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PROTECTING RIGHTS IN SRI LANKA; MANIFEST DILEMMAS AND MANIFOLD PROBLEMS

LAW & SOCIETY TRUST

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Editor's Note ... ...

This Double Issue of the Review encompasses a wide range of papers, articles and reports all dealing with the manifest dilemmas and the manifold problems of protection of rights in Sri Lanka today. We have published as an appropriate commencement to these discussions, the latest Communication of Views by the United Nations Human Rights Committee in terms of the First Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR). In ***Raththinde Katupollande Gedara Dingiri Banda vs Sri Lanka***, the Committee expressed its concerns regarding the continuing question of impunity for those who commit abusive acts under cover of office.

In this instance, the victim (himself, a military officer) was abused by his senior colleagues ostensibly during a 'ragging' ceremony. While this incident itself may have been relatively nondescript, the extent of the injuries inflicted had been grave, thus necessitating in him having to leave military service. Thereafter, his complaints remained unaddressed; a military tribunal (at which the victim was not allowed to present evidence) merely recommending forfeiture of seniority in regard to the two senior officers who had perpetrated the abuse. Indeed, the two perpetrators had later been promoted. Cases filed by the victim at all stages of the legal process, namely the Magistrate's Court, the District Court and the Supreme Court were to no avail. In a development of serious concern, the victim alleged that the fundamental rights case that he had filed in the Supreme Court after seeking legal assistance from the Bar Association of Sri Lanka, had, in fact, been settled against his will.

Considering these facts, the Committee rejected the State party's argument that the two perpetrators had already been tried and punished by a military tribunal and could not be tried again. Buttressing this view, the Committee observed that this military tribunal had no jurisdiction to try anyone for acts of torture, that the victim had not been represented and that the punishment given to the two perpetrators was only a temporary forfeiture of seniority despite the serious injuries caused to the victim. Moreover, none of the legal proceedings had resulted in effective relief being given to him. The settled rule of general international law that all branches of government, including the judicial branch, may be in a position to engage the responsibility of the State party was reiterated and a violation of ICCPR Article 2(3) read with Article 7 was found.

This Communication is significant in several respects. First, it is relevant in the context of the question of laws delays and the effectiveness of the legal remedies proposed. Secondly, the spurious use of the concept of double jeopardy to justify as to why a prosecution was not launched under the Convention Against Torture and other Inhuman and Degrading Punishment Act No 22 of 1994 well illustrates the

tortuously circumlocutory arguments that Sri Lanka's prosecution agencies resort to in attempting to deny justice to victims. The three fold failure of the investigative, prosecutorial and legal process in this country in many cases of this nature must remain of serious concern to persons of all ethnicities in Sri Lanka, Sinhalese, Tamils, Muslims and others as the case may be.

From another perspective, the hypocrisy of the Sri Lankan State in continuing to make their submissions in Individual Communications before the United Nations Human Rights Committee, despite the fact that the 2006 judgment of the Supreme Court in the *Sinharasa* case (see LST Review, Volume 17, September and October Joint Issue - 227 and 228) has rendered such Communications to be of no force or effect within the country, is palpable. Ideally, the Government should have passed domestic legislation and engaged in other measures necessary in order to overcome the difficulties posed by the *Sinharasa* case which declared that the Presidential act of accession to the Protocol was an unconstitutional exercise of legislative power as well as an equally unconstitutional conferment of judicial power on the Committee. In the alternative, there should have been an open acknowledgement of the inability to do so instead of recourse to dishonest measures such as the recently passed so-called "ICCPR Act' which only reproduced a few selected ICCPR rights.

The second and third articles that the Review publishes, discusses the functioning of the *Presidential Commission of Inquiry to Investigate and Inquire into Allegations of Serious Human Rights Violations* established by the Government of Sri Lanka on November 03, 2006. In timely analysis given the expiry of a full one year since the Commission was established, two papers by ***Howard Varney*** and ***Dulani Kulasinghe*** examine the deficiencies in its functioning. In particular, it is recommended by the first writer that the Commission should not solely preoccupy itself with investigating the identified crimes but also ascertain as to why these crimes, together with the other thousands of similar cases have not been solved by the law enforcement or prosecutorial agencies. This eminently sensible recommendation may however be prevented by a new condition attaching to the extension of the mandate of this Commission in November 2007 which states that 'the Commission is not required in any way to consider, scrutinize, monitor, investigate or inquire into the conduct of the Attorney General or any of his officers with regards to or in relation to any investigation already conducted into the relevant incidents.'

While this was not a condition attaching to the original mandate of the Commission, its inclusion at this stage is only indicative of the unfortunate defensiveness with which the Department of the Attorney General views its own actions in these cases and indeed, is a considerable limitation on the authority of the Commission. The fact that the Commissioners themselves appear to have consented, without protest, to

this unwarranted narrowing of their authority detracts from the integrity of their involvement

Meanwhile, the explicit inclusion in the extended mandate that 'the Commission could continue to obtain the assistance of officers of the Attorney General's Department' conflicts with the oft expressed concerns of the International Independent Group of Eminent Persons (IIGEP) that the involvement of the officers of the Attorney General amounts to a conflict of interest and that legal counsel assisting the Commission should be drawn from the independent bar. Given that the prosecutorial role in many of these cases is also an integral part of the process to be investigated, as stated above, this is an understandable - though now completely bypassed - concern.

We next publish an extract of a working document listing persons killed/disappeared during the period 1 January to 31 August 2007, released by the Conflict and Human Rights Programme of the Law and Society Trust in collaboration with the Free Media Movement and the Civil Monitoring Commission. The data, obtained from media monitoring and direct contact with field level activists, is revised and updated with errors made *bona fide* being corrected as new and credible information becomes available.

The Review also publishes a Discussion Paper by the ***International Commission of Jurists*** on an effective international human rights monitoring presence in Sri Lanka. The Paper is published in the interests of enabling informed public understanding as to the context in which such a call is made. However, ultimately it is the Sri Lankan people themselves who must address the gravity of the breakdown in domestic structures of accountability with all the collective strength that can be mustered. Constructive international interventions can only help in such internal efforts and cannot be urged in isolation. The extent of such breakdown in domestic structures of accountability is meanwhile further addressed in the next paper analyzing the performance of Sri Lanka's Human Rights Commission submitted by the Trust as part of the documentation for the 12th Annual Meeting of the Asia Pacific Forum of National Human Rights Institutions (APF sessions) in Sydney, September 2007 as well as in the publication of concerns raised by the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Novak during a Mission Visit to Sri Lanka, 1st to 8th October 2007.

The final publication in this Issue pertains to a book review by ***Judge C.J. Weeramantry*** on *'The Protection of Culture, Cultural Heritage and Cultural Property'* by Justice A. R. B. Amerasinghe.

Kishali Pinto-Jayawardena

Raththinde Katupollande Gedara Dingiri Banda vs Sri Lanka

Human Rights Committee

Ninety-First Session

15 October to 2 November 2007

Views - Communication No. 1426/2005

Submitted by: Raththinde Katupollande Gedara Dingiri Banda (represented by counsel, the Asian Legal Resource Centre)
Alleged victim: The author
State Party: Sri Lanka
Date of communication: 20 June 2005 (initial submission)
Document references: Special Rapporteur's rule 97 decision, transmitted to the State party on 23 August 2005 (not issued in document form)
Date of adoption of Views: 26 October 2007

Made public by decision of the Human Rights Committee.
Subject matter. Ill-treatment of army officer by other members of the armed forces
Procedural issue: non-substantiation of claim
Substantive issues: prohibition of torture and cruel, inhuman and degrading treatment: right to security of the person; right to an effective remedy
Articles of the Covenant. article 7; article 9; article 2, paragraph 3
Article of the Optional Protocol: article 2
On 26 October 2007, the Human Rights adopted the annexed text as the Committee's Views, under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1426/2005.

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights - Ninety-first session concerning Communication No. 1426/2005*

*The following members of the Committee participated in the examination of the present communication: Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glélé Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Julia Antoanella Motoc, Ms. Elisabeth Palm, Mr. José Luis Perez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,
Meeting on 26 October 2007,
Having concluded its consideration of communication No. 1426/2005, submitted to the Human Rights

Committee by Raththinde Katupollande Gedara Dingiri Banda, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication, dated 20 June 2005, is Raththinde Katupollande Gedara Dingiri Banda, a Sri Lankan national born on 24 February 1962. He claims to be a victim of violations by Sri Lanka of article 7; article 9, paragraph 1; and article 2, paragraph 3, of the Covenant. He is represented by counsel, the Asian Legal Resource Centre. The Covenant and the Optional Protocol entered into force for the State party on Il September 1980 and 3 January 1998, respectively.

The facts as presented by the author

2.1 The author was an officer in the Gajaba regiment of the Sri Lanka Army. On the night of 21 October 2000, he was asleep at his quarters at the Saliyapura camp. Just after midnight, two superior officers came and physically assaulted him. As a result of the assault, the author suffered severe injuries and was admitted to the Military Hospital of Anuradhapura the following day. He was soon moved to the General Hospital of Anuradhapura for further treatment, since his condition was deemed critical. On 3 November 2000, he was moved to the intensive care unit of the General Hospital of Kandy where he remained for one month. He remained at this hospital until 26 January 2001. The injuries sustained by the author included renal and respiratory failures, genital bleeding and impairment of liver functions.

2.2 The author was granted leave for medical reasons until 16 February 2001. After that date, he was moved to the Army Hospital in Colombo for a week and granted a further period of sick leave until 20 April 2001. On 21 April 2001, he was admitted to the Centre for Rehabilitation of the Saliyapura Army Camp. Since his health was still deteriorating, he was re-admitted at the Military Hospital of Anuradhapura on 30 April 2001: He was then categorised as a person "not fit enough to handle firearms" by the psychiatrist of the General Hospital of Kandy. On 20 October 2001, he was also categorised as a person destined to "sedentary duties", since his left kneecap had calcified as a result of the injuries he had suffered. Since then, the author has lost his position in the Sri Lanka army because he was declared unfit to serve in the military.

2.3 The author filed a complaint against the perpetrators of the assault before the Military Court. As a result, the Regimental Commander of the Gajaba Regiment Detachment at the Saliyapura camp ordered an inquiry into the incident. However, the author was not granted any opportunity to present evidence during that inquiry. The Court of Inquiry, composed of officers from the Gajaba Regiment, concluded that the two perpetrators of the assault had acted in an offensive and scandalous manner that caused disrepute to the Sri Lanka Army. Nevertheless, no Court Martial was subsequently convened and the perpetrators

were only given a temporary suspension of their promotion. The perpetrators were later promoted and serve today as captains in the Sri Lanka Army.

2.4 Following the submission of a police report, a non-summary inquiry was initiated before the Magistrate's Court of Anuradhapura against the two perpetrators on charges of attempted murder.[1] On 13 June 2003, the author gave a statement before the court, providing all details about the incident. The inquiry is still on-going after five years. The delay has been caused by the failure of the Medical Officer to send his medical report on the author's injuries, despite several requests from the Court.

2.5 On 19 August 2002, the author filed a fundamental rights application in the Supreme Court of Sri Lanka. He was assisted by a *pro bono* counsel assigned to him by the Human Rights Centre of the Colombo Bar Association. In view of the several attempts made by the perpetrators to reach a friendly settlement in the matter, the author sent a letter to his counsel dated 25 June 2004 giving him specific instructions not to agree to any settlement with the perpetrators. However, on 28 June 2004, he learnt that his counsel had appeared before the Supreme Court and withdrawn his application. The proceedings before the Supreme Court were thus terminated. He immediately wrote to the Chief Justice and to his counsel to have the case resumed for hearing. He has not received any reply. The author also filed a complaint against his counsel with the Colombo Far Association. However, no inquiry in this matter has been conducted so far.

2.6. On 14 October 2002, the author filed a civil complaint before the district Court of Anuradhapura, claiming civil damages from the perpetrators. This procedure has also been repeatedly adjourned and no decision has been handed down.

2.7 On 3 September 2004, two unknown persons called at the author's house asking for him. When his sister replied that she did not know where he was, they warned her that they knew how to trace him. Following this incident, the author started to receive death threats, warning him not to proceed with the case. He has been in hiding since 3 September 2004. Despite several requests to this effect from his current counsel, he has not yet been provided with any protection by the authorities.

The complaint

3.1 The author alleges a violation of article 7 of the Covenant, because he was severely assaulted by two Army officers on 21 October 2000. The resulting injuries were so severe that they led to the author being certified as unfit to serve in the Army.

3.2 The author claims a violation of article 9, paragraph 1, of the covenant because he is under continued threat from his assailants who have successfully evaded any form of punishment for injuring him. He argues that it is not rare for victims of torture in Sri Lanka to be harassed for the mere reason that they pursue their torture case against the police. By failing to take adequate action to ensure that he is

[1] A non-summary inquiry is a preliminary inquiry for the recording of statements by a magistrate before the indictment is filed at the High Court for a serious crime, e.g. murder or attempted murder.

protected from threats by those who tortured him or other persons acting on their behalf the State party has breached article 9, paragraph 1.

3.3 The author further alleges a violation of article 2, paragraph 3, of the Covenant. He recalls that despite four different proceedings initiated by the author, none of the domestic bodies has provided him with an effective remedy against the violation of his rights under the Covenant. He also recalls that the Committee has concluded in the past that the lack of effective remedies was in itself a violation of the Covenant [2] and invokes General Comment No. 20 on article 7. In his own case, investigations into the acts of torture were not initiated after five years since the incident. No disciplinary or other action was taken against the alleged perpetrators and the existing proceedings are at a standstill. Moreover, the author has been of the object of threats and other acts of intimidation.

