have acted at the behest of politicians contrary to law was clearly evidenced during this period.

In the promotion of Udugampola SP over 15 more senior officers to the rank of DIG, I saw the portents of the plan to use the Police Force in the narrow interests of politicians. It was clear to me that alternative structures of command were put in place within the Police Force for the purpose. I realised that a system of promotion to this effect was being put into operation.<sup>277</sup> (Evidence by former IGP (Mr LGD Cyril Herath)

It is fair to ask how it is that such candid testimony could emerge. The answer will owe a great deal to the fact that the political regime implicated in this influence peddling was no longer in power.

In the *1994 Northern and Eastern Disappearances Commission Report*, the Commission came to the conclusion that ninety percent of the removals were at the hands of the security forces: army, navy, air force and the police.<sup>278</sup> This Commission explicitly named the security officers repeatedly implicated in the enforced disappearances but cautioned (as indeed, did the other Commissions) that it could not, on *ex parte* evidence alone, decide on their guilt.<sup>279</sup>

Hence proper inquiries have to be undertaken and evidence given by the complainants should stand the scrutiny of cross-examination.<sup>280</sup>

The manifold aspects of state accountability in this regard were stark as well outlined in one observation

[I]n addition to the government's liability that arises solely from the act of disappearances themselves, there are other factors adding to the gravity of these cases, such as the conspiracy to cause these disappearances, acts of encouragement to cause disappearances, acts of supervision of the process of carrying out these disappearances and acts of failure to divulge information regarding these disappearances.<sup>281</sup>

The need to enforce accountability on the part of those so implicated from the highest to the lowest levels in Sri Lanka's political structures was clear. Otherwise, as was observed,

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<sup>276</sup>Final report of the *1994 Western, Southern and Sabaragamuwa Disappearances Commission*, Sessional Paper No V, 1997, at p. 35.

<sup>277</sup>*ibid.*

<sup>278</sup>Final report of the *1994 Northern and Eastern Disappearances Commission*, Sessional Paper No VII, 1997, at p. 62.

<sup>279</sup>*ibid.*

<sup>280</sup>*ibid.*

<sup>281</sup>Asian Human Rights Commission, *'Thousands of Disappearances Established: Truth Commission urged'*, Human Rights SOLIDARITY, Vol. 7, No. 5, Hong Kong, 1997, at p. 17.

[...] law enforcement officers [implicated in these crimes] could claim that they have been unfairly treated if the politicians who were architects of the policy that caused these disappearances are immune to criminal liability.<sup>282</sup>

### 3.1.2. Scrutiny of the Mandate

A major limitation of the 1994 Commissions was that they were not mandated to inquire into human rights violations allegedly committed between 1984 and 1988.<sup>283</sup> Therefore, even though the Commissions engaged in praiseworthy efforts during the time period of their functioning, large numbers of human rights violations remained uninvestigated. Neither did these abuses come within the scope of the final All-island Commission appointed to look into the remaining complaints that had been 'left over' by these three Commissions (examined below). Meanwhile, the mandate was opened regarding the 'end date' of violations that the Commissions were empowered to investigate.<sup>284</sup>

While in theory the 1994 Commissions could look into actual and emerging violations, interviews with ex-Commissioners reveal that, in the midst of their inquiries, the Commissioners were directed by a senior Government Minister to refrain from inquiring into contemporaneous violations.<sup>285</sup> Such a direction without explicit amendment of the mandate raises questions in regard to the integrity of even the 1994 Disappearances Commissions, distinguished as these concerns may be from the vastly more overt politicization that characterized other commissions of inquiry, both pre and post-1994.

Further, the mandate of the 1994 Commissions gave rise to substantive questions of interpretation. An initial concern was whether the term 'Involuntary Removal or Disappearances of Persons' included extrajudicial executions as well as enforced disappearances. Observations made by monitors during the early years of the establishing of the Commissions indicated some uncertainty on the part of the Commissioners themselves.<sup>286</sup> In practice, the Commission went to some length to ensure inclusion of extrajudicial killings, even where there was, strictly speaking, no evidence of removal or enforced disappearance.

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<sup>282</sup>ibid.

<sup>283</sup>This was a special concern raised in the Concluding Observations of the United Nations Human Rights Committee in regard to the Third Periodic Report of Sri Lanka, CCPR/C/79/Add.56, 27.07.1995. Indeed, the number of those subjected to enforced disappearances particularly in the Jaffna peninsula during a period even prior to 1984, namely during 1981 was a further factor as disclosed for example in the Amnesty International, *'Report of An Amnesty International Mission to Sri Lanka,'* 31 January – 9 February 1982, at p. 42. As pointed out in the Amnesty Report, it was reported in the local newspapers in November 1981 that legal action will be instituted against twelve police officers for their alleged misconduct in the areas of Kankasanturai and Chunnakam police stations in the Jaffna peninsula during 1981. Interestingly however, the major crime for which these police officers were 'likely to be charged' were not connected to the causing of enforced disappearances but rather, for 'desertion of post.' In Amnesty International, *'Time for Truth and Justice'*, AI Index, ASA 37/04/95, 1995, at p. 6, several cases of enforced disappearances occurring in the South during 1987 are noted, including that of a lecturer attached to the University of Ruhuna.

<sup>284</sup>Section (a) of the mandate simply refers to acts occurring "at any time after January 1, 1988".

<sup>285</sup>Author's private interviews with former Commissioners, Colombo, August 2009.

<sup>286</sup>Amnesty International, *'Time for Truth and Justice'*, AI Index, ASA 37/04/95, 1995, at p. 6.

The 1994 *Western, Southern and Sabaragamuwa Disappearances Commission* even found a way to include cases of suicide resulting from depression related to threats. As a matter of historical record and lessons learned, it is worth noting the various categories established by the 1994 *Western, Southern and Sabaragamuwa Disappearances Commission* to decide on eligibility. A similar approach was adopted by the other two 1994 Commissions.

#### *Admissible Cases*

The first category related to cases *ex facie* falling within the mandate, including persons involuntarily removed allegedly by agents of the state (police, army, etc.), para-military groups, ‘subversives’, or unknown persons, and subsequently “disappeared” (fate unknown). These cases also included persons allegedly held in detention in unauthorised army camps or police stations and subsequently “disappeared” (fate unknown).<sup>287</sup> There was no dispute regarding the admissibility of these cases.

The second category of admissible cases - ‘other cases’ – were those in which victims of enforced disappearances were found dead.<sup>288</sup>

- i. Persons involuntarily removed allegedly by agents of the state (police, army, etc.) or para-military groups in collaboration with them or subversives or unknown persons or allegedly held under detention in unauthorised army Camps or police stations and subsequently found killed (body identified by witnesses).<sup>289</sup>

Commissioners included these cases on the basis that it would be illogical to draw a distinction between enforced disappearances where the fate of the victim remained unknown, and those in which they had been confirmed the victims of killings.’

#### *Illustrations*

- a. A case where the evidence showed that the corpus had been in a detention camp after being involuntarily removed and subsequently found dead at a public road.
- b. Cases where girls who had been abducted from their homes as hostages by unidentified persons who had come looking for their brothers or fathers were later found to be raped and killed (in one case the body burnt).
- c. Cases where three brothers had been involuntarily removed and while the dead bodies of two of them had been subsequently discovered the third disappeared without any trace and remains missing to date.<sup>290</sup>

The category of ‘other cases’ was also held to include extrajudicial killings that did not involve a period of detention.

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<sup>287</sup>Final report of the 1994 *Western, Southern and Sabaragamuwa Disappearances Commission*, Sessional Paper No V, 1997, at pp. 5-12.

<sup>288</sup>*ibid.*

<sup>289</sup>*ibid.*, at p.6.

<sup>134</sup>*ibid.*

<sup>290</sup>*ibid.*

- ii. Persons removed by alleged agents of the state (police, army, etc.) or paramilitary groups in collaboration with them or subversives or unknown persons invading the residence etc, of the corpus and killing corpus.<sup>291</sup>

It was pointed out<sup>292</sup> that although "the killing" in the above was not preceded by an involuntary removal in a physical sense, this fine distinction could not shield the case from the Commission's investigation without offending common sense. The Commission cited the following illustration.

*Illustration*

A tenant cultivator from Embilipitiya had gone to the paddy field. On his return home he found two of his sons had been burnt alive inside the house. A third son had been removed. The cultivator's wife and his daughters who were waiting at the doorstep had not been able to identify the perpetrators of these acts.

A strict and, in the Commission's view, nonsensical reading of the mandate would include the case of the son who had been removed but not the two sons burnt alive. Consequently, the Commission concluded that a liberal reading of the mandate was warranted.<sup>293</sup>

A third category of admissible cases was defined by the following factors.

- a. The surrounding circumstances and/or climate of the times
- b. The personal antecedents and/or socio-economic and socio-political involvement of the victim.

*Illustrations – 'Disappearances'*

Victim had gone to the market place/junction/friend's or relative's place to attend a function/work place/some other errand on the day in question where there had been an official curfew or a curfew imposed by subversives/the complaint being "I think my son/husband/Friend/relative must have been taken away by the Police/Army/subversives."<sup>294</sup>

*Illustrations - 'Killings'*

- a. Unknown persons had thrown a bomb at a Hindu Kovil. A woman street dweller who had been in the vicinity had become a victim of this act.
- b. One rainy night unknown persons had left a parcel near a playground of a school. The following day three children meddled with this parcel, which turned out to be a bomb. On the bomb going off the children had died.
- c. A large number of cases where the corpora had been found killed on a road side; near a paddy field; on and under bridges; tied to lamp posts and trees; or burnt on tyre pyres etc.<sup>295</sup>

In these cases the evidence revealed circumstances similar to those referred to in illustrations given in regard to disappearances above. The Commission was therefore

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<sup>291</sup>ibid.

<sup>292</sup>ibid.

<sup>293</sup>ibid.

<sup>294</sup>ibid.

<sup>295</sup>ibid, at p.7.

focused on allowing within its purview all cases that assisted in fully accounting for the patterns of abuse.

Variations of the above situation was where the complainant suspected that the victim must have been abducted in a "cordon and search" operation or from somewhere "because he is young", "because someone must have petitioned that he is a subversive out of personal jealousy or otherwise", "because he was a political activist", "because he was involved in and/or took the lead in strike (employee/trade union) action etc.", "because he put posters on behalf of the JVP", "because he went to vote at the Provincial Council Elections", or "because another family member was a UNP/SLFP/JVP activist."<sup>296</sup>

#### *Illustrations*

a. A brother, a graduate teacher giving evidence stated that in September 1989, his brother who was a Ruhuna Medical Student had disappeared. A month prior to this incident another brother also a graduate teacher had been abducted by unidentified persons. Their father was a UNP loyalist. But thereafter their family had laid off politics, the police had warned them that there had been petitions against their family that their residence was being used to conduct JVP lectures. Witness stated that no such thing happened in their house. The evidence suggested that the disappearance had been orchestrated by persons out of personal jealousy with the aid of para-military groups.

b. A mother giving evidence before the Commission stated that her two sons who were both in their early twenties were missing since March and September 1989 respectively. The evidence revealed that the complainant's daughter had been a SLFP activist and had been a polling agent on behalf of the SLFP at the 1988 and 1989 elections. A family closely related to them, were supporters of the UNP. Members of that family had repeatedly threatened the witness that her son will be 'lifted' because of the daughter's involvement with the SLFP. The incident had taken place around the Presidential Elections time in 1988. The evidence suggested that the disappearance had been instigated by this rival family with the assistance of para-military groups.<sup>297</sup>

Several cases fell into a fourth category, in which unidentified persons had by the use of arms, inflicted physical injury on the victims. The Commission determined that the majority of these incidents were alleged to have been caused by subversive action on account of the victim "not heeding warnings calling upon them to resign from Government employment"; "failing to publicly denounce involvement with the political party (generally the UNP) to which the corpus belonged", "refusing to join and/or assist the JVP" or "for breaking the unofficial curfew".<sup>298</sup>

However, the Commission also noted instances where the allegations were against the armed forces. Considering factors such as the type of arms and instruments used by the perpetrators, the location selected for the infliction of the injury and other surrounding circumstances, it was ruled that death had resulted from the physical

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<sup>296</sup>ibid.

<sup>297</sup>ibid.

<sup>298</sup>ibid, at p.8.

injury so inflicted in the absence of any evidence to the contrary and therefore that these cases also fell within the terms of the mandate.

#### *Excluded and Borderline Cases*

Cases were excluded from the Commission's consideration on the basis of geographical jurisdiction or territorial ouster where the complaint related to an incident that had occurred in an area falling within the jurisdiction of one of the other Commissions; time limitations (incidents occurring prior to 1 January 1988); or other factors, including insufficient evidence, "disappearance" resulting from private quarrels, cases of pure physical injury and cases of temporary involuntary removal where allegations appeared merely speculative.<sup>299</sup>

A more difficult mandate issue concerned cases involving suicide resulting from political threats, observed by the Commission as 'a novel problem for consideration.'<sup>300</sup> Many persons had been subjected to threats, directly through warning letters and notices as well as indirectly through anonymous calls or warnings notes, by subversives as well as paramilitary groups, sometimes allegedly instigated by political opponents). They had thereafter committed suicide allegedly in an ill state of mental health.

Strictly reading the mandate, the Commissioners acknowledged that there was no involuntary removal or "disappearance" in the literal sense in these cases. However, the question was as to whether, instead of a physical injury followed by death or an involuntary removal, "the threats" which had led to the state of neurotic depression followed by death, the proximate cause being the act of the victim, could be regarded as a case falling within the meaning of "involuntary removal or disappearance".<sup>301</sup>

On a liberal interpretation of its warrant amounting to a *de facto* extension of the mandate and reasoning that, "true nervous shock is as much a physical injury as a broken bone or torn flesh wound",<sup>302</sup> the Commission accommodated such cases for inquiry. The view that the felonious act of the victim himself in taking his own life would not break the chain of causation between the state of neurotic depression he was said to have been subjected to as a result of threats and his death.

The categorization by the *1994 Western, Southern and Sabaragamuwa Disappearances Commission*, though not exhaustively reasoned in quite the same way, was reflected in the Reports of the other Commissions as well.

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<sup>299</sup> *ibid.*

<sup>300</sup> *ibid.*

<sup>301</sup> *ibid.*

<sup>302</sup> Eldredge, *Modern Tort Problems*, p. 76, as quoted in the Final report of the *1994 Western, Southern and Sabaragamuwa Disappearances Commission*, Sessional Paper No V, 1997, at p. 11. Though this principle was asserted, in the one such case that was examined by the Commission, it was found that the absence of adequate medical evidence in regard to the claim that "the corpus had committed suicide in a state of neurotic depression forced by JVP threats" was not sufficient for the Commission to come to a positive finding on the said claim.

### 3.1.3. Reflections on the Procedures

The COI Act of 1948 gives significant discretion to commissions to determine their own procedures. While such discretion may be desirable in order to maintain flexibility in their functioning, it also created inconsistencies and oversights that impacted on perceived fairness. For example, public access to the three 1994 commissions varied. The 1994 *Western, Southern and Sabaragamuwa Disappearances Commission* decided to hold all their sittings *in camera*,<sup>303</sup> while the other Commissions took a different approach.

The procedures affecting alleged perpetrators are similarly left for commissions to determine. Thus, all three 1994 Commissions decided not to proceed beyond the stage of *ex parte* inquiries. Perpetrators were not summoned or provided the opportunity to speak before the Commissions. A former commissioner expressed regret regarding this decision, but suggested that part of the explanation of this procedural decision related to the sheer number of complaints that were filed before the Commission, thus precluding extensive inquiry beyond *ex parte* testimony.<sup>304</sup>

Since the alleged perpetrators were not heard and their accusers not cross-examined, the Commissioners decided that the names of those implicated should not be disclosed in the *1994 Commissions Report*. Instead names were sent under confidential cover to the President, with the following explanation:

The Commission feels that on ex-parte evidence alone, it cannot decide on the guilt of these people. Hence proper inquiries have to be undertaken and evidence given by the complainants should stand the scrutiny of cross-examination. This is a task we leave to the next Commission.<sup>305</sup>

In fact, the 'next Commission' in this respect (*1998 All-Island Commission*; see next section) was not authorised to reinvestigate cases already examined by the *1994 Disappearances Commissions*.

Thus it was that the *1994 Disappearances Commissions* limited its role to recording testimony and, in practice, leaving further investigation and prosecution to the police and Attorney General. Of course, the fact-finding mandate of the Commissioners was

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<sup>303</sup>The rigid policy of the *1994 Western, Southern and Sabaragamuwa Disappearances Commission* in insisting on holding all its hearings *in camera*, thus depriving the press and public from participation and thereby taking away an important element of public accountability from the process was in fact, regretted in retrospect by one Commissioner, Jayantha de Almeida Guneratne, "*The Role of Commissions of Inquiry in Sri Lanka's Justice System*", State of Human Rights Report 2007, Law & Society Trust, at page 194. The one exception to this policy was in relation to the Richard de Zoysa assassination which would be discussed later.

<sup>304</sup>De Almeida Guneratne, Jayantha, op. cit.

<sup>305</sup>Final report of the *1994 Northern and Eastern Disappearances Commission*, Sessional Paper No VII, 1997, at p. 62. The usage of the term 'guilt' in this context which permeates many of these Commission reports reflects the wide gap between public expectations that the Commission would bring to brook those responsible for gross human rights violations and the legal limitations of such Commissions which precludes such findings in the first instance given the fact finding nature of their mandate. See also '*Your Commissioners recommend that the investigations by the IGP should be under the supervision of the Attorney General and be referred to the Attorney General for the determination of the appropriate legal proceedings that should ensure*,' at p. 29 of the final report of the *1994 Western, Southern and Sabaragamuwa Disappearances Commission*, Sessional Paper No V, 1997.

clearly distinct from the determination of individualized guilt by a criminal court, but it is also clear from the quotation above that – between these institutional mandates – there was significant scope for ambiguity about respective roles, particularly when it came to the identification of perpetrators where crimes were disclosed by testimony. The use of the word, “guilt”, for example, is not unusual in the work of commissions during this period, although the same commissions also acknowledged the limitations on their role. What remains unresolved is whether and how the 1994 Commissions might have gone further in recommending prosecutions. For example, the likelihood of Commission recommendations being taken more seriously might have improved if their queries had gone through to the second stage (inquiry beyond *ex parte* testimony) with sufficient resources and time.

The irony and frustration in what actually transpired in this regard was not lost on the commissioners, who in their reports laid out plainly compelling reasons for doubting the likelihood of adequate follow-up investigations and prosecutions.

The distortion of the investigations to conceal more than to reveal and mechanically labelling as ‘subversive act’ without investigation, were some of the practices of avoidance used in the rare instances where the authorities could not refrain from semblance of an investigation.<sup>306</sup>

The three examples cited are not isolated departures from practice or ‘excesses’. They exemplify a generalised practice, which in its turn warrants the reasonable inference that this practice denotes a generalised direction NOT to investigate such incident (emphasis in the original).<sup>307</sup>

The observations were similarly harsh in regard to the absence of prosecutions.

In the few cases where evidence regarding removals of persons existed and those responsible were revealed, not only was there even failure to take further action (prosecution, disciplinary action) but some of them had even received promotions and medals.<sup>308</sup>

Despite these explicit acknowledgements of defective investigations and prosecutions, the 1994 Disappearances Commissions had little choice but to refer specific cases back to those very same government institutions. This referral was no doubt accompanied by the expectation that there would be some changes evidenced in investigative and prosecutorial processes and a new political will would be manifested in bringing perpetrators to justice.

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<sup>306</sup>Final report of the *1994 Western, Southern and Sabaragamuwa Disappearances Commission*, Sessional Paper No V, 1997, at p. 53. cited as a prefatory remark to discussing the February 1990 killing of Richard de Zoysa (examined later in detail), the January 1989 killing of Sarath Sepala Ratnayake, a human rights lawyer and the opposition’s area candidate at the then forthcoming General Election and the Hokandara mass graves where a bomb crater on a public highway was transformed into an open grave containing several charred corpses.

<sup>307</sup>*ibid*, at p. 55 citing the cases of the “*Dambarella Incident*”, the “*Marawala Incident*” and the “*Dickwella Incident*” which all concerned disappearances of persons in state custody but with no investigation or prosecution evidenced thereafter.

<sup>308</sup>*ibid*, at p. 65.

However, the weak process of re-referrals meant acquiescence to the same structural obstacles to truth, justice and reparations that the Commissions, in theory, were created to overcome. With the Kumaratunge administration itself plunging into renewed conflict with the LTTE, leading to the return of the phenomenon of enforced disappearances and extrajudicial executions in the North and East during the years thereafter, any existing political will to address gross human rights violations effectively dissipated. As noted below, the recommendations of the 1994 Disappearances Commissions led to few prosecutions.

The 1994 Western, Southern and Sabaragamuwa Disappearances Commission observed great care in not publicly naming alleged perpetrators. Its reluctance to 'name and shame' alleged perpetrators emanated from the fact that these alleged perpetrators had not been given an opportunity to refute the charges made against them. The 1994 Northern and Eastern Disappearances Commission and the 1994 Central, North Western, North Central and Uva Disappearances Commission Commissions, however, did name some politicians, security personnel and police officers as being 'credibly implicated'<sup>309</sup> in the enforced disappearances in their respective reports. The issue of protecting the rights of alleged perpetrators in commission proceedings is taken up in a subsequent chapter, below.

#### **3.1.4. Reflections on the Recommendations**

The *1994 Commissions Reports* are unambiguous with regard to the expectation that justice and reparations follow their determination of truth as disclosed through their inquiries.

This Commission recommends a vigorous prosecution of those responsible for disappearances.<sup>310</sup>

Severe disciplinary measures should be meted out to Government Officials who have failed to take adequate measures to prevent disappearances.<sup>311</sup>

The Recommendations of the 1994 Disappearances Commissions in relation to reforms of the law and legal process included the following:

Investigations into all acts of gross human rights abuses should be carried out through a special unit of the police under the direct supervision of an officer not below the rank of a Deputy Inspector General of Police;<sup>312</sup>

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<sup>309</sup>This term which has been used commonly by all three Commissions, refers to instances where an alleged perpetrator's name is found to repeatedly occur in the evidence of witnesses before them.

<sup>310</sup>Final report of the *1994 Western, Southern and Sabaragamuwa Disappearances Commission*, Sessional Paper No. V, 1997, at p. 175.

<sup>311</sup>Final report of the *1994 Commission of Inquiry into the Involuntary Removal or Disappearance of Persons in the Central, North Western, North Central and Uva Provinces*, Sessional Paper No VI-1997, at p. 3.

<sup>312</sup>*ibid*, at pp. 68 and 171 Following these recommendations, a Disappearances Investigation Unit (DIU) was established under the Deputy Inspector General of Police of the Criminal Investigations Department. It has been consistently maintained by the government that police officers are 'handpicked' for this Unit and that great care is taken to ensure that they have a 'good record' – as reiterated in confidential interviews with police officers conducted for the purpose of this research. However the performance of this Unit has been poor despite the good intentions of some police officers

An Independent Human Rights Prosecutor should be established as an institution similar to the Commissioner of Elections and the Auditor General with funds provided by Parliament;<sup>313</sup>

Evidentiary rules in regard to cases of enforced disappearances and extrajudicial executions should remain that of the normal law. However, once detention is established, the burden should shift to the person charged in the absence of an explanation.<sup>314</sup>

Legal principles relating to chain-of-command liability should be clarified by the Supreme Court in the exercise of its jurisdiction in terms of Article 126 of the Constitution.<sup>315</sup>

Due obedience should not be entertained as a defence to abuses.<sup>316</sup>

It is also worth noting one specific recommendation that did not make it into the final report. This recommendation arose in the case of the 1994 Western, Southern and Sabaragamuwa Disappearances Commission, and relates to the frequently debated issue of whether commission proceedings and findings should be reviewable by the judiciary. The recommendation, later removed, read as follows: “the Commission of Inquiry Act [should] be amended by introducing a comprehensive preclusive (or

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who have attempted to do their work properly. In certain instances, officers had been transferred out from the Unit after they tried to investigate their senior officers for alleged abuses. Cases investigated by the DIU which appear to result in credible evidence against state officers are referred to the Missing Persons Unit (MPU) of the Attorney General’s Department for prosecution. The MPU’s lamentably unsatisfactory record of prosecutions is examined immediately below.

<sup>313</sup>Final report of the *1994 Western, Southern and Sabaragamuwa Disappearances Commission*, Sessional Paper No. V, 1997, at pp. 69 and 171. Recommendation not implemented. See later discussion pertaining to the office of the Attorney General.

<sup>314</sup>Final report of the *1994 Western, Southern and Sabaragamuwa Disappearances Commission*, Sessional Paper No. V, 1997, at p. 171. Recommendation not implemented. The Commission’s recommendation, in fact, mirrored the approach of the Court of Appeal, during a particular period in time, when (in several cases including most notably *Violet and others v. O.I.C Police Station, Dickwella and Others*, [1994] 3 Sri LR 377 per Justice of the Court of Appeal (as he was) SN Silva and more recently, *Kanapathipillai Matchavalavan v. Officer in Charge, Army Camp Plantain Point, Trincomalee and three others* SC 90/2003, SCM 31.03.2005, per Justice Shirani Bandaranayake. However, despite such individual decisions, there has been little judicial consistency evidenced, particularly in respect of *habeas corpus* applications alleging enforced disappearances from the North and East.

<sup>315</sup>Final report of the *1994 Western, Southern and Sabaragamuwa Disappearances Commission*, Sessional Paper No. V, 1997, at p. 172. Though the Supreme Court has clarified the doctrine of vicarious liability of superior officers in numerous recent cases (for example, *Sriyani Silva v. Iddamalgoda* [2003] 2 Sri LR 63; *Wewalage Rani Fernando case, SC(FR) No 700/2002, SCM 26/07/2004*) where the culpable inaction of custodial officers included failure to monitor the activities of their subordinates, which would have prevented further ill treatment of persons in custody and failure to investigate any misconduct) there is just one decision relating to chain-of-command- liability in situations of active conflict concerning actions of military officers (*Liyanage v. de Silva* [2000] 1 Sri LR 21) and this decision by the Court is unfortunately to the negative as would be discussed later. A related recommendation under the section of the *1994 Western, Southern and Sabaragamuwa Disappearances Commission* Report dealing with *habeas corpus* applications was that severe disciplinary punishment be meted out to government officials who failed to take adequate measures to prevent disappearances - see at p.175 of the report. This recommendation remains unimplemented.

<sup>316</sup>Final report of the *1994 Western, Southern and Sabaragamuwa Disappearances Commission*, Sessional Paper No. V, 1997, at pp. 79 and 172.

ouster) clause ruling out judicial review of proceedings before the Commission".<sup>317</sup> Legal principles as to the limited context in which judicial review of commission proceedings may be invoked are, in any event, firmly laid down,<sup>318</sup> and it was unnecessary that an ouster clause, problematic as it is in principle, be inserted into the COI Act for this purpose.