3.4 The author states that his complaint has not been submitted to another procedure of international investigation or settlement. With regard to the issue of exhaustion of domestic remedies, he recalls that he has attempted to obtain redress through a fundamental rights application and before the criminal and civil courts. He has not obtained any result after five years and has even been subjected to threats and other acts of intimidation because he has initiated these procedures. He therefore considers that the remedies are not effective and need not be exhausted.[3]

3.5 The author invites the Committee to recommend that the State party take necessary action to ensure that he receives full reparation, including rehabilitation without delay;

- that criminal procedures relating to his assault and torture be concluded promptly;

- that he is not submitted to further threats in connection with the procedures that he has initiated;

- and that appropriate legislative changes be adopted to provide effective, impartial and adequate remedies for the violations of individual rights without delay by ensuring a prompt investigation and trial.

State party's observations on admissibility and merits

4.1 On 22 February 2006, the State party contested the sequence of events as presented by the author. It recalled that having served at several formations in the Sri Lanka Army, the author had reported for duties to the Saliyapura camp on 20 October 2000. On 24 October 2000, he requested sick leave because he had been found at "fault for unusual rhythm in saluting". Since his behaviour had been thought suspicious, he was brought before the Centre Commander. He did not complain of any assault then. On the same day, he was admitted to the Military Hospital of Anuradhapura. He was later transferred to the General Hospital of Anuradhapura, and then to the General Hospital of Kandy.

[2] See Communication No. 90/1981, Luyeye c Zaire, views adopted on 21 July 1983, para 8.
[3] See Communication No.986/2001, Semey v. Spain, Views adopted on 30 July 2003, para.8.2; and Communication No. 859/1999, Jiménez Vaca v. Colombia, Views adopted on 25 March 2002, para.6.3.

4.2 On a complaint made by the author, the Military Police and the civil police initiated investigations into the alleged assault by Captains Bandusena and Rajapaksha from the Gajaba regiment. On 6 November 2000, the Military Police handed the two officers over to the civil police. The following day, they appeared before the Magistrate's Court of Anuradhapura and were remanded in custody. There were released on bail on 22 November 2000. On a complaint made by the author's wife, the Human Rights Commission of Sri Lanka called for a report from the Commander of the Army with regard to the alleged assault. This report was submitted on 20 November 2000. The author also filed a fundamental rights application to the Supreme Court. On 28 June 2004, proceedings in this case were terminated.

4.3 The Gajaba regiment appointed a Court of Inquiry to investigate the alleged assault. The Court found that the two officers mentioned above had assaulted the author on 21 October 2000. Upon the recommendation of the Commander of the Army, summary trials were held against the two officers who pleaded guilty to the charges against them. By way of punishment, they were awarded forfeiture of seniority of 10 and 9 places in the Officers' Seniority List of the Regular Force of Sri Lankan Army. They were also denied promotions, local and foreign courses and other privileges.

4.4 The State party submits that it was the author who requested, on 16 March 2001, that he appear before an Army Medical Board in order to retire from military service. The Board recommended that he be discharged from the Army on medical grounds and he accordingly retired from the Army on 23 February 2002. He was paid a lump sum and started receiving a monthly pension, as well as an annual disability pension.

4.5 On the alleged violation of article 7, the State party submits that the two officers who assaulted the author were allegedly "ragging" him, as he was a newcomer to the regiment. It notes that the author does not describe the background to this assault and that instead he submitted to the Committee selected extracts of the proceedings before the Magistrate's Court of Anuradhapura. It claims that the text of the full proceedings would have shown why the case was postponed and would have highlighted the weakness of the author's evidence. The State party also submits that any form of ragging newcomers by the seniors is contrary to the rules and regulations pertaining to discipline in the Sri Lanka Army which has established a Court of inquiry and conducted trials against the officers responsible. Since the two officers held the rank of Captain, they were tried summarily. This is normal practice for all officers below the rank of Major. The State party explains that the accused officers received the highest possible punishment which could be given at a summary trial, namely forfeiture of seniority. It also explains that the summary trial held under the Army Act is for all purposes, a criminal trial. Therefore, since the two officers were tried and punished, it is now impossible to hold another criminal trial against them based on the same facts. The State party submits that the author has failed to establish a violation of article 7, that the accused officers have been tried and punished, that the maximum possible sentence has been imposed on them, that the Supreme Court has terminated the proceedings on the basis that the author agreed to receive compensation and that the author has claimed damages from the two officers before the District Court.

4.6 On the alleged violation of article 9, paragraph 1, the State party argues that the author never claimed or alleged that he was subjected to any arrest or detention. He has made a vague allegation of being subjected to threats from those who had assaulted him. While he claims that he has made some written requests for protection, he does not state where such complaints were directed to, nor does he submit copies of them. In any case, he should have directed them to the nearest police station or to the Commander of the Army. He thus cannot complain of a violation of article 9, paragraph 1.

4.7 On the alleged violation of article 2, paragraph 3, the State party notes that the author himself admits that he had recourse to four different proceedings. With regard to the summary trial conducted by the Sri Lanka Army, it explains that since the offences were not of the category which had to be tried only by a court martial and on the basis of the ranks held by the accused officers, they could be tried only by a summary trial since they did not make any request for a court martial. As the officers pleaded guilty, there was no need to present evidence against them. The Court imposed the maximum possible punishment that could be imposed at a summary trial. With regard to the Magistrate's Court proceedings, the State party submits that the author has "failed to provide all the proceedings at this trial" and that in any case, the same accused should not be tried again for the same incident under the "double jeopardy" rule. With regard to the District Court proceedings, it notes that it has not been named as a party to these proceedings and that it cannot be held liable for any delay if any.

4.8 With regard to the Supreme Court proceedings, the State party notes that since these proceedings were not criminal proceedings, it was not possible to either convict or sentence those who violated the author's fundamental rights: the Supreme Court can only grant a declaration that the author's fundamental rights have been violated and any further relief in a just and equitable manner. It submits an affidavit from the author's counsel dated 16 February 2006 in which he denies having received the letter from the author prior to the settlement entered in court on 28 June 2004. Counsel recalls that the author was present in court on that day and never instructed him against the settlement. The State party claims that the author has tried to mislead the Committee by hiding the following facts. Firstly, he did write to the Supreme Court on 23 July 2004 requesting that his case be re-listed and this request was to be examined by the Court on 27 September 200 4. However, he did not appear in court that day and consequently, the Court decided not to take any further action on the request. Secondly, the author made a second attempt on 20 October 2004 to have his case re-listed. This request was denied by the Chief Justice in the light of the Order made by the Court on 27 September 2004.

4.9 The State party added that the wife also made a complaint to the National Human Rights Commission. As a result, the Commission requested on 7 November 2000 that the Sri Lanka Army submit a full report on the incident. The Army submitted its report to the Commission on 20 November 2000, in which it explained that a Court of inquiry had been established to look into the matter. The Human Rights Commission appeared to be satisfied with the action taken by the Army, since it did not send any further communication afterwards.

4.10 The State party implicitly argues that domestic remedies have not been exhausted in the case, by asserting that the domestic mechanisms available provide more than adequate avenues of redress for any person, such as the author, who claims that his human rights have been violated.

Author's comments on the State party's submissions

5.1 On 12 May 2006, the author notes that the State party accepts that two officers had assaulted him and argues that, in the light of the detailed medical evidence on the injuries that he suffered as a result, this assault amounts to torture or cruel and inhuman treatment under article 7 of the Covenant. He recalls that the Convention against Torture has been incorporated into Sri Lankan law through Act No.22 of 1994 and this Act provides that a person committing torture should be tried by the High Court. He argues that the State party has breached its obligation to provide him with a remedy since he was given no remedy under criminal law and has received no compensation.

5.2 The author submits that the arguments raised by the State party on the basis of the summary trial held against the two alleged perpetrators, i.e. the issue of double jeopardy and the issue of the pending civil case, are not valid defences against his claim of violations of his rights. The officers were charged only for breach of military discipline and had the option of choosing court martial proceedings or a summary trial. During the trial, the author had no choice to advance his case. The punishment given to the two officers was a forfeiture of seniority, which was not effective since both have since been promoted. The two officers were neither tried, nor convicted for torturing the author, because the military court had no jurisdiction to try anyone for acts of torture. Only the High Court can do so. On the issue of double jeopardy, the author recalls that section 77 of the Army Act does not limit the jurisdiction of a civil court to try the two officers for committing acts of torture.[4] Consequently, there is no obstacle for the two officers to be tried by the appropriate High Court. Besides, the author notes that the two officers have not raised the defence of double jeopardy before the Magistrate's Court where the initial proceedings have been pending for the last five years.

5.3 With regard to the fundamental rights case filed by the author before the Supreme Court, he recalls that proceedings were terminated on 28 June 2006 without explanation. It is not mentioned anywhere in the journal entries of the Court that proceedings were terminated with the consent of the parties. The author also explains that where a person applies to withdraw the case, the Supreme Court has held that it will in each case use its discretion to allow or not such an application for withdrawal. In the present case, there is no indication that the Court has allowed what the parties had consented to. The author did not consent to any form of termination of the proceedings and has not accepted any money as part of a settlement. While the State party seems to suggest that a friendly settlement was reached between the parties, the author denies this. In any case, in a fundamental rights case, the Supreme Court can only dismiss the case under article 126 of the Constitution for lack of merits or grant the relief claimed by the

[4] Section 77 of the Army Act provides that "Save as provided in subsection (2) of this section, nothing in this Act shall affect the jurisdiction of a civil court to try, arrest, or to punish of any civil offence any person subjected to military law". Section 162 of the ACT defines a "civil court" as "any court other than courts martial" and a "civil offence" as "an offence against any law of Sri Lanka which is not a military offence".

petitioner.[5] Therefore, the word "terminated" has no legal meaning within the Constitution of Sri Lanka. The author had filed before the Court all the relevant documents and the Court could only have made a decision on merits.

5.4 The author tried to get the case reopened before the Supreme Court on two occasions. On the first occasion, the court allowed the case to be called. However, as the author received the notice after the date in which he was called to appear in court, he filed a further motion seeking another occasion to request the Court to proceed with his case. This time, the Court did not issue notice for the author to come before it.

5.5 With regard to the case pending before the Magistrate's Court, the author recalls that proceedings have not been concluded five years and six months after the incident. This cannot be considered an effective remedy. With regard to the civil case pending before the District Court of Anuradhapura, he notes that the State party affirms that since it is not a party to these proceedings, it does not acknowledge its obligation to provide an effective civil remedy to human rights violations.

5.6 With regard to the alleged violation of article 9, paragraph 1, the author reiterates that he has been repeatedly threatened and has made several complaints to the police and military authorities. On one occasion, he even received death threats from unidentified persons. He regularly moves places in order to evade danger.

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[5] Article 126 of the Constitution provides that :
(1) The Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by executive or administrative action of any fundamental right or language right declared and recognized by Chapter III or Chapter IV.
(2) Where any person alleges that any such fundamental right or language right relating to such person has been infringed or is about to be infringed by executive or administrative action, he may himself or by an attorney-at-law on his behalf, within one month thereof, in accordance with such rules of court as may be in force, apply to the Supreme Court by way of petition in writing addressed to such Court praying for relief or redress in respect of such infringement. Such application may be proceeded with only with leave to proceed first had and obtained from the Supreme Court, which leave may be granted or refused, as the case may be, by not less than two Judges.
(3) Where in the course of hearing in the Court of Appeal into an application for orders in the nature of a writ of habeas corpus, *certiorari*, prohibition, *procedendo, mandamus or quo warranto*, it appears to such Court that there is prima facie evidence of an infringement or imminent infringement of the provisions of Chapter III or Chapter IV by a party to such application, such Court shall forthwith refer such matter for determination by the Supreme Court,
(4) The Supreme Court shall have power to grant such relief or make such directions as it may deem just and equitable in the circumstance in respect of any petition or reference referred to in paragraphs (2) and (3) of this Article or refer the matter back to the Court of Appeal if in its opinion there is no infringement of a fundamental right or language right.
(5) The Supreme Court shall hear and finally dispose of any petition or reference under this Article within two months of the filing of such petition or the making of such reference."

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with article 93 of its rules and procedures, decide whether or not it is admissible under the Optional Protocol of the Covenant.

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2(a), of the Optional Protocol.

6.3 On the alleged violation of article 9, paragraph 1, the Committee notes the State party's argument that the author has never claimed or alleged that he was subjected to any arrest or detention. With regard to the author's allegation of being subjected to threats from those who had assaulted him, the State party argued that the author does not state where such complaints were directed to, nor does he submit copies of these complaints. The Committee notes that the author merely reiterated that he had made several complaints to the police and military authorities, without providing any further details. It therefore concludes that the author has not substantiated his claim under the Covenant, for purposes of admissibility, and finds that this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.4 In relation to the State party's contention that domestic mechanism available provide more than adequate redress to any person complaint about a violation of his or her human rights, the Committee recalls its jurisprudence that domestic remedies most not only be available but also effective. It considers that in the present case, the remedies relied upon by the State party have either been unduly prolonged or appear to be ineffective.