The Reports of the Commissions submitted to President Kumaratunge in 1997 were not made publicly available in a generalised way until some years later, even though the Sessional Papers themselves are dated 1997. In any event, some portions of these reports have still not been made public. The relatives of the victims and those who appeared before the Commissions were not individually or collectively informed of the findings of the Commissions. Except for the payment of compensation in certain cases, no effective action was forthcoming in displacing the systems and structures that permitted and encouraged the disclosed crimes. The manner in which the system had failed the victims at every point was reflective in the following observation:

The loss of the victims' faith that there would be a solution forthcoming from the legal and social system is an indisputable fact. Immediately following the disappearances, most relatives of the victims did all they were asked by the system: they made complaints; they gave all the information they had to those who asked for it; they went from house to house, seeking the assistance of politicians who had appeared to want to help them. Finally they also went before the disappearances commissions. In addition, many of them took an active part in elections to support those who promised them justice.

None of these actions brought them any tangible result. In fact, all these actions taught them a stern lesson: that 'nothing is in fact working.'

Under these circumstances these people finally turned to religious rituals and prayers. Some engage in cursing the perpetrators of violence, and some call for divine vengeance. Such practices themselves demonstrate their loss of faith in society's legal and social machinery.<sup>319</sup>

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<sup>317</sup>Interim report of the Commission of Inquiry into the Involuntary Removal or Disappearance of Persons in the Western, Southern and Sabaragamuwa Provinces, Sessional Paper No. II, 1997, at p. 20.

<sup>318</sup>As is in any event, acknowledged by the Commissioners themselves, *ibid.* In *Mendis, Fowzie and others v. Goonewardene*, [1978-79] II Sri LR 322, Court of Appeal) which held that the Commission's findings in that case amounted to findings affecting reputation and were therefore amenable to judicial review under Article 140 of the 1978 Constitution. This decision was reversed by the Supreme Court in appeal. See: [1978-79-80] I Sri LR 166, wherein it was ruled that the Commission findings were merely recommendatory in nature and consequently not amenable to writ. The legal principle that recommendatory reports of fact finding Commissions of Inquiry are not amenable to the writ jurisdiction of the Court of Appeal was recently affirmed in relation to the findings of the Athurugiriya Commission of Inquiry, see '*CA dismisses writ against findings of Commission of Inquiry on Athurugiriya Safe House raid.*', *The Island*, 06.08.2009. These decisions need to be distinguished from instances where recommendations in consequence of which deprivation of rights occur, which would be subject to judicial review as was indeed the case in *Dharmaratne v. Samaraweera* [2004] I Sri LR 57 where adverse findings against the appellants, including that they be deprived of their civic rights and criminally prosecuted were quashed by the Supreme Court on the basis that the rules of natural justice had been infringed.

<sup>319</sup>Fernando, Basil, '*Disappearances: 15% are Children*,' Asian Human Rights Commission, Human Rights SOLIDARITY, Vol. 8, No. 8, Hong Kong, 1997, at p. 17.

A factor that is sometimes overlooked in this context is that apart from prosecutions, the findings in these Commission Reports would have warranted internal disciplinary action to be taken in respect of officers found credibly implicated in the incidents investigated in terms of internal departmental orders of the police and services regulations of the forces. However, whatever action taken on this basis has also been negligible.<sup>320</sup> Further, as adverted to later, a 1996 presidential direction to the Commander of the Armed Forces to send 200 services personnel implicated in the findings of the three 1994 Disappearances Commissions on compulsory leave, was ignored.

### **3.2. The 1998 All Island Disappearances Commission**

Date of Appointment: 30 April 1998.<sup>321</sup>

Date of Report: March 2001.<sup>322</sup>

Mandate: to inquire into and report on the following matters:

- (a) The allegations about the involuntary removal of persons from their residences, or the disappearances of persons from their residences, made to the Commissions of Inquiry appointed under the Commissions of Inquiry Act, and terms of reference of which are published respectively, in Gazettes No. 855/18, 855/19 and 855/20 of January 25, 1995, being allegations in respect of which no investigations have commenced on the respective dates, appointed by the respective warrants appointing such Commission of Inquiry, for the rendering of the reports of such Commissions of Inquiry;
- (b) The evidence available to establish such alleged removals or disappearances;
- (c) The present whereabouts of persons alleged to have been so removed or to have so disappeared;
- (d) Whether there is any credible material indicative of the person or persons responsible for the alleged removals or disappearances;
- (e) The legal proceedings that can be taken against the person held to be so responsible;
- (f) The measures necessary to prevent the occurrence of such alleged activities in the future;

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<sup>320</sup>Conversations with Mr M.Q.M. Iqbal, Secretary to the 1994 *Central, North Western, North Central and Uva Disappearances Commission* and the 1998 *All Island Disappearances Commission*.

<sup>321</sup>Appointed by President Chandrika Kumaratunge. The Commissioners comprised Manouri Kokila Muttetuwegama (Attorney-at-Law) functioning as Chairperson, Hetti Gamage Dharmadasa (former Commissioner of Prisons) and Ponnuchamy Balavadivel (former High Court judge).

<sup>322</sup>Final report of the Commission of Inquiry into Involuntary Removal and Disappearances of Certain Persons (All Island), (hereafter referred to as the *1998 All-Island Disappearances Commission*) Sessional Paper No. I – 2001, March 2001.

(g) The relief if any that should be afforded to the parents, spouses and dependents of the persons alleged to have been so removed or to have disappeared;

And to make such recommendations with reference to any of the matters that have been inquired into under the terms of this warrant.

The 1994 Disappearances Commissions regretted the fact that, despite having been given extensions of their time period, they had not been able to finish their work. Due to the fact that they were unable to enquire into all the complaints of enforced removals they had received and a further 10,135 complaints submitted to the Commissions by relatives and witnesses remained to be investigated, the All-Island Presidential Commission of Inquiry was appointed in 1998. The mandate of this Commission had a geographical reach extending to the entire country which was a considerable improvement from its predecessor.

The 1998 All Island Commission adopted procedures similar to its predecessors to inquire into the remaining 10,136 files handed over from the earlier Commissions. The majority of the 10,316 files inquired into came from Kandy (Central Province – 3397 files), Kurunegala (North-Western Province- 1581 files) and Matale (Central Province – 1042 files) and Anuradhapura (North-Central Province – 883 files). Files from the North/East provinces were considerably less in number, totalling Jaffna-42 files, Batticaloa – 18 files, Kilinotchi – 8 files, Mannar – 1 file, Mulaithivu – 7 files, Trincomalee - 9 and Vavuniya – 3 files. The Commission concluded that a further 10,400 persons had “disappeared” during the relevant period. Distinct patterns were indicated in the “disappearances” and abductions. Thus, for example, at least 680 of such cases were linked to the participation of such persons in legitimate political activities.<sup>323</sup>

The repeated involvement of perpetrators was clear: Thirty-seven persons were credibly implicated in three or more incidents and an additional 37 were credibly implicated in respect of two incidents. In one incident, alone, 270 persons were implicated.<sup>324</sup> Twenty-seven persons implicated in grave human rights violations in the findings of this Commission had also been implicated in the findings of the three 1994 Disappearances Commissions and other Presidential Commissions, including the Batalanda Commission as well as the Special Presidential Commissions inquiring into the assassinations of Brigadier (subsequently Lt General) Denzil Kobbekaduwe, Lalith Athulathmudai and Vijaya Kumaratunge.

The chilling account below recounted by this Commission is emblematic of the atrocities of that period:

Where the perpetrators were the agents of the State or paramilitary groups, family members generally had no access to bodies for identification. In a few cases, even where disappearances were at State hands, bodies were publicly exhibited. For instance, a resident of Katupotha was taken into custody by the police, tied to the rear of a jeep and dragged along the streets of Katupotha

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<sup>323</sup>Report of the 1998 All-Island Disappearances Commission, Sessional Paper No 1, 2001, at p. 10.

<sup>324</sup>ibid.

town, before being shot dead and strung up on a tree at the market place for public exhibition. Floating dead bodies in rivers, bodies on roads, burning bodies on tyres had been a common sight during this period.<sup>325</sup>

The 1998 All-Island Disappearances Commission sent a list of individuals implicated in the enforced disappearances under confidential cover to the President, following the 1994 Disappearances Commissions' procedures in not embarking to the second stage of affording the alleged perpetrators an opportunity to testify.<sup>326</sup> It was concluded that in the 4,473 cases where enforced disappearances had been proved, agents of the state, paramilitaries acting in collaboration with them, as well as subversive groups, were implicated.<sup>327</sup> Personal enemies and unknown persons were also noted to be responsible for some of the cases.

This Commission recommended, *inter alia*, the following measures in respect of legal proceedings against those responsible for gross human rights violations:

*The creation of an office of an Independent Human Rights Prosecutor*<sup>328</sup>

Worth noting in this regard is the problematic nature of the Commission's recommendation that the Human Rights Commission of Sri Lanka (HRCSL) Act, No 21 of 1996 be amended to provide for an Independent Human Rights Prosecutor to deal with complaints of human rights violations in general and disappearances, in particular.<sup>329</sup> Without first addressing the manifold problems affecting the independence and functioning of the HRCSL,<sup>330</sup> purely vesting prosecutorial powers in the HRCSL would be a cosmetic measure. Preferable in this respect is the suggestion by one of its predecessor Commissions, namely the 1994 Western, Southern and Sabaragamuwa Disappearances Commission, that an Office of an Independent Prosecutor be established with appropriate constitutional safeguards.<sup>331</sup>

*The creation of a crime of enforced disappearances*<sup>332</sup> *and inclusion of the concept of command responsibility*<sup>333</sup>

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<sup>325</sup>Report of the 1998 All-Island Disappearances Commission, Sessional Paper No 1, 2001, at p. 6.

<sup>326</sup>*ibid.*, at p. 9.

<sup>327</sup>*ibid.*, at p. 10.

<sup>328</sup>*ibid.*, at p. 16. Recommendation not implemented.

<sup>329</sup>*ibid.*

<sup>330</sup>For an examination of the deficiencies in the HRCSL Act, No. 21 of 1996, see 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 p. 194. These deficiencies relate primarily to the HRCSL's independence from government including the fact that Section 31 of the Act empowers the Minister to make regulations in regard to the functioning of the HRCSL as well as its powers of investigation. The HRCSL's record of performance even when its members were appointed following approval by the Constitutional Council in accordance with the dictates of the 17<sup>th</sup> Amendment to the Constitution (2002-2005) has not been optimal.

<sup>331</sup>Final report of the 1994 Western, Southern and Sabaragamuwa Disappearances Commission, Sessional Paper No. V, 1997, at p. 83 in particular.

<sup>332</sup>Report of the 1998 All-Island Disappearances Commission, Sessional Paper No 1, 2001, at pp. 16-17. Recommendation not implemented.

<sup>333</sup>*ibid.*, at p.19. Recommendation not implemented.

*Interdiction from service of alleged perpetrators to take place following the initiation of criminal and/or disciplinary proceedings*

Where investigations have commenced against alleged perpetrators, such persons should be transferred out of the area of the alleged incidents under investigation and if any perpetrator is alleged have attempted to interfere with a witness threatened lawyers, threatened the prosecutor, or obstructed investigations, such action to be a subject of a further inquiry followed by further punishments which should also be a ground for interdiction.<sup>334</sup> While a recent Court of Appeal decision has upheld the interdiction of police officers who have been indicted in relation to prosecutions of enforced disappearances ensuing from the Commission reports (as examined later), this decision is applicable to only a small amount of cases in which alleged perpetrators have, in fact, been indicted. Armed forces personnel repeatedly implicated in some of the most serious human rights violations during this period continue to serve in the military establishment, some at senior levels, without being brought before the law in any manner whatsoever.

*Affirmation of the principle of accountability in respect of past acts for the good of society in the future*<sup>335</sup>

Interestingly, this Commission also unequivocally affirmed the need for recognition of the liability of armed groups for human rights abuses committed by them as distinct from the liability arising as a result of the breach of the domestic criminal law.<sup>336</sup>

### **3.3. Post-1994 COIs regarding Specific Incidents/Occurrences**

#### **3.3.1. The Batalanda Commission**

Date of Appointment: 15<sup>th</sup> December 1995<sup>337</sup>

Date of Report: 2000<sup>338</sup>

Mandate: To inquire and report on the following:

(a) the circumstances relating to the disappearance of Sub-Inspector Rohitha Priyadarshana of the Sapugaskanda Police Station... and the persons directly or indirectly responsible;

(b) the circumstances relating to the arrest and subsequent detention of Sub-Inspector Ajith Jayasinghe of the Peliyagoda Police Station... and the persons directly or indirectly responsible;

(c) the establishment and maintenance of a place or places of detention at the Batalanda Housing Scheme of the State Fertilizer Manufacturing Corporation

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<sup>334</sup>ibid, at pp. 18-19. Recommendation not implemented.

<sup>335</sup>ibid, at p.83. Recommendation not implemented.

<sup>336</sup>ibid, at p.83. Recommendation not implemented.

<sup>337</sup>Appointed by President Chandrika Kumaratunge. The Batalanda Commission comprised judges D. Jayawickrema (Chairman) and NE Dissanayake.

<sup>338</sup>Sessional Paper No. 1, 2000.

and whether ... any person or persons ... were subject to inhuman or degrading treatment or to treatment which constitute an offence under any written law as a result of a conspiracy and the person or persons directly or indirectly responsible for the same;

(d) whether any inquiry or probe into any of the aforesaid matters had been conducted by any officer and whether any person or persons directly or indirectly interfered in such inquiry or probe and the person or persons responsible for such interference;

(e) whether any officer of any other person was responsible for the commission of any criminal offence under any written law or the use of undue influence or misuse or abuse of power in relation to any of the aforesaid matters.

The Batalanda Housing Scheme had allegedly been used as a ‘torture chamber’ during the late 1980s through the early 1990s when the second insurrection of the Janatha Vimukthi Peramuna (JVP) was at its height. The Commission found senior politicians of the UNP, (which was in the government at the time), and senior police officers culpable of using the Batalanda ‘torture chamber’ to torture and ‘disappear’ dissidents. Public controversy was generated by the manner in which this Commission was established as well as by specific aspects of its functioning.<sup>339</sup>

The strongest findings of the Commission were against a senior superintendent of police, Douglas Pieris, for having “masterminded and executed the Counter Subversive Unit operations from the Batalanda Housing Scheme”, thus becoming directly responsible for the arbitrary detention and torture of persons.<sup>340</sup> In particular, the Commission found that SSP Pieris was directly implicated in the abduction and detention of a Sub-Inspector of the Peliyagoda Police Station who had been investigating the alleged enforced disappearance of another colleague, Rohitha Piyadarshana. Priyadarshana, a police officer attached to the Sapugaskande Police station, had allegedly incurred the SSP’s disfavour by apprehending suspects without consideration to political considerations. SSP Peiris was found to be indirectly responsible for Priyadarshana’s enforced disappearance as well.<sup>341</sup> The Commission arrived at more contentious findings of indirect responsibility against other senior police officers, such as Nalin Delgoda and Merrill Guneratne, who were found to have participated in discussions on counter subversive activities presided over by then Industries Minister<sup>342</sup> Ranil Wickremesinghe at Batalanda.

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<sup>339</sup>While there was no doubt about the substantive merit of the allegations that the Batalanda Housing Scheme was used as a “torture chamber”, the manner in which this Commission functioned did cast doubt on its credibility. The allegation was that the Commission was politically appointed by President Kumaratunge to discredit Leader of the Opposition Ranil Wickremesinghe who had been a senior Minister of the UNP during the time that the Batalanda “torture chamber” was in operation. As will be discussed below, some of the police officers against whom disciplinary action was taken on the findings of the Commission report later successfully challenged these actions in the Supreme Court on the basis that they had been deprived of a fair hearing.

<sup>340</sup>Final report of the Batalanda Commission, Sessional Paper No. 1, 2000, at pp. 61 and 62.

<sup>341</sup>ibid, at p. 84 onwards as well as at p. 113 onwards.

<sup>342</sup>For example, ibid, at pp. 63 – 70 and at p. 122.

The Batalanda Commission recommended comprehensive investigations to be initiated in terms of the provisions of the Penal Code against the individuals implicated.<sup>343</sup> Its other rather novel recommendation related to the Supreme Court being vested with additional jurisdiction to impose suitable sanctions in the deprivation of civil rights on persons who are found to have repeatedly violated basic fundamental rights of citizens.<sup>344</sup>

The timing of the appointment of this Commission by President Kumaratunge, the (long-delayed) release of the Report, and the government's selective use of its extracts for party political propaganda, detracted from the positive impact that such an inquiry might have been expected to achieve.<sup>345</sup>

### **3.3.2. The Presidential Truth Commission on Ethnic Violence (1981-84)**

Date of Appointment: 23 July 2001<sup>346</sup>

Date of Report: September 2002<sup>347</sup>

Mandate: Inquire and report on the following matters:

- (a) the nature, causes and extent of –
  - (i) the gross violation of human rights; and
  - (ii) the destruction of and damage to property committed as part of the ethnic violence which occurred during the period commencing from the beginning of the year 1981 and ending in December 1984, with special reference to the period of July 1983, including the circumstances which led to such violence;
- (b) whether any person, group or institution was directly or indirectly responsible for such violence;
- (c) the nature and extent of the damage, both physical and mental, suffered by the victims of such ethnic violence;
- (d) what compensation or solatium should be granted to such victims or to their dependents or heirs;
- (e) the institutional, administrative and legislative measures which need to be taken in order to prevent a recurrence of such violations of human rights and destruction or damage of property in the future and to promote national unity

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<sup>343</sup>See later analysis for the attempted prosecution of individuals implicated in the findings of this Commission.

<sup>344</sup>Final report of the Batalanda Commission, Sessional Paper No. 1, 2000, at p.124.

<sup>345</sup>Kumaratunge's use of the *Batalanda Commission* report at the 1999 presidential election campaign is noted in this regard. As Hoole comments 'the selective use of commission reports which became the property of the executive president, as propaganda, was started by Jayawardene (ie; Sansoni report). It diminishes the standing of the judiciary.'" Hoole, Rajan, op. cit, at p. 252.

<sup>346</sup>Appointed by President Chandrika Kumaratunge. The Commission comprised S. Sharvananda (Retired Chief Justice as Chairman) and SS Sahbandu and MM Zuhair (Presidents' Counsel) as members.

<sup>347</sup>The Final report of the Presidential Truth Commission on Ethnic Violence (1981-1984) is published as Sessional Paper No. III, 2003.

and reconciliation among all communities and to make such recommendations with reference to any of the matters that have been inquired into under the terms of this Warrant.

The Report of this Commission reveals witness testimony and other evidence in regard to the burning of the Jaffna Public Library in 1981, the District Development Council elections (1981), the July riots (1983) and the killing of prisoners at the Welikada Prison (1983).

Though a useful historical record for the events of that time, the Commission report is a weakly structured document and the exercise was not, in any sense, comparable to the truth commissions of other countries, most notably South Africa. In the words of one witness who appeared before the Commission:

Where the Welikade massacres were concerned for instance it did hardly any – if any – investigation of its own. It relied on me (CRM) for practically everything (for instance, even the inquest proceedings were supplied to it by us) and seemed more than happy with just our material. What it should have done is taken our material as a starting point and then followed up from there, with all its powers of investigation and summoning witnesses, which we didn't have. For instance it could and should have tried to obtain the statements recorded by the police after the first massacre. The instructing attorneys in the 35 civil cases filed by dependents of victims (assisted by CRM; it was in pursuance of these that we tracked down and interviewed survivors) called for these time and again in preparation for the trials, but were met with evasion after evasion by the Police. The cases never came to trial because they were eventually settled, state paying some compensation but without admitting liability... ..By the time of the 'Truth' Commission, I guess I was exhausted with putting the facts before them and it was probably partly my fault I did not press sufficiently for follow-up, or possibly I thought it would be no use. Welikade was only a small part of the Commission's whole remit. In its report, the Commission did pay CRM and me a handsome tribute, which was certainly gratifying, but we had really hoped that it would investigate further and uncover information which we had not already found out for ourselves.<sup>348</sup>

Despite the many pronouncements of this Commission as to the taking of measures that were deemed necessary for national healing, there was no implementation of any of these recommendations except for the payment of certain amounts of compensation.<sup>349</sup> The Commission report had, in fact, minimal positive impact on public opinion and did not serve as a mechanism for accountability or redress.

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<sup>348</sup> Assessment of veteran civil rights lawyer and Secretary, Civil Rights Movement (CRM) Suriya Wickremasinghe in reference to the testimony that she gave on the Welikada prison massacres before the Commission, quoted by the University Teachers for Human Rights (Jaffna), *'Scripting the Welikade Massacre Inquest and the Fate of Two Dissidents,' 'From Welikade to Mutur and Pottuvil: A Generation of Moral Denudation and the Rise of Heroes with Feet of Clay,'* Supplement to Special Report No. 25, 31.05.2007.

<sup>349</sup> See later analysis for the lack of the Commission's findings leading to prosecutions.

### 3.3.3. The Bindunuwewa Commission

Date of Appointment: 8<sup>th</sup> March, 2001<sup>350</sup>

Date of Report: November 2001 (Not Published)

Mandate: To inquire into questions of responsibility, rehabilitation, administration, and prevention in respect of incidents that occurred at the Bindunuwewa Rehabilitation Centre during the month of October 2000.

This is one example of a commission appointed to examine alleged rights violations committed during the appointing President's own administration. The inquiry centred on disturbances on 24 October 2000 at the Bindunuwewa Rehabilitation Centre. This facility had been held out by the government as contributing to rehabilitation of former LTTE rebels, including child soldiers. On the day prior to the incident, some of the detainees had protested to the officer-in-charge regarding their long detention without any charges being filed against them and had complained regarding some other matters such as the non-receipt of letters and telephone messages. Tensions mounted when the Officer-In-Charge (OIC), Capt. Y.K. Abheyaratna, informed the detainees that he was not authorised to order their release. The police were called to the scene, giving rise to further demonstrations. However, after these tensions subsided, matters had returned to normal in the camp to all intents and purposes.

The next morning however, the camp was attacked by a large number of Sinhalese civilians, apparently residents of the area, who assaulted and clubbed detainees, setting fire to the halls of residence. They were not stopped by the police officers on duty. In total, 28 Tamil youth between the ages of 14-23 years were killed while some 14 other Tamil youth were seriously injured.

The Commission report held liable the two senior police officers, ASP Dayaratne and HQI Seneviratne, for not taking action to prevent the attacks and for ordering the police to shoot into the crowd of detainees. It further held their junior officers, Sub-inspectors Walpola, Ratnayake and Abeynarayana, responsible for engaging in the attacks wilfully.<sup>351</sup>

## 4. Prosecutions in relation to Commissions of Inquiry Reports

The findings of these Commissions were not used to any good effect in enabling prosecutions of alleged perpetrators thereafter.

### 4.1. The Sansoni Commission Report

In the Sansoni Commission Report, the names of few police officers (of Sinhalese ethnicity) are mentioned as regards their culpability in the communal violence of 1977 resulting in the deaths and destruction of the properties of Tamil victims. However, no action was taken against even the handful of individuals identified by Sansoni; i.e. SP

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<sup>350</sup>Appointed by President Chandrika Kumaratunge. The Commission was headed by Justice PHK Kulatilleke.

<sup>351</sup>See later analysis for critique of the prosecutions that took place relevant to the *Bindunuwewa case*. It must be noted that these prosecutions did not follow from the findings of the Commission of Inquiry.

GW Liyanage, TD Gunewardene, PC 5920 and Cyril Fernando of Wattedgama,<sup>352</sup> all of Sinhalese ethnicity.

In other instances, Sansoni had observed that he was unable to come to a conclusion regarding the culpability of specific individuals due to their being unknown or being members of a mob.<sup>353</sup>

#### **4.2. The Kokkadicholai Commission Report**

No prosecutions resulted from the findings of this Report. The Commission had recommended, in any event, that further action should be taken only under the provisions of military law. These recommendations as well as the payment of compensation were accepted by the Cabinet of Ministers in mid-1992. Also adopted was the Commission's recommendation that military authorities give clear instructions to soldiers not to indulge in or execute extra-military or non-military acts.

The offenders were subsequently brought before a Military Court, which acquitted the 17 Sinhalese army men implicated in the killings of the Tamil civilians, but found the officer in charge, Captain Kudaligama, guilty on two counts - failure to control his subordinates and the improper disposal of dead bodies. The army announced in December 1992 that the officer had been dismissed.<sup>354</sup>

This case illustrates the dangers in replacing the normal judicial process with military trials, resulting in cover-ups with one or two accused being cast as "scapegoats", as evidenced in this instance. The reference of the matter to a Military Court by this Commission effectively amounted to a subversion of the jurisdiction of civilian courts. Further, though the Commission declined to refer the case to the ordinary criminal civilian court on the grounds that criminal liability could not be sustained as the individual perpetrators could not be identified, the Military Court's finding of culpability of the officer-in-charge illustrates that indictment may yet have been possible for the offence of illegal omission under Sections 30 and 31 of the Penal Code.

Such an indictment was in fact pursued successfully in the High Court against relevant officers-in-charge by the Attorney General in the Bindunuwewa Case, discussed later, even though the conviction was overturned by the Supreme Court pursuant to legal reasoning that has been stringently critiqued. The point needs to be reiterated however that whatever lacunae that may exist in the ordinary law cannot serve as a justification for referring cases of grave human rights violations to military courts. This issue is taken up later in the final chapter.

In addition to ensuring that military tribunals do not have jurisdiction over human rights violations, law reform is required to incorporate into Sri Lanka's penal statute a form of command responsibility that allows superiors to be held responsible both for dereliction of duty and, where warranted, for the crimes of their subordinates. A

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<sup>352</sup>Hoole, Rajan, op. cit, at p. 37.

<sup>353</sup>Sessional Paper No. VII, July 1980, at p. 259.

<sup>354</sup>Abeysekera, Charles, 'Human Rights 1992 - A Dismal Record,' *Pravada*, Social Scientist's Association, Colombo, 1993.

recommendation to this effect by the Kokkadicholai Commission (some of whom were judicial officers) is disappointingly absent in their report.

#### 4.3. The Presidential COIs into Disappearances (1991-1993)

The 1991-93 Presidential Commissions concluded hearings in six of the cases accepted for investigation, which were all enforced disappearances linked to police custody. The Commissioners had refrained from examining enforced disappearances linked to military custody on the basis that this 'would be difficult in a context of 'armed conflict'.<sup>355</sup> Reports were submitted to the President but were not released to the public.

A case was filed only in one instance in consequence of commission findings, alleging the involvement of Assistant Superintendent of Police K. Sugathadasa concerning the enforced disappearance of police constable Basnayake in January 1991. The Magistrate discharged the accused and stated that he was doing so on the basis of the findings of the 1991-93 Presidential Commission. As pointed out by one sceptical commentator:

[T]his gave rise to a curious situation - of a man being accused and then discharged on the basis of the same findings; since the PCIIRP reports are not available to the public, this curiosity is one that cannot yet be satisfied.<sup>356</sup>

The legitimacy of the 1991-93 Presidential Commissions was clearly undermined by the political context of its establishment and functioning. Its findings of fact were of insufficient value to propel effective investigations and prosecutions.

#### 4.4. The 1994/1998 Disappearances Commissions<sup>357</sup>

The response of the Government to the UN Committee Against Torture in pursuance of the periodic reporting obligation under the Convention Against Torture (CAT),<sup>358</sup> details the most recent official data in relation to prosecutions undertaken consequent to the recommendations of the following commissions/bodies: namely, the 1994 Southern, Western and Sabaragamuwa Disappearances Commission; the 1994 Central, North Western, North Central and Uva Disappearances Commission<sup>359</sup>; the 1998 All-Island Disappearances Commission and the 1996 Board of Investigation into Complaints of Disappearances in Jaffna Peninsula.<sup>360</sup>

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<sup>355</sup>ibid.

<sup>356</sup>Abeysekera, Charles, op. cit.

<sup>357</sup>As prosecutions relevant to the *Embilipitiya Case* and the *Bindunuwewa case* did not strictly follow as a consequence of the findings of the relevant Commissions of Inquiry, the prosecutions in both cases are examined later under examination of prosecutions other than those initiated as a result of the reports of Commissions of Inquiry.

<sup>358</sup>United Nations Committee against Torture: Sri Lanka, CAT/C/LKA/CO/2/Add.1 (Comments by Government of Sri Lanka on the Concluding Observations of the CAT Committee), 20.02.2007; See also United Nations Committee against Torture, Second Periodic Report, CAT/C/48/Add.2, 06.08.2004.

<sup>359</sup>The omission of data relating to prosecutions consequent to the findings of the *1994 Northern/Eastern Disappearances Commission* is disturbing in this regard.

<sup>360</sup>The last mentioned body is a Board of Investigation that was appointed by President Chandrika Kumaratunge in 1996 pursuant to persistent demands being made to her to constitute a Commission of Inquiry to investigate the disappearances in Jaffna during the mid nineties (which was during the time

According to these statistics, the Disappearances Investigation Unit (DIU) of the Police Department (a special Unit established to investigate enforced disappearances cases) had carried out investigations into 3,615 cases. Of these, 2,462 cases have been completed and relevant files of 2,095 cases have been forwarded to the Attorney General, on whose advice 1,033 cases have been closed. Investigations with regard to 256 cases could not be continued due to insufficient evidence.<sup>361</sup>

The following statistics related to the details of the criminal proceedings resulting from the investigations conducted by the Disappearance Investigations Unit:<sup>362</sup>

	High Court	Magistrate Court	Total
Cases filed	376	56	432
Cases Concluded	135	43	178
Pending cases	241	06	247
Accused discharged	123	07	130
Convicted	12	-	12

Statistics of these cases, as disclosed in earlier Government Reports made to the UN treaty monitoring bodies, indicate the factual situation relevant at that particular year. In the Fourth Periodic Report of the Sri Lanka Government to the UN Human Rights Committee (2002) pursuant to ICCPR obligations, for example,<sup>363</sup> the Government reported 1,681 cases pending initiation of criminal prosecutions as a consequence of the findings of the Disappearances Commissions.

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of her own administration). While she desisted from appointing a Commission of Inquiry, a Board of Investigation into Complaints of Disappearances in Jaffna Peninsula was appointed on 05.11.1996. The Board was chaired by a retired senior officer of the Sri Lanka Administrative Service and also comprised four senior officers of the services; i.e. the Army, Navy, Air Force and the Police. The Board held sittings in Jaffna on several occasions. Some 2,621 complaints were investigated from which 765 cases of enforced disappearances were sifted out. After a process of visiting detention centres, police stations, 201 persons were traced. The Board concluded finally that fourteen deaths had been at the hands of the members of the armed forces. United Nations Working Group on Enforced or Involuntary Disappearances, Report of the Working Group on Enforced or Involuntary Disappearances (25-29 October 1999), E/CN.4/2000/64/Add.1, 21.12.1999; Presented to the UN Commission on Human Rights at its 56<sup>th</sup> sessions, March-April 2000, at para. 18.

The UNWG stated that 21 cases of disappearance where "evidence has revealed sufficient facts to justify further inquiries by the police with a view to pursuing legal action against offenders". In another 134 cases of disappearance the Board of Investigation found sufficient evidence of criminal acts but could not identify the alleged perpetrators. It recommended further inquiries by the Service Commanders to identify the offenders.' United Nations Working Group on Enforced or Involuntary Disappearances, Report of the Working Group on Enforced or Involuntary Disappearances (25-29 October 1999), E/CN.4/2000/64/Add.1, 21.12.1999; Presented to the UN Commission on Human Rights at its 56<sup>th</sup> sessions, March-April 2000, at para. 36.

The failure of the Government to appoint a Commission of Inquiry to look into the disappearances that occurred in Jaffna in mid 1996 despite promises by then President Chandrika Kumaratunge was roundly condemned at that time. Asian Human Rights Commission, 'Investigation of Disappearances: A Review as at mid-July 1998; Civil Rights Movement', Human Rights SOLIDARITY, Vol. 8, No. 12, Hong Kong, 1997, at p. 17.

<sup>361</sup>United Nations Committee against Torture, Second Periodic Report, CAT/C/48/Add.2, 06.08.2004, at para. 63.

<sup>362</sup>ibid, at para. 64.

<sup>363</sup>United Nations Human Rights Committee, Fourth Periodic Report of Sri Lanka, CCPR/C/LKA/2002/4, 18.10.2002, at para. 158.

As of 31 December 2000, according to the Government, the DIU had conducted criminal investigations into 1,175 of these cases, about which the Missing Persons Unit (MPU) of the Attorney General's Department, which was established to initiate prosecutions into these disappearances, had received information from the DIU. As at 31 December 2001, 262 of these cases had led to indictments in the High Court and non-summary proceedings had commenced in 86 cases in the Magistrate's Court. These included cases against 597 security personnel, (ethnicity was not disclosed). Some 423 cases had been discharged for want of evidence. The DIU had been advised to cause further investigations into 323 cases.<sup>364</sup> The total number of "disappeared" persons from the period 1988-90 was asserted to be approximately 27,200 persons.<sup>365</sup>

These statistics are manifestly unsatisfactory as official submissions by the Government of Sri Lanka to the UN treaty bodies. They do not yield a full picture of the prosecutorial and overall legal process in regard to cases of such overriding importance to Sri Lanka's accountability record. For example, what is meant by the term 'discharged for want of evidence'? For what number of years are the 'pending' cases languishing in Sri Lanka's courts and what are the reasons for delays? Where cases are categorised as being 'investigated', to what extent (if at all) does the MPU maintain supervision over the police investigations? Should not case numbers be included in this data, together with the minutes of the court orders where acquittals or convictions have been handed down in order that the information may be cross-checked and the transparency of such data, maintained?

At present, there is little likelihood of actually identifying the relevant court orders. Though some orders of the High Courts are analysed below, it is not possible to state with certainty that these prosecutions emanated from the findings of the Disappearances Commissions, or whether they were stemmed from an independent source.

Further, the data is not disaggregated in terms of its geographical location and thus, there is no way of ascertaining which prosecutions emanate from the conflict-affected areas of the North and East and which, from other areas of the country.

The low percentage of convictions in these cases is one irrefutable fact that is evidenced from these statistics. This is a result of unsatisfactory investigations and prosecutions. Clearly, the DIU, though functioning reasonably effectively during the first few years of its existence, very quickly thereafter lapsed into a state of ineffectiveness, reflecting the lack of political will in investigating offences that involved senior politicians and police officers.<sup>366</sup> Those police officers who investigated their superior officers in this regard too zealously were transferred out of the DIU or penalised in some other way.

For its own part, the MPU appeared to exercise no supervision over the investigations, but merely accepted notes of investigations sent to the Attorney General by the DIU on face value. Thus, for example, where a case was noted as marked by an

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<sup>364</sup>ibid at para. 159.

<sup>365</sup>ibid at para. 161. However, the unofficial number remains much higher, at a conservative estimate of 40,000 disappeared persons.

<sup>366</sup>Interviews with former senior police officers, 21.06.2009.

insufficiency of evidence to take the investigation further, this was accepted without any demur.<sup>367</sup> In the actual prosecution itself, the problems faced by even conscientious prosecutors were remarked upon as follows:

The attitude of counsel, courts and the accused sometimes make our work difficult. The attitude seems to be that if the police/army had not resorted with such force against subversives at that time, our society will not have survived that era. Hence what is done is believed to be justified. Some believe that the police officers were only doing their job. Some judges are also biased by the personal experiences that they have had to undergo during this period.<sup>368</sup>

This may be a critical observation that reflects the dominant culture of impunity, although it points to institutional and motivational factors that are difficult to measure, except through such testimony and by inference from the actual and quantifiable performance of police, prosecutors, and the judiciary.

In addition, two factors in particular have been instrumental in preventing successful prosecutions of these cases. First, fear has prevented many witnesses from complaining to the police regarding the enforced disappearance or involuntary removal of the victim. In many instances where in fact attempts have been made to lodge such complaints, police officers typically have refused to record them. This is then used against them in Commission reports to discredit the testimony as lack credibility due to its belated reporting.

Secondly, even many years after making their first complaint, witnesses do not usually state the names of the alleged perpetrators. In the official government forms signed as a basis for compensation, complainants state that the perpetrators were subversives or 'unknown persons.'<sup>369</sup> In court, thereafter, when they claim to specifically identify the perpetrators, their earlier statements are often used against them by defence counsel to impugn their credibility.<sup>370</sup>

The conflict of interest emanating from the role of the Attorney-General in conducting these prosecutions has been succinctly summed up by the 1998 All-Island Disappearances Commission (after having the benefit of examining the functioning of the MPU for some years) as follows:

The establishment of this Unit while underlining the special problems of prosecuting cases of disappearances suffers from drawbacks, in that the prosecutor is the Attorney General who invariably is the representative of the State, either as prosecutor or as respondent in judicial proceedings. In this instance, the present arrangement makes the Attorney General the representative of the victim and prosecutions are conducted on the basis that the crimes were the acts of errant officials. This again highlights a problem of the public perception of a Conflict of Interest, in that the victims are very

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<sup>367</sup>Interviews with former senior state counsel, 11.06.2009.

<sup>368</sup>ibid.

<sup>369</sup>Referred to in Sinhala as '*naanduna pudgalayan.*'

<sup>370</sup>Interviews with former senior state counsel, 11.06.2009. The practice of holding identification parades in this regard also do not seem to be resorted to on the principle that it would be unfair to the suspects as there is a substantial time lapse since the occurrence of the incidents.

much affected by the awareness that State officers are investigating into complaints against officers of State.<sup>371</sup>

The Commission strongly advocated an independent prosecutorial body in this regard though its suggestion that the Human Rights Commission of Sri Lanka (HRCSL) be allowed to establish a prosecuting arm is subject to criticism due to the manifest lacunae in the law under which the HRCSL functions, as observed previously. The recommendation of the 1994 Western, Southern and Sabaragamuwa Disappearances Commission that an Office of an Independent Prosecutor be established with appropriate constitutional safeguards<sup>372</sup> is a preferable approach.

#### **4.5. The Batalanda Commission**

A great deal of publicity was generated by the findings of the Commission in regard to the prosecution of those found implicated of criminal culpability. However, what actually transpired was a good example of the manner in which commission findings are made nugatory as a result of the politicized establishment of these bodies. The primary police officer implicated in the findings, SSP Douglas Pieris, did not appear before the Commission, having fled the country by that time while an affidavit later submitted by him was rejected on the grounds of it not being authentic.

The other police officers who had been found implicated indirectly were arrested and detained on the basis of threats received by the Batalanda Commission, risk of flight, and the possibility that these officers could inflict violence on witnesses before the Commission, and, indeed, on the Commissioners themselves. In response to their petition, the Supreme Court held that their detention was in clear breach of constitutional safeguards.<sup>373</sup> This ruling buttressed the perception that the Commission had been engaged in something resembling a political witch-hunt against particular police officers, rather than an impartial inquiry into practices of torture and illegal detention during a previous political regime. Though these findings by the Supreme Court may have been overcome later by a good faith investigation and prosecution of the alleged responsible police officers, this opportunity was also squandered.

In a later prosecution, former SSP Douglas Peiris along with four other policemen were convicted of the offence of abduction of two men and one schoolboy and keeping them at the Batalanda “torture chamber” with the intent of causing murder during the late 1980’s, and sentenced to five years rigorous imprisonment by the

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<sup>371</sup>Report of the 1998 *All-Island Disappearances Commission*, Sessional Paper No. 1, 2001, at p. 16. The Commission went on to suggest that the Human Rights Commission of Sri Lanka be allowed to establish a prosecuting arm which suggestion however is inherently problematic as observed previously.

<sup>372</sup>Final report of the 1994 *Western, Southern and Sabaragamuwa Disappearances Commission*, Sessional Paper No. V, 1997, at p. 83 in particular.

<sup>373</sup>*I. Jayaratne v. de Silva and others* S.C. (FR) No. 609/1996, SCM 21.09.1998. The three member bench of the Court comprised Justices Mark Fernando, A.R.B. Amarasinghe and D.P.S. Gunesekera. The Court pointed out as follows; “It is true that allegations of misconduct against police officers must be dealt with promptly and effectively and that the respondents purported to be acting in order to prevent the subversion of the course of justice before a Commission inquiring into unlawful arrests and unlawful places of detention. However, it is distressing and disturbing that the entire process of arrest and detention of the petitioners has been contrary to basic constitutional safeguards.”

Gampaha High Court on 26 August 2009.<sup>374</sup> The relatively mild sentence was occasioned by the fact that, in the absence of a crime of enforced disappearance in the Penal Code, this case – like many similar cases - was prosecuted on the basis of abduction of certain persons with the intention of murder, keeping them in illegal custody and causing their disappearance. As discussed later in detail, the lack of a statutorily defined offence with commensurately severe penalties is a most troublesome lacuna in Sri Lanka's penal law.

#### **4.6. The Presidential Truth Commission on Ethnic Violence (1981-1984)**

The Commission regretted the failure of the government to prosecute persons responsible for the acts of violence committed on persons of Tamil ethnicity during 1981-1984 and (in the minimum) to engage in proper investigations. Observations made in the context of the Welikada Prisons massacre are reproduced in their entirety given their relevance in pointing to the absence of political will in this respect.

We regret to find that the government failed to prosecute those involved in the crimes of July 25<sup>th</sup> and 27<sup>th</sup>. The domestic inquiry initiated by the Head of the Welikada Prison Mr. Leo de Silva was not proceeded with. There is no evidence that investigations commenced by the Borella Police had been proceeded with, beyond the stage of the inquest. The efforts of the Commission to trace the police records proved futile with the IGP informing that these records were not traceable. It is the responsibility of every government to ensure that perpetrators of crimes are punished and that no one acts with impunity or gets away without accountability. The government of the day has failed to discharge these obligations.<sup>375</sup>

No findings of *prima facie* culpability against any individual, public official, or political representative were arrived at and no specific prosecutions were recommended by this Commission.

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<sup>374</sup>Justice after 20 years - Douglas Peiris given 5 yrs RI', Daily Mirror, 27.08. 2009

<sup>375</sup>Final report of the Presidential Truth Commission on Ethnic Violence, Sessional Paper No. III, 2003, at p. 61.

## Chapter Four - Evaluating Sri Lanka's Commissions of Inquiry

This chapter provides a comparative analysis of Sri Lanka's commissions of inquiry between 1977 and 2001 in terms of a standard set of categories including mandate, composition, proceedings and procedures, powers and resources. As emphasized below, many of the weaknesses identified also shed light on elements of the regular criminal justice system that contribute to impunity, analyzed in detail in the next chapter.

### 1. Normative Framework

Among the most fundamental principles of international law is the State obligation to ensure that an independent inquiry occurs where human rights violations are alleged. Commissions of inquiry are extraordinary means to fulfil this obligation when the regular justice system is inadequate due to the nature and scope of the alleged violation or the lack of capacity or will of those responsible of the administration of justice. However, a commission of inquiry must be understood in relation to the broader duty of the state to guarantee a remedy and reparations where human rights violations and crimes are disclosed by such independent inquiries. In other words, from the perspective of victims, a commission of inquiry can only partially fulfil their right to truth, justice and reparations.<sup>376</sup>

Every state has the obligation – binding on the executive, legislative and judicial branches – to guarantee an effective and enforceable remedy for violations of human rights.<sup>377</sup> In the case of violations of rights amounting to gross violations, international law requires that the state remedy be judicial in nature. In certain other cases, administrative measures carried out by the executive might be sufficient.<sup>378</sup>

International law and jurisprudence has established a set of state obligations that correspond to the victim's right to truth, justice, and reparations. As noted, at the most general level, the state has an overarching obligation to ensure an effective remedy. This includes the cessation of any ongoing violation, a duty that is relevant in the case of disappearances, which are an ongoing violation until the fate of the victim is disclosed.<sup>379</sup> Overlapping with this general obligation are two further duties: first, to provide an adequate legislative and administrative framework and apparatus for preventing and responding to violations; and, second, to ensure an independent and

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<sup>376</sup>For a full analysis of these dimensions of victims' rights under international law, see International Commission of Jurists, *The Right to a Remedy and to Reparation for Gross Human Rights Violations – A Practitioners' Guide*, December 2006.

<sup>377</sup>Article 2, *International Covenant on Civil and Political Rights* (Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49). For commentary on this obligations, see Human Rights Committee, *General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004).

<sup>378</sup>See International Commission of Jurists, *The Right to a Remedy and to Reparation for Gross Human Rights Violations – A Practitioners' Guide*, December 2006, pp 49-50.

<sup>379</sup>"Cessation of an ongoing violation is an essential element of the right to an effective remedy." Human Rights Committee, *General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004).

impartial judiciary able to adjudicate and review state action that may infringe on human rights and provide a judicial remedy. There are a further four states duties to victims and the public:

- (i) to investigate violations;
- (ii) to prosecute and punish perpetrators;
- (iii) to establish and make public the truth about violations; and
- (iv) to ensure reparations.

Reparations duties encompass the right to restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition,<sup>380</sup> these obligations constitute part of the obligation to undertake legislative and administrative measures and to cease any ongoing practice of violations.

As noted, these obligations are binding on the state as a whole, meaning the executive, legislature and the judiciary. The absence of any of these elements represents a failure of the state to fulfil its obligations under international law.<sup>381</sup> Commissions of inquiry need to be understood in the light of these duties, particularly in terms of their relationship with the prosecutorial system and criminal courts.

The criminal justice system is intended to effectuate the state's repudiation of alleged crimes, particularly where they constitute grave human rights violations that are also crimes under international law. A trial in a criminal court before a judge determines the guilt or innocence of the accused with regard to a specific set of facts determined in a court of law. The truth is therefore established beyond a reasonable doubt, but this truth may not be the whole truth with which the public is concerned.

There are cases where the nature or scale of the crime leads to demands for a public inquiry that looks beyond individualized guilt to underlying causes, to the level of state responsibility, and then to measures to prevent the recurrence of this public harm. A criminal court is not designed for this purpose. Similarly, there may be cases where the State, as the alleged perpetrator, is unable to fulfil its duty to the public through normal mechanisms. This may be due to lack of competence, conflicts of interest, the lack of public confidence in those charged to carry out the investigation, and related political interference.

The UN *Principles on Remedy and Reparations*<sup>382</sup> and the UN *Principles on Impunity*<sup>383</sup> set out in detail the principles and standards governing commissions of inquiry, including truth commissions, in order to ensure their proper role, particularly *vis a vis* the criminal justice system, for publicly establishing the truth regarding a

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<sup>380</sup>*Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, A/RES/60/147, 21 March 2006.

<sup>381</sup>International Commission of Jurists, *The Right to a Remedy and to Reparation for Gross Human Rights Violations – A Practitioners' Guide*, December 2006, p 25.

<sup>382</sup>Resolution adopted by the General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, A/RES/60/147, 21 March 2006.

<sup>383</sup>Commission On Human Rights, *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, E/CN.4/2005/102/Add.1, 8 February 2005.

pattern of harms, to recommend measures to prevent their repetition as well as reparations, and to provide a basis for prosecutions where crimes are disclosed.<sup>384</sup>

The following analysis assesses whether these legitimate purposes have been served in the case of commissions established in Sri Lanka between 1977 and 2001.

## 2. Establishment

The establishment of a commission of inquiry is often a reluctant move by a government whose immediate political objectives may not be served by an independent inquiry, but which is prompted at least to appear to take action, as a consequence of domestic and international pressure.<sup>385</sup> This is a common feature of the commissions described in the previous chapter, as is the reverse problem, in which a commission is established for partisan rather than public interest. In neither case are the interests of truth, justice and reparations appropriately served.

This reality highlights both the importance and challenge faced by the state in taking a principled approach to establishing commissions of inquiry. Principle 6 of the *UN Principles on Impunity* requires the inclusion “broad public consultations” as the basis for determining the terms of reference and composition of commissions of inquiry. The consultations should seek especially “the views of victims and survivors”, and in its subsequent investigations, seek to secure “recognition of such parts of the truth as were formerly denied”.<sup>386</sup>

While often the result of widespread public pressure, including that of victims and their families, the commissions in Sri Lanka have generally not been established through public consultation, nor does the COI Act of 1948 contemplate anything other than executive fiat in establishing commissions.

The lack of sound, non-partisan criteria for establishing commissions of inquiry in Sri Lanka is apparent when one notes similar incidents that did not lead to these extraordinary measures. For example, although a commission of inquiry was appointed to look into the Kokkadicholai massacre, other massacres such as at

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<sup>384</sup>See Philip Alston, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, A/HRC/8/3, 2 May 2008, para. 12-58, in which he summarizes key purposes and concerns in relation to commissions of inquiry, and lists the main sources of international norms as follows; *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, E/1989/89 (1989), especially Principle 11; *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, General Assembly resolution 55/89, Annex, especially Principle 5; *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, Report of the independent expert to update the set of principles to combat impunity, Diane Orentlicher, E/CN.4/2005/102/Add.1 (8 February 2005), especially Principles 6-13; *United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, Model Protocol for a Legal Investigation of Extra-Legal Arbitrary and Summary Executions (“Minnesota Protocol”), E/ST/CSDHA/12 (1991); *Report of the Secretary-General*, E/CN.4/2006/89 (15 February 2006), para. 2. Philip Alston, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, A/HRC/8/3, 2 May 2008, para. 19.

<sup>385</sup>Alston, *supra* note 384, at para. 19.

<sup>386</sup>*Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, Report of the independent expert to update the set of principles to combat impunity, Diane Orentlicher, E/CN.4/2005/102/Add.1 (8 February 2005), especially Principles 6-13

Kumarapuram (11 February 1996), at Mylanthanai (9 August, 1992) and at Thambalagamam (1, February 1998), received no such special treatment. The context in which the violations occurred in these situations were, however, similar, given that they all involved alleged massacres by army personnel following attacks by the LTTE designed to provoke a reaction. It appeared that the Kokkadicholai Commission of Inquiry was established wholly as a result of the wide publicity that the massacre generated nationally and internationally. Needless to say, while public attention and demand is often an ingredient in the decision to establish a commission of inquiry, it is not a sufficient basis, and lends itself to action primarily on the basis of political expediency.

In other instances of gross human rights violations, ministerial committees or committees headed by judges and police officers have been appointed to inquire and report.<sup>387</sup> Such inconsistency in the appointment of these bodies highlights the arbitrariness of the process.

Successive governments at least indirectly have acknowledged the weakness of the ordinary criminal investigative mechanism as the basis for establishing these Commissions. However, actual reform of the investigative mechanisms has been consistently disregarded. The pattern has instead been to appoint a commission of inquiry on a reactive basis in response to public pressure and, ultimately, as a means of glossing over chronic failures in law enforcement and ordinary investigative mechanisms.

### **3. Mandate**

No commission of inquiry will achieve a useful purpose unless it is able to conduct an inquiry independently. This is an important area in respect of which lessons may be learned from the experience of commissions described in the previous chapter. It is critical, in this regard, to look at whether the commissions of inquiry were structurally designed to ensure independence and then to examine whether in fact they actually functioned independently to achieve their mandate.

A second important aspect of the commission mandate is its relationship to the regular criminal justice system. Commissions of inquiry may disclose crimes that merit criminal investigations and prosecutions; however, it is important that their terms of reference clearly distinguish the role of the commission of inquiry from civil, administrative, or criminal courts. With regard to criminal courts, no other body – including a commission of inquiry – has jurisdiction to pass judgement on individual criminal responsibility and punish accordingly.<sup>388</sup> This remains an area of ambiguity internationally, since commissions of inquiry often will identify perpetrators and recommend prosecutions that may or may not take place; meanwhile, the rights of perpetrators to a public defence and fair trial may be jeopardized (this issue is taken up further below). The key point is that, where a commission appears to take on the role of a criminal court in assigning individual responsibility, it must be clearly

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<sup>387</sup>For example, the Ministry of Defence Board of Investigation into Disappearances in the Jaffna Peninsula (report issued in 1998). In other instances, the Human Rights Commission of Sri Lanka has made some useful interventions such as the Committee of Disappearances in the Jaffna Region (report issued in 2002).

<sup>388</sup>Principle 8, *UN Updated Principles to Combat*, supra note 7.

justified and spelled out in the mandate, and must not undermine the right of and individual to a fair trial before an independent and impartial court in accordance with international standards.<sup>389</sup>

Third, commissions of inquiry ought to be able to perform an advisory function regarding measures to ensure reparations, including guarantees non-repetition. In this sense, the mandate can establish commissions of inquiry as catalysts of policy, legislative, and institutional change that will enhance human rights protections and combat impunity.<sup>390</sup> Further, while some parts of a commission's work may be necessarily confidential, for example to protect victims and witnesses, its final report ought to be widely disseminated and freely available.<sup>391</sup>

The commissions of inquiry described in the previous chapter reveal weaknesses with regard to all three aspects of their mandates.

### 3.1. Independent Inquiry

Under the COI Act 1948, the President of Sri Lanka may revoke or alter the mandate at any time.<sup>392</sup> Coupled with the discretionary power of the President to remove Commissioners at any time, the degree of independence in principle that these Commissions enjoy is unsatisfactory.