6.5 On the basis of the information available to it, the Committee concludes that the claims based on article 7 and article 2, paragraph 3, are sufficiently substantiated, for the purpose of admissibility, and finds the rest of the communication admissible.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information available to it, as provided under article 5, paragraph 1, of the Optional Protocol.

7.2 With regard to the alleged violation of article 2, paragraph 3, the Committee notes that the proceedings against the two alleged perpetrators have been pending in the Magistrate's Court of Anuradhapura since 2003, and that the proceedings concerning the author's fundamental rights application before the Supreme Court have been terminated in unclear circumstances. The committee

reiterates its jurisprudence that the State party is under a duty to investigate thoroughly alleged violations of human rights, and to prosecute and punish those held responsible for such violations.[6]

7.3 The Committee notes the State party's argument that the two perpetrators have already been tried and punished by a Military Court of Inquiry and cannot be tried again. The Committee observes that this Court of Inquiry had no jurisdiction to try anyone for acts of torture, that the author was not represented and that the punishment given to the two perpetrators was only forfeiture of seniority, despite the fact that the author had to be hospitalised for several months and had several medical reports describing his injuries. With regard to the proceedings before the Magistrate's Court, the Committee notes that while both parties accuse each other of responsibility for certain delays in these proceedings, they are still ongoing after more than seven years. The delay is further compounded by the State party's failure to provide any timeframe for the consideration of the case. With regard to the proceedings before the District Court which are still pending after five years, the Committee notes that the State party merely argues that it has not been named as a party to these proceedings and that it cannot be held liable for any delay if any. However, the Committee reiterates the settled rule of general international law that all branches of government, including the judicial branch, may be in a position to engage the responsibility of the State party.[7]

7.4 Under article 2, paragraph 3, the State party has an obligation to ensure that remedies are effective. Expedition and effectiveness are particularly important in the adjudication of cases involving torture and other forms of mistreatment. The Committee considers that the State party may not avoid its responsibilities under the Covenant with the argument that the domestic courts have already dealt or are still dealing with the matter, when it is clear that the remedies relied upon by the State party have been unduly prolonged and would appear to be ineffective. For these reasons, the Committee finds that the State party has violated article 2, paragraph 3, read together with article 7 of the Covenant. Having found a violation of article 2, paragraph 3, read together with article 7, and in light of the fact that the consideration of this case, as it relates to the claim of torture, remains pending before the Magistrate's Court, the Committee does not consider it necessary, in this particular case, to determine the issue of a possible violation of article 7 alone of the Covenant.[8]

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal violations by the State party of article 2, paragraph 3, read together with article 7 of the Covenant.

9. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including adequate compensation. The State party is under an obligation to take effective measures to ensure that the Magistrate's Court proceedings are

[6] See communication No. 1250/2005, Rajapakse v. Sri Lanka adopted on 14 July 2006, para 9.3
[7] See General comment No. 31 (2004), para 4.
[8] See Footnote *6, Rajapakse v. Sri Lanka,* para.9.5.

expeditiously completed and that the author is granted full reparation. The State party is also under an obligation to take measures to prevent similar violations in the future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, that State party has undertaken to ensure all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Reflections on Commissions of Inquiry: How Does Sri Lanka's Presidential Commission of Inquiry Compare with International Best Practice?

Howard Varney[*]

Why are Commissions of Inquiry Established?

Commissions are generally established to inquire into matters of importance and controversy. These can be matters such as government operations, the treatment of minorities, events of considerable public concern or economic questions and accidents that cause multiple deaths.

Commission proceedings should never be regarded as a substitute for judicial proceedings and as such should only be resorted to in exceptional situations. They should be regarded as inappropriate in relation to allegations of a crime unless the circumstances are particularly compelling, such as police and government corruption, police involvement in organised crime, ongoing police and prosecutorial incompetence and routine cover-ups.

Commissions can be useful to uncover the systems and methods that powerful and corrupt, public officials use to shield themselves from conventional investigation. Commissions may also be useful to inquire into the activities of political and economic power that they could easily evade ordinary methods of investigation. In such circumstances, a Commission may bring to light information which would otherwise be suppressed. Commissions are expected to investigate and to get to grips with what happened, why it happened and who was responsible for causing it to happen. In other words, commissions must find answers, namely the relevant facts. But an inquiry is required to do more than place facts on the table, it must also consider what the most appropriate remedy or solution is to address the mischief.

Commissions are not normally set up every time an unfortunate event takes place. It is only where the nature of the problem is complex or not fully understood, and more significantly, when conventional measures and steps have failed to address the mischief. So for example, the committal of an appalling crime should not in itself prompt the setting up of a commission. It is the job of the law enforcement agencies to get to the bottom of the crime. It is only if such crimes are repeated and where it becomes apparent that the criminal justice system is incapable of dealing with such offences that a commission of inquiry is warranted. While commissions can play a useful role in uncovering the real circumstances pertaining to incidents of crime, far more important tasks are to investigate why public agencies have failed to address the problem; and how to address the problem going forward.

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Effectively a commission is nothing more than a mechanism by which a head of state can obtain information and advice. The functions of a commission are therefore to determine facts and to advise the president through the making of recommendations. The president is bound neither to accept the commission's factual findings nor to follow its recommendations. Some critics view the establishment of commissions as being little more than a way to end public criticism of government inaction without actually doing anything.

Types of Commissions of Inquiry

Traditionally, a distinction has been drawn between common law commissions and statutory commissions. Any body of persons, whether private or public, is competent to establish a common law commission. Religious and communal bodies have from time to time established commissions into matters affecting the interests of the institution in question. Also falling under the category of common law commissions are commissions of inquiry established by a head of state acting in terms of the prerogative powers.

Some constitutions expressly confer upon the head of state the power to appoint a commission. Commissions appointed by heads of state by virtue of common law or constitutional sources of power are sometimes referred to as "executive commissions". The Presidential Commission of Inquiry is an executive commission.

Some constitutions also make provision for the appointment of specific standing commissions, such as human rights, equality, gender and electoral commissions. Such commissions are referred to as "constitutional commissions." Commissions created by statue are known as statutory commissions. Examples of such commissions include national youth and sport commissions and long term inquiries into political violence. In recent years, a species of commission known as "truth and reconciliation commissions" has been developed under this category. Such commissions have been established in post conflict societies to address the wrongs of the past and to commence the task of rebuilding shattered lives and destroyed institutions.

How Commissions Operate

Commissions have to act within terms of reference and governments are usually very careful about framing the terms of reference and generally include a date by which the commission must finish.

A commission of inquiry normally determines its own procedure. It may for example divide into sub-commissions or committees, each carrying out one or more particular functions on behalf of the commission.

The proceedings of some commissions involve investigatory functions as well as functions sometimes resembling the conduct of adversarial contests such as those which occur in courts. Often a commission will commence with an investigation and culminate in an adversary situation in the form of hearings. However, a commission is not a court of law. There are no issues for it to try; there is neither plaintiff nor defendant counsel leading evidence. A commission does not perform the functions of a prosecutor and there are no accused. Since a commission is expected to get to the truth of the matter, most commissions adopt an inquisitorial approach to fact finding.

Even though a head of state is not bound to accept findings nor implement recommendations, serious repercussions may still flow from findings and recommendations made by an inquiry. For this reason, procedural fairness is normally adhered during the course of inquiries – which is why commissions are sometimes referred to as quasi-judicial.

A commission is responsible for collecting evidence and obtaining statements from witnesses. It may receive evidence either orally or in writing. It may consider information of any nature, including hearsay evidence and newspaper reports, or even submissions and representations that are nothing more than opinions. Commissions usually involve research into an issue, consultations with experts both within and outside of government and public consultations as well.

Statute law inevitably grants commissions authority to summon and examine witnesses, to administer oaths and affirmations and to call for the production of books, documents and objects – inclusive of classified information.

Independence of Commissions

In order to arrive at the truth and to make the most appropriate recommendations, commissions of inquiry ought to be scrupulously independent. If they are not, their findings are tarnished by bias and by the interests of others. In other words, the findings and recommendations of commissions that are not independent are likely to be incorrect and tailored to particular interests. They are unlikely to address the real causes of the problems at hand. Such inquires are not trusted by the public and their findings are ultimately discredited.

Independence is normally obtained by appointing commissioners of high competence and integrity. They should enjoy unquestionable public confidence. Persons of such repute are able remove the subject matters of the inquiry from the area of partisan politics. Commissions should enjoy financial, administrative and operational autonomy. Financial autonomy means maintaining control over the commission's finances and retaining decisions on how to spend money. Inquiries should be allocated a budget which should be managed by the commission.

Administrative and operational independence means having unfettered decision making powers in relation to the hiring and management of staff and experts. It also means retaining full control of administrative and information management systems and the day to day operations.

It goes without saying that where commissions investigate sensitive matters and powerful persons, effective protection of witnesses and information is vital. When witness protection and information security are found wanting, most key witnesses will avoid the commission. Fearful witnesses will not provide the full truth and may fabricate information to protect themselves and their families.

If any one of these measures is lacking or absent the independence of a commission is severely compromised and its outcome is likely to be commensurably tainted.

Why was the Presidential Commission of Inquiry* appointed?

According to the mandate issued under the Presidential seal, the Commissioners are enjoined to amongst other things:

(a) cause independent and comprehensive investigations into 16 incidents involving alleged serious violations of human rights arising since 1st August 2005 specifically including the incidents set out in the Schedule, and

(b) examine the adequacy and propriety of the investigations already conducted into such incidents.

The main objective of the inquiry is to enable the President to present the relevant material to the appropriate competent authorities, including the Attorney General, for the purpose of the institution of criminal proceedings against those persons who have allegedly committed serious violations of human rights.

The Commission is also enjoined to make recommendations to prevent the repetition of such human rights violations.

The main thrust of the mandate requires the Commission to effectively assume the role of the police insofar as the Commission is required to find the culprits responsible for the 16 incidents. This is a highly inappropriate role for a commission to perform.

The main focus of the inquiry ought to be an interrogation of the manifest failure of the responsible organs of state to apprehend the perpetrators and to bring them to justice. In particular, the inquiry ought to focus on the systemic issues that have contaminated the criminal justice system and which prevents the solving of politically related crimes.

While the mandate expressly permits such lines of inquiry, it jumps the gun by stating that the material gathered by the Commission will be handed to the "competent authorities" including the Attorney General and presumably, the police. These structures have proven themselves to be utterly incapable of resolving such cases. There can be no doubt that these authorities, as presently

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*Ed Note: The author is referring to the *Presidential Commission of Inquiry to Investigate and Inquire into Allegations of Serious Human Rights Violations* established by the Government of Sri Lanka on November 03, 2006. The specific mandate of the eight-member Commission is to inquire into 15 stipulated incidents amounting to serious violations of human rights. The Commission also has the mandate to investigate and inquire into other incidents which in the opinion of Commission amount to serious violations of human rights. The Commission is 'observed' by eleven 'eminent persons' whose functioning is governed by a mandate issued by the Presidential Secretariat. The Commission commenced its formal sittings in March 2007. Its mandate was extended for a further one year in November 2007 with however, a further (publicly critiqued) condition that the Commission is not required in any way to consider, scrutinize, monitor, investigate or inquire into the conduct of the Attorney General or any of his officers with regards to or in relation to any investigation already conducted into the relevant incidents.

composed and organised, are very much part of the problem. Their conduct in these matters ought to come under the closest scrutiny during the course of the inquiry.

It is accordingly presumptuous of the mandate to assume that the Commission would recommend that the very same authorities resume their investigations into such sensitive cases. The Commission may in fact recommend that fundamental changes need to be made to ensure successful investigations going forward. Such a recommendation may include the establishment of a special law enforcement body comprised of truly independent and skilled detectives and prosecutors who are able to conduct themselves boldly and fearlessly.

Can the Presidential Commission of Inquiry be considered to be independent?

The Commissioners themselves are persons who have reputable track records and who are highly respected within Sri Lankan society. At this level, it can be said that that the Commission enjoys a measure of independence, or at least a perception of independence. However, the independence of a commission is not only measured by the calibre of its commissioners. Even with the most respected commissioners, the independence of a commission can be compromised through other shortcomings. Indeed it is what lies beneath the level of the Commissioners that gives rise for grave concern. On closer examination, the Commission enjoys little autonomy as to how it manages its operations. The Commission enjoys no financial autonomy. It has not been allocated a budget. Every time it wishes to take an action costing money, it has to make a request and motivate the action to the Presidential Secretariat. Such a process removes real decision making powers from the Commission. It also undermines operational efficiency and is likely to result in security breaches as sensitive information may have to be disclosed to motivate requests for money.

The 'engine room' of a commission are those persons who conduct the investigations and research upon which the ultimate findings are made. These crucial tasks have fallen largely to police officers and state lawyers who have been seconded to the Commission. While it is not uncommon for state personnel to be seconded to a commission of inquiry, this is normally done in a way that ensures that the independence and integrity of the inquiry is not compromised. Such persons are normally seconded on a full time basis and a "Chinese Wall" of sorts is established between their permanent posts and their functions at the inquiry. This is done by the complete severing of their connections to their permanent posts for the full duration of the commission. While their benefits and prospects of promotion should remain unaltered during their time away from their permanent posts, they are not permitted to maintain their normal tasks and duties while working at the commission. In other words, they only have one reporting line while employed at the commission.