In practice, this lack of independent determination of mandates has been reflected in the way mandates have been framed. Where the relevant commission of inquiry related to the investigation of events that had occurred during the time of the prevailing regime, the mandate and terms of reference have been cautiously worded, a classic example of which is the mandate of the Kokkadicholai Commission of Inquiry. This Commission was not required to report on the identities of alleged perpetrators; the mandate - in convoluted form - did, however, ask the Commission to recommend whether any action against any members of the Armed Forces should be taken under military law or the normal civil law. Commissions of inquiry are not intended to make individualized findings of guilt, but in this case the commission went to the extent of finding that there was no evidence of individual responsibility among the "soldiers run amok" and, therefore, nothing for a criminal court to consider. In so doing, the commission ran the risk of displacing the jurisdiction of criminal courts by failing to take due care for issues of fairness and preservation of evidence.

In other cases, such as the 1994/1998 Disappearances Commissions, in which the government requested inquiry into the actions of a previous political regime, their mandates have been more expansive while also tailored to certain periods. In these cases, the political nature of these mandates was also revealed by the periods deemed

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<sup>389</sup>"If the commission's mandate overlaps significantly with that of the regular criminal justice institutions (for example, where it is tasked with investigating and identifying perpetrators, duties normally performed by police and public prosecutors), a sound rationale needs to be provided by the Government to justify the creation of such a commission. Without such justification, the commission is likely to be a tool to delay prosecutions or deflect the international community's attention from advocating for prosecutions." Alston, *supra* note 384, para. 55.

<sup>390</sup>Principle 12, *UN Updated Principles to Combat*, *supra* note 7.

<sup>391</sup>Principle 13, *UN Updated Principles to Combat*, *supra* note 7.

<sup>392</sup>Section 5 of the COI Act of 1948 as amended by Amendment Act, No. 16 of 2008.

worthy of investigation. For example, the 1994/1998 Disappearances Commissions were prohibited from inquiring into involuntary removals and enforced disappearances during 1984-1988, notwithstanding the fact that this was the period during which such abuses were at their height. Again, the element of politicization of the process emerges from the disclosure that, despite the mandates of the 1994 Disappearances Commissions requiring the Commissioners to investigate involuntary removals and enforced disappearances after 1 January 1988 but with no end date specified, the Commissioners were prevented from investigating ongoing violations as a result of a verbal direction from the government of the day.

Recent changes to the law have sought to enforce greater accountability at least in respect of the removal of commissioners. *Amendment Act, No 16* of 2008, which added new sub-sections (3) and (4) to Section 2 of the COI Act of 1948, stipulates three defined situations where a Commissioner may be removed. These are namely, where the President is satisfied that a Commission member has abused or misused his or her office as a member or has abused or misused the powers conferred on him; where the member has engaged in bribery or corruption, or where the member is suffering from physical or mental infirmity. Consequent to the removal, the President is required to forthwith report such fact to Parliament, stating the reasons for such removal.

Although the amendments were an improvement on the earlier state of the law, the continuing dependence on Presidential discretion in respect of removals of commission members remains unsatisfactory. Mere notification to Parliament in this regard is an insufficient fetter. Further, the Presidential power to revoke or amend a particular mandate without assigning specific reasons for doing so needs to be replaced by the stipulation that, in the minimum, such alteration or revocation should be for legitimate and clearly stated reasons.

### **3.2. Relationship with criminal justice system**

Accountability for gross human rights violations has at least three dimensions from the perspective of victims: truth, justice, and reparations. The findings and recommendations of commissions of inquiry go to all three dimensions, but accountability, including through prosecutions, are a necessary follow-up if justice is to be ensured and impunity addressed. The repeated experience of Sri Lanka's commissions of inquiry is their utter irrelevance in this regard. Even where prosecutions have taken place in relation to the same set of alleged crimes, the findings of commissions have not been considered.

On the other hand, it is worth noting that the mandates of all the commissions discussed above were defined in such a manner as to prevent conflicts of jurisdiction with courts of law. This is critical to avoiding the built-in risk of commissions of inquiry usurping the individual guilt determination that is the exclusive jurisdiction of the courts. One problematic case, for related reasons, is that of the Kokkadicholai Commission, in which the mandate was in fact, problematically structured. Commissioners were asked to recommend the forum in which further prosecutorial action should occur, namely under military or civilian law. As discussed above, the Commissioners opted for the military law purportedly due to its finding that though the offences were punishable in terms of the Penal Code, as there was no evidence

against any particular soldier or soldiers as such, “the offenders cannot be brought before a criminal court of law.”<sup>393</sup>

It is also worth noting that legal proceedings, at least in respect of some incidents being investigated by the 1994 Disappearances Commissions, proceeded in parallel to the Commission hearings. The Commission inquiries into the cases themselves did not invoke conflicts with the courts in parallel hearings. This is also an important observation, inasmuch as the establishment of a commission of inquiry should not in principle be used as an excuse to delay prosecutions.

While not usurping the criminal justice process, and while useful as some of these commission reports undoubtedly were in supplying a historical record of the violations investigated, most commission reports have remained in a state of limbo. They have not proved useful to the progress of the legal developments on the one hand and, on the other, they have been insufficiently powerful in terms of their public impact as a truth-finding tool. The reasons as to their insufficient impact on public opinion, relating primarily to the politicization of these commission processes.

A 2008 amendment to the COI Act (1948) conferred new powers upon the Attorney General to “institute criminal proceedings in a court of law in respect of any offence based on material collected in the course of an investigation or inquiry, as the case may be, by a Commission of Inquiry” appointed under the Act.<sup>394</sup>

Vesting discretion in the office of the Attorney General in this regard, as did the 2008 amendment needs to be distinguished from the more specific reforms called for by the 1994 Commissions: namely, the amendment of the laws of criminal procedure, penal culpability and evidence in order to vest the proceedings and findings of commissions of inquiry with specific legal relevance. The 2008 amendment is liable to be critiqued on the basis that merely conferring powers of indictment upon the Attorney General in this regard poses a certain element of risk given the politicized nature of this office.<sup>395</sup> In fact, these concerns were raised during the relevant Parliamentary debates on this amendment.<sup>396</sup>

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<sup>393</sup>Final report of the Kokkadicholai Commission of Inquiry, Sessional Paper No. 11, 1992, at p. 6.

<sup>394</sup>New Section 24 of the COI Act of 1948 brought in by the Commissions of Inquiry (Amendment) Act, No 16 of 2008.

<sup>395</sup>Kishali Pinto Jayawardena ‘Discussing mock turtles and commissions of inquiry’ in ‘Focus on Rights’ *The Sunday Times*, 28.10.2007. Also, ‘Further Reflections on Commission Inquiries and Rights Violations, Part 1’ in ‘Focus on Rights’ *The Sunday Times*, 03.02.2008 and ‘Further Reflections on Commission Inquiries and Rights Violations, Part 11’ in ‘Focus on Rights’ *The Sunday Times*, 10.02.2008.

<sup>396</sup>In the debates that took place in Parliament on the passing of this amendment, leader of the Sri Lanka Muslim Congress (SLMC) Rauf Hakeem, himself a lawyer, while referring to ‘Discussing mock turtles and commissions of inquiry’ in ‘Focus on Rights,’ *The Sunday Times*, October 28, 2007, questioned as to whether it was wise to vest discretion of this nature in the office of the Attorney General, given the precedents of the Richard de Zoysa case and other such cases where the politicisation of state law officers in controversial prosecutions had been credibly documented – see the Hansard of 07.02.2008, at pp. 850-852. See also “AG gets greenlight to initiate criminal proceedings”, *Daily Mirror*, 08.02.2008. Government ministers replying to this charge pointed out that giving the power of indictment to the AG did not mean that the accused would be convicted of an offence since the conviction would ultimately depend on a legal assessment by a Court. However, this point of view ignores the extreme harassment of politically motivated indictments in a context where though the principle of judicial review of *mala fide* indictments by the AG in exceptional circumstances has been

It also has been recommended that evidence given by family members regarding enforced disappearances and extrajudicial executions be conferred the status of a “first information” under Sri Lanka’s criminal procedure laws. Normally the first information is mandatory before a criminal investigation can proceed that might lead to a prosecution.<sup>397</sup> This recommendation emerges from the fact that many of the family members of the “disappeared” did not lodge a police complaint due to overt hostility being directed towards them by police, amounting to, at times, refusal to record the complaint. These witnesses testified, some years later, before the commissions as to both the fact of the incident and the reasons for the delay or inability to lodge a first information as to the enforced disappearances or extrajudicial execution of their loved ones.<sup>398</sup>

As later discussed, some High Courts dismissed prosecution cases on the basis that the delayed complaint had undermined the credibility of the complaint. On the one hand, this is undoubtedly a judicial position that does not take into account the frequent hostility shown by the law enforcement machinery towards the family members of the disappeared, a reality exhaustively documented commissions of inquiry. On the other hand, judges who handed down such decisions have contended that the law does not allow them to go further in showing empathy for family members of the victims.<sup>399</sup> While this aspect of the law is considered more fully later, it may be observed that formal conferring of the status of a first information on evidence given by a witness at a commission of inquiry in the context of extraordinary human rights violations may be one way of overcoming this problem.

These observations support a general lesson learned, which is that commissions of inquiry will not fulfil the state’s obligation to carry out an independent inquiry if the underlying problems with the criminal justice system and broader separation of powers issues are not addressed. Ultimately, even a genuinely independent commission of inquiry must rest on the foundation of the criminal justice system and the independence of the judiciary, both decisive as to whether disclosed crimes are adequately investigated, prosecuted and punished. Measures required to address underlying structural problems in the criminal justice system are addressed in the next chapter.

However, in urging a stronger nexus between commission of inquiry findings and the regular judicial proceedings, the underlying assumption is that the courts themselves enjoy independence and exercise authority impartially. As noted earlier in the

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asserted in principle by the Supreme Court (see *Victor Ivan v. Sarath Silva, AG* [1998] 1 Sri LR 340), the courts have practically abstained from such review.

<sup>397</sup>Section 109(1) of the Code of Criminal Procedure Act states that “every information relating to the commission of an offence may be given orally or in writing to a police officer or inquirer.”

<sup>398</sup>De Almeida Guneratne, Jayantha, *op. cit.*

<sup>399</sup>Discussions with former High Court judges, 15.02.2009. This point of view may however be subject to refutation given that legal precedent does indeed allow such laxity in clearly defined cases – vide *Sumanasekera v. AG* [1999] 3 Sri LR 137 where it was ruled that if a valid reason is given for the delay, it must be accepted. However, this legal rationale has not held good uniformly. In *Jayawardene v. The State* CA No 98-100/97: [2000] 3 Sri LR 192, the judicial view was that, as normalcy prevailed in the country by 1991, it was not reliable to act on a complaint made in 1995 in regard to an incident of enforced disappearance in 1989.

analysis, these pillars of the judicial branch have also been severely challenged in Sri Lanka.<sup>400</sup>

A commission of inquiry bereft of justice, leaves the issue of truth and reparations to the political will of the government of the day. The government in most cases only reluctantly acquiesces to the establishment and operation of a commission of inquiry in the first place, or may seek to use it for particular political purposes. There is therefore little transparency or accountability in the way the truth is told or reparations addressed. The end result, seen in the commissions analyzed above, is a failure to pass the fundamental test of their usefulness, in other words, whether the commissions are able effectively to address impunity.<sup>401</sup>

### 3.3. Advisory function

In addition to recommending prosecutions, commissions of inquiry are uniquely placed to recommend measures for reparation, including compensation, rehabilitation, restitution, satisfaction, and guarantees of non-repetition.<sup>402</sup> As part of the commission's advisory function, they can recommend legislative and other action to combat impunity, and the UN principles make special note in this regard of the role of women's experiences in making its recommendations.<sup>403</sup> Importantly, the terms of reference ought also to include a Government undertaking to "give due consideration" to commission recommendations.<sup>404</sup>

Commissions of inquiry examined above had limited success in establishing the circumstances surrounding alleged violations and even less impact in terms of giving rise to prosecutions in order to ensure justice. With regarding to reparations and other recommendations designed to address underlying causes, there is little to report.

Further, the long delay in making the Commission reports public have detracted from the authority attaching to the Commission hearings. This delay has been evidence in relation to the 1994/1998 Disappearances Commissions as well as other Commissions. In certain cases, such as the PCIIRP of 1991-1993, the reports of the Commissions were never made public.

In his study of commissions of inquiry over the last 26 years, particularly in relation to extrajudicial killings, Special Rapporteur Philip Alston notes that, in the context of an armed conflict, it may be not be feasible to establish an independent inquiry domestically, and that international participation may be needed. This may explain in

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<sup>400</sup>In some instances, the findings of such Commissions (other than the *1994/1998 Disappearances Commissions*) have been set aside by the Supreme Court on the basis that their procedures were in flagrant violation of the law in that criminal prosecutions and deprivation of civic rights had been recommended without affording the impugned persons an opportunity to be heard. See *Dharmaratne v. Samaraweera* [2004] 1 Sri LR 57. See also the controversy relating to arrests and detentions of police officers that had taken place in connection with the proceedings of the Batalanda Commission of Inquiry, examined in the next chapter.

<sup>401</sup>Alston, *supra* note 7, at para. 24: "The basic question that must guide an assessment of a commission is whether it can, in fact, address impunity."

<sup>402</sup>Principles 34 and 35, *UN Updated Principles to Combat*, *supra* note 7. See also para. 16-23, *UN Principles on Reparations*, *supra* note 7.

<sup>403</sup>Principle 12, *UN Updated Principles to Combat*, *supra* note 7.

<sup>404</sup>*ibid.*

large part why successive commissions of inquiry described above have lacked sufficient independent leverage to go beyond documenting past violations to wielding sufficient influence in order to address impunity both in terms of prosecutions and its legislative and administrative underpinnings. These systemic elements of impunity are examined in detail in the next chapter. While it is beyond the scope of this report, others have already examined in detail this apt observation by the Special Rapporteur in relation to Sri Lanka's 2006 Commission of Inquiry.<sup>405</sup>

There are notable exceptions. As mentioned above, the 1994 Southern, Western and Sabaragamuwa Disappearances Commission provided useful recommendations regarding the *habeas corpus* remedy (analyzed in detail in the next chapter). At the time this Commission was sitting, this remedy was frequently used in cases of enforced disappearances.<sup>406</sup> The Commission identified various deficiencies in the way remedy was treated by the Court of Appeal and recommended important reforms.

Even in those very rare cases where the findings of the 1994 Disappearances Commissions were used in later judicial proceedings, this use was at times to the disadvantage of the victim. For example, the 1994 Commissions duly recorded the evidence of the family members of victims to the effect that state officers were not responsible for the enforced disappearances of their loved ones. They had made these statements due to their desire to obtain compensation that, according to the circular applicable at that time, was payable only if the death was caused by non state forces. This was, of course, a transparent and deliberate intent of the government to compel family members of victims to transfer responsibility from government forces to non state actors. At the time, devastated families acquiesced to this Kafkaesque bureaucratic requirement as part of their own survival tactics. This harsh reality was routinely ignored by the courts, however, when the same family members testified to the identity of state perpetrators before the Commissions. Their testimony was disbelieved on the basis of compelled, but nonetheless contradictory, statements in their earlier compensation claims.

An important part of the advisory role of commissions is determined finally by the ultimate fate of the final commission report, which, in principle, ought to be made public in full and widely disseminated in keeping with its role in publicly establishing the truth, recommending reparations, including measures to avoid a repetition of harms, and promoting judicial and other remedies.<sup>407</sup>

Unfortunately, in some cases, as noted above, commission proceedings were held in secret or reports went unpublished. In such circumstances, the right of victims and family members to truth, and the legitimate demand of citizens for measures to prevent recurrence of violations, was left unfulfilled.

There is a clear need for law and policy reforms that, at the very least, confer some measure of authority on the findings and recommendations of commissions of inquiry that are duly constituted with independence and guarantees of impartiality and

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<sup>405</sup>See Amnesty International, *Twenty Years of Make-Believe, Sri Lanka's Commissions of Inquiry*, June 2009.

<sup>406</sup>Final report of the *1994 Western, Southern and Sabaragamuwa Disappearances Commission*, Sessional Paper No V, 1997, at pp. 98-110.

<sup>407</sup>Principle 13, *UN Updated Principles to Combat*, *supra* note 7.

competence. Their findings must be made public in order to empower citizens to demand justice and reparations, including the right to understand the underlying causes and ensure non-repetition.

#### 4. Composition

It follows that a mandate structured to provide independence to a commission of inquiry requires a selection process that ensures capacity and willingness to act independently and impartially. As with the judiciary, but particularly so in the case of commissions of inquiry due to public spotlight under which they typically carry out their inquiries, the selection process is critical. The subsequent independence of commissioners needs to be protected through their irremovability (except for reasons of incompetence or incapacity) and through privileges and immunities necessary for their protection. Representation of women and other appropriate groups is also recommended explicitly under international standards.<sup>408</sup>

As noted above, the President possesses the authority under the 1948 COI Act to remove commissioners at any time without review. Notwithstanding this lack of structural protection of independence, the commissioners appointed to the bodies described above appeared to have the required technical expertise and experience. Of greater concern in some cases was the independence and impartiality of commissioners, as for example, in the case of the Batalanda Commission. A more contested question concerned the degree of their commitment to questions of human rights accountability. The presumption that lawyers and retired judges who were primarily appointed to these Commissions would automatically possess the requisite commitment to the rule of law and human rights was not always well-founded in reality.

In addition, the predominance of commissioners with legal training has resulted in a somewhat unfortunate tendency on the most part to convert fact-finding inquiries into proceedings with the character and flavour of legal hearings rather than as fact-finding investigations. This had its own peculiarly paradoxical effect. Even though these commission inquiries conformed in many respects to legal proceedings, the commission findings, proceedings, and material collected remained largely irrelevant to all the later prosecutions in courts of law. Commission documents were not used even to a limited extent in regard to setting out the factual context to a particular violation of the law under scrutiny by the courts. At the same time, some commissions, while taking on the air of legal proceedings, were insufficiently cautious about naming alleged perpetrators without providing an opportunity for a public defence which illustrated a lack of fairness that was exacerbated by the absence of follow-up prosecutions. Neither truth nor justice was served by the outcome.

Gender representation in many of these Commissions was also inadequate. Where the 1994/1998 Disappearances Commissions were concerned, there was an element of gender as well as minority representation in the composition. However, these Commissions remained the exception in this regard.

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<sup>408</sup>Principle 7, *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, E/CN.4/2005/102/Add.1, 08.02.2005.

A further concern is that officers of the Attorney General's Department were assigned to assist the Commissions in many of these instances. While such assistance was rendered without controversy, the part played by the state lawyers attracted no small measure of criticism in some instances as in relation to the Sansoni Commission, as remarked previously. In principle, the assistance rendered to Commissions of Inquiry by state law officers raises the questions as to an actual or perceived conflict of interest situation, particularly when a Commission is being required to inquire into poor or flawed prosecutions as part of an inquiry into failed justice processes in respect of a specific human rights violation. In such instances, problems may be clearly posed by the interaction of the Attorney General with a Commission's functioning in terms of rendering legal advice and directing the inquiries.<sup>409</sup>

This potential for conflict of interest has been reflected upon by a number of commentators. For example, in calling for an independent commission of inquiry to be appointed into the political assassination of Richard de Zoysa during the early nineties, the Liberal Party was at pains to stress that such a Commission should be independent of the Attorney General and of the police and was indeed instrumental in trying to bring in a parliamentary motion that sought to exclude the Attorney General from participating in the work of a Commission of inquiry to be appointed into the case. The motion was not successful. However, the following observation is pertinent in the context of the Liberal Party concluding that the credibility of the Attorney General's Department had been undermined:

We reiterate that we have arrived at this opinion because of the large body of evidence that suggests the immense partiality and lack of integrity by the Attorney General and his Department and of the police in this case.<sup>410</sup>

Recent changes to the law have been noteworthy in this regard. By *Amendment Act, No 16* of 2008, the Attorney General and his or her officers have been specifically authorised to appear before any Commission, to place any material before the Commission that is determined by the Attorney General to be relevant to the investigation or inquiry and to examine any witness summoned by the Commission if 'it appears to him that the evidence of such witness is material to or has disclosed information relevant to, the investigation or inquiry, as the case may be.'<sup>411</sup>

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<sup>409</sup>Kishali Pinto-Jayawardena 'Discussing mock turtles and commissions of inquiry' in 'Focus on Rights,' *The Sunday Times*, October 28, 2007. Also, 'Further Reflections on Commission Inquiries and Rights Violations, Part 1' in 'Focus on Rights,' *The Sunday Times*, 03.02.2008 and 'Further Reflections on Commission Inquiries and Rights Violations, Part 11' in 'Focus on Rights,' *The Sunday Times*, 10.02.2008. These queries were raised particularly in respect of the conflict of interest questions relating to officers of the Attorney General assisting the 2006 Commission to Inquire into Serious Human Rights Violations, which were highlighted by the International Independent Group of Eminent Persons (IIGEP).

<sup>410</sup>Amaratunge, Chanaka and Wijesinha, Rajiva, eds., 'The Liberal Party Replies to the UNP' in *The Liberal Review*, February 1991, at p.37. Wijesinha was the head of the current Government's Peace Secretariat and remains the Secretary to Sri Lanka's Ministry of Human Rights.

<sup>411</sup>New Section 26 of the COI Act of 1948 brought in by the Commissions of Inquiry (Amendment) Act, No 16 of 2008. The 2008 amendment was an unequivocal rejection by the government, of the IIGEP's objections.

Regardless of the amendment however, the question of the conflict of interest arising in the context of these Commission inquiries in relation to the role of the Attorney General remains pertinent.

Apart from concerns as to the political nature of the office of the Attorney General, some commissions of inquiry were established and functioned with a patently political mandate designed to discredit the actions of the predecessor regime. Similarly, where commissions have been appointed by an administration to probe its own acts while in office, the predominant motive had been to whitewash the alleged abuses. While the four 1994/1998 Disappearances Commissions functioned with integrity, the same cannot be said for each and every Commission appointed by the president in this regard.

## 5. Powers and Resources

The terms of reference of commissions of inquiry should contain specific powers and resources necessary for an independent and effective inquiry. Commissioners ought to have the right to call for testimony from relevant actors, with the proviso that victims and witnesses testifying on their own behalf can only do so voluntarily.<sup>412</sup> The commissioners should have access to any necessary court action to address any risk that their inquiries may pose to any concerned person or to evidence important both for the inquiry and any future judicial process.<sup>413</sup>

The terms of reference of commissions examined above reflected these powers to a limited extent, the main weakness being the failure of compliance with commission requests for documentation. The second area of concern is the lack of specific provisions guaranteeing the voluntariness of victim and witness testimony, and the access to court action to protect the safety of concerned persons or to preserve evidence.

The powers vested in the commissions described above have included powers to procure and receive all evidence and to examine all such persons as witnesses 'as the commission may think it necessary or desirable to procure or examine',<sup>414</sup> to summon any person residing in Sri Lanka to give evidence or produce any document or other thing in his possession<sup>415</sup> and, notwithstanding any of the provisions of the *Evidence Ordinance*, to admit any evidence, whether written or oral which might be inadmissible in civil or criminal proceedings.<sup>416</sup> Additional powers may be conferred by the President upon a Commission if it so requests, requiring the furnishing of certified copies of bank documents and documents in the possession of the Commissioner-General of Inland Revenue.<sup>417</sup>

Section 7 of the COI Act was amended by Amendment Act, No 16 of 2008 conferring further powers on a Commission in respect of applying to a court of law or any tribunal, for certified copies of *inter alia* the proceedings of any case, requiring any

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<sup>412</sup> Principle 8(a), *UN Updated Principles to Combat*, *supra* note 7.

<sup>413</sup> Principle 8(b), *UN Updated Principles to Combat*, *supra* note 7.

<sup>414</sup> Section 7 (a) of the COI Act of 1948.

<sup>415</sup> Section 7(c) of the COI Act of 1948.

<sup>416</sup> Section 7(d) of the COI Act of 1948.

<sup>417</sup> Section 8 of the COI Act of 1948.

person to produce any document, a certified copy thereof or any other material in his possession and to require any person to provide to the Commission, any information in writing which he is likely to possess.<sup>418</sup> The assistance of a public officer selected by the Commission, with the concurrence of the relevant appointing authority, to conduct investigations into the relevant matter or subject that is being inquired into/investigated by the Commission is also secured by the 2008 amendment.<sup>419</sup>

Although, as noted above, the COI Act of 1948 vests considerable powers in the commissions to summon witnesses, one perennial complaint by the commissioners related to the failure of law enforcement officers to adhere to their summons. As stated by the 1994 Northern and Eastern Disappearances Commission, this was a frustrating experience:

The Second Stage of the inquiry was to find out the persons responsible for these arrests and subsequent disappearances. This was a more complex problem. Most people who suffered in the North and East were illiterate and from rural milieu and could not distinguish the Special Task Force persons from the Army personnel. It was virtually impossible for them to identify any officers who were responsible for these arrests by name or by rank. The Sri Lankan Army does not display the name badge on the uniform like the American G.I. Except for some notorious cases of Army Personnel who were known far and wide for their terror tactics, most of the officers and soldiers who participated in the arrests could not be identified. We had to write to the Army and the Police to find out which officer was in-charge of a particular camp at a particular time. This operation was time consuming. There were delays in replies and often there were no replies at all. We were able to investigate into some complaints but the bulk of the exercise is left for the successor commission to look into.<sup>420</sup>

In many instances, the commissioners made on-site visits. Insofar as resources are concerned, the following observation made by one of the 1994 Disappearances Commissions is pertinent:

In addition we have to face administrative bottlenecks. The Secretary had to make several trips to various offices to get even small matters attended to. A photocopier which is a must is yet to come. Typewriters were made available only a few days ago. Our application for a telephone was approved on a priority basis on 23<sup>rd</sup> January 1995; the connection has still not been given.<sup>421</sup>

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<sup>418</sup>New sections (bb), (bbb) and (bbbb) to Section 7 of the COI Act of 1948 brought in by the Commissions of Inquiry (Amendment) Act, No 16 of 2008.

<sup>419</sup>New section 23 to the COI Act of 1948 brought in by the Commissions of Inquiry (Amendment) Act, No. 16 of 2008.

The Commission cannot arrive at any conclusion consequent to such investigations until it has examined the material collected in the course of such investigation and inquired into such matter or incident, observing the rules of natural justice.

<sup>420</sup>Final report of the *1994 Northern and Eastern Disappearances Commission*, Sessional Paper No VII, 1997, at p. 3.

<sup>421</sup>Interim report of the *1994 Central, North Western, North Central and Uva Disappearances Commission*, Sessional Paper No. III, 1997, at p. 1. The Commission's complaint regarding the lack of a permanent telephone meant that, given the date on which the application had been made (1995) and the date of the interim report (1997), a telephone link had not been afforded to it for over two years.

It was recorded by at least some of the Commissioners of the 1994 Disappearances Commissions, as noted above, that there were problems with the allocation of resources at least at some points. At the time of the writing of the 1995 Amnesty International report, two of the commissions had not been able to acquire a computer.<sup>422</sup> The other Commission reports were more circumspect in complaining regarding the lack of resources. Information in this respect is therefore more anecdotal.

One factor common to the Disappearances Commissions in particular was the lack of sufficient time to complete their tasks, again resulting from the lack of full preparation as well as serious political will in regard to the drafting of these mandates. While the work of such commissions should not drag on indefinitely and risk public frustration, politicization, and loss of relevance, it must be noted that an unreasonably short mandate undermines a full determination of truth, and weakens the likelihood of establishing conditions for justice and reparations. This was in fact, the case in respect of these commissions. It should be recalled that the latter principle of reparation includes the principle of guarantees of non-repetition, an element vital in the case of Sri Lanka and the context in which these commissions operated.

## **6. Procedures and Proceedings**

The terms of reference of commissions of inquiry should include procedures, in particular, for protecting victims and witnesses, for ensuring fairness to those who may be identified as alleged perpetrators, and for protecting evidence.<sup>423</sup>

### **6.1. Security of Victims and Witnesses**

Confidentiality of testimony was taken into account and preserved as necessary in the case of the 1994 Commissions. The most significant failure on the part of the 1994 Commissions, however, was in respect of their inability to put into place concrete procedures ensuring the safety and security of victims, witnesses and complainants. Although the 1994/1998 Disappearances Commissioners did engage in some efforts to ensure witness protection, these efforts were undertaken in a piecemeal rather than systemic manner. Successive governments that established these Commissions evinced a marked lack of commitment in this regard.

### **6.2. Investigation *vis a vis* Inquiry**

The COI Act of 1948 permits, on the face of Section 2, only the single stage of an inquiry into the alleged incidents in regard to which a Commission is appointed. An investigative stage, to establish the grounds for public inquiry, is not contemplated. The commissions analysed in this research generally carried out their work in a single-stage process of inquiry, with the exception of the 1991 Presidential Commission of Inquiry into the Involuntary Removal of Persons (PCIIRP), which conducted a preliminary ‘investigation’ to determine if *prima facie* evidence existed

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<sup>422</sup> Amnesty International, ‘*Time for Truth and Justice*’, AI Index ASA 37/04/95, 1995, at p. 12.

<sup>423</sup> Principle 10 (e-f), *UN Updated Principles to Combat*, *supra* note 7.

to proceed to a second stage of 'public inquiry'. As noted by the Commissioners to an Amnesty International team visiting Sri Lanka in 1992:

[W]hen complaints are received, they are first investigated by a team of ten investigating officers under the direction of the Chief Investigating Officer who is a retired policeman. Once they have established that there is *prima facie* evidence of disappearances, relatives are called to Colombo to give evidence. [...] [O]nce the evidence has been collected, the senior state counsel assigned to the Commission decides whether there is sufficient evidence available to proceed to a public inquiry before the five Commissioners.<sup>424</sup>

Unfortunately, as noted earlier, the PCIIRP conducted all of these inquiries in secret, was not mandated to look at the worst of the disappearances cases, and never published its report. Most observers have concluded that this outcome was foretold by the underlying intention in establishing the PCIIRP, which seemed to be to deflect rather than invite scrutiny.

Some legal commentators have raised questions as to the legitimacy of establishing two distinct stages of investigation and inquiry in the context of the COI Act of 1948 (as the law stood in 2008).<sup>425</sup> In 2008 however, this concern was met this concern by amending Section 2 and adding new Sections 23 to 26, which authorised a Commission to engage in 'an investigation or inquiry or both where appropriate.'<sup>426</sup>

This amendment is in keeping with the spirit of commissions of inquiry under international standards, which requires that the proceedings and procedures of commissions of inquiry be conducive of public accountability and measures to prevent recurrence, while protecting the rights of accused and the security of witnesses and victims.

### **6.3. Cross examination and legal representation**

Various procedures regarding the right to cross-examine and the right to legal representation have been adopted. While the Kokkadichoai Commission did not permit cross-examination, the Sansoni Commission and the Batalanda Commission developed procedures to allow the exercise of this right. The 1994/1998 Disappearances Commissions, as observed, did not proceed to the second stage of calling the persons credibly implicated in their investigations, before them.

Such procedures, alone, however, could not rescue a commission's work where political interference was prevalent. The case of the Batalanda Commission is instructive in this regard (see above, Chapter 3, s. 4.1). While it permitted cross-examination and allowed witnesses to be represented by legal counsel, the context in which the Commission functioned and the partisan manner in which its findings were used, seriously impugned its credibility.

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<sup>424</sup>Amnesty International, 'Sri Lanka; An Assessment of the Human Rights Situation', AI Index, ASA/37/1/93, 1993, at p. 4.

<sup>425</sup>De Almeida Guneratne, Jayantha, op.cit. These questions were raised primarily in the context of the 2006 *Commission to Inquire into Serious Human Rights Violations* adopting such a two-stage process from 2006.

<sup>426</sup>Commissions of Inquiry (Amendment) Act, No. 16 of 2008.

#### 6.4. Affording alleged perpetrators a right of reply

Where the commission has within its mandate the identification of perpetrators, applicable international standards stipulate two procedures: corroboration of information before naming individuals publicly in a report and, second, providing the implicated individuals with an opportunity to provide a statement either at a hearing or through a documented right of reply included in the commission file.<sup>427</sup>

The 1994 Disappearances Commissions, as their reports reveal, did not afford alleged perpetrators an opportunity to reply publicly to the evidence. Rather, the Commissions sent the names of alleged perpetrators under separate cover to the President recommending further investigations wherever the commission had been of the view that there was credible (*prima facie*) evidence against persons.<sup>428</sup>

Limitations on available time for carrying out the mandate of commissions negatively impact on the adequacy of procedure, a problem especially clear in the case of the 1994/1998 Disappearances Commissions. For example, inquiries into the alleged enforced disappearances were not prompt, although the requirement that the investigations be thorough was satisfied in the main. To their credit, these Commissions - appointed to examine large-scale enforced disappearances - did not wait for a formal complaint to initiate investigations. Victims were afforded the opportunity to present their views in a substantive manner though psychological assistance was not made available to them.

With some 28,000 cases in front of the 1994 Commissions, large numbers of complaints were left unattended.<sup>429</sup> Although these complaints were examined by the 1998 All-Island Disappearances Commission, this Commission too did not proceed beyond the *ex parte* stage, deciding to again refer for prosecution a list of those persons identified as perpetrators based on 'credible evidence indicative of their responsibility for disappearances of certain persons.'<sup>430</sup> It was observed that until further investigations by the "investigative authorities are held, confidentiality must prevail, both in respect of the nature of the material available and in respect of the identity of the persons implicated by such material".<sup>431</sup>

There may be some justification for the procedure so adopted by these commissions in as much as the public 'naming and shaming' of alleged perpetrators may have undermined their rights, given that they themselves were not afforded an opportunity to meet those charges. However it is undisputed that an opportunity should be afforded to the alleged perpetrators to state their case publicly, before reporting and recommending to the President in regard to what measures should be taken in regard to them. This opportunity is a question of fairness.

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<sup>427</sup> Principle 9, *UN Updated Principles to Combat Impunity*, *supra* note 7.

<sup>428</sup> For example, see Final Report of the *1994 Northern and Eastern Disappearances Commission*, Sessional Paper No VII, 1997, at p. 62.

<sup>429</sup> De Almeida Guneratne, Jayantha, *op. cit.*

<sup>430</sup> See Final report of the *1998 All Island Disappearances Commission* (March 2001) Sessional Paper No. 1, 2001 at p. 9.

<sup>431</sup> *ibid.*

A two stage procedure – an informal stage to receive and procure evidence where identities of alleged perpetrators may transpire, and a formal sitting to afford an opportunity to state their case should such identities transpire before reporting and recommending to the President – is therefore highly recommended. Nothing more nor less would respond to the duty to act fairly as would be required from a Commission of Inquiry as articulated in the Supreme Court decision in *Fernando v Jayaratne*.<sup>432</sup>

As held (in another context), in *Wickremesinghe v. Tambiah*,<sup>433</sup>

[T]here can be no reasonable objection to the Commissioner interviewing witnesses or reading documents in private with a view to ascertaining whether the material so elicited is of sufficient materiality to be adduced at a formal sitting. What he does object to is the use of facts so elicited for the guidance of the Commissioner in compiling his report, without having such matters tested at a formal sitting.”(emphasis added)

In ironic contrast, those Commissions (such as the Batalanda Commission) that did, in fact, bring the perpetrators before them, were tainted by serious doubts regarding their political integrity. While there was no such overt taint with respect to the 1994 Disappearances Commissions, the practical impact of the laborious exercise stretching for over three years and falsely raising the expectations of many victims of abuses and the members of their families may be reasonably questioned. Citizens were denied the right to a public accounting and measures to prevent recurrence. In the absence of prosecutions, moreover, there was no opportunity for a full determination of individual responsibility, robbing both perpetrators and victims of an opportunity to see justice done.

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<sup>432</sup>ibid. For the Supreme Court decision cited, see [1974] 78 NLR 123.

<sup>433</sup>[1945] 46 NLR 105. This related to a Commission of Inquiry appointed under Ordinance No. 9 of 1872.

## Chapter Five – Sri Lanka’s Criminal Justice System

### 1. Introduction

The preceding chapters on the history of political violence in Sri Lanka, the evolution of constitutionalism, illustrative cases, and commissions of inquiry, provide a basis for looking at systemic elements of impunity in the criminal justice system as reflected in the way the state has responded to gross human rights violations. This chapter engages in a detailed critique of persistent failures in investigations and prosecutions. The analysis then moves on to systemic elements in the investigations and prosecutions.

### 2. Investigations and prosecutions

The criminal justice system in Sri Lanka has tolerated acts amounting to crimes under international law, including unlawful killings and enforced disappearances, for the better part of the past few decades. In view of such state complicity, it was not surprising that effective investigations and prosecutions have been rare and, then only against junior officers. The rationale has been that even if grave crimes were committed, these were in situations of extraordinary stress for the average soldier or police officer, a factor that should counterpoise against any demand for accountability. This intent appears to run through judicial decision-making and is facilitated by laws that are weak, archaic, or are incompatible with Sri Lanka’s human rights obligations, as in the case of emergency laws. Where there have been attempts to hold perpetrators accountable for gross human rights violations to the extent possible under existing law, there has been a clear lack of political will to prosecute such cases. The rule ‘of’ law has effectively been replaced by rule ‘by’ law of executive fiat, most often through the impediment of prosecutorial action, whether regarding enforced disappearances in the South<sup>434</sup> or in the North and East.

In some instances, human rights investigations established by law have identified perpetrators but no action has been taken. For example, the *Human Rights Task Force* (HRTF), after a series of visits to the area, named four army personnel as responsible for the alleged enforced disappearance of some 158 persons from a refugee camp at Vantharamoolai on 5 September 1990,<sup>435</sup> but no action was taken to investigate these allegations or to prosecute the named perpetrators. Commenting on this situation, then Chairman of the HRTF, Justice J.F.A. Soza, observed;

The perpetrators of this dastardly crime have been identified and named by me in my previous report and although credible evidence is available, no inquiry whatsoever has been initiated into this incident where as many as 158 persons were arrested and have disappeared and must be presumed to have been killed extra judicially. Parents and relatives and the public of the area are living in anguish over the loss of their loved ones. The State remains as unmoved and as inscrutable as the sphinx.”<sup>436</sup>

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<sup>434</sup>The term ‘the South’ is used in this Study as referring to all the provinces excepting the North and East.

<sup>435</sup>Human Rights Task Force, Annual Report 10.08.1992-10.08.1993, at p. 23.

<sup>436</sup>Human Rights Task Force, Annual Report 10.08.1993-10.08.1994, at pp. 14-15.

The problem of non-indictments is not specific to cases of enforced disappearances but is well seen in instances of torture cases from the South as well, involving the torture of Sinhalese as well as Tamil persons by Sinhalese police officers. In many cases, despite disclosure of evidence of torture and other ill-treatment prosecutions have not ensued.<sup>437</sup>

Even when political will to take action against perpetrators had been manifested at the highest levels, the obduracy of the military establishment has prevented it being translated into concrete action. An illustrative example of this was in January 1996 when then President Kumaratunge directed the Army Commander to place 200 service personnel on compulsory leave, following their repeated involvement in gross human rights abuses as evidenced in the *Disappearances Commissions Reports*.<sup>438</sup> However, the order was not implemented.

The extent to which this facility of impunity prevails on the part of the military hierarchy is exemplified in the Embilipitiya Case, referred to above. Here, a senior military officer, of Sinhalese ethnicity, then Lt Col. Parry Liyanage, was implicated in the long-term detention of Sinhalese schoolchildren in a camp under his direct control during the conflict between the Government and the JVP in the 1980s and early 1990s as discussed above. He was acquitted by the High Court due to the want of evidence of direct involvement to a standard satisfying the criminal burden of proof beyond reasonable doubt. He thereafter filed a fundamental rights petition in the Supreme Court saying that he should have been given his due promotion as Brigadier General. By that time, he had already been promoted to Brigadier by the Army Commander.

However, further promotions were vested by law in the hands of the President,<sup>439</sup> who had refused to make the promotion due to his being implicated in the Embilipitiya Case. Despite this, the Supreme Court decided that the requisite promotion ought to be given as Liyanage's responsibility was no more and no less than all the others in the chain of command. The ruling was in direct contrast to the observations of the 1994 Disappearances Commission in respect of the long-term detention of the schoolchildren at the Sevana Army camp,<sup>440</sup> which appeared not to have been brought

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<sup>437</sup>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 pp. 178-180.

<sup>438</sup>Hoole, Rajan, op. cit, at p. 272. Kumaratunge is commended for this action given that it was taken despite an ongoing war situation.

<sup>439</sup>Under the 1978 Constitution, it is the executive President of the country who is the Commander in chief of the Armed Forces. (Article 30) The President is also the Minister of Defence, by virtue of Article 44 (2), which enables the assigning of any specific ministerial subject or function to be directly under the office of the President. By virtue of regulations made under Section 155 of the Army Act, the Commander in Chief is empowered to make all appointments and promotions above the rank of major. For discussion of this case, see Pinto-Jayawardena, Kishali, 'Rights Accountability at stake; the difficult dilemma of the non-promoted brigadier,' Moot Point, Centre for Policy Alternatives, Legal Review, 2000, at p. 45.

<sup>440</sup>Volume 11 of the Special Report of the 1994 Western, Southern and Sabaragamuwa Disappearances Commission (unpublished), at p. 36. 'In view of the above evidence elicited from the Army official register for the Sevana army camp, the positions taken up by the Army Commander in the Answers filed in the Court of Appeal in respect of the habeas corpus applications that the Sevana army

to the attention of the Court in any event. The Court order also ignored the fact that the army camp in which the children were subjected to enforced disappearance came directly under Liyanage's command.<sup>441</sup>

Despite this judgment, President Kumaratunge refused to make the promotion. When the matter came up before the Court again challenging the presidential failure to adhere to the judicial directive, it was ruled that the constitutional immunity afforded to acts of the President while in office precluded judicial review of her decision. This case is perhaps the single instance where the Presidential immunity bar led to increased accountability for human rights violations.

One conclusion that we can draw from this example is that, just as judicial deference for unwarranted executive interference in prosecutions is not a given, so too the executive in rare moments has pushed for accountability beyond prevailing judicial interpretations. In other words, there is scope for occasional tug and pull between the executive and the judiciary. However, the overall tendencies, with or without this exceptional tension between branches of the state, have been deleterious for the rule of law as outcomes are at best, uncertain and, in most cases, offer no protection for victims of gross human rights violations.

In several *habeas corpus* applications that were examined in the Court of Appeal, the Court specifically recommended that the respondents in the cases who were found responsible for enforced disappearance should be prosecuted.<sup>442</sup> However, these directions went unheeded. For example, the prosecutorial policy in the Embilipitiya Case resulted in the accused being indicted only in 25 cases of enforced disappearances, while the actual number of children who had been subjected to enforced disappearance was much greater. The deep sense of individual grievance suffered by the parents and family members of the missing children whose cases had not been included in the indictment were articulated by them to the 1994 Western, Southern and Sabaragamuwa Disappearances Commission.<sup>443</sup> The Commission recommended that the Attorney General frame the indictment in respect of the remaining cases but this was not done.<sup>444</sup>

The reluctance of the Attorney General in this respect may well have been due to the difficulty of establishing a *prima facie* case in regard to penal culpability of the perpetrators within the ambit of the general criminal offences on which the indictment proceeded.<sup>445</sup> This amply demonstrates the essential problem in the lack of a crime of enforced disappearances in the penal law and the absence of any legal mechanism whereby the State can be held accountable where individual culpability may not be proved on the evidence. Given the extraordinarily secret nature of these crimes, proving individual responsibility in many cases is difficult. In this context, it is

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*camp was not an authorised detention camp and therefore the inference that no persons were held in detention there, is untenable."*

<sup>441</sup> *Embilipitiya Case* S.C. (Spl) L.A. Nos. 15-20/2002, SCM 14.02.2003.

<sup>442</sup> i.e.; *Leeda Violet and others v. Vidanapathirana and others* [1994] 3 Sri LR 377, per judgment of Justice Sarath N. Silva.

<sup>443</sup> At p. 3 of Volume 11 of the Special Report of the Commission, op. cit.

<sup>444</sup> *ibid.*

<sup>445</sup> Penal Code, Sections 355 (kidnapping or abduction in order to murder), 356, (kidnapping or abduction with intent to cause that person to be secretly and wrongfully confined), 335 (wrongful confinement), 32 (common intention) and conspiracy (Section 113 (A) and abetment (Section 102).

necessary therefore to incorporate legal provision that recognizes the act of enforced disappearance coupled with recognition of the doctrine of command responsibility. The combined effect of such legal reforms should impose responsibility upon the officer in charge of the relevant camp or police station where the victim had been last seen as per the reasoning of the Court of Appeal in the Leeda Violet Case<sup>446</sup> and others as well as in the Matchavallan Case<sup>447</sup> (both of which have been commented upon earlier), where responsibility in this respect is imposed upon the State.<sup>448</sup>

In this regard, impunity resulting from the lack of prosecutorial action is buttressed by acquittals where indictments have been issued. The foremost reason for non-indictments particularly of senior officers is the absence of the doctrine of command responsibility in the criminal law, an aspect discussed further below, combined with the tendency of the executive to turn a blind eye to violations occurring in the context of the armed conflict. As has been discussed, although a senior officer was indicted in the Embilipitiya Case, he was acquitted for lack of evidence directly involving him in the enforced disappearances. In the Bindunuwewa Case, even though the police officers in charge were indicted on the basis of culpable omission, for which they were convicted in the High Court, the conviction was reversed on appeal to the Supreme Court. A positive example of the High Court affirming the responsibility of a senior officer by using the existing provisions of the Penal Code is discussed in one judgment of the High Court below.<sup>449</sup>

These experiences have led the Attorney General's Department to be wary of filing indictments of senior officers unless the level of direct involvement in the incidents is clearly established. This problem needs to be overcome by specific amendment to the law as previously recommended.

A further reason for the failure of the prosecutorial process is that prosecutors depend solely on police investigations for the establishing of a *prima facie* case on which indictment is issued. In many cases, good investigations are simply not forthcoming by police officers who are essentially investigating their own colleagues, whether the matter concerns a case of torture or enforced disappearance. A related question would be whether the decision of the Attorney General to indict or not is subject to judicial review. This question is dealt with below in examining the role and functioning of the Attorney General.

Specific reasons for non-indictment, acquittals and withdrawals are as follows.

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<sup>446</sup>*Leeda Violet and others v. Vidanapathirana and others*, [1994] 3 Sri LR 377.

<sup>447</sup>*Kanapathipillai Matchavallavan v. OIC, Army Camp, Plantain Point, Trincomalee and others* S.C. Appeal No. 90/2003, S.C. (Spl) L.A. No. 177/2003, SCM 31.03.2005, per judgment of Justice Shirani Bandaranayake. "...it is reasonable to conclude that the corpora these cases reiterated the well established principle that the State will be held responsible for the disappearance of the corpus in the absence of identification of individual responsibility in the context of *habeas corpus* applications.

<sup>448</sup>*Wagaachige Dayaratne v. IGP and others* S.C. (FR) 337/2003, SCM 17.5.2004, per judgment of Justice CV Wigneswaran, at p. 24, "*The responsibility for the acts collectively performed by the police officers who gathered at the scene of the incident, thereafter forcibly arrested and took the petitioner to the police station at Bambalapitiya and then detained him, must fairly and squarely be placed on the State. The State is responsible for the actions of its officers.*"

<sup>449</sup>High Court Galle No. 1947, H.C. Minutes, 01.08.2003. per High Court judge Samith de Silva. This decision was affirmed in appeal by the Court of Appeal and is presently being appealed from the Supreme Court.

## 2.1. First Information Reports

In all of these cases, the police carry out the investigations as a basis for moving the alleged crime from Magistrates to High Court. The problem comes at the very first stage of lodging a “first information” at the police station on the basis of which the investigation commences. This necessary step entails enormous difficulties: the police either refuse to record the complaint or record it only as a minor complaint, with the consequence that inquiries are not conducted with the requisite urgency or thoroughness. This is seen in almost all of the cases of enforced disappearances and extrajudicial executions examined in this report.

During the ‘period of terror’, most of these people did not even have an opportunity to lodge a complaint at a police station, a basic right that a citizen is entitled to. During the sittings of this Commission, we repeatedly heard the saying ‘when we went to a police station, we were chased away like dogs’.<sup>450</sup>

The Embilipitiya Case would suffice to illustrate the extent of the problem. In its Special (unpublished) Report on the Embilipitiya Case, the Western, Southern and Sabaragamuwa Disappearances Commission found as established on the facts and evidence placed before it: the refusal on the part of the police to record statements that abductions had been carried out by army officers (sometimes identified by name, and in some cases by reference to the particular regiment or battalion to which they were attached) and that some of the abducted children had been seen in the particular army detention camp and later “disappeared” without further trace.<sup>451</sup> In particular, the refusal on the part of the police to record statements was seen by the Commission as a common feature where it appeared that the complaint was against the police officer. In many cases, the fact that the enforced disappearance was caused by state agents themselves meant that the affected family members were naturally reluctant to lodge complaints.<sup>452</sup>

The presiding judge in the Embilipitiya High Court trial later observed during the course of seminar proceedings in Colombo that the biggest obstacle that he faced in regard to returning convictions against the accused was the statements made by the parents, which had been fabricated and falsified by the police. He observed as follows:

Immediately after their children had been kidnapped, most parents went to the police and lodged complaints. However, these complaints were not recorded, or were incorrectly recorded. The statements were utilized to contradict witnesses. If he had adhered strictly to legal procedures and rules of evidence the accused would have gone free because the statements made by the

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<sup>450</sup>Final report of the 1994 *Western, Southern and Sabaragamuwa Disappearances Commission*, Sessional Paper No V, 1997, at p. xv of the Preface.

<sup>451</sup>One such example is referred to at p. 62 of Volume 11 of the Special Report of the Commission, *op. cit.*

<sup>452</sup>*ibid.*, at p. 6.

parents/witnesses were fabricated and hence there was no consistency with the evidence given in court.<sup>453</sup>

As observed previously, the 1994 Disappearances Commissions noted patterns of deliberately ineffective investigations into the thousands of enforced disappearances that occurred during this period. It was remarked that when the authorities were compelled to investigate as a result of public pressure, the best that they did was to categorise the incident as a violation committed by ‘subversives’ (the JVP, in this case) and thereby avoid actual investigations that might implicate government forces.<sup>454</sup> Further, such practices of avoidance were categorized not as isolated cases but as “a generalised direction”<sup>455</sup> with the consequent implication that such directions came from the high political command.

A feature that struck us most forcefully in our inquiries was the utmost care that had been taken not only by individual perpetrators but also by the system itself to prevent these occurrences from being reflected in the official records of the country. Starting with the refusal of the local police to record complaints – which was a general feature in all three provinces – through the blatant use of vehicles without number plates right up to the refusal to allow the bereaved to take possession of corpses identified by them let alone obtaining death certificates in respect of them, there is clear evidence of a systematic attempt to keep these deaths/disappearances from being recorded in the official annals. A nation which takes pride in the fact of having a recorded history of thousands of years should not leave a dark patch of unrecorded events in the recent past.<sup>456</sup>

Insofar as actions of the police in the North and East are concerned, systematic attempts to cover up killings and disappearances apply with even greater force in recent times.

The police record in respect of disappearances in Jaffna is heavily marred by overwhelming evidence that they had initially refused to take down the statements by the complainants in respect of the arrests and when they did belatedly record statements, they were nearly all in Sinhala (which none of the complainants understood) and moreover, were badly and systematically distorted to avoid revealing the institutional identity of those making the

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<sup>453</sup>Comments of then High Judge Chandradasa Nanayakkara at a seminar, Law and Society Trust & Women and Media Collective, *Preventing and Prosecuting Disappearances: Looking Back and Looking Forward*, Report of conference sessions, Colombo, June 2003.

<sup>454</sup>Final report of the *1994 Western, Southern and Sabaragamuwa Disappearances Commission*, Sessional Paper No V, 1997, at p. 53. cited as a prefatory remark to discussing the February 1990 killing of Richard de Zoysa (examined later in detail) as well as the January 1989 killing of Sarath Sepala Ratnayake, a human rights lawyer and the opposition’s area candidate at the then forthcoming General Election and the Hokandara mass graves, where a bomb crater on a public highway was transformed into an open grave containing several charred corpses.

<sup>455</sup>ibid, at p. 55 citing the cases of the “*Dambarella Incident*”, the “*Marawala Incident*” and the “*Dickwella Incident*” which all concerned disappearances of persons in state custody but with no investigation or prosecution evidenced thereafter.

<sup>456</sup>ibid, at p. xv of the Preface.

arrests. In consequence, most of these statements are of no use to either the complainants or to us in identifying the person or institution responsible for the arrests, they reveal police complicity if not in the disappearance, at least in attempts to cover up. Having heard the evidence of hundreds of complainants and read the statements recorded by the police in Sinhalese that they had signed, we have no doubt that the distortion was deliberate.<sup>457</sup>

A further factor is that, owing to the excessive time that lapses prior to the commencement of the investigation, the police and services personnel implicated in the case have ample time to falsify relevant documentation. All these actions amount to dereliction of duty and grave misconduct according to the cumulative effect of the Establishments Code, as well as internal departmental orders of the police<sup>458</sup> and the Public Complaints procedures of the National Police Commission.<sup>459</sup> However, no action is taken against transgressing officers on a consistent and regular basis.