Most of the state personnel seconded to the Commission, with the exception of the lower ranks, are there on a part time basis. None of the state lawyers work at the Commission full time and the two senior police officers are also part timers. They effectively have two reporting lines and follow instructions from both the Commission and the government. They are accordingly seen as an extension of the government into the Commission. The roles of the representatives of the office of the Attorney General and the police are furthermore questionable, not only because of the dual roles they play, but because these two departments ought to be the primary subjects of the Commission's inquiry. The police and the office of the Attorney General can hardly be expected to interrogate their own roles in failing to combat political crime. The conflict of interest is abundantly clear.

Aside from the respect commanded by the Commissioners there appears to be very little else that characterises the Presidential Commission of Inquiry as an independent commission of inquiry.

Is the Presidential Commission of Inquiry Operating like a Typical Commission of Inquiry?

No commission can operate effectively when it operates essentially on a part-time basis. Many of the Commissioners themselves still continue with their other duties and responsibilities outside the Commission. A commission that does not enjoy financial and operational autonomy can also not be expected to operate like a typical commission.

The investigators are not trained to investigate the systems or machinery behind large conspiracy type crimes and tend to focus on crime scene investigations. It appears that the Commission does not have the resources or the time to allow investigators to spend substantial periods in the areas where the crimes took place. They are accordingly unable to establish relationships with key persons on the ground or to gain the trust of local communities.

Indeed investigators are prevented from approaching witnesses or leads until the witness protection team has first made contact with the persons in question. This effectively means that the investigators are not on the ground investigating but are simply following in the path of the witness protection team.

The Commission has apparently not always succeeded in securing relevant state documents, notwithstanding its coercive powers which it seems reluctant to employ.

The Commission has not established a unit of researchers and analysts. Such a unit comprising of experts knowledgeable of the local history and dynamics ought to provide the Commission with the 'big picture' and the connections between different events. Normally researchers work closely with investigators and provide them with specific questions to follow up on. They then feed the results of the investigations and research in packaged form to the Commissioners.

Many commissions that investigate politically sensitive matters, particularly during times of conflict, enjoy 'on the ground' or 'hands on' international monitoring or observation. Such observers – who are normally experienced investigators or forensic analysts – are with the commission round the clock. They have full and unrestrained access to all persons and information. Not only do such international observers add considerable credibility to the work of the commission, they are also able to advise local investigators on international best practice. The current method of 'remote' or 'off site' observation achieves none of these outcomes.

Going Forward

While there is a veneer of independence at the level of the commissioners, what happens below this level serves to deprive the commission of actual independence and operational autonomy.

It ought to be clear by now that the Commission cannot succeed on its current trajectory. It is simply not set up to play the role of a police investigating unit. Unless there are dramatic breakthroughs, it

will not succeed in its main task of solving the 16 listed crimes. Indeed its temporal mandate of one year is up and it has failed to get to the bottom of the two cases that it has to date focussed on.

Now that a decision has to be made on whether to extend the life of the Commission, it may be time for civil society groups to call for certain minimum changes. Such changes include:

1. Adjusting the focus from finding the culprits responsible for the 16 crimes, to investigating why these crimes have never been solved by law enforcement agencies – and by implication, the thousands of other serious cases that remain unsolved. This does not mean that the listed cases should not be examined in detail.

    a. Such investigations would include a consideration not only of the structural and systemic deficiencies within the responsible state organs; but whether political or other influences were brought to bear on the investigations and which may have resulted in cover-ups.

    b. This does not mean that the listed cases should not be examined in detail.

        i. The new focus would involve a thorough examination of the investigations launched so far, including the interviewing of all police officers, state lawyers, prosecutors and officials associated with the investigations. It would also include interviewing survivors and family members to ascertain what follow-up has happened from their perspective.

        ii. It would include the unearthing of all documents produced in the course of the inquiries by police investigators, state intelligence units and the office of the Attorney General. These documents should be the subject of meticulous study and examination.

        iii. The new focus should also include a consideration of steps taken by family members and civil society groups to follow up these crimes. The information and leads in the hands of civil society should be compared with existing information in the hands of the state.

    c. A meticulous investigation into the "investigations" of 16 cases will serve to inform the Commission why there has been systemic institutional failure within the wider criminal justice system. Such an inquiry involves hundreds of hours in the field interviewing as many relevant persons as possible and hundreds of hours poring over thousands of documents.

    d. Nonetheless, a broad institutional analysis is still necessary. The inquiry must understand how the different state organs function and what methods and procedures they employ. These should then be compared to standard practices in other jurisdictions. Stated methods must of course be compared with what actually took place in the 16 cases to ascertain whether those investigations complied with local requirements; and secondly whether they complied with international best practice.

e. Local and international experts should advise the Commission on what to look out for when interviewing witnesses and studying documents. Specific case studies arising from the 16 incidents should be put to the experts for their consideration.

f. Some of the case studies should become the subject of public hearings. Those in authority must be called to account in public hearings why they were unable to solve these specific cases. During these hearings, the responsible officials must explain why specific identified practices fell short of local and international best practices.

g. During the course of these inquiries it is possible that information will arise that may point to the culprits. Where actual and real leads arise they should be followed. However, the Commission should not become a substitute for police investigations. The Commission's main focus should remain an inquiry into why such serious crimes never get resolved. It will be the findings arising from such a focus that will inform and shape the recommendations as to how sensitive politically related crimes should be handled in the future.

h. It should be noted that the terms of reference do not need to be amended to accommodate such a shift in focus.

2. The Commission should enjoy full operational and administrative autonomy.

   a. Direct funding should be provided to the Commission by the government and the international community on the basis of prepared budgets.

   b. Senior persons of organisations that are to be scrutinized by the Commission should not be part of the Commission.

   c. Members of staff who are seconded from the State must be transferred on a full time basis for the full duration of the inquiry and must report only to the Commission.

   d. All persons joining the Commission should be vetted to ensure that they have no questionable links to the subject matters of the inquiry.

3. A research and analyst unit should be established to support the work of the Commission.

4. Experienced international observers should provide 'hands on' observation round the clock to the investigations and inquiry.

   a. Observers should be permitted full access to all documents held by the Commission and be free to observe all activities of the Commission, including all interviews and field trips.

   b. Such experienced observers ought to provide ongoing technical advice to the investigators and staff.

c. Observers should be based in the same premises as the Commission.

Independent minded Commissioners should push for such adjustments and insist that such changes be effected to secure their continued involvement in any extension of the Commission.

Seeing with New Eyes: Looking at Some Mandate Cases With a View to Changing the Approach of Sri Lanka's Presidential Commission of Inquiry

Dulani Kulasinghe [♦]

Introduction

Commencing in March 2007, INFORM, Rights Now and the Law & Society Trust visited sites of three cases listed in the mandate of the Presidential Commission of Inquiry to Investigate and Inquire into Serious Violations of Human Rights (the Commission). These field visits were made in order to: 1) better understand what had happened before, during and after the incident in question and 2) find out, to the extent possible, how subsequent investigations were carried out and what progress had been made, with specific reference to obstacles encountered. Reports on each field visit have been submitted to the Commission.

As listed in the Commission's mandate, the three cases looked into were:

- the killing of 10 Muslim villagers at Radella in Pottuvil police area on 17 September 2006 (mandate case no. 11);
- the killing of five students in Trincomalee on 2 January 2006 (mandate case no. 5);
- the alleged execution of Muslim villagers in Muttur in early August 2006 (mandate case no. 3).

Given its current working methods, the Commission appears to be focused on the first four sections of its mandate: understanding the facts of the case, identifying victims, grasping circumstances leading to the incident and identifying likely perpetrators. However, nearly all the mandate cases highlight serious problems in the criminal justice system itself. The very appointment of a Commission of Inquiry to look at cases is an extraordinary measure and indicates that there has been a breakdown in the usual system to deal with them. Therefore, the Commission should broaden its focus to include an analysis of why such serious violations of human rights have remained unresolved for so long. This would not require a change in the mandate, but a different approach.

In his article for this *Review*,[1] Howard Varney discusses the reasons for establishing a commission and accepted standards of how one should work. As the theoretical framework and detailed recommendations stemming from it are set out in his article, this report focuses on the systemic issues within the cases listed above. It provides a brief summary of each incident, its context and aftermath, followed by an examination of problems common to the three cases, with a brief aside on the last case. The case studies illustrate the urgent need for the Commission to exercise its full mandate, as well as take up the recommendations made by Mr Varney.

♦ Researcher, Human Rights in Conflict Programme, Law & Society Trust

[1] Howard Varney, "Reflections on Commissions of Inquiry: How does the Presidential Commission of Inquiry compare with International Best Practice?"

1. Case studies

1.1 Killing of 10 Muslim Villagers in Pottuvil – 17 September 2006

On 17 September 2006 10 Muslim labourers were killed near their worksite at Radella anicut, three to four kilometres from Sastraveli STF camp, the nearest habitation.

Despite the proximity of the STF camp to the site of the killings and regular STF patrols of the area, a search party of Muslim villagers from Pottuvil, eight kilometres away, were the first people to arrive at the scene, at 6 a.m the following day. They were concerned about the whereabouts of the missing labourers, who should have returned home the night before. They reported seeing arrack bottles, cigarette butts and boot marks, though these were not produced as evidence at the inquest. Instead, the CID produced previously unseen evidence – a boat, motor and hatchets – alleging that the LTTE had come in a boat, massacred the labourers and left. The bodies were removed from the scene by Pottuvil police without a magistrate's order, in breach of standard procedure.

The only known survivor of the incident was initially treated at Pottuvil hospital. He was then transferred to nearby Kalmunai base hospital but never reached it, as traffic police diverted the ambulance to Ampara hospital. Statements made to LST researchers during their visit suggest that the diversion may have been authorised by Ampara's DIG. While at Ampara hospital, the survivor was under constant armed guard. Family and friends, as well as the SLMM, were prevented from seeing him on the basis that he was traumatised and physically unable to speak. This statement contradicted earlier police claims that he had made an official statement to them.[2]

All other visitors were barred, though Minister ALM Athaullah saw him twice; soon after the incident and again on 29 September, during which visit the survivor is alleged to have stated that the massacre was carried out by the LTTE. However, the survivor later told the District Medical Officer at Pottuvil hospital that he had not accused the LTTE, but said only that the attackers "wore khaki like gear and spoke fluent Tamil".

Minister Athaullah and ASP Jamaldeen were also mentioned locally in connection to a statement sent to the Defence Secretary by the Akkaraipattu Pradesha Fish Vendor's United Credit Co-op Society Ltd. Akkaraipattu Traders Association and the Akkaraipattu Jummah Grand Mosque. These groups allegedly sent a written statement accusing the LTTE of the killings to the Defence Secretary, as reported by the Defence Ministry on 23 September 2006. However, it is said that they had been pressured into writing the statement and later circulated a flyer distancing themselves from it.[3]

The killing of the 10 Muslim labourers occurred against a backdrop of ongoing tension between local Sinhala and Muslim communities as well as between the STF and Muslims in particular. Communal tensions had resulted from perceived injustices relating to land. Muslims reported that they had been allocated insufficient land for their numbers, while local Sinhalese complained of encroachment.

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[2] *Daily Mirror*, "Lone survivor says attacked by Tigers," http://www.dailymirror.lk/2006/09/20/front/3.asp

[3] 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," http://www.uthr.org/SpecialReports/spreport25.htm#_Toc168410544

Relations between the STF, especially the OIC of Sastraveli camp, and local Muslims were strained allegedly due to competing interests in illegally felled timber.

Following the incident Pottuvil was shut down by a *hartal*. Sastraveli STF, travelling through Pottuvil town, opened fire into a crowd of angry local Muslims blocking their vehicle and injured at least 14 people. On 20 September Rauff Hakeem, head of the Sri Lanka Muslim Congress and a Government Minister, made a public statement criticising the STF's treatment of local Muslims and called for an international independent inquiry. Two days later it was reported that Mr Hakeem's STF security unit had been withdrawn by order of IGP Chandra Fernando.[4] The timing of the withdrawal of security suggests reprisal for Mr Hakeem's statement, however no reason was reported at the time.

1.2 Killing of Five Students in Trincomalee – 2 January 2006

On the evening of 2 January 2006, a grenade exploded at the Gandhi roundabout near Trincomalee town beach. There were police or military checkpoints on all roads leading to and from the roundabout so the area was immediately sealed off by security forces. Five young Tamil men were killed.

Initial Government reports claimed the five were LTTE cadres whose own grenade exploded on the way to attack an Army checkpoint, and that a live grenade had been found at the site. However, Dr. Gamini Gunatunga, the judicial medical officer (JMO) who conducted the post-mortems, reported that all five had died of gunshot injuries, not the explosion.[5] This was corroborated by a surviving student, who stated that 15 uniformed persons arrived soon after the grenade blast, put all those injured into the jeep, assaulted them and then pushed them out.[6] This survivor's account is also corroborated by Dr. Manoharan, the father of one of those killed, who received a phone message from his son Rajihar saying that security forces arrived after the grenade blast.

University Teachers for Human Rights (Jaffna) report that state security forces had complete control of the area where the students were killed.[7] According to the UTHR report, a green three-wheeler drove towards the students and a grenade was rolled towards them from the three-wheeler and exploded. Three students were injured in the explosion; the others were unhurt. This three-wheeler would have had to pass through a checkpoint to enter and to exit the area, but was not stopped. It continued driving and entered Army HQ in Fort Frederick, a High Security Zone (HSZ).