This pattern establishes a clear need for institutional and legal reform. The reform must address the way in which the first information report to police, the condition precedent to any inquiry in regard to an alleged offence prescribed by law,<sup>460</sup> has been rendered nugatory, resulting in the bypassing of the subsequent steps prescribed by law. Without the proper filing of the first information, police avoid their concomitant duty to require attendance of (other) persons able to give information and their examination.<sup>461</sup> The law must be amended to hold police accountable in the penal law itself, as opposed to other non-binding codes of conduct, if refusal or reluctance to record the first information is shown.

But even such a reform would not fully address the institutional and normative problem. The process of investigation, as the law now stands, would still be in the control of the police. Given that there is typically a refusal even in the first instance to even record a first information report, the police are unlikely to be relied on to conduct thorough investigations. In many of the cases at issue in this report, ordinary

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<sup>457</sup>Human Rights Commission of Sri Lanka, Report of the Committee on Disappearances in the Jaffna Region, October 2003, Colombo.

<sup>458</sup>For example, Police Departmental Orders No. A. 20, No. A. 3, and No. E. 21, which imposes rigorous duties on police officers in terms of arrests, searches, detention as well as on officers in charge in respect of monitoring the police stations under their authority.

<sup>459</sup>Gazette No 1480/8 – 2007, 17.01. 2007. Offences listed in Segment B of the Schedule to these Rules of Procedure detail the nature of complaints that may be referred for inquiry by the NPC to the IGP, who is required to conduct an impartial inquiry by independent officer/s - Section 15 of the Rules of Procedure. These complaints relate *inter alia* to assault/intimidation/abuse/threat, refusal/postponement to record a statement required to be made to the police, making deliberate distortions in statements recorded and miscarriage of justice resulting from misconduct by a police officer. The findings of the IGP are forwarded to the NPC. Offences listed in Segment C of Schedule One concern undue delay in making available certified copies of statements made to the police, discouraging complainants and witnesses from making statements, use of abusive words, threats or intimidation to complainants and witnesses and inaction and partiality by the police in taking action on complaints made. Section 16 of the Rules of Procedure stipulate that these complaints be referred to a DIG or SSP of a Division in the provinces for impartial investigation by one or more independent officers. Though these procedures are defective in that they rely on the IGP and senior police officers to conduct investigations into the complaints, they did constitute an official acknowledgement that the conduct of the police in this regard needs to be remedied. However, with the lapsing of the NPC in mid 2009, even this mild supervision has been dispensed with.

<sup>460</sup>Section 109(1) of Code of Criminal Procedure Act, No. 15 of 1979 (as amended).

<sup>461</sup>*ibid*, Section 109(6) and Section 110 of the said Act.

police investigations had taken place, with all of their manifest deficiencies. Subsequent to the recommendations in the 1994 Disappearances Commissions Reports, a special unit within the CID (the Disappearances Investigation Unit (DIU)) had been put in charge of investigations but their performance had not been satisfactory, as seen above. Indeed, as noted, when officers heading the DIU attempted to perform their duties efficiently and proceeded to investigate senior officers' consequent to the findings of the Disappearances Commissions, they were transferred out.<sup>462</sup>

## 2.2. Prosecutorial Discretion

The lack of prosecutorial will in regard to prosecutions of enforced disappearances and extrajudicial killings<sup>463</sup> is part of a general context of an unsatisfactory prosecutorial record in respect of grave crimes<sup>464</sup> as well as in regard to 'ordinary' torture cases.<sup>465</sup>

Insofar as cases of enforced disappearances and extrajudicial killings are concerned, the current procedure is that the police prosecute at the non-summary stage, with state counsel appearing only in rare cases judged to be of special significance. This practice is extremely unsatisfactory, particularly in the cases of crimes under international law, including torture and other ill-treatment, extrajudicial killings, including in mass numbers, and enforced disappearances which directly involve the police or the army as perpetrators.

Thus, for example, human rights monitors expressed concern that in the Kumarapuram Case, evidence in the non-summary inquiry was led by an Inspector of Police from the Mutur police station instead of a state counsel from the Attorney General's Department.<sup>466</sup> Generally, the non-summary inquiry proceeds at a lackadaisical pace, frequently taking a number of months, and the vital task of gathering evidence and conducting good investigations is left entirely to the police, with no stringent supervision by the magistrate<sup>467</sup> or by the officers of the Attorney General.

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<sup>462</sup>Interviews with former senior police officers, 21.06.2009

<sup>463</sup>*Wijesuriya v. the State*, [1973] 77 NLR 25, (Premawathie Manamperi Case) evidences a successful prosecution in the 1970s, during the first JVP insurrection where the Court of Criminal Appeal held that whether there was a period of combat during the incident or a state of actual war, in either case, there could be no justification for the shooting of a prisoner who was held in custody. In a situation such as that which existed on that date, a soldier subject to military law should remain the custodian of the civil law and has the responsibility of the discharge of police duties in which process, he is as much subject to the civil law as the ordinary policeman. In more recent times, the two high profile cases in which successful prosecutions were evidenced was in the Krishanthi Kumaraswamy case and the Embilipitiya case, all of which however were limited to the culpability of junior officers.

<sup>464</sup>The rate is 4 percent; Committee Appointed to Recommend Amendments to the Practice and Procedure in Investigations and Courts, *"The Eradication of Laws Delays,"* Final Report, 02.04.2004, (the Committee was headed by the incumbent Attorney General). See also, Asian Human Rights Commission, *'State of Human Rights in Eleven Asian Nations'*, Hong Kong, 2006, at p. 288.

<sup>465</sup>From the time that the Anti-Torture Act was enacted into law in 1994, no convictions for torture resulted up to 2004, for a period of ten years. Thereafter, only three convictions by the High Court have been manifested to date.

<sup>466</sup>Movement for Interracial Justice and Equality, *'Kumarapuram Massacre and Legal Proceedings,'* April 1997, at p. 2.

<sup>467</sup>Section 124 of the CCP whereby Magistrates are called upon to assist the conduct of an investigation by making and issuing appropriate orders and processes of court is not implemented in actual practice.

Lengthy delays in filing indictments, delays in the non-summary inquiry and further delays in the substantive trial proceedings are common factors in cases of human rights violations. It is common, for example, for a lapse of several years before the first step of filing an indictment is taken and for delays to persist thereafter in the trial process. This pattern is also commonly seen in the cases of torture of ordinary persons in the South filed under the Convention Against Torture and other Inhuman and Degrading Punishment Act No 22 of 1994. Indictments have been pending for almost two years in the relevant High Court without being served on the accused. The defence advanced in this respect is that the delay is due to the backlog of cases in the Court. The Attorney General's Department is responsible for issuing indictments and is also blamed for unjustifiable delays, which accusation is met by the invariable counter that the Department lacks sufficient staff and resources.<sup>468</sup>

On the other hand, lawyers appearing for the victims often complain of a lack of interest on the part of the state in conducting prosecutions and point to non-appearances in court on the days that the trial is due to be conducted and frequent applications for postponements as manifesting this lack of interest. Lack of capacity on the part of state lawyers is also evident. All of these factors cumulatively result in 'unplanned' prosecutions and eventual acquittals or withdrawals.

[T]here have been instances where State Counsel who have been prosecuting for several years have had no experience in conducting a prosecution before the High Court from beginning to end. Such officers who cannot perform their official duties with confidence naturally tend to succumb to internal and external pressures and interferences as regards their official functions. Their mindset is to 'somehow survive in their job' with the least realization that their functional involvements as State Counsel call for much higher standards of honesty, integrity and commitment than for an ordinary 'job'.<sup>469</sup>

The filing of faulty indictments is another manifestation of this same problem as was clearly seen in the acquittals of the accused in relation to prosecutions commenced following the findings and recommendations of the 1994/1998 Disappearances Commissions, examined previously.

The office of Sri Lanka's Attorney General has been subjected to the tug and pull of political pressure from many decades back. Examples noted above include the role of the state law officers before the Sansoni Commission, as well as the actions of the

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<sup>468</sup>Committee Appointed to Recommend Amendments to the Practice and Procedure in Investigations and Courts, "*The Eradication of Laws Delays*", Final Report, 02.04.2004, at point 3.1, it is stated that the failure to introduce an increase of cadre to correspond with the growing number of files received by the Attorney General's Department has seriously impeded its expeditious dispensation of legal advice. It was observed that at present the Department comprises 123 officers out of which over 60 Officers are assigned to the Criminal Division. The last cadre increase at the Attorney General's Department was in 1996 during which year the number of files received by the Department stood at 1639. However, as at 2003, the number of advice files received by the Department, in addition to those involving Court appearances amounted to over 6000 files (see above graph). Additional cadre was recommended to be recruited with immediate effect, with particular reference to the Criminal Division.

<sup>469</sup>De Silva, Samith, "*A critique of the prosecutorial/judicial system and the role of the Attorney General in respect of prosecutions for grave human rights violations*" *LST Review, Law & Society Trust* Volume 17, Issue 234 & 235, April & May 2007, p. 30, at p. 37.

Attorney General in the Richard de Zoysa case. Batty Weerakoon, the lawyer appearing for de Zoysa, severely castigated the then Attorney General for refusing to take steps against the police officer identified by de Zoysa's mother as having been responsible for the abduction of her son.<sup>470</sup> Weerakoon also analysed in detail the manner in which Parliament had been misled in this context as a result of a report presented by the Attorney General to the then Justice Minister.<sup>471</sup> Similarly, sharp criticisms have been advanced by the Liberal Party.<sup>472</sup> Yet another well-known example is the alleged role of Attorney General officers in covering up the inquiry into the massacre of prisoners at the Welikada prisons.<sup>473</sup>

As remarked by a former Acting Attorney General who went on to become a member of Sri Lanka's Supreme Court, despite the theoretical independence with which it is traditionally cloaked, the office of the Attorney General has always been under threat from the political executive.

It has been our experience that every administration wishes the judgments of the court to be in its favour. Perhaps we cannot fault politicians for this, But the Attorney General should be able to advise the Executive and explain the legal basis of most judgments which have gone against the State. When I was Acting Attorney General, I was asked by the President whether the Supreme Court could review a Cabinet decision and whether a particular judgment was right. I sent him a letter defending the Supreme Court judgment, in the context it was given. Perhaps the Attorney General is no longer free or strong enough to advise the Executive. But this will not give a licence to Executive or Members of Parliament to make insinuations against the judgments of the court or to offer advice to judges at public functions as to how they may discharge their duty [...] I have observed a gradual decline in the independence of the officers of the Attorney General's Department. They are unable to tender correct advice to the State for fear of incurring the displeasure of the executive. State officers do not appear to accept the Attorney General's advice. The cause of this situation is the fear psychosis created by politicization.<sup>474</sup>

A further observation was made by a state prosecutor, later High Court judge, during the course of drafting this report.

It is sad to note that the Attorney General did not act impartially during the late '80's especially in *habeas corpus* applications made on behalf of the disappeared. It is well known that the Attorney General's Department had a special 'unit' to handle *habeas corpus* applications, set up by the Attorney General when he was heading the criminal section. To the outside world, it was to enable a systematic and quick job of work. The unit had handpicked

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<sup>470</sup>Weerakoon, Batty, op. cit, at p. 13.

<sup>471</sup>ibid, at p. 17. Somewhat ironically, Weerakoon later became the Minister of Justice during the Kumaratunge administration for a brief period.

<sup>472</sup>Amaratunge, Chanaka and Wijesinha, Rajiva, op.cit.

<sup>473</sup>University Teachers for Human Rights (Jaffna), '*From Welikade to Mutur and Pottuvil: A Generation of Moral Denudation and the Rise of Heroes with Feet of Clay*,' Special Report, No. 25, 2007.

<sup>474</sup>Kulatunge, KMMB, '*Disorder in Sri Lanka*,' Gunasena Publishers, Colombo, 2001, at p. 24.

officers who were prepared not only to do a 'quick job' but 'any job'. Police were coaxed to swear diabolically false affidavits to court. The police officers did so to save their skins.<sup>475</sup>

It must be acknowledged, however, that at times the holders of the office of Attorney General have attempted to perform their duties according to law and as justly as possible, but have been impeded by political constraints. A good example in this regard is detailed by the UTHR in its recent report<sup>476</sup> concerning a magisterial order delivered in Trincomalee ordering the removal of unauthorised religious structures, including a Buddha statue as well as four Kovils. The advice of the Attorney General K.C. Kamalabayson was sought and action was filed on this basis. This move was opposed by a Buddhist priest who went before the Supreme Court alleging that the magisterial order was issued "on the advice of the Attorney General, Mr. Kamalabayson, who is a Hindu and a Tamil, and who also was a former resident of Trincomalee."

The UTHR observes that this petition "amounted to a personal attack on the Attorney General citing his minority affiliation, when in fact he was carrying out a task assigned by the Government." As such, the Supreme Court might simply have refused leave to proceed. Instead, former Chief Justice Sarath Silva advised the Attorney General to withdraw the case filed by him in the Trincomalee District Court in return for the Buddhist priest to withdraw his petition. The UTHR observes;

The Attorney General, who struck observers as having been shaken, gave in. The exchange was done on 18 July 2005. Legal sources read this as the Attorney General being arm-twisted with the threat of giving the petitioner leave to proceed. Then the Attorney General is likely to have been left isolated with the hounds baying for his blood.<sup>477</sup>

Recent amendments have constitutionally strengthened the office of the Attorney General with the appointments procedure subject to provisions of the 17<sup>th</sup> Amendment to the Constitution.<sup>478</sup> The removals procedure has also been made subject to stringent safeguards similar to that of appellate court judges by subsidiary legislation passed consequent to the 17<sup>th</sup> Amendment.<sup>479</sup> However, the 17<sup>th</sup> Amendment has currently been rendered non-functional with the result that the independent functioning of any holder of the post of Attorney General has been left more vulnerable than before.

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<sup>475</sup>De Silva, Samith, 'Some thoughts on the current crisis affecting Sri Lanka's criminal justice process,' LST Review, Law & Society Trust, Volume 18, Issue 246 & 247, April & May 2008, p. 41, at p. 49.

<sup>476</sup>University Teachers for Human Rights (Jaffna), 'From Welikade to Mutur and Pottuvil: A Generation of Moral Denudation and the Rise of Heroes with Feet of Clay,' Special Report, No. 25, 2007.

<sup>477</sup>ibid.

<sup>478</sup>The 17<sup>th</sup> Amendment specifies that the nomination for the post should be approved by an apolitical body, namely the Constitutional Council (CC) with the appointment being made by the President. However, this important vetting task performed by the CC has now broken down due to the CC not being constituted in its second term owing to an unconscionable negating of the 17<sup>th</sup> Amendment by the Presidency and Parliament.

<sup>479</sup> See Removal of Officers (Procedure) Act, No 5 of 2002.

The separation of the public prosecution function from the Attorney General's Department has long been advocated as a solution to the perceived lack of independence. Indeed, a Public Prosecutor's Office had been recommended as far back as 1953 when the Criminal Courts Commission advised the creation of such an office.<sup>480</sup> As stated by this Commission, serious weaknesses in the process of investigation on the part of the police meant that the intervention of a legal authority in this regard was necessary. It was envisaged not only that such a legal authority would have the duty of giving counsel but that the police would be under a legal obligation to report cases to this new legal office that would then have conduct of the prosecution.<sup>481</sup> The guidance of trained lawyers with the ability to brush aside inessentials and drive to the heart of the case was considered desirable.<sup>482</sup>

It was consequent to this recommendation of the Criminal Courts Commission that the office of a Director of Public Prosecutions (DPP) was created by the Administration of Justice Law No. 44 of 1973. This law was replaced in 1977 by the Code of Criminal Procedure Act, No. 15 (1979); however, the DPP was abolished.

During its brief existence, the DPP had a wide variety of powers, including sanction over certain types of prosecutions, power to apply to the High Court for continued custody of suspects pending investigation and power to take over private prosecutions. The DPP also had to be informed of any prosecution being withdrawn or not proceeded with in the Magistrate's Court. Regarding the police, the DPP was to advise them "in difficult cases", including the provision of "directions regarding the carrying out of the investigations after studying the police reports."<sup>483</sup> However estimable the intention was in the creation of the office of the DPP, there is no doubt that the office was directly subject to political pressure. It was due to such politicisation of the process that the office of DPP was abolished when the administration changed in 1977.

One related recommendation in recent times is the 'Office of Independent Prosecutor'. Put forward by both the 1994 Western, Southern and Sabaragamuwa Disappearances Commission,<sup>484</sup> and by the 1998 All-Island Disappearances Commission,<sup>485</sup> their related observations illustrate the serious impact of the absence of prosecutorial independence.

We feel the need to create the office of an independent prosecutor with security of tenure (with a supporting staff) to institute prosecutions once evidence has been collected by the proposed investigating unit. The existing framework of the Attorney General's Office is not structured to fill this need. The Attorney General's function is to mount prosecutions and represent generally state officers in complaints against them. This appears to place that office in a paradoxical position. The sole concern of the proposed independent

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<sup>480</sup>Sessional Paper XIII of 1953.

<sup>481</sup>*ibid.*, at p. 20, para. 50.

<sup>482</sup>*ibid.*

<sup>483</sup>Law Commission, Memorandum, 16.11.1970, at paras. 58-59.

<sup>484</sup>Final report of the *1994 Western, Southern and Sabaragamuwa Disappearances Commission*, Sessional Paper No. V, 1997, at pp. 69, 83 and 175.

<sup>485</sup>Report of the *1998 All-Island Disappearances Commission*, at p. 16. This Commission recommended that the office of an Independent Human Rights Prosecutor be created under the ambit of the Human Rights Commission by amending the relevant law.

prosecutor's office would be to institute proceedings (criminal prosecutions) where the Human Rights Commission (with the assistance of its investigating unit) has found sufficient evidence for that purpose. We also recommend that while the salary of the proposed independent prosecutor be made a charge on the Consolidated Fund, the nomination to the office be made by and ratified by a majority of the Members of Parliament.<sup>486</sup>

### 2.3. Appeals from Acquittals

In certain instances, the non-filing of an appeal from an acquittal has been wholly due to the refusal of the Attorney General. In terms of the applicable law, an appeal from an acquittal, by law, has to be approved by the Attorney General (AG). In the Mylanthenai case, for example, despite requests made to the AG to appeal, the AG refused to proceed with any appeal or grant his approval for the same citing various technical grounds.<sup>487</sup>

As also seen above, in relation to the acquittals by the High Court in prosecutions emanating from the findings of the 1994/1998 Disappearances Commissions, none of these cases have been appealed from despite the manifestly unsatisfactory nature of the acquittals.

### 3. Judicial Review of Attorney General's Decisions

Given the controversial role played by the Attorney General in cases such as Richard de Zoysa and Mylanthanai, in which prosecutions do not get off the ground or acquittals that shock the public conscience were accepted without appeal, the question of judicial review of AG decisions becomes important, particularly where emergency laws are invoked.

Pertinent case law is illustrative. In *King v. Noordeen*,<sup>488</sup> a question arose as to the jurisdiction of the Supreme Court to entertain applications in review of the AG's refusal to sanction an appeal from an acquittal, or in a similar class of circumstances which would include the powers of intervention of the Attorney General where the Magistrate discharges an accused. The Supreme Court held that it would not hesitate to exercise its powers of revision provided that proper materials had been laid before Court to call for its exercise and provided that the heavy burden put on the applicant to establish a case of positive miscarriage of justice is satisfied. In *AG v. Kanagaratnam*,<sup>489</sup> the Court reviewed the Magistrate's orders in relation to non-summary proceedings, prior and subsequent to the indictment. The Court limited its review to magisterial orders in the light of instructions given by the AG, and chose not to pronounce more broadly on its powers to review the exercise of statutory powers by the AG, himself.

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<sup>486</sup>Final report of the 1994 Western, Southern and Sabaragamuwa Disappearances Commission, Sessional Paper No. V, 1997, at p.83.

<sup>487</sup>Interview with attorneys-at-law watching the interests of the victims in the case, 09.07.2009.

<sup>488</sup>[1910] 13 NLR 115.

<sup>489</sup>[1950] 52 NLR 121.

This point was directly in issue, however, in *Velu v. Velu*.<sup>490</sup> In that case, the Supreme Court considered its powers of revision to circumvent a Magistrate's discharge order; as well the Attorney General's decision not to intervene. The Supreme Court was asked to substitute its own decision, committing the accused to stand trial. Justice Weeramantry refused the application for revision, stating that while the Supreme Court

[...] may in theory have the power to revise an order of discharge made by the Magistrate, the Court would in so doing be entering upon the field where, another authority, namely the Attorney General, enjoys the concurrent jurisdiction.<sup>491</sup>

The Supreme Court did not respond to the question avoided by this puzzling reasoning; that is, the applicable standard governing its powers to revise orders of the Attorney General, particularly where it was shown that a positive miscarriage of justice would otherwise result. For the better administration of the law, and in response to this uncertainty, the Code of Criminal Procedure Act, No. 15 of 1979 could be amended explicitly to clarify the revisionary jurisdiction of the Court of Appeal over decisions by the Attorney General where precise criteria are fulfilled, consistent with Article 138 of the Constitution of Sri Lanka.<sup>492</sup>

More recently, in an important decision, the Supreme Court held that the exercise of the Attorney General's discretionary powers to prosecute was subject to review based on the Court's powers to examine violations of fundamental rights under Article 126 of the Constitution. The Court concluded that such a power of review existed where, *inter alia*, the evidence had been plainly insufficient, where there had been no investigation, or where the decision had been based on constitutionally impermissible factors.<sup>493</sup> In the specific case however, investigating officers rather than the Attorney General were found primarily responsible for the lack of a proper investigation and other lapses regarding the filing of an indictment for criminal defamation.

#### 4. Witness protection

Acquittals of prosecutions related to enforced disappearances by the High Courts of Sri Lanka<sup>494</sup> tend largely to be based on the purportedly inconsistent testimony of the witnesses. This becomes the source of 'reasonable doubt' as grounds for acquittal. A second main factor is the delay in lodging complaints relating to the enforced disappearances.

Explanations for these patterns in victims and witness behaviour are not difficult to discern. At all points, victims and members of their families are trapped by the extraordinarily brutal context in which grave human rights violations occur as well as

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<sup>490</sup>[1968] 76 NLR 21.

<sup>491</sup> *ibid.*

<sup>492</sup>De Almeida Guneratne, Jayantha, 'The Role of Commissions of Inquiry in Sri Lanka's Justice System', State of Human Rights Report 2007 Law & Society Trust, at page 194.

<sup>493</sup>*Victor Ivan v. Sarath Silva, AG* [1998] 1 Sri LR 340, per judgement by M.D.H. Fernando J (with Wadugodapitiya J and Bandaranayake J. agreeing).

<sup>494</sup>H.C. Case No. 94/99, High Court of Hambantota, H.C. Minutes 04.02.2004; H.C. Case No. 14/2001, High Court of Hambantota, H.C. Minutes 25.08.2003 and H.C. Case No. 24/2002, High Court of Hambantota, H.C. Minutes 19.06.2003.

by the byzantine and unfair burdens imposed by the criminal justice system. For example, following the widespread and systematic enforced disappearances in the 1980s and the early 1990s, devastated and often destitute family members of victims were informed that much-needed compensation was available only if the enforced disappearance was caused by anti-government elements. The result was predictable. Many victimised persons who were rendered economically vulnerable by the killings of their husbands and sons (often the breadwinners in the family) stated that the enforced disappearances were caused by subversive elements. These statements were then used by defence counsel against them years later in subsequent criminal prosecutions.

Similarly obvious and yet frequently ignored are the reasons for delays in lodging complaints: extreme trauma combined with the routinely hostile and sometimes threatening – and retraumatizing – reception by the police. These delays were often used against the victims during prosecutions in order to discredit their case. Rather than upholding the rights of victims to truth, justice, and reparations – the universal norms to which Sri Lanka is bound – the legal process was often an additional and tragic harm visited upon victims.

The protracted delays imposed by the legal system itself, not caused by complainants, have resulted in many witnesses facing death threats by perpetrators who continued to occupy high positions in the army and the police. In the special report of the 1994 Western, Southern and Sabaragamuwa Disappearances Commission,<sup>495</sup> the parents and family members of the “disappeared” children had complained that ‘officials of the security forces who were responsible for the abduction of their loved ones were still working in those same places.’ In fact, the Commissioners categorised a particular group of family members of the “disappeared” as “inhibited complainants” due to this reason and came to the view that legal proceedings should be suspended until such time that their security could be assured.<sup>496</sup>

Where the massacre cases from the North and East are concerned, witness intimidation is a common feature in all the cases analysed for this report. Thus, in regard to the Kumarapuram massacre for example, Commissioners considered

[...] how willing witnesses will be to testify when they are still living with a military presence - the Magistrate’s Court itself is surrounded by military when the witnesses testify. Furthermore, the drawn out process of the case has reportedly left many witnesses almost indifferent to the case and cynical about any justice being done.<sup>497</sup>

As pointed out by Amnesty International in a further example regarding a prosecution during the period 1987-1990, witness intimidation can rise to the level of the ‘witnesses themselves being abducted and disappeared.’<sup>498</sup>

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<sup>495</sup>Special report of the 1994 Western, Southern and Sabaragamuwa Disappearances Commission, submitted to the President on 31.05.1997, at pp. 8 and 43.

<sup>496</sup>ibid, at pp. 8 and 9.

<sup>497</sup>INFORM, Sri Lanka Information Monitor, Colombo, November 1997, at p. 7.

<sup>498</sup>Amnesty International, ‘Sri Lanka: Extrajudicial Executions, ‘Disappearances’ and Torture,’ 1987-1990, AI Index, ASA/37/21/90, September 1990, at pp. 27-28.

Against this overwhelming trend stands a laudable recent decision of the Court of Appeal to quash a police circular that purported to return to full duty officers indicted in the cases of enforced disappearances and released on bail.<sup>499</sup> While this decision was exceptional and welcome, it impacts only a tiny fraction of police officers implicated in such offences. The vast majority of army and police officers credibly implicated in cases of enforced disappearances continue to serve in the military and police establishment, many enjoying promotions.

Once a trial commences, marginalisation of victims in the criminal process has often resulted in their dropping out of the process. Again, the Embilipitiya Case illustrates the problems in this regard extremely well. Subsequent to the start of the trial, there is overwhelming evidence as to hostility of the adversarial legal process with its harsh cross examination of witnesses who had to suffer multiple trauma, first with the enforced disappearance of their children and thereafter with the ordeal of having to stand up in open court and withstand the rigorous scrutiny of defence lawyers.

Indeed, intimidation of witnesses is not an isolated practice resorted to only on the part of the police and armed forces during times of emergency and war. It is, rather, a common practice among law enforcement agencies and is manifested even in normal times, by police officers accused of torture kept in their positions despite indictment and thus afforded an opportunity to threaten or even kill witnesses.<sup>500</sup> A witness protection system remains an imperative need.<sup>501</sup>

In general, the bypassing of victims' concerns by the prosecutorial process needs to be redressed. In the Embilipitiya Case, the decision of the Attorney General on the grounds of appeal, including particularly, the decision not to appeal against the acquittal of commanding officer of the area and head of the Sevana camp, Lt. Col. RP (Parry) Liyanage, caused considerable anger among the parents. The marginalisation of the parents of the abducted children was clear at every stage of the legal process.

## 5. Discrimination as a factor impeding prosecutions

A teachers' organization has pointed out that

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<sup>499</sup> *Pathirana v. DIG (Personnel & Training) and others*, C.A. Writ Application No. 1123/2002, C.A. Minutes 09.10.2006, per Justice S. Sriskandarajah.

<sup>500</sup> *Sanjeewa v. Suraweera* [2003] 1 Sri LR 317. Although a constitutionally established body to monitor the police, the National Police Commission took the welcome step, in 2005, of interdicting all police officers indicted for torture under the 1994 Anti-Torture Act. This move was met with tremendous opposition from the Inspector General of Police (IGP), whose appeals against the NPC decision to the Supreme Court proved to be unsuccessful. Later, the term of the NPC expired and they were succeeded by members unconstitutionally appointed by the President. The current status of this policy of interdicting police officers indicted under the Anti-Torture Act is unknown.

<sup>501</sup> United Nations Human Rights Committee, Concluding Observations on Sri Lanka (2003), CCPR/CO/79/LKA, 01.12.2003. See also observations of former Attorney General of Sri Lanka, Mr. K.C. Kamalabayson on 02.12.2003: *"Another important feature that requires consideration is the need for an efficient witness protection scheme that would ensure that witnesses are not intimidated and threatened. No doubt this would involve heavy expenses for the State and amendments to the law. I will only pose a simple question. Is it more important in a civilized society to build roads to match with international standards spending literally millions of dollars rather than to have a peaceful and law abiding society where the rule of law prevails?"* in remarks made during the 13<sup>th</sup> Kanchana Abhayapala Memorial Lecture as reported in *'The Right to Speak Loudly'*, Asian Legal Resource Centre, 2004.

[...] while those in authority hold that there is a justice system that works without ethnic bias, cases by Tamil victims are suppressed, 1.) By delay that allows for intimidation, 2.) Harassment where the victims have to eke out a living amidst trauma and misgivings as to whether the uncertain wait for justice is a practical proposition and 3.) Filing indictments in a court where the victim is at a distinct disadvantage.<sup>502</sup>

These three points are well-illustrated in the following analysis as well as generally in this segment of the report.

### 5.1. Transferral of Cases

Ordinarily transfers of cases, including cases of gross human rights violations such as extrajudicial executions and enforced disappearances, from one court to another is effected through a granting of leave by the Court of Appeal or, more commonly in practice, upon order of the Judicial Service Commission (JSC). This is often upon the motion of the accused and on the basis that risks would be posed to defendants if the case were to be heard in the Court situated in the area where the violation occurred. In many cases of gross human rights violations committed during the conflict, the matter has been transferred to a court in the predominantly Sinhala North Central Province or to Colombo. This is clearly unfair in circumstances where the victim, family members or witnesses, often of Tamil origin and from the most marginalised villages in the North and East, have already suffered traumatisation by the incident and continue to be intimidated and threatened by the perpetrators. In these circumstances, victims and witnesses are unable or unwilling to engage in hazardous travel to other parts of the country to give evidence or pursue the trial. From the outset therefore the legal process is evidently weighted against the victims. An exception is possible only if the case is pursued by a non-governmental organisation (NGO) on behalf of the victims in which case, strenuous efforts are evidenced to at least have the trial proceed in the capital city.

An instructive example in this regard is the Mylanthanai massacre case referred to above.<sup>503</sup> The non-summary inquiry originally took place in the Magistrate's Court, Batticaloa, but following two appearances before the Batticaloa magistrate, the matter was transferred to the Polonnaruwa Magistrates' Court, which is situated in the predominantly Sinhala North-Central province. Lawyers watching the interests of the massacre victims complained that the transferral was at the instance of the Attorney General, without any reasons being given for the transfer.<sup>504</sup>

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<sup>502</sup>University Teachers for Human Rights (Jaffna), *'From Welikade to Mutur and Pottuvil: A Generation of Moral Denudation and the Rise of Heroes with Feet of Clay,'* Special Report, No. 25, 2007.

<sup>503</sup>See Centre for Human Rights and Development, *'Issues in the News; Justice Delayed is Justice Denied,'* Sentinel, Colombo, September-December 1999, at p. 17 for discussion of what transpired in this case.

<sup>504</sup>A more recent case which is within the mandate of inquiry of the current Commission to Investigate Grave Human Rights Violations is the killing at point blank range of 17 aid workers in Mutur in August 2006. Here too, the case which was originally heard in the Mutur Magistrate's Court (being the relevant court having jurisdiction in that matter) was transferred to the Magistrate's Court of Anuradhapura (situated in the predominantly Sinhala North Central Province. What made the transfer even more problematic than in the Mylanthanai case was that in this instance, the transfer was not by the Attorney General but as a consequence of a phone call made by the Secretary, Ministry of Justice to

[...] [W]itnesses expressed fear to go to Polonnaruwa because it was a Sinhala majority area. There was also a financial constraint because they had to travel a long distance to Polonnaruwa.<sup>505</sup>

An even more forthright comment was made regarding this transfer by the HRTF:

[W]itnesses from Mailanthanai fear to go to Polonnaruwa and testify against the army men from there. If overnight stay becomes necessary, as it most probably will, owing to transport problems, they would become easy targets. The witnesses are understandably unwilling to attend the courts at Polonnaruwa. On their absents themselves, warrants will be issued for their arrest. They will then have to furnish bail or be remanded. If they furnish bail and fail to attend court, their bonds will be forfeited. If they fail to pay the forfeits, they could be jailed. The witnesses have lost their dear ones, their homes have been destroyed and some of them will risk losing their liberty. To them, the transfer is a subtle move to scuttle the case. Much public confidence will be restored if the case is transferred back to Batticaloa.<sup>506</sup>

Two witnesses filed an appeal in the Court of Appeal stating that, as Tamils, they felt insecure in travelling to Polonnaruwa to give evidence in such a controversial case; the appeal was dismissed.<sup>507</sup> Later, the case was transferred to the Colombo High Court in a compromise.

In the Mannar Women Rape Case, the accused again applied for the matter to be moved to Colombo, but the Centre for Human Rights and Development (CHRD), a local NGO that was involved in the case on behalf of the victims, successfully managed to prevent the transfer. Later, the case transferred to Anuradhapura in the North Central Province whereas the matter should actually have been heard in the Vavuniya High Court.<sup>508</sup>

This same pattern is evidenced in the Mirusuvil massacre case in which trial was fixed before a three-member High Court Trial at-Bar in Colombo. In one instance, a warrant was issued by the Court on four witnesses who had not attended the trial due to fear of travelling to Colombo from Jaffna. Thereafter, witnesses were brought to Colombo from Jaffna and kept in safe custody.

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the Mutur Magistrate, ordering the transfer on instructions of the Judicial Service Commission. Consequent to public protests when the manner in which the transfer had been effected became public knowledge (journalized as it had been by the Mutur magistrate), the case was transferred back to Kantalai. Although the official defence was that the transfer had been made for the better administration of justice, the transfer of the case to another court thousands of miles away had an unconvincing logic. Taken at the best explanation of the authorities responsible for the transfer, it still showed a grossly insensitive attitude to the family members of the victims and the witnesses in the case. Such transfer applications are now commonplace. In the killing of five students in Thandikulam agriculture school (18.11.2006), the accused police constable who was arrested and indicted in the Vavuniya High Court in connection with the incident also requested a transfer to the Anuradhapura High Court on the basis that his life would be in danger if the trial proceeded in Vavuniya.

<sup>505</sup>Centre for Human Rights and Development, *Issues in the News; Justice Delayed is Justice Denied*, op. cit, at p. 17.

<sup>506</sup>Human Rights Task Force, Annual Report 10.08.1992-10.08.1993, at p. 29.

<sup>507</sup>ibid, at p. 19.

<sup>508</sup>Interview with attorneys-at-law watching the interests of the victims in the case, 09.07.2009.

## 5.2. Language Issues at Trial Stage

In one notable instance, when indictment was served on a person of Tamil ethnicity only in Sinhala, Eastern High Court judge J. Visuvanathan expressed the opinion that “it would be a travesty of justice if the inquiry were to be held against the accused without providing him with the Tamil translation of his confession.”<sup>509</sup>

Although the instance above relates to a suspect rather than witnesses giving evidence in the trial of the killings of their family members and loved ones, the language issue is a major factor in trials and results in the postponement of cases as pointed out below. Article 24 of the 1978 Constitution (as amended) provides specifically for translation of documents relevant to a court inquiry. However, this constitutional right has not been transformed into practical application in the legal process due to failure to direct resources towards the provision of adequate translation services. According to data relevant to 2004, the Government Translators Office had only 44 translators proficient in Sinhala to Tamil or Tamil to Sinhala, 108 translators proficient in Sinhala to English and 14 translators proficient in Tamil to English.<sup>510</sup>

Similarly, in the Mylanthanai Case, when the matter was transferred to the Colombo High Court, it was postponed initially on two occasions. On the third occasion, the postponement was due to the fact that a judge proficient in Tamil needed to be appointed.<sup>511</sup> Thereafter, counsel for the accused requested that the appointed judge should also be able to understand the Sinhala language as the accused had asked for a Sinhala speaking jury<sup>512</sup> and consequently the judge needed “not only to be proficient in Tamil but also be able to address the jury in Sinhala.”<sup>513</sup> The proceedings ended in the acquittal of all the accused on 25 November 2002, the circumstances regarding which are examined below.

## 6. *De Jure* Impunity

There are numerous deficiencies in the penal laws, including in relation to evidence and criminal procedure procedures. Among the more critical of these are the absence of a crime of enforced disappearances, resulting in the accused being prosecuted for abductions (in the absence of proof of death) and murder in cases where the body is traced, absence of a doctrine of command responsibility, and legal provisions and

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<sup>509</sup>Centre for Human Rights and Development, ‘*Human Rights Overview, 2002*,’ Sentinel, Colombo, 2002, at p. 6.

<sup>510</sup>Collure, Raja ‘*Bilingualisation of the Public Service*’ in Shanthakumar, B., ed., ‘*Language Rights in Sri Lanka Enforcing Tamil as an Official Language*’, Law & Society Trust, 2008, at p. 43. It is pointed out in this same publication that a Language Audit conducted in 2006 by the non-governmental organization, the Foundation for Co-existence (FCE) had found that the Ratnapura High Court, with a staff of 60, did not have a single court official competent in the Tamil language, see *ibid* at p. 49. The severely understaffed and under resourced Official Language Commission has acknowledged the severe dearth of translators and has recommended that ‘a fair number’ of judges at all levels of the judiciary be conversant in all three languages to reduce their reliance on interpreters and translators, see *ibid* at p.96.

<sup>511</sup>Centre for Human Rights and Development, ‘*Issues in the News; Justice Delayed is Justice Denied*,’ *op.cit*, at p. 17.

<sup>512</sup>The question of jury trials in these cases is addressed immediately below.

<sup>513</sup>Centre for Human Rights and Development, ‘*Issues in the News; Justice Delayed is Justice Denied*,’ *op.cit*, at p. 17.

practices that favour the accused at the expense of the victim. This is manifestly unsatisfactory.

Similarly, although Sri Lanka is a party to the UN Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (CAT), its implementation of the CAT through domestic law, required under Sri Lanka's dualist system in order to give effect to international treaties, through the enacting law falls short of international standards. It narrows the international definition of torture to acts causing severe pain, eliminating the word "suffering" as well as the separate crime of "cruel, inhumane or degrading treatment". It also arbitrarily limits the purposes for which violations may be found to occur, fails to recognize the principle of *non-refoulement*, and also does not provide for reparations to victims. A further critical shortcoming was analyzed in the UN Human Rights Committee's decision in the *Singarasa* case, regarding the incompatibility of Sri Lanka's emergency and counter-terrorism laws with its obligations under the CAT.<sup>514</sup>

### 6.1. Command Responsibility

As developed through international criminal law, including the International Tribunals for Yugoslavia<sup>515</sup> and Rwanda, and customary international humanitarian law, the doctrine of command responsibility encompasses both military and civilian personnel holding positions of de facto or de jure authority, and who on this basis may be held to varying degrees of responsibility for failing to prevent or punish crimes committed by subordinates. The determination of the degree of responsibility should be based on several factors, including the extent of effective control and whether the superior knew or had reason to know that the crimes would be or were committed.

The principal of command responsibility is well-established in general international law. Recently adopted treaties reflect that principle. The UN Convention for the Protection of All Persons from Enforced Disappearance provides under Article 6:

1. Each State Party shall take the necessary measures to hold criminally responsible at least:
  - (a) Any person who commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance;
  - (b) A superior who:
    - (i) Knew, or consciously disregarded information which clearly indicated, that subordinates under his or her effective authority and control were committing or about to commit a crime of

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<sup>514</sup> *Nallaratnam Singarasa v. Sri Lanka*, Communication No. 1033/2001, UN Doc.

CCPR/C/81/D/1033/2001; See also: Redress, Comments To Sri Lanka's Second Periodic Report To The Committee Against Torture Submitted 31 October 2005, pp.4-5.

<sup>515</sup> "The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof." Article 7(3), ICTY Statute, S.C. Res. 827, U.N. SCOR, 48th Ses., 3217th mtg., Annex, U.N. Doc. S/RES/807 (1994), reprinted in 32 I.L.M. 1163 (1994).

- enforced disappearance;
- (ii) Exercised effective responsibility for and control over activities which were concerned with the crime of enforced disappearance; and
- (iii) Failed to take all necessary and reasonable measures within his or her power to prevent or repress the commission of an enforced disappearance or to submit the matter to the competent authorities for investigation and prosecution;

(c) Subparagraph (b) above is without prejudice to the higher standards of responsibility applicable under relevant international law to a military commander or to a person effectively acting as a military commander.

The International Criminal Court Statute, Part 3, was accepted by States at the International Conference in Rome as reflecting General Principles of Criminal Law. Article 28 provides, in respect of genocide, war crimes and crimes against humanity, including when consisting in the practice of enforced disappearances:

1. A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(a) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(b) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

2. With respect to superior and subordinate relationships not described in paragraph 1, a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(a) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(b) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(c) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to

submit the matter to the competent authorities for investigation and prosecution.

The UN Committee against Torture, in its General Comment 2 on obligations of the Convention against Torture, to which Sri Lanka is a party, has affirmed that

“those exercising superior authority-including public officials- cannot avoid accountability or escape criminal responsibility for torture or ill-treatment committed by subordinates where they knew or should have known that such impermissible conduct was occurring, or was likely to occur, and they failed to take reasonable and necessary preventive measures. The Committee considers it essential that the responsibility of any superior officials, whether for direct instigation or encouragement of torture or ill-treatment or for consent or acquiescence therein, be fully investigated through competent, independent and impartial prosecutorial authorities.”<sup>516</sup>

The omission of the doctrine of command responsibility in Sri Lanka’s penal law is a highly significant factor in this context. As discussed earlier, the Embilipitiya Case is an excellent illustration. In evidence before the High Court, it had been established that the 3<sup>rd</sup> accused, then Lt. Col. R.P. (Parry) Liyanage district coordinating secretary for the area, under whose command the Sevana camp was run, had responsibility over the running of the camp. The “disappeared” children had been kept at the camp which was under his supervision. Parents of the victim testified that they had brought their appeals to him to find out what had happened to their children and he had done nothing.<sup>517</sup> However, this officer was acquitted by the High Court on the basis that no direct evidence could be found regarding his responsibility for the enforced disappearance of the children at the army camp.

As seen in the Bindunuwewa Case above, the existing criminal law provision of culpable inaction<sup>518</sup> is not sufficient to impose responsibility in extraordinary situations of grave human rights violations given that what is in issue in this context is the primary negative actions of the accused in question. On the contrary, penal responsibility needs to be imposed in terms of the Sri Lankan law on the failure by superior officers to take positive steps to control the actions of their misfeasant subordinates. As reflected upon earlier, the Supreme Court’s development of the doctrine of vicarious liability of superior officers may be taken as a useful illustration

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<sup>516</sup> UN Committee against Torture, General Comment No. 2 on Implementation of article 2 by States parties, UN Doc. CAT/C/GC/2, 24 January 2008, para. 26.

<sup>517</sup>For example, at p. 24 (where there is reference to the fact that he had prevaricated when questioned by one parent as to whether her son was being kept at the camp). At p. 475 (where it is observed by the trial judge that the father of Prasanna Handuwela testified that his son had been brought by him to the Sevana army camp on the express direction of Lt. Col. Liyanage, that he had been kept in the camp for about a week, that thereafter he had observed his son to be very weak and that upon his pleas, he had been allowed to take his son for medical treatment and that upon doing so, had been informed by the doctors that his son had passed keys, sponges and pieces of glass along with his feces, that he had been directed to bring his son back to the camp for further interrogation and that after doing so, his son had been ‘disappeared’ just outside the army camp and that he had made a specific appeal to Lt Col Liyanage to return his son, which had been disregarded.

<sup>518</sup>The offence of culpable inaction is contained in Sections 30 and 31 of the Penal Code No. 2 of 1883 (as amended).

as to why specific reform of the criminal law is needed to bring in the concept of chain-of-command liability.

## 6.2. Military Jurisdiction

As noted earlier, with reference to the findings and recommendations of the Kokkadicholai Commission Report,<sup>519</sup> the recommendation to address criminal responsibility through a military tribunal raises serious concerns. The military tribunal in that case eventually found a lower-level officer responsible for lesser offences. The Commission's argument that individual perpetrators could not be identified flew in the face of the Military Court's own finding. As difficult as a criminal prosecution may have been, an indictment may yet have been possible for the offence of illegal omission under Sections 30 and 31 of the Penal Code.

In Sri Lanka, as in many jurisdictions, military tribunals fall under executive authority and lack the independence and impartiality guaranteed by the separation of powers that is intended constitutionally to protect the judiciary from the same reproach. Where the alleged offence is defined as such under ordinary legislation or relates to serious human rights violations, as opposed to being defined only as a military offence, there is no justification to shield the accused from the jurisdiction of ordinary criminal courts.

This standard, at the heart of which is the very principle of legality and equality before the law, is particularly important with respect to combating impunity in relation gross violations of human rights. For this reason, the 1992 Declaration on the Protection of All Persons from Enforced Disappearance stipulates in Article 16 (2) that those responsible for enforced disappearance, either as principal or accessory, "[...] shall be tried only by the competent ordinary courts in each State, and not by any other special tribunal, in particular military courts."<sup>520</sup> The use of the phrase, 'in particular', is noteworthy.

In 2005, covering international human rights violations more broadly, article 29 of the Updated Set of principles for the protection and promotion of human rights through action to combat impunity captured the movement of international law towards addressing the causes of impunity in stating that:

The jurisdiction of military tribunals must be restricted solely to specifically military offences committed by military personnel, to the exclusion of human rights violations, which shall come under the jurisdiction of the ordinary domestic courts or, where appropriate, in the case of serious crimes under international law, of an international or internationalized criminal court.<sup>521</sup>

Principle 8 of the UN Principles Governing the Administration of Justice through Military Tribunals (Decaux Principles) provides: "In all circumstances, the jurisdiction of military courts should be set aside in favour of the jurisdiction of the ordinary courts to conduct inquiries into serious human rights violations such as

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<sup>519</sup> See Ch 3, s 2.3.

<sup>520</sup> G.A. res. 47/133, 47 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/47/49 (1992), Adopted by General Assembly resolution 47/133 of 18 December 1992.

<sup>521</sup> United Nations Commission on Human Rights, E/CN.4/2005/102/Add.1, 8 February 2005.

extrajudicial executions, enforced disappearances and torture, and to prosecute and try persons accused of such crimes”

The rationale, as explained in paragraph 27 of the Principles, is that: “ Contrary to the functional concept of the jurisdiction of military tribunals, there is today a growing tendency to consider that persons accused of serious human rights violations cannot be tried by military tribunals insofar as such acts would, by their very nature, not fall within the scope of the duties performed by such persons. Moreover, the military authorities might be tempted to cover up such cases by questioning the appropriateness of prosecutions, tending to file cases with no action taken or manipulating “guilty pleas” to victims’ detriment. Civilian courts must therefore be able, from the outset, to conduct inquiries and prosecute and try those charged with such violations. The initiation by a civilian judge of a preliminary inquiry is a decisive step towards avoiding all forms of impunity. The authority of the civilian judge should also enable the rights of the victims to be taken fully into account at all stages of the proceedings.

UN experts who have affirmed the principle of civilian jurisdiction over human rights violations include the Special Rapporteur on extrajudicial, summary and arbitrary executions,<sup>522</sup> the Special Rapporteur on torture,<sup>523</sup> the Special Rapporteur on the independence of judges and lawyers,<sup>524</sup> the Special Representative on the question of human rights defenders,<sup>525</sup> the Special Rapporteur on the situation of human rights in Guatemala,<sup>526</sup> the Special Rapporteur on the situation of human rights in Equatorial Guinea,<sup>527</sup> the Working Group on Enforced or Involuntary Disappearances,<sup>528</sup> and the Working Group on Arbitrary Detention.<sup>529</sup> The Special Rapporteur on the question of impunity of the former UN Sub-Commission on the Promotion and Protection of Human Rights<sup>530</sup> and the Sub-Commission’s Rapporteur on the Administration of Justice through military tribunals<sup>531</sup> have also recommended that gross human rights violations should not be tried in military courts and the Sub-Commission has urged states to investigate, prosecute and punish crimes against human rights defenders in ordinary courts.<sup>532</sup>

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<sup>522</sup> E/CN.4/1983/16, paras 75-78; E/CN.4/1984/29, paras 75- 86 and 130-131; E/CN.4/1985/17, paras 41 to 45; E/CN.4/1987/20, paras 186 and 246; E/CN.4/1989/25, para 220; E/CN.4/1990/22, para 463; E/CN.4/1991/36, para 591; E/CN.4/1993/46, para 686; E/CN.4/1994/7, para 697; E/CN.4/1994/7/Add.2, para 48; E/CN.4/1995/61, paras 93, 125,183, 402 and 403; E/CN.4/1998/68, para 97; E/CN.4/1999/39/Add.1, paras 62, 66, 72, 172 and 216; E/CN.4/2000/3/Add.3, para 44; E/CN.4/2000/3, para 89; and E/CN.4/2001/9 paras 56 and 62.

<sup>523</sup> E/CN.4/2002/76, 27.12.2001, Annex 1, Recommendation (j); E/CN.4/2003/68, 17.12.2002, para 26 (k).

<sup>524</sup> E/CN.4/1998/39/Add.2, 30.03.1998, para 7.

<sup>525</sup> A/57/61, 10.09.2001, para 47; E/CN.4/2002/106/Add.2, 24.04.2002, paras 183, 184.

<sup>526</sup> E/CN.4/1996/15, 05.12.1995, para 129; E/CN.4/1997/90, 22.01.1997, para 23.

<sup>527</sup> E/CN.4/2000/40, 27.01.2000, para 71.

<sup>528</sup> E/CN.4/1994/26, 22.12.1993, para 45 (i).

<sup>529</sup> E/CN.4/2002/77/Add.2, 05.03.2002, para 77; E/CN.4/1999/63, 18.12.1998, paras 49,

80 (b).

<sup>530</sup> Principle 29 of the UN Updated Principles on Impunity, *supra* note 7.

<sup>531</sup> Working paper by Special Rapporteur Decaux containing an updated version of the draft principles governing the administration of justice through military tribunals, E/CN.4/Sub.2/2005/9, Principle 8.

<sup>532</sup> Resolutions on the question of the violation of human rights and fundamental freedoms in all countries, E/CN.4/Sub.2/RES/1998/3 20 August 1998, para 3; E/CN.4/Sub.2/RES/1999/3, 20.08.1999, para 4.

### 6.3. Absence of a Specific Crime of Enforced Disappearances

The absence of a specific crime of enforced disappearances means that many of these prosecutions must be fitted into a difficult straitjacket of ordinary offences such as abduction. This means first, the fitting of the facts of these extraordinary cases into the ambit of a commonplace crime of abduction and/or murder which is no easy task as amply illustrated in the prosecutions relating to enforced disappearances as contained in the Reports of the 1994/1998 Disappearances Commissions. This question of non-identification of perpetrators and the question of satisfaction of the requisite criminal burden of proof beyond reasonable doubt is crucial in this regard.

Secondly, the absence of a specific crime of enforced disappearances also means that the sentences imposed, even where criminal culpability is found, are grossly inadequate as discussed further below. It is one of the State's principal obligations to establish legislative mechanisms upholding the State's duty to guarantee human rights protections. In keeping with this fundamental principle, the UN Declaration on the Protection of All Persons from Enforced Disappearance states in Article 3 that:

Each State shall take effective legislative, administrative, judicial or other measures to prevent and terminate acts of enforced disappearance in any territory under its jurisdiction.

Article 4 specifies that "All acts of enforced disappearance shall be offences under criminal law punishable by appropriate penalties which shall take into account their extreme seriousness."<sup>533</sup>

Although Sri Lanka is not yet a party to the International Convention for the Protection of All Persons from Enforced Disappearance, that instrument, adopted by consensus of the UN GA in 2006, constitutes the internationally recognized normative standards surrounding the crime of enforced disappearance. For that reason, the Supreme Court of Nepal, in its landmark 2007 judgment *Rajendra Dhakal and Others v. The Government of Nepal* (writ. No. 3575, registration date Jan. 21, 1999, decision June 1, 2007), ordered the Government "to urgently enact a law which includes provisions that the act of disappearance is a criminal offence, defining the act of disappearance pursuant to the definition stated in the International Convention for the Protection of All Persons from Enforced Disappearance, 2006." This decision was taken despite the fact that Nepal was not yet a party to the Convention on Enforced Disappearances.

The definition of enforced disappearance contained in the Convention on Enforced Disappearances provides the following elements:

1. detention/deprivation of liberty in whatever form;
2. refusal to acknowledge the deprivation of liberty or concealment of the fate or whereabouts of the disappeared person;
3. placing the disappeared person outside the protection of the law; and

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<sup>533</sup> UN General Assembly, A/RES/47/133, 18 December 1992.

4. the conduct constituting the act of enforced disappearance is undertaken by a state agent or persons or group acting with the authorization, support or acquiescence of the State.

#### **6.4. Non-Identification of Perpetrators**

In all of these cases, although the ordinary law requires that an identification parade be held after arrest, the extraordinary secretive nature of enforced disappearances has meant that the requirement is not followed, rendering identification extremely difficult after a lapse of years.