On 4 January 2006 the President called for a report from Inspector General of Police Chandra Fernando, who ordered a probe into the incident by a police team led by a Deputy IG. The Defence Ministry also decided to hold a "full scale probe" into the incident, given the discrepancy between

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[4] *Daily Mirror*, "Govt. hits back at Hakeem," http://www.dailymirror.lk/2006/09/22/front/01.asp

[5] Medical reports of Dr Gamini Gunatunga, 3 January 2006. See also UTHR(J), "Flight, Displacement and the Two-fold Reign of Terror," http://www.uthr.org/bulletins/bul40.htm#_Toc138040840

[6] Mr T Suntheralingam, *Report of Special Rapporteur to Sri Lanka Human Rights Commission*, 31 March 2006 (unpublished).

[7] For schematic map of area see http://www.uthr.org/SpecialReports/Schematic%20Diagram.JPG); for labelled aerial map of area, see http://www.uthr.org/SpecialReports/Gandhi_Statue-jpg.JPG).

initial official reports and post-mortem results.[8] Neither these reports nor their findings have been made public.

At the inquest which began on 10 January 2006, the grenade mentioned in initial reports was not produced as evidence, nor was any explanation given for its absence. Though the JMO had found that the killings resulted from gunshot injuries, no bullet casings were produced. At the time of LST's visit to Trincomalee in April 2007, there was still no ballistics information available on the bullets found in the bodies of the students. There were also serious internal contradictions relating to time and location of relevant individuals, undermining the credibility of statements made by Government security forces personnel.[9]

After the killings families of all five students suffered severe intimidation and threats. The Manoharans bore the brunt of this, as Dr. Manoharan had very publicly sought justice for the death of his son Rajihar. The harassment did not stop, however, and the family were eventually forced to flee the country.

The magistrate in the inquest ordered the police to report on a monthly basis on the results of investigations into the original incident. After a series of fruitless hearings which ended earlier this year, the next hearing in this case has been scheduled for November 2007.

1.3 Alleged Execution of Muslim Villagers in Muttur – August 2006

Between 29 July and 5 August 2006, the Sri Lankan military and LTTE fought for control of Muttur town. Residents first took shelter in local school and religious buildings, but when they found that neither side was willing to stop shelling despite the presence of civilians between them, a large group fled the town on foot, taking the road to Kantale.

At the 60th mile post, soldiers at an Army checkpoint warned them to stop, as the Army would not be able to protect them; however, they continued. At the 64th mile post the LTTE diverted them on the pretext that the road ahead was heavily mined. The LTTE assured the group that they would provide the necessary protection for their safe passage through the jungle. There were several LTTE checkpoints in this area and the group was allowed to pass unmolested through the first one. However, the LTTE then claimed that there were *jihadis* (Muslim paramilitary members) and members of the Karuna group among the people and separated the men from women and children at the second or third checkpoint, near Kinanthimunai. A man in a mask identified those who allegedly had connections with the Karuna group or the military. Witnesses claim that some of these men were taken at gun point into the jungle.

Men and boys identified as *jihadis* had their hands tied behind their backs and were kept aside. Many accounts, including some eyewitness accounts, state that the LTTE shot and killed one man who either picked a quarrel with them or tried to run.

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[8] *Daily Mirror*, "Trinco mourns as hartal enters second day," 5 January 2006, http://www.dailymirror.lk/2006/01/05/front/02.asp

[9] For a detailed account of the incident and inquest, see UTHR(J), "The Five Students Case in Trincomalee," Special Report No. 24, http://www.uthr.org/SpecialReports/spreport24.htm

Just after this, the army fired shells and multi-barrels into the area, killing three LTTE cadres and six civilians. The LTTE fled and the civilians were able to proceed on their journey. However, thirteen persons went missing during this exchange, of which five bodies were recovered later. Given the delay in recovery, the identity of these five could not be conclusively determined, nor does Muttur have the resources for DNA testing. Six persons are missing to date; LST has no information about the two others.

It is unclear which deaths noted above – the one witnessed execution by the LTTE or the five dead persons found many days later – are included in the Commission's mandate under the heading "alleged execution of Muslim villagers in Muttur." However, the community and religious leaders LST spoke to in Muttur felt strongly that all civilian deaths from this period deserve recognition by the Commission. Fifty eight civilians are reported to have been killed in the shelling of Muttur town. The difficulty for the Commission is that this tragedy – of a community trapped between two warring parties during a full scale battle – should be considered under humanitarian law and the Ceasefire Agreement, not strictly as a serious human rights violation.

Though culpability for the suffering of the people of Muttur falls on both sides, the state must carry responsibility for the safety of its citizens. It is indefensible to use an area where civilians are known to live as a battleground, without giving sufficient warning of attack. To then hide behind the argument that "they did it too" is a petty playground excuse, unworthy of a state. Even without regard to this argument, however, the power to recommend compensation already exists in the Commission's mandate. The Commission could give much needed relief and recognition to a community that is still rebuilding over a year later.

2. Recurring Issues Across Cases

There are innumerable unsolved cases within the Sri Lankan criminal justice system. The Commission was only asked to examine 16 and this article has focused on only three of those. Despite this limited view, some disturbing commonalities emerge, with implications for the Commission's approach to its work and functioning.

Apparent state involvement

Where state actors are implicated in a crime, it is perhaps not surprising that justice proves difficult to attain using state machinery. State security forces are unavoidably implicated in the killings in Trincomalee, given their control of the area where the incident took place as well as the account of one of the surviving students. In Pottuvil the impression of involvement is created by the proximity of Sastraveli STF camp to the site of the incident, as well as the existing tensions between the camp's OIC and the local Muslim community. In the circumstances, the lack of progress in these investigations suggests that genuine investigations have been suppressed.

Lack of evidence

Another difficulty in resolving the mandate cases is the apparent lack of evidence. This applies both to physical and witness evidence. In Trincomalee, though the crime occurred around 7 p.m and the area was sealed off until 11a.m the next day, no evidence that might reasonably have been expected to

be produced, such as bullet casings, was presented at the inquest. In Pottuvil, items seen and photographed by the first persons to arrive in the aftermath of the killing were similarly not produced at the inquest. Additionally, bodies were removed from the crime scene without authorisation of a magistrate, in violation of basic procedure, raising questions of competence, negligence or, at worst, interference. In Muttur, should there be an inquiry, it will be nearly impossible to obtain evidence, for logistical reasons such as delay, control of the area where the incident happened and lack of authority to call suspects. The Muttur case will be further complicated by the issue of which killings fall within the ambit of the "alleged execution."

Lack of credible and effective witness protection

The possible involvement of the state also means that witnesses are understandably reluctant to give evidence. In some cases, witnesses and family members of victims have said that they would only be willing to give evidence if guaranteed passage out of Sri Lanka immediately afterwards. Clearly no progress can be made in any of these cases if there is no credible assurance of safety for witnesses. In the case of the five students, no families remain in Trincomalee and most have fled Sri Lanka. The failure to prevent witness intimidation and lack of effective recourse when witnesses face it, pose some of the gravest threats to the possibility of justice being served.

At every stage in the investigation of these crimes there have been attempts to impede the rule of law. Failure to protect witnesses, failure to produce evidence and continual political interference characterise each case. It cannot be enough for the Commission to focus, as an ordinary court would, on matters of evidence and procedural fairness. There are clearly urgent structural matters which must be addressed before any progress can be made on the cases themselves.

Political interference

The seemingly improper use of power is a thread that runs through many of the mandate cases, not only the ones discussed above. Varney observes that, "Commissions can be useful to uncover the systems and methods that powerful and corrupt public officials use to shield themselves from conventional investigation. Commissions may also be useful to inquire into the activities of political and economic power that they could easily [use to] evade ordinary methods of investigation. In such circumstances, a Commission may bring to light information which would otherwise be suppressed". Looking at the Pottuvil case, for example, it is difficult to understand Minister Athaullah's alleged actions in Pottuvil and Akkaraipattu except in terms of political interference. The withdrawal of Minister Hakeem's STF protection immediately after his public criticism of the STF's actions is similarly of concern.

Other highly publicised instances of interference include the change of magistrate and jurisdiction in the cases of the killing of 17 ACF aid workers and the "disappearance" of Fr Jim Brown. Another instance is the initial refusal of Colombo Municipal Court to release court documents relating to the assassination of Foreign Minister Lakshman Kadirgamar.

Of course, the argument could be made that the mandate itself is a political document. Why these 16 and not others? Wording of the mandate case names is also revealing. For example, why are all the cases termed "killings" and "assassinations" with the exception of case number 7, neutrally called the "death of 51 persons in Naddalamottankulam (Sencholai)"? These persons were deemed orphans by the LTTE but combatants in training by the Government. UNICEF visited the site)and stated that

"these children are innocent victims of violence".[10] The controversy remains in fact, but apparently not on paper.

3. Conclusion

The Commission was asked to gather evidence that could be used to prosecute suspects. However, it also needs to examine structural and systematic problems within the criminal justice system. These three cases illustrate the troubling recurrence of interference with witnesses, evidence, procedure and in some cases the justice system itself. As Mr. Varney notes, "The main focus of the inquiry ought to be an interrogation of the manifest failure of the responsible organs of state to apprehend the perpetrators and to bring them to justice. In particular, the inquiry ought to focus on the systemic issues that have contaminated the criminal justice system and which prevents the solving of politically related crimes". The need to incorporate Mr. Varney's recommendations in relation to the Commission is borne out by the very cases they have been asked to examine.

It may be the ghosts of many eminent but ignored past Commissions of Inquiry that, in some way, haunt this one. There must be a desire to ensure that *this time* more successful prosecutions will result from the Commission's work. The mandate clearly tasks the Commissioners with providing the President with "the relevant material [to give] to the appropriate competent authorities...including the Attorney General enabling the institution of appropriate legal action including...criminal proceedings [against]...those persons who have allegedly committed serious violations of human rights".[11] These two things together may go some way to explaining the extreme care taken over procedure which has, some have said, slowed the Commission's work so drastically that only two cases of 16 have been looked at in detail. But, as Mr. Varney and other commentators have noted, it is unlikely that evidence obtained in Commission proceedings would be admissible in criminal proceedings given the standard of proof required. Any efforts taken over procedures in this connection are therefore wasted. Also, as noted by Mr. Varney, given that the Attorney General himself must answer for the lack of progress in investigation of these cases, it would be far better to have a truly independent and well resourced unit that could investigate and prosecute serious political crimes.

Incorporating the suggestions made by Mr. Varney would not require a change in the mandate itself. This new emphasis would, however, necessitate a fundamental shift in the current working methods of the Commission. The Commission should not limit itself to an investigation of individual incidents. Rather, it should analyse the gaps in the criminal justice system that have prevented the resolution of these cases and many others.

Structural changes which compromise the Commission's independence must also be addressed. As the Commission was created by executive order, the Presidential Secretariat must ensure that it enjoys real financial and operational independence, independent counsel in all cases, and a clear separation between Commission and State structures, matters which Mr. Varney has addressed in detail.

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[10] UNICEF press release, "Children are victims of the war in Sri Lanka," 15 August 2006, http://www.unicef.org/infobycountry/media_35336.html

[11] Mandate of the Presidential Commission of Inquiry to Investigate and Inquire into Serious Human Rights Violations, P.O. No. CSA/10/3/8

These changes to the internal focus and external autonomy of the Commission need to be made soon and simultaneously. One change without the other will be ineffective. The cost, in terms of families' suffering, public confidence and financial expenditure, not to mention international credibility, is too high to continue in the current way. In the absence of such changes, it is difficult to see how substantive progress can be made.

Though Sri Lanka has a long unfortunate history with Commissions of Inquiries, unpublished reports and neglected recommendations, the renewal of this Commission's mandate provides an opportunity to transform a flawed mechanism. If Mr. Varney's suggested approach is attempted, this Commission could leave a lasting positive legacy in the form of a credible analysis of problems, as outlined above, which appear to have plagued Sri Lanka's criminal justice system for years.

Second Submission to the Presidential Commission of Inquiry and the public on Human Rights Violations in Sri Lanka: January – August 2007*

Law & Society Trust, the Civil Monitoring Commission and the Free Media Movement

The Law & Society Trust, in collaboration with four local partners including the Civil Monitoring Commission and the Free Media Movement, has updated a working document listing 662 persons killed and 540 persons disappeared during the period 1 January to 31 August 2007. This amounts to a total of 1212 – roughly five victims per day. The document provides revised data for the first six months of the year, with corrections based on newly received information and deletions due to accidental repetition, and provides additional information for July and August.

This complete confidential document, with names, locations of incidents and all available data, has been submitted as before to the Presidential Commission of Inquiry ("the Commission") and the Presidential Commission regarding the incidents of abductions, disappearances and attacks on civilians resulting in deaths throughout the Island, headed by Mahanama Tillakaratne, well as relevant members of Government, including the Ministry for Human Rights and Disaster Management, the Human Rights Commission and the Attorney General. In addition, copies were sent to the UN Working Group on Enforced and Involuntary Disappearances and the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, amongst others.

Some of our local partners did not wish to be named to ensure that they remain free to document violations – it is for this reason that the document is confidential.

Please note that this is not, nor is it intended to be, an exhaustive document and is the result of work done in a difficult, hostile and dangerous environment, with concerns for the physical safety of human rights defenders involved.

Basis for submission to the Commission

Though the Commission has been asked to look specifically at 16 cases, plus the assassination of TNA MP N Raviraj, we note that the wording of the Commission's mandate – "to obtain information, investigate and inquire into alleged serious human rights violations arising since 1st August 2005" – provides an omnibus clause which permits consideration of cases outside of those specified in the mandate.

In particular, we expect the Commission to give priority and focus on examining the adequacy and propriety of the investigations already conducted into these incidents, especially in the absence of credible reporting and an acknowledgement of these killings and disappearances by the government and other statutory bodies with a mandate for human rights protection in the country.

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* This publication is an extract of the Submission released on 31 October 2007. The date was compiled by Ruki Fernando and Dulani Kulasinghe of the Conflict and Human Rights Programme at the Law and Society Trust.

It is our hope that the investigations by the Commission, with assistance of the International Independent Group of Eminent Persons (IIGEP), will lead to identification of perpetrators and prosecution, thereby ensuring justice to victims and their family members, and more importantly, will directly address the prevailing culture of impunity.

However, in the long term we believe it is not *ad hoc* bodies such as the Commission that should address these violations, but statutory domestic human rights protection mechanisms, cooperating with and assisted by the international community, particularly the United Nations. We also hope that by bringing together information from a range of reliable sources on killings, missing persons, and other rights violations, this document may give the public some sense of the enormity of the current human rights crisis in Sri Lanka.

Methodology

The information in the confidential working document – the basis for this summary report – was obtained through the following methods:

- direct reporting of incidents by witnesses or family members to organisations with a district presence (ie, offices or individuals);
- Tamil, Sinhala and English media monitoring

To the extent possible, this information has been cross-checked to ensure that there is no multiple reporting of the same incident. Sources used for cross checking include University Teachers for Human Rights (Jaffna) – UTHR(J), Foundation for Co-Existence's Daily Situation Reports, Tamil Centre for Human Rights' March to August 2007 documentation on arrests / detention, and updates from the Asian Human Rights Commission.

Government responses and updates on the 1st working document:

The Commission of Inquiry and the Ministry of Human Rights have separately acknowledged receipt of the 1st working document. The Government commented on the working document and the issues it raises in Geneva during the September sessions of the UN Human Rights Council and in the local media, and also through direct communication with LST.

Through a letter dated 3 September 2007, the Ministry of Human Rights indicated to us that relevant authorities had been instructed to take action on the cases submitted. However, to date, we are not aware of progress made on any of the cases. During the 6th session of the Human Rights Council in September 2007, Ms Shiranee Goonetileke, Legal Advisor to SCOPP, responded to civil society observations about attacks on religious leaders and places of worship, a matter raised in this report, by noting that any attacks on such persons and places were "isolated incidents" and would be "dealt with as we have shown in the case of Father Jim Brown."[1] Given the lack of progress in investigations in the case of Father Jim Brown, the fact that it is before the Commission is not a reassuring prospect for the protection of religious leaders, humanitarian actors and civilians in general.

[1] http://www.un.org/webcast/unhrc/archive.asp?go=070913 (webcast); also http://portal.ohchr.org/portal/page/portal/HRCExtranet/6thSession/OralStatements/140907/Tab16/Tab2/3.Sri_Lanka.pdf

Overall, the revision and updating based on government responses and our own information **increases** the total number of civilians killed or disappeared over the period January – June 2007 to 995, not 943 as in the 1st submission. In terms of killings, 40 cases have been removed and 26 have been added. In terms of disappearances, 9 cases have been removed and 75 added.

Content of the Summary Report

The attached summary report contains three sections (the first two are based on information in the confidential working document): a brief narrative analysis, graphs with tables summarising disappearances and killings from January to August 2007, and a compilation of published material from reliable and credible sources. These are namely the Sri Lanka Monitoring Mission (SLMM) and UNICEF for the period January to August 2007 on killings and missing persons as well as recruitment of child soldiers.

Analysis

The following pages break down the 662 killings and 540 disappearances by gender, age, ethnicity and district. In looking at this aggregate data it must be remembered that every number represents a named person on the confidential list. Beyond highlighting the high levels of ongoing human rights abuses, these figures indicate a number of trends.

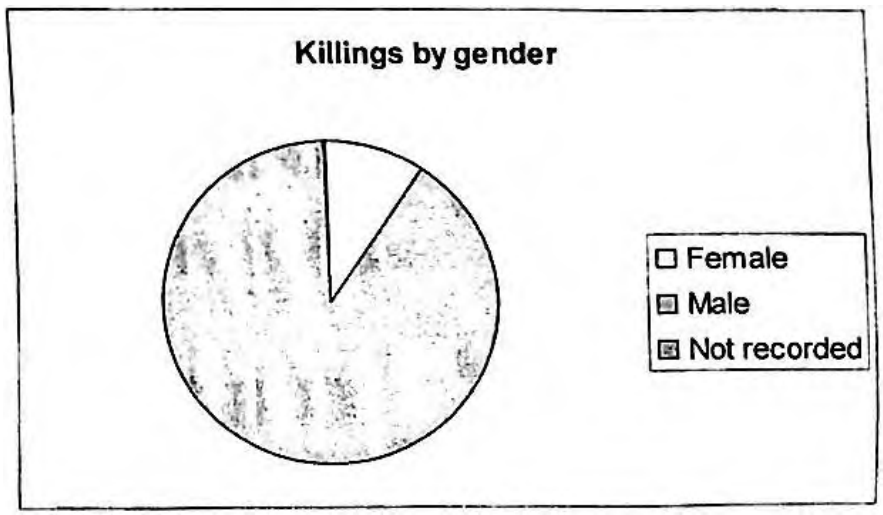
- Certain sectors of the population are disproportionately affected by disappearances and killings:
    - Men are victims of more than 90% of killings and 97% of disappearances
    - Disappearances and killings affect young people disproportionately – 45% of those killed and almost 60% of those disappeared are 30 years old or younger
    - Tamils are overwhelmingly affected. Although Tamils make up only 16% of the population, 78% of victims of killings and 84% of victims of disappearances are Tamil
    - Amongst the cases are:
        - 14 humanitarian workers and religious leaders killed
        - 9 humanitarian workers disappeared
        - 3 media personnel killed
        - 5 media personnel disappeared
        - 25 children killed
        - 43 children disappeared
    - The majority of disappearances and killings are concentrated in just a few districts, particularly Jaffna. More than half of reported disappearances and 28% of reported killings took place in Jaffna. For disappearances this was followed by Colombo (14.4%) and Mannar and Batticaloa (7% each). For killings Jaffna was followed by Batticaloa (20%) and Vavuniya (18%)
- Seen cumulatively, this means that young, male Tamils face very high rates of human rights abuses, particularly in Jaffna. **Approximately 22% of all reported disappearances from January to August – one in five – affected young, male Tamils in Jaffna.** In contrast, no Sinhalese women were reported disappeared anywhere in the country. This skewed

distribution means that risk is highly predictable and suggests that protection measures would be most effective if focused on this group.

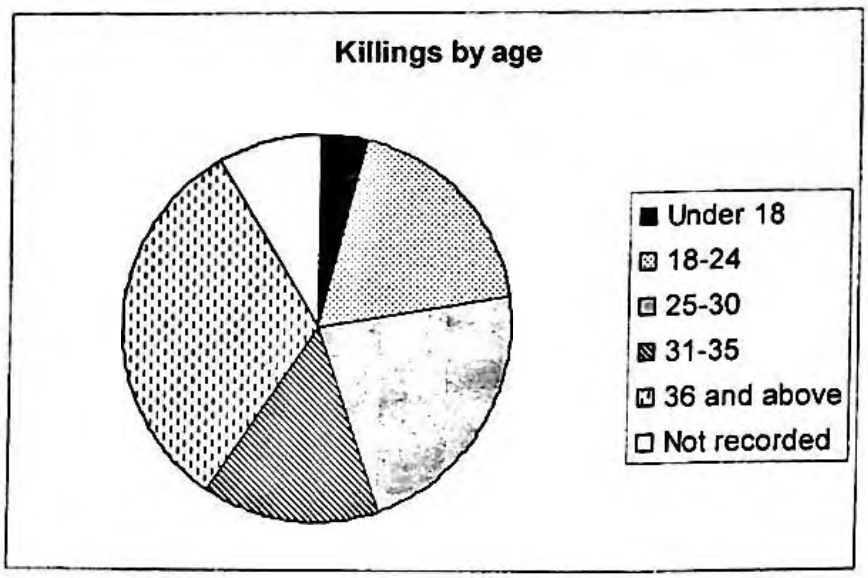
- Although incomplete data means that it is difficult to comment on trends, it suggests killings and disappearances gradually fell until July, but rose sharply in August.

We will continue to collect, analyze and distribute this data regularly. We welcome all credible contributions and constructive feedback.

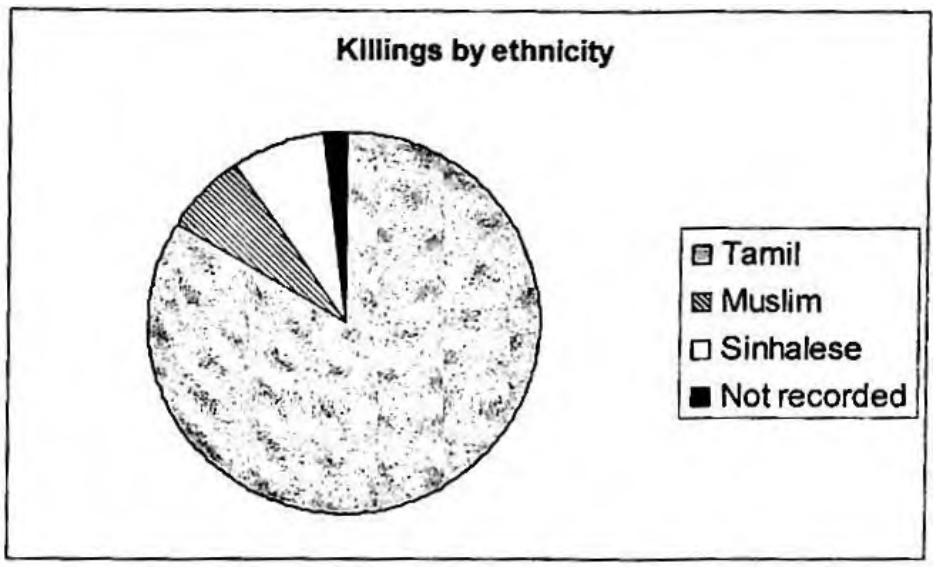
Summary Graphs and Tables Killings January – August 2007



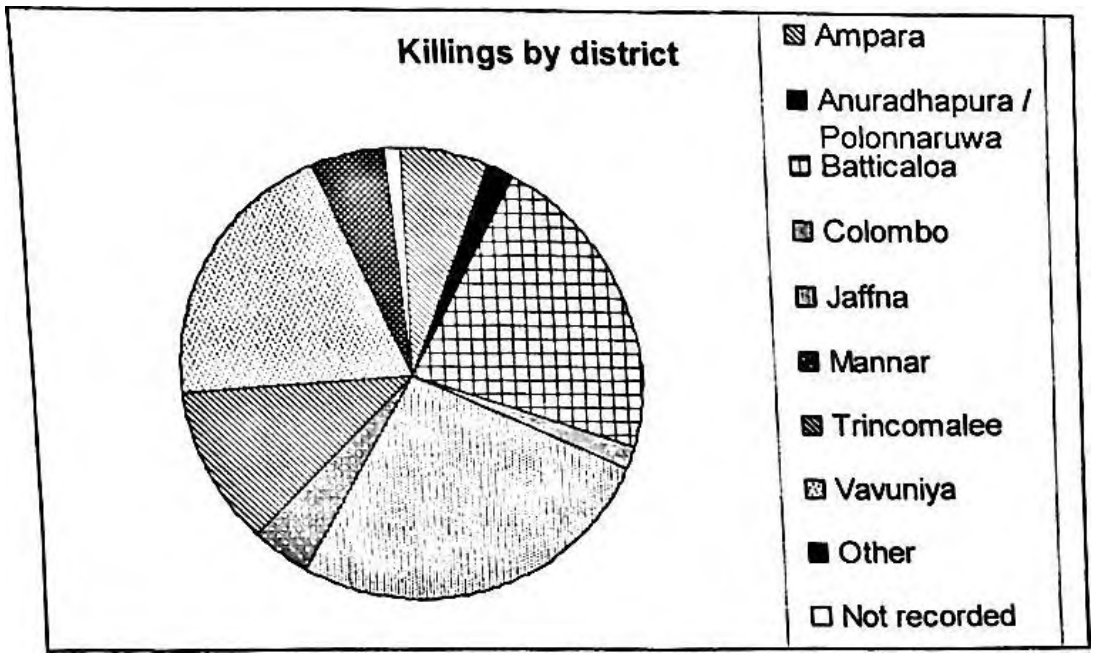
Gender	n	%
Female	65	9.79
Male	595	89.91
Not recorded	2	0.30
	662	100.00



Age	n	%
Under 18	25	3.77
18-24	124	18.67
25-30	148	22.29
31-35	98	14.76
36 and above	211	31.78
Not recorded	56	8.73
	662	100

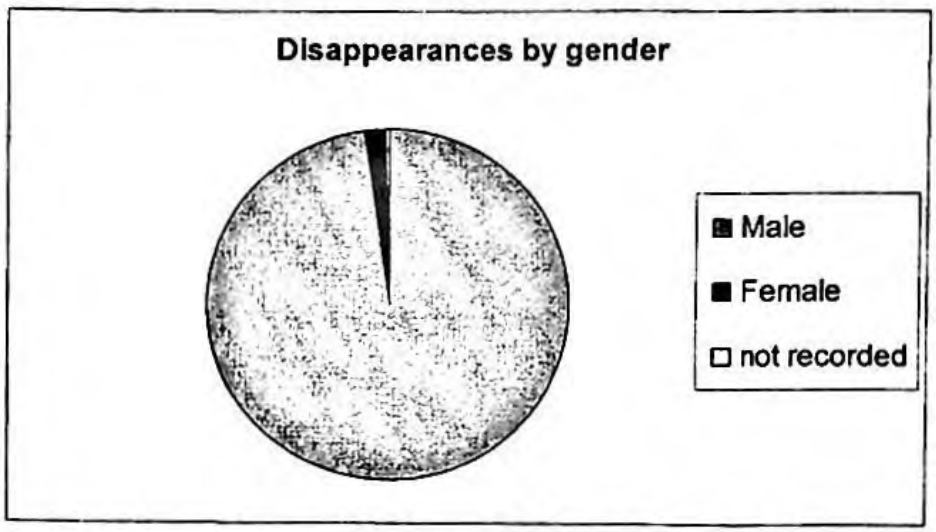


Ethnicity	n	%
Tamil	554	83.73
Muslim	43	6.48
Sinhalese	53	7.98
Not recorded	12	1.81
	662	100.00

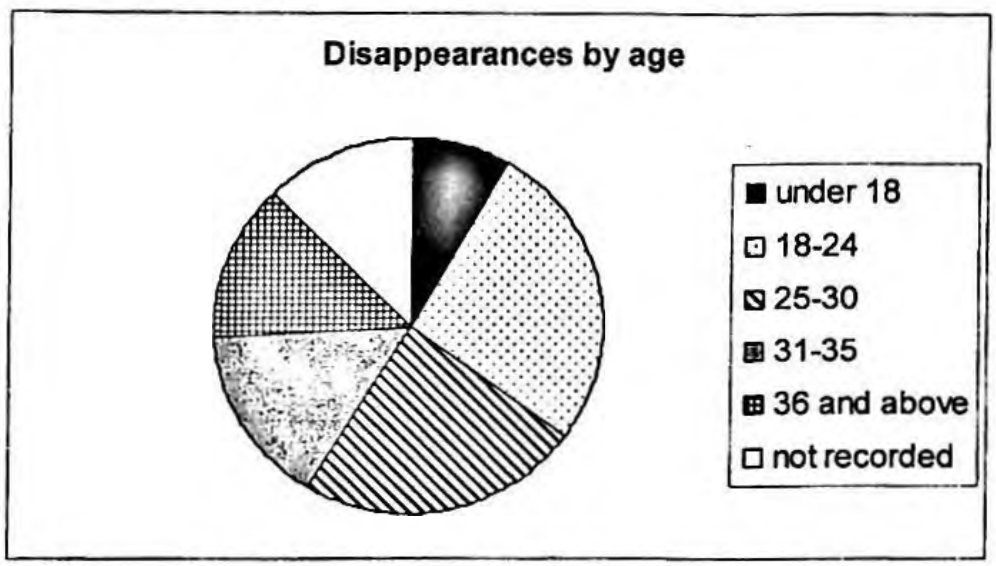


District	n	%
Ampara	40	6.02
Anuradhapura / Polonnaruwa	13	1.96
Batticaloa	145	21.99
Colombo	11	1.66
Jaffna	178	26.81
Mannar	27	4.07
Trincomalee	76	11.45
Vavuniya	130	19.58
Other	35	5.42
Not recorded	7	1.05
	662	100.00

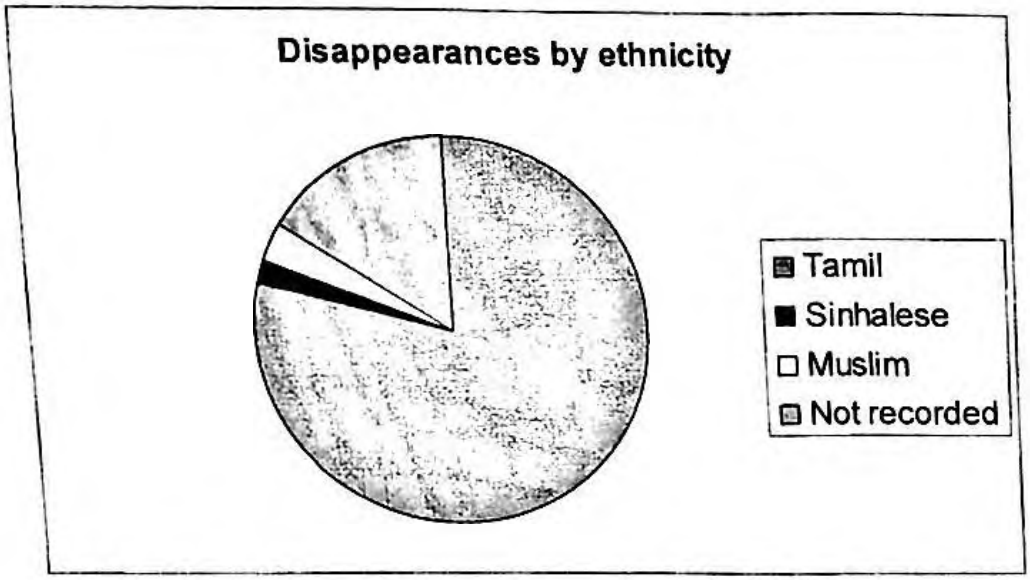
Summary Graphs and Tables **Disappearances January – August 2007**



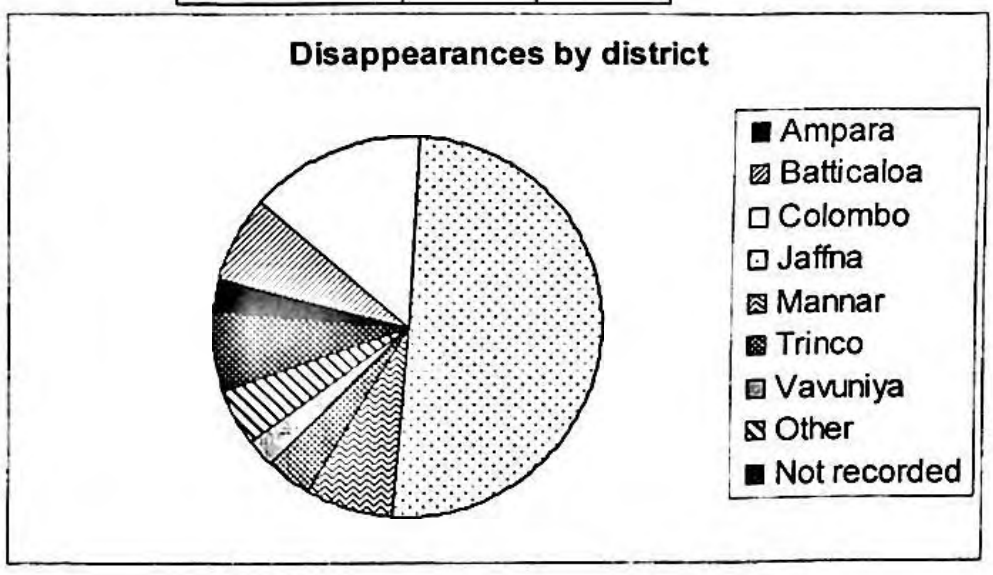
Gender	n	%
Male	528	97.78
Female	11	2.04
Not recorded	1	0.19
	540	100.00



Age	n	%
Under 18	45	8.33
18-24	144	26.67
25-30	127	23.52
31-35	84	15.56
36 and above	73	13.52
Not recorded	67	12.41
	540	100.00

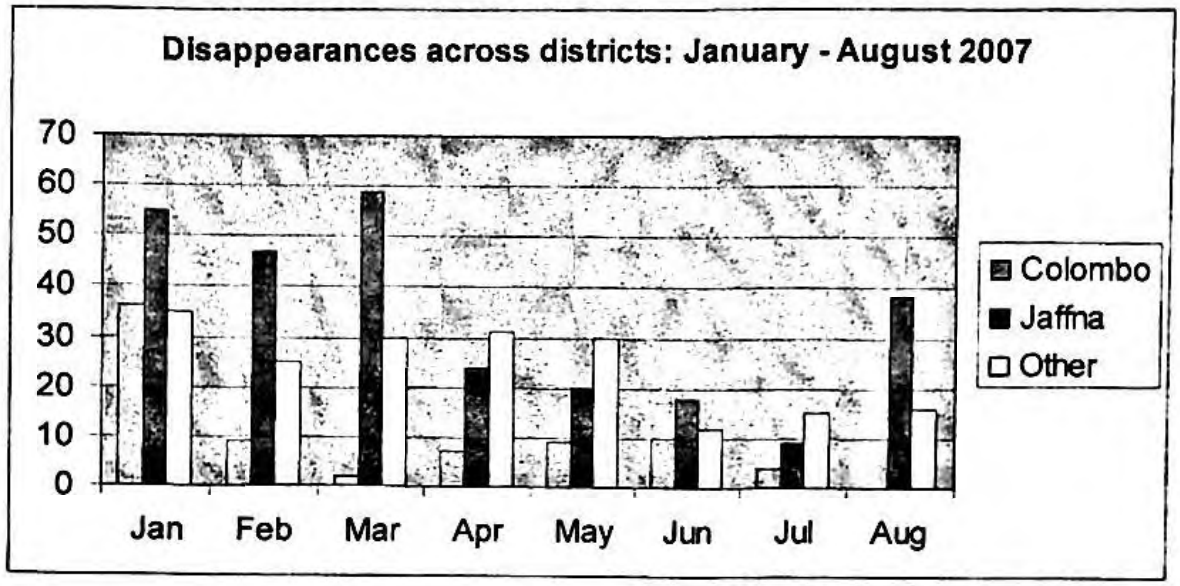


Ethnicity	n	%
Tamil	426	78.89
Sinhalese	10	1.85
Muslim	19	3.52
Not recorded	85	15.74
	540	100.00



Location	n	%
Ampara	15	2.78
Batticaloa	39	7.22
Colombo	78	14.44
Jaffna	271	50.19
Mannar	40	7.41
Trinco	20	3.70
Vavuniya	14	2.59
Other	26	4.81
Not recorded	37	6.85

	540	100.00



Disappearances - table corresponding to graph above

	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug
Colombo	36	9	2	7	9	10	4	0
Jaffna	55	47	59	24	20	18	9	38
Other	35	25	30	31	30	12	15	16

All disappearances January - August 2007

	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug
Ampara	1	0	1	0	2	3	7	1
Batticaloa	6	1	10	4	5	3	3	7
Colombo	36	9	2	7	9	10	4	0
Jaffna	55	47	59	24	20	18	9	38
Mannar	6	5	1	16	5	1	4	2
Trincomalee	0	0	2	6	7	1	1	4
Vavuniya	3	1	2	1	6	1	0	0
Other	4	5	7	3	4	2	0	2
Unknown	15	13	7	1	1	1	0	0

CHILDREN AFFECTED BY THE CONFLICT:

A. UNDERAGE RECRUITMENT / CHILD SOLDIERS

In a public document on its website, in reference to its monitoring and reporting, UNICEF states: "UNICEF continuously checks its database on under age recruitment to ensure its accuracy. UNICEF only withdraws recruits from its database when it is able to verify their release through an official letter of release, or by establishing that the child is reunited with his or her parents. UNICEF estimates that its database only reflects a third of the actual number of children recruited." See http://www.unicef.org/srilanka/Monitoring_and_Reporting_August_Update.pdf

Organisation	Region covered	Period	Child recruits
UNICEF	All island	January – August 2007	Held by LTTE 1469 Held by Karuna 214 **Total 1683**

B. CHILDREN ABDUCTED OR KILLED – according to working document

Reports of children abducted or killed which appear in the working document can be summarised as follows:

	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Total
Children killed	03	01	04	09	01	03	03	01	**25**
Children abducted	10	04	07	04	10	03	03	02	**43**
Total	13	05	11	13	11	06	06	03	**68**

KILLINGS

Based on the updated confidential working document already passed to the Presidential Commission of Inquiry, a number of reliable sources estimate the number of civilians killed from January to August 2007 is **662** persons. To the best of our knowledge, this figure represents civilians only.

Please note that our previous public report of SLMM data mistakenly included combatants with civilian casualties. The data below has been revised and therefore does not include unidentified civilian casualties or deaths of combatants. However, the numbers below are neither absolute nor exact due to the imprecise nature of the SLMM reports.

Though there are numerous public sources on killings in Sri Lanka, it has not previously been possible to see the most credible information in a single glance. This is compiled here to give a general idea of the impact of the conflict.

Organisation	Region covered	Period	Number killed
Sri Lanka Monitoring Mission (SLMM)	NE	January to August 2007	Jan - 60 Feb - 59 Mar - 48 Apr - 131 May - 37* Jun - 31 July - 26 August - 29 **Total- 421**

* Details for May cover the first two weeks only, as accounts of casualty figures for the final two weeks vary greatly between the Government and the LTTE.

MISSING

Based on the updated confidential working document already passed to the Presidential Commission of Inquiry, reliable sources put the number of disappearances from January to August 2007 at **540** persons. To the best of our knowledge, this figure represents civilians only.

SLMM figures, quoted below, have also been checked and should reflect numbers of missing civilians only. As stated above, these numbers are not exact due to the imprecise nature of the SLMM reports.

Organisation	Region covered	Period	Number missing
Sri Lanka Monitoring Mission (SLMM)	NE	January – June 2007	Jan – 38* Feb – 68 Mar – 43 Apr – 62 May – 30 Jun – 46 Jul – 7 Aug – 18 **Total – 312**

*Definite numbers are not always mentioned, yet the statements below suggest the status of abductions:

"The situation in Vavuniya remained tense; due to... increased numbers of direct assassinations and abductions."
"There are still many abductions in the Batticaloa district...Although the figures are still elevated, they are smaller than last week's. Abductions are reported in the other districts as well, but not as many."
(January Reports)

"Abductions are still taking place, mostly in Batticaloa and Vavuniya, but also in other districts."
"The number of abductions was lower this week (4th Week- Feb) than the week before. In Batticaloa four abductions were reported, compared to 19 last week."
(February Reports)

"In Jaffna mass abductions, disappearances and killings continue. No proper investigations are made into these killings by GOSL, even though they are taking place close to heavily guarded sentry posts and areas."
"Assassinations and abductions in Batticaloa continue. This week alone SLMM received fourteen abduction cases, seven of them against the Government, four against LTTE and three against TMVP (Karuna). Also two persons have been reported missing."
(March Reports)

"In Jaffna the number of abductions also dropped....One person was abducted this week, as compared with 4 last week, and 8 the week before that."

(April Reports) "The number of abductions in the Eastern Region decreased this week, from 11 last week to 3 this week, all of which occurred in Trincomalee district." "Abductions are still taking place in Batticaloa and Ampara districts. Perpetrators are most often suspected to be members of TMVP or LTTE, although some times it is the Army or police who are accused of abductions." **(May Reports)** "There has been a significant increase of child abductions reported in the Batticaloa and Ampara districts." "Thirty-four abductions were reported this week [11-17 June] as compared with nine last week. In Trincomalee district, three abductions were reported, in Ampara district fourteen and in Batticaloa district seventeen. Of these sixteen were minors. This is a significant rise compared to the two minors reported as abducted last week. Six civilians were assassinated during the week." **(June Reports)** "Street violence in Jaffna continued through extortion, assassinations and abductions. Youth and businessmen were targeted as violence picked up compared to [the] previous week." (3rd Week) **(July Reports)** "The unrest continued in Jaffna, where the SLMM received reports on 10 assassinations during the week (1st Week)" "Abductions were still being reported in the north, with the SLMM receiving three complaints. According to the complaints abductions were regularly carried out in broad daylight..."(2nd Week) **(August Reports)**	
Human Rights Commission of Sri Lanka (HRCSL)	Figures requested but not available at the time of publishing this report.

Discussion Paper on a Human Rights Field Presence in Sri Lanka

International Commission of Jurists♦

Introduction

This document seeks to stimulate debate and discussion about the establishment of an international human rights field presence in Sri Lanka in response to the current human rights crisis. It has been prepared by the International Commission of Jurists (ICJ), drawing on discussions and consultations with relevant actors in Sri Lanka and elsewhere. It explores a range of concerns that have been raised about such a human rights presence. It is divided into two parts. The first part describes the context, in particular the difficulties encountered by existing national bodies and institutions in protecting human rights. It also sketches the limitations on the work of ceasefire monitors from Nordic countries deployed in the north and east since 2002 and the role of the Senior Human Rights Adviser to the United Nations Country Team. The second part examines some past and present field presences in other countries and draws out some aspects relevant to Sri Lanka.

The ICJ considers that an effective international human rights field presence should be established because of the seriousness of the situation in Sri Lanka and the positive role it would play. Relevant factors include: the scale and nature of the human rights violations; the limited capacity of national institutions to protect human rights, especially in areas outside the capital; the need to take action to help protect civilians in the conflict; a long-standing climate of impunity; the weaknesses of key state institutions, as well as increasing threats against human rights defenders from both the Liberation Tigers of Tamil Eelam (LTTE) and state institutions.

As the conflict escalates, domestic human rights mechanisms have become insufficient to protect people from human rights violations. Experience from around the world has shown that in situations such as this, a professional, impartial and international human rights field presence can play a significant positive role. Together with other strategies, it can help to protect lives, discover the truth about abuses on all sides and support the government and civil society in protecting the civilian population. A formal international human rights presence can also reinforce the justice system and other national human rights mechanisms and support official efforts to make the justice system effective.

At this time in Sri Lanka, given the gravity of the human rights situation and the fact that a peace agreement is not likely to materialize in the immediate future, the ICJ considers that a human rights field presence should be put in place even before any sustainable peace agreement between the Government and the LTTE. A field presence could also assist in building confidence, help to de-escalate the conflict, and help to open up space for political initiatives.

♦ Released in October 2007

There is a broad agreement within national and international civil society that the United Nations Office of the High Commissioner for Human Rights (OHCHR) is best placed to take on this role. On 10 October 2007, 33 national organisations and individuals submitted a letter addressed to the High Commissioner for Human Rights during her visit to Sri Lanka asking her to raise with the Government and the LTTE the need to establish a field presence in Sri Lanka.

The Sri Lankan Context

Hostilities in Sri Lanka have escalated dramatically since August 2005. There has been heavy fighting between Government forces and the LTTE, in particular in the east of the island. The violations include extrajudicial executions and enforced disappearances[1], as well as violations of the laws of war committed against civilians and soldiers *hors de combat*.[2] The Ceasefire Agreement of February 2002 has collapsed in practice. In late November 2006, the leader of the LTTE stated that the LTTE no longer felt bound by it. In mid-April 2007, the Secretary of the Ministry of Defence was quoted as having said that the ceasefire no longer had meaning.[3]

Between April 2006 and March 2007, more than 230,000 people were newly displaced, according to the United Nations High Commissioner for Refugees.[4] Half of them are from Batticaloa District in the east. They have reportedly faced pressure to return to their homes, including threats by local authorities to stop assistance if the displaced stay in Batticaloa.[5]

Concerns have also been raised regarding the functioning and independence of some of Sri Lanka's democratic institutions.[6] Since March 2005, the Constitutional Council, the body responsible for making appointments to independent commissions and for approving appointments to other positions such as the Chief Justice, the Attorney-General, the Judicial Service Commission and the Inspector-General of Police, has not been constituted. The President has made direct appointments to the Human Rights Commission, the Judicial Service Commission, the Supreme Court, the Court of Appeal and the Attorney-General.

The LTTE has been responsible for widespread human rights abuses, including political killings, abductions, recruitment of child soldiers, torture of prisoners and threats and intimidation of journalists and others seen as critical of them. In addition, it has given military training, reportedly often under duress, to tens of thousands of civilians in areas under its control.

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[1] See report of International Crisis Group, *Sri Lanka's Human Rights Crisis*, June 2007, p. 10-11, Human Rights Watch reports, *Human Rights Council : Act to end serious abuses in Sri Lanka*, 1 March 2007 and *Letter to the Human Rights Council*, March 2007 and of the Civil Monitoring Committee and the Sri Lankan Human Rights Commission Jaffna and Batticaloa quoted in The Nation, *Anarchy Unlimited*, 11 March 2007.

[2] See for example International Commission of Jurists, *Sri Lanka - ICJ inquest observer finds flaws in investigation into killing of ACF aid worker*, April 2007; Amnesty International report, *Sri Lanka: A Climate of Fear in the East*, June 2006 and Human Rights Watch reports, *Sri Lanka: Karuna Group and LTTE Continue Abducting and Recruiting Children*, March 2007 and *Sri Lanka: Letter to Pope Benedict XVI on the situation in Sri Lanka*, April 2007.

[3] Associated Press, Colombo, 12 April 2007.

[4] See http://www.unhcr.org/news/NEWS/45f6bb704.html.

[5] See Interagency Standing Committee report, *Sri Lanka fact sheet: Batticaloa district*, 29 March 2007, http://www.reliefweb.int/rw/rwb.nsf/db900SID/LSGZ-6ZSHRL?OpenDocument.

[6] See Human Rights Watch, *Sri Lanka: Return to War: Human Rights Under Siege*, August 2007, Asian Legal Resource Centre submission, *Sri Lanka: Serious Concerns Affecting Sri Lanka's Judiciary*, May 2007, International Crisis Group, *Sri Lanka's Human Rights Crisis*, June 2007.

In addition, there have been reports of killings, abductions and forced recruitment of child soldiers by the Karuna Group, a breakaway faction of the LTTE. Observers, including Allan Rock, the Special Advisor to the United Nations Special Representative for Children and Armed Conflict, have concluded that certain elements of the Government security forces have been complicit in the recruitment of children by the Karuna Group.[7]

I. Existing Bodies and Institutions in Sri Lanka Responsible for Human Rights Protection

> *"It is the Commission's belief that no national or regional human rights entity will be able to effectively monitor and implement human rights standards in the north and the east. No organisation or individual enjoys that kind of universal authority and legitimacy."*
> The Human Rights Commission of Sri Lanka, December 2003[8]

> *"I continue to be concerned that there needs to be also a very robust but forward-looking human rights capacity in Sri Lanka to deal with the clearly deteriorating human rights and humanitarian situation, in particular cases of abductions, disappearances and the management of the severe displacement, particularly in the east. ... We would of course like to envisage the possibility of establishing an OHCHR office in Sri Lanka".*
> UN High Commissioner for Human Rights, March 2007[9]

National Institutions

The capacity to protect human rights in Sri Lanka is limited, especially in areas outside the capital. There is a long-standing climate of impunity in the country and human rights defenders have come under attack from both sides.[10] Key parts of the criminal justice system, such as the police and the Attorney-General's Department have not been able effectively to investigate human rights violations or bring perpetrators to justice. In areas under its control, the LTTE have prevented the development of any independent and effective human rights institutions. The country's criminal and judicial system has been prevented from functioning in LTTE-controlled areas for a number of years.

The high level of violence has created an atmosphere of fear and insecurity for civilians. Victims of violence are apprehensive about complaining to police or other authorities for fear of retaliation, especially in the absence of victim and witness protection mechanisms. The drafting of a witness protection bill has been underway for over one year.

The country's Human Rights Commission (the HRC), set up in 1996, has a mandate to investigate incidents of specific violations and recommend redress. But time and again it has been unable to fulfil its mandate, primarily due to the lack of cooperation from the Government and the LTTE. The Commission lacks sufficient political weight to ensure implementation of its recommendations. The

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[7] http://www.un.org/children/conflict/pr/2006-11-13statementfromthe127.html
[8] Human Rights Commission, *The Human Rights Situation in the Eastern Province*, December 2003.
[9] High Commissioner for Human Rights, interactive debate at the Human Rights Council in March 2007.
[10] See United Nations Office at Geneva statement 'Independent Experts Express Serious Concern over the Escalation of violence in Sri Lanka', 11 August 2006. Also available at: http://www.unog.ch/unog/website/news_media.nsf.

Commission's work has, at times, been blocked by public officers. Furthermore, its capacity to monitor the human rights situation and investigate specific incidents in conflict areas is limited. After a fact-finding mission in December 2003, the Commission stated:

> *"It is the Commission's belief that no national or regional human rights entity will be able to effectively monitor and implement human rights standards in the north and the east. No organisation or individual enjoys that kind of universal authority and legitimacy".*

The HRC reiterated this concern after a further fact-finding mission in April 2005. In reaching these conclusions, the HRC highlighted abuses by the LTTE, such as political killings, recruitment of child soldiers, abductions and extortions, as well as violations by the state. The HRC does not function in LTTE-controlled areas as it has no access to those areas.

The independence of the HRC and other constitutional bodies was undermined in 2006 when the President of Sri Lanka directly appointed their members, contrary to the usual procedures set out in the Constitution for making appointments to independent bodies.

A Ministry of Disaster Management and Human Rights set up in late 2005 has taken some human rights initiatives, including convening an Inter-Ministerial Committee that has committed itself to following up on investigations into human rights violations.

Civil society actors engaged in human rights work have been labelled in the media as "traitors".[11] Many face serious threats from both sides of the conflict as they continue to carry out their work.[12] Access to areas affected by the conflict is often limited and controlled by both sides. In January 2006, the Parliament established a Parliamentary Select Committee to investigate NGOs. The basis for this, as set out in the terms of reference issued in Parliament, is the allegation that some NGOs are engaged in activities that are "inimical to the sovereignty and integrity of Sri Lanka" and "detrimental to the national and social well being of the country", and that adversely affect "national security".

The Sri Lanka Monitoring Mission (SLMM)

The Sri Lanka Monitoring Mission (SLMM) has monitors from Nordic countries deployed in the north and east to monitor the ceasefire. Their role has been principally to ensure the separation of forces, as agreed in the ceasefire. Under Article 2.1 of the Ceasefire Agreement (CFA), the SLMM also has a mandate to monitor "hostile acts against the civilian population, including such acts as torture, intimidation, abduction, extortion and harassment".[13] While some cases have been resolved through involvement of the SLMM, victims of human rights abuses have also reported that they are reluctant to make complaints to the SLMM as they fear reprisals due to the composition of the Local Monitoring Committees.[14]

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[11] See Human Rights Watch, Sri Lanka: Return to War: Human Rights Under Siege, August 2007 and Sri Lanka: Letter to Pope Benedict XVI on the situation in Sri Lanka, April 2007.
[12] See Human Rights Watch, Sri Lanka: Return to War: Human Rights Under Siege, August 2007.
[13] See http://www.slmm.lk/documents/cfa.htm
[14] Local Monitoring