In the Embilipitiya Case, no identification parade was held and the prosecution had to give an explanation as to why no identification was held. The police never visited the scene of crime and no investigation was undertaken. After the passage of five years, investigations were transferred to the Criminal Investigation Division (CID) of the police and the identification of the perpetrators became more difficult due to the intervening years.

In acquittals by the High Court in prosecutions emanating from the findings of the 1994/1998 Disappearances Commissions, failure to establish identity of the abductors was a major factor for the acquittals.<sup>534</sup> The inability to prosecute and the discharging (in the military court) of the accused in the Kokkadicholai Case also indicates the overriding problem of identification in cases that are as complex as mass extrajudicial executions.

#### **6.5. Burden of Proof**

The Embilipitiya Case illustrates the difficulties that may arise in a criminal proceeding in regard to establishing proof of secret detention as borne out by the rejection by the High Court of evidence relating to the fact that the students were, in fact, detained at the Sevana army camp. The 1994 Western, Southern and Sabaragamuwa Disappearances Commission adopted a position which substantially differed from the judicial findings in the High Court. At the time of its deliberations, the Court of Appeal had directed the Chief Magistrate, Colombo, to record evidence and come to a finding in respect of eighteen *habeas corpus* applications filed before court. The findings, which had been completed by the Magistrate in all except one case, were scrutinized in the commission process. The Commissioners found that the “disappeared” children had been held in long-term detention as alleged.<sup>535</sup> Evidence of witnesses in the *habeas corpus* applications is also specifically noted.<sup>536</sup>

The High Court of Ratnapura in the Penal Code proceedings referred to above, did not find evidence of long term detention of the “disappeared” children at the Sevana army

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<sup>534</sup>H.C. Case No. 94/99, High Court of Hambantota, H.C. Minutes 04.02.2004; H.C. Case No. 14/2001, High Court of Hambantota, H.C. Minutes 25.08.2003 and H.C. Case No. 24/2002, High Court of Hambantota, H.C. Minutes 19.06.2003.

<sup>535</sup>In support of its position, the Commissioners refer to the Expenses Register of the Sevana Army Camp supplied to them by the Army Commander which indicated the contrary.

<sup>536</sup>These, in particular, include the evidence of one witness who stated that his son’s name figured in the Food Register of the Sevana Army camp and that he, the father had been required to sign for him during his period of detention at Sevana and of another who affirmed that Registers of Attendance and Release etc were maintained at the army camp and that his own name figured in them.

camp. Scrutiny of the evidence in the trial indicates that knowledge of the fact that the “disappeared” children were being kept at the camp had been strongly established. This knowledge was testified to, for example, by the mother of one “disappeared” child who said that she knew full well that the children were being kept in the camp and further, that she had made a trip to the camp to see if her child was being kept there and had been told by the soldiers that her son had been “a naughty boy” and that they would cure this behaviour.”<sup>537</sup>

This witnesses’ evidence was accepted on all points by the trial judge who, in fact, praised the credibility of her testimony.<sup>538</sup> In that context, the selective omission of that part of her evidence attesting to the fact of long-term detention of the “disappeared” children at the camp is inexplicable. This is all the more so in the light of other witnesses testifying to that same effect.<sup>539</sup> Evidence of other “disappeared” children who had later been released and who had testified as to detention at the camp is also relevant.<sup>540</sup>

Although the fact of long-term detention at the camp had been highly evident in the findings of the 1994 Western, Southern and Sabaragamuwa Disappearances Commission and at the magisterial inquiry, as well as reflected in the evidence led at the trial, this fact was not reflected in the judicial findings. This point, equally unfortunately, was not reflected at the appellate court level. At one level, it showed the manner in which the Commission findings are thoroughly disregarded at the stage of legal proceedings. At another level, the inability to establish long term detention of the children at the army camp impacted on judicial findings in regard to the culpability of the individual accused as well as the culpability of the third accused commanding officer, as discussed below.

In contrast, the Supreme Court and the Court of Appeal have affirmed in *habeas corpus* applications that, if the fact of detention by the state is established, then the liability of the State follows irrespective of whether the actual enforced disappearance can be established or, for that matter, whether the precise identity of the culpable persons (re the Leeda Violet case and the Matchavallan case referred to above) can be established. It is important in this context to note that international law does not permit a shifting of the burden of proof to an individual accused to prove his or her innocence in such a case. This burden remains with the State prosecution. However, it is a different matter to hold the State, itself, responsible for a right to life violation. International jurisprudence holds that, because direct evidence of State involvement in killings linked to disappearances is almost inevitably unavailable, circumstantial evidence of cognizable patterns and practices of the State to which the specific case can be shown to be linked, is sufficient to hold the State responsible for right to life violations. This means a burden of proof less than the reasonable doubt standard.<sup>541</sup>

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<sup>537</sup>Evidence of a witness, Sujatha Kalugampitiya, who was herself, the principal of Moraketiya Maha Vidyalaya, a minor school in the area and whose son had been disappeared, acknowledged at pp. 22 and 24 of the High Court judgment.

<sup>538</sup>At pp. 28, 30 and 33 of the judgment.

<sup>539</sup>Statements that the first accused, the principal had told the parents that the children were being detained at the camp, referred to at pp. 52 and 64 of the judgment.

<sup>540</sup>At p. 100 of the judgment where there is reference to the testimony of one child that he had been kept ‘bound and naked’ at the camp along with the others.

<sup>541</sup>*Caseo Velásquez Rodríguez*, IACHR; *Çiçik v. Turkey*, 27 February 2001, ECHR.

## 6.6. Admission of Confessions

Emergency laws allowing “confessions” of guilty conduct made to an ASP and any officer above that rank and imposing the burden on the accused to prove that the statement was involuntary, have been subjected to severe critique, both domestically and internationally.

In Theivandran’s Case,<sup>542</sup> the Supreme Court exhibited a sharp division of opinion on the question of the admissibility of confessions under the PTA. Justice C.V. Wigneswaran, writing a 26 page separate opinion was thoroughly disinclined to accept the contents of such confessions are solely sufficient to convict an accused in the absence of corroborative evidence. His warning was pertinent;

After all, the general civilised law of the country frowns upon the admission as evidence of confessions to police officers. When a special politically motivated law admits them, significantly when such admission (Section 16(1) &(2) of the PTA) is incompatible with Articles 14(3)(g) and 14(2) of the ICCPR to which Sri Lanka is a signatory (Vide 27(15) of our Constitution and Justice Mark Fernando’s dictum in *Weerawansa v. The Attorney General and Others* (2000) 1 Sri Lanka Law Reports page 387 at page 409, the responsibility of the Court which sits without a jury increases manifold. The burden on the Judge is quite heavy in such instances.<sup>543</sup>

Justice Fernando however in this case, declined to go so far as affirming that confessions in such contexts should invariably be corroborated in order to be accepted and preferred instead to state that a presumption of truth attaches to such confessions. However, both judges agreed with the opinion of the third judge on the Bench, Justice Ameer Ismail that, on the facts of the case before Court, the confession lacked ‘congruity and consistency’<sup>544</sup> and therefore, that the Court of Appeal has erred in affirming the conviction of the appellant based solely upon the contents of the confession.

In *Singarasa v. Sri Lanka*,<sup>545</sup> a *detenu* under the PTA filed an individual communication before the United Nations Human Rights Committee under the first Optional Protocol to the ICCPR, stating that *inter alia*, it was impossible for him to satisfy the burden imposed on him under Section 16(2) of the PTA to prove that the confession was extracted under duress and was not voluntary in terms of Section 16(2), as he had been compelled to sign the confession in the presence of the very police officers by whom he had been tortured. He pleaded that his rights under Article 14, paragraph 3 (g) of the Covenant (no one shall “be compelled to testify against himself or confess guilt”) were consequently violated.

The Committee referred to the principle that no one shall “be compelled to testify against himself or confess guilt” which must be understood in terms of the absence of

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<sup>542</sup>SC Appeal No 65/2000, SCM 16.10.2002

<sup>543</sup>ibid.

<sup>544</sup>ibid.

<sup>545</sup>*Nallaratanam Singarasa v. Sri Lanka*, Communication No. 1033/2001, CCPR/C/81/D/1033/2001, adoption of views, 21.07.2004.

any direct or indirect physical or psychological coercion from the investigating authorities on the accused with a view to obtaining a confession of guilt. The burden should accordingly be on the prosecution to prove that the confession was made without duress. The Government of Sri Lanka was called upon to amend Section 16(2) of the PTA.<sup>546</sup> However, this recommendation remains unimplemented.

A review petition was then filed before the Supreme Court on the basis that legal thinking in relation to the admissibility of confessions had changed since the initial judgment in the Singarasa Case and citing the Committee's Communication of Views as persuasive precedent. This petition was dismissed by a Divisional Bench of the Court, which affirmed that the very act of accession to the Optional Protocol to the ICCPR was unconstitutional.<sup>547</sup>

In ironic counterpoint to the admittance of confessions to police officers above a particular rank under emergency law, these confessions are excluded under ordinary law with which alleged perpetrators of grave human rights violations who commit these crimes under cover of their office are prosecuted. Sections 24, 25(1), (2) and 26(1), (2) of the Evidence Ordinance declares inadmissible three categories of confessions: those caused by an inducement, threat or promise; confessions made to a police officer, a forest officer or an excise officer; and confessions made by any person while in the custody of the these three categories of officers.

Previously, the High Court had taken the position that confessions made to officers of the military police are not encompassed within this absolute bar and consequently went on to test the voluntary nature of the confession in terms of Section 24 of the Evidence Ordinance, holding it admissible if the voluntary nature was proven. However, the Supreme Court, in a Divisional Bench judgment in the Krishanthi Kumaraswamy Case examined above, ruled that confessions made to military officers attract the absolute bar as they come within the term 'a police officer' as referred to, in the Evidence Ordinance.

While this ruling had no practical effect in the Krishanthi Kumaraswamy Case, as the conviction and sentencing was upheld on the basis that the evidence was strong enough even without the confessions in issue, the same may not be the case of each and every prosecution in such instances where the criminal law and procedure is, in any case, weighted in favour of the accused. Based on the Krishanthi Kumaraswamy precedent, a confession made to a military police officer was ruled to be inadmissible in the pending Mirusovil case.<sup>548</sup>

## **7. The Trial Process**

### **7.1. Jury Trial/Trial by Judge/Trial-at-Bar**

In some cases, the option currently given to the accused to elect for a jury trial or a trial by judge only has increased the possibility of the trial being weighted in favour of the accused. In the Mylanthanai Case, examined above, the accused Sinhalese

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<sup>546</sup>ibid.

<sup>547</sup>*Nallarattnam Singarasa v. Attorney General and Others*, S.C. SpL (LA) No. 182/99, SCM 15.09.2006, per former Chief Justice Sarath N. Silva.

<sup>548</sup>Interviews with attorneys-at-law monitoring the case, 12.04.2009.

soldiers opted for a jury trial with a Sinhala speaking jury and witnesses were brought all the way from Trincomalee in the Eastern province to the capital Colombo for the trial. The accused were acquitted on 25 November 2002. The acquittal occurred despite overwhelming evidence to the contrary as buttressed by the High Court Judge, S. Srisikandarajah's observations urging the jury to reconsider its decision in the light of several factors in the evidence placed before it. However, the same verdict was returned by the jury.<sup>549</sup>

As contrasted with the option of trial by jury or trial by a single judge, the general consensus is that a trial-at-bar is a fairer judicial procedure to try ethnically and politically charged cases. Justice T.S Fernando acknowledged this back in the early 1960s.

The reason for the introduction into our law of the system of trial without jury in cases which up to that time had been triable by jury was understandable as the chances of ensuring an unbiased jury at times when public feeling is profoundly disturbed, whatever be the cause, are considerably lessened. (J)<sup>550</sup>

In certain instances such as the Krishanthi Kumaraswamy Case discussed above, the trial-at-bar was constituted as a result of the information submitted by the Attorney General under subsection 450(4) of the Criminal Procedure Code, No. 15 of 1979 (as amended) in order to conduct a special judicial hearing in the High Court before a three judge bench without a jury. The nomination of the trial-at-bar is left to the discretion of the Chief Justice. The nomination of a trial-at-bar in this manner has, however, led to problematic situations at times, as is seen in the contrasting treatment of the trials into the assassination of a high court judge and a torture victim in cases examined below.

## 7.2. Long delays

Delays evidenced at all stages of the pre-trial and trial process are not peculiar to trials of grave human rights violations. Rather, they are a common feature of the prosecutorial process.

Indeed, departure from rules of procedure in the criminal justice system that were formerly enforced strictly, currently characterizes almost every aspect of the trial process. For example, an average trial generally takes three to four days and the trial is heard from beginning to end. However, even though it is not legally permissible, there are instances where jury trials are not conducted from day-to-day but instead,

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<sup>549</sup>Centre for Human Rights and Development, 'CHRD in 2002; CHRD provides legal assistance to those without help,' Sentinel Special Issue, Colombo, 2002, at p. 9.

<sup>550</sup>*The Queen v. Liyanage and others (TAB)* [1962] 64 NLR 313. It was held in this case that section 9 of the (old) Criminal Law (Special Provisions) Act was *ultra vires* the Constitution because (a) the power of nomination conferred on the Minister in respect of nomination of judges for a trial-at-bar was an interference with the exercise by the Judges of the Supreme Court of the strict judicial power of the State. The power of nomination is one which has hitherto been invariably exercised by the Judicature as being part of the exercise of the judicial power of the State, and cannot be reposed in anyone outside the Judicature. Subsequently, on 14.11.1962 Parliament enacted the Criminal Law Act, No. 31 of 1962 which, *inter alia*, empowered the Chief Justice to name the judges of a trial-at-bar. These provisions were brought over to the current Criminal Procedure Code Act, No. 15 of 1979 as amended.

have been adjourned by the relevant High Court judge for weeks.<sup>551</sup> In instances where trial is by a judge sitting alone, due to the large number of cases to be heard, the witnesses are not given sufficient time to record their statements and are required to attend court on several occasions.

Quite often the adjournment between two trial dates where the same witness gives testimony can range from a couple of months to even to two years. Also, it is usual for differences in testimony to occur due to forgetfulness as a result of long delays and this leads inevitably to acquittals.<sup>552</sup>

Delays are also occasioned by the lackadaisical nature of prosecutions as well as by the failure of other government departments, such as the Government Analyst's Department, to submit necessary reports to court on time.<sup>553</sup> This shortcoming was illustrated in the Kumarapuram Case even after the lapse of two years. The long delay in the Chemmani Case examined above is another illustration of such delayed trial processes. Indeed, the long pending nature of such prosecutions, which can amount to up to several years, has been a prevalent feature from the 1980's onwards.<sup>554</sup> Delay in the trial process is a major reason for acquittals in prosecutions of grave human rights violations.

The delayed prosecutorial process in such cases is contrasted with other instances where the prosecutorial and the judicial systems have functioned with remarkable speed. This is exemplified in the manner in which the respective trials into the shooting of a High Court judge and the shooting of a torture victim on 21 November 2004 were conducted. (The killing of the first victim occurred coincidentally two days prior to the killing of the second victim.) The trial concerning the assassination of Judge Sarath Ambepitiya was conducted day-to-day before a trial-at-bar, consequent to immediate police investigations and apprehension of the suspects, and was concluded within seven months (the accused were found guilty and the convictions were upheld on appeal). In contrast, the indictments against the suspects in the killing of the torture victim, Gerald Perera was only issued after the lapse of several months and the murder trial is still pending.<sup>555</sup>

### 7.3. Judicial approaches in acquittal cases

This section focuses on some stark contrasts historically in the willingness of the judiciary to convict in cases such as Bindunuwewa, discussed above.<sup>556</sup> In that case, the Supreme Court overturned the High Court conviction of the accused. This example appears to be part of a pattern that prevailed across many High Court cases, in which there is a tendency to acquit where enforced disappearances are alleged, and

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<sup>551</sup> de Silva, Samith, op. cit.

<sup>552</sup> ibid.

<sup>553</sup> Delays in this instance are commonly attributed to lack of resources.

<sup>554</sup> Amnesty International, 'Sri Lanka; An Assessment of the Human Rights Situation', AI Index, ASA/37/1/93, 1993, at p. 3.

<sup>555</sup> 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.

<sup>556</sup> See section 3.7, Chapter Two, above (Illustrative Cases).

particularly where the complaint is filed late.<sup>557</sup> Acquittals have also ensued on the basis that the indictment had been wrongly framed in that given that the facts disclosed unlawful detention with the intention of causing his death, then, the charge should have been under Section 355 of the Penal Code (kidnapping or abducting in order to murder) rather than under Section 356 (kidnapping or abducting with intent to secretly and wrongfully confine a person.)<sup>558</sup> In this case, the High Court studiously abstained from exercising its legally conferred authority<sup>559</sup> to amend the indictment charges. The Attorney General, too, might have been expected to call for an amendment of the indictment.<sup>560</sup>

A stark contrast is evident between the judicial approach in these cases and different judicial reasoning in response to almost similar factual situations brought before the High Courts where convictions were handed down<sup>561</sup> instead of acquittals. This is reflective of the inconsistency in the judicial approach. In the cases handing down convictions, judges adopted a set of reasons that hold the use of police authority to account, even where their illegal acts and omissions may have been ordered by superiors.

In one such case,<sup>562</sup> the fact that the police complaint was made after a wait of four years and was in any event not produced at the trial did not serve to undermine the credibility of the witness. The fact that this witness had testified before the 1994 Central, North Western, North Central and Uva Disappearances Commission is, in

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<sup>557</sup>H.C. Case No. 94/99, High Court of Hambantota, H.C. Minutes 04.02.2004; H.C. Case No. 14/2001, High Court of Hambantota, H.C. Minutes 25.08.2003 and H.C. Case No. 24/2002, High Court of Hambantota, H.C. Minutes 19.06.2003. Legal precedent is instructive in this respect. In *Jayawardene v the State*, [2000] 3 Sri LR 192, it was held that, given the fact that normalcy prevailed in the country by 1991, it was not reliable to act on a complaint made in 1995 in regard to an alleged incident of enforced disappearance in 1989. A far more rational judicial view was expressed in *Sumanasekara v AG*, [1999] 3 Sri LR 137, wherein the Court said that if a valid reason is given for the delay, this must be accepted. In all the cases of acquittals, the reasons given by the complainants relating to their fear that they would be harassed by the police, are not accepted. In many of the acquittals the ratio in *Sumanasekara v. AG* (supra) has been applied rigidly.

<sup>558</sup>H.C. Case No. 94/99, High Court of Hambantota, H.C. Minutes 04.02.2004.

<sup>559</sup>Section 167(1) of the Code of Criminal Procedure Act – “Any court may alter any indictment or charge at any time before judgment is pronounced or, in the case of trials before the High Court by a jury, before the verdict of the jury is returned.”

<sup>560</sup>Section 160(3) of the Code of Criminal Procedure Act confers the authority on the Attorney General to substitute or include in the indictment any charge in respect of any offence which is disclosed in evidence. In the *Krishanthi Kumaraswamy* Case, an objection that the Attorney General has no power to add the charge of rape to the indictment (which charge was not on the indictment before the Chief Justice, on the basis of which a trial-at-bar was directed to be constituted) was dismissed out of hand by the Supreme Court, referring to Sections 167 and 160(3) of the Act.

<sup>561</sup>H.C. Case No.1284/99, High Court of Kandy, H.C. Minutes 30.08.2000. per (then) High Court judge Samith de Silva; H.C. Case No. 1947, High Court Galle, H.C. Minutes 01.08.2003. per (late) High Court judge Sarath Ambepitiya. See also a recent decision of the Court of Appeal affirming one such conviction at the High Court stage in *Liyanadeniya Aratchilage Tikiri Banda v. Attorney General*, 2007(1) Appellate Law Recorder (ALR), at p.40, per Eric Basnayake J. (with Jagath Balapatabendi J. agreeing). In this instance, the Court of Appeal ruled that a defence that a policeman had acted on superior orders cannot be accepted as a valid defence and further queried as to why the officer in charge of the police station had not been indicted by the Attorney General. For another recent decision, see ‘*Appeal Court doubles sentence*’, BBC News of 4<sup>th</sup> August 2009 where the Court of Appeal doubled the sentence of six years rigorous imprisonment imposed by the Panadura High Court in 2001 on a soldier for abducting and ‘disappearing’ two brothers in the late 1980s. These decisions illustrate the strict approach taken by the Court of Appeal in this regard in recent times.

<sup>562</sup>H.C. Case No.1284/99, High Court of Kandy, H.C. Minutes 30.08.2000.

fact, acknowledged.<sup>563</sup> The accused, in his dock statement, had stated that he may have taken the abducted person into custody on the day in question. The judges then asked why, if this was the case, the abducted person was not produced in court thereafter. Discrepancies recorded in the police information book were also held against the accused. This judgment was affirmed in appeal. Importantly, the defence of superior orders relied upon by the accused in appeal was categorically rejected.

That cannot be held as a valid defence. If the policeman breaks the law even under the orders of his superiors, he has to suffer the consequences. Even if (the) accused (acted, sic) on the orders of a superior, the burden would be in him to prove it on a balance of probability.<sup>564</sup>

A similar affirmation of accountability for the consequences of omissions was reflected in another conviction relevant to a case of enforced disappearance.<sup>565</sup> Here, a further innovative feature was the conviction of the officer-in-charge of the relevant police station on the judicial reasoning that even though he was aware of the unlawful abduction and detention of the three abducted persons at his police station, he took no action. He was therefore culpable in terms of Section 359 of the Code of Criminal Procedure Act in relation to wrongfully concealing or keeping in confinement, a kidnapped or abducted person, read with Section 356 of the Penal Code. Based on credible evidence of witnesses that established his state of knowledge in this regard beyond all reasonable doubt, his guilt was held to have been sufficiently proved.

As these decisions are yet in the appeal stage, either at the level of the Court of Appeal or on further appeal to the Supreme Court, there is as yet, no firm legal precedent established. This is an appropriate context perhaps where a Divisional Bench may lay down an unequivocal precedent as to the nature of command responsibility relevant in these cases.

#### **7.4. Sentencing**

The problem of inadequate sentencing is exemplified in the Embilipitiya Case discussed above. Unlike in the Krishanthi Kumaraswamy Case, in which the serious crimes of rape and murder formed the basis for the convictions, the facts of the Embilipitiya Case gave rise to relatively less serious offences: namely abduction, secret and unjustifiable detention, aiding and abetting such action with common intention or conspire to assist in such an action with a common intention or not, with the purpose of causing the death of the students or putting them into danger. Correspondingly, the sentences liable to imposed ranged from five to ten years rigorous imprisonment (RI).

Even so, due to the cluster of offences for which each accused was found guilty, (in some cases, as in the case of the seventh accused who was convicted on thirty-three

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<sup>563</sup>This rare link may have been occasioned by the fact that the High Court judge in this case had, in fact, been assisting this Commission from the Attorney General's Department during the hearings.

<sup>564</sup> At p. 5 of the Appeal Court judgment, in CA No 83/2000, C.A. Minutes 24.11.2006.

<sup>565</sup>H.C. Case No. 1947, High Court Galle, H.C. Minutes 01.08.2003.

counts)<sup>566</sup> a cumulatively harsh sentence could have been individually imposed. However, the decision by the High Court, upheld on appeal, that the sentences should run concurrently, thus effectively restricting each sentence to a period of 10 years negated the severity of the sentence to a considerable extent. In addition, the order of the Supreme Court on appeal that the period in which the accused was in custody after conviction pending the appeal should be taken into account as having been served as part of the sentence further aggravated the minimizing of the deterrent impact of the sentence.

The Supreme Court remarked in this instance that ‘we have taken into account the fact that the accused-appellants have gone through a protracted trial and have been in custody for a period of nearly three years.’<sup>567</sup> It was however unfortunate that the gravity of the crimes in question were not weighed in the balance to militate against an application of the judicial discretion to take the years spent in prison after conviction into account when determining the time period of the sentence. It is important to put this point in the context of the applicable criminal law standards. In the Embilipitiya case, as the bodies of the students were never found, no charges of actual murder of the students were brought against the accused, resulting in it being possible only to indict for the lesser offences. This exemplifies the problem in the absence of a crime of enforced disappearances in the criminal law with a commensurate severe sentence.

## 8. Decisions of International Tribunals

As noted previously, decisions of international monitoring bodies in relation to enforced disappearances and extrajudicial executions have been treated cursorily by the government.

A classic example is one individual communication submitted to the United Nations Human Rights Committee under the Optional Protocol procedure by a father whose son had ‘disappeared’ in army custody in 1990.<sup>568</sup> The Committee found a violation of the rights to liberty and security and freedom from torture not only of the son but also of his parents who, the Committee concluded, had suffered ‘anguish and stress’ by the continuing uncertainty concerning his fate and whereabouts.

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<sup>566</sup>He was sentenced to five years RI on each count in regard to the first cluster of seventeen counts and to ten years RI on each count in regard to the second cluster of 16 counts. In appeal, his convictions were varied to the extent that he was acquitted on the conspiracy charges in counts 2 and 4.

<sup>567</sup>*Embilipitiya Case* S.C. (Spl) L.A. Nos. 15-20/2002, SCM 14.02.2003, at p. 6, per former Chief Justice Sarath Silva. The period 10.02.1999 - 04.01.2002 was taken into account as having been served as part of the sentence. This meant that the accused would be free from his sentence on 10.02.2009.

<sup>568</sup>*Jegetheeswaran Sarma v. Sri Lanka*, CCPR/C/78/D/950/2000, adoption of views, 31.07.2003. The First Optional Protocol to the ICCPR which allows persons subject to the jurisdiction of the State to bring an individual communication before the United Nations Human Rights Committee (UNHRC) sitting in Geneva, alleging a violation of Covenant rights, entered into force for Sri Lanka on 03.01.1998. In so submitting itself, the State made a declaration that it; “recognises the competence of the Human Rights Committee to receive and consider communications from individuals subject to the jurisdiction of the Democratic Socialist Republic of Sri Lanka, who claim to be victims of a violation of any of the rights set forth in the Covenant which results either from acts, omissions, developments or events occurring after the date on which the Protocol entered into force for the Democratic Socialist Republic of Sri Lanka, or from a decision relating to acts, omissions, developments or events after that date.”

The Human Rights Committee affirmed that even where an official is acting *ultra vires*, the State is responsible if it provided the means or facilities to accomplish the act. The State was advised to expedite ongoing criminal proceedings against individuals implicated in the enforced disappearance, to ensure the prompt trial of all persons responsible for the abduction, and to provide the victims with an effective remedy, including a thorough and effective investigation into his enforced disappearance and fate; immediate release if still alive; adequate information resulting from its investigation; and adequate compensation for the violations suffered by him and his family. These Views have thus far been ignored.

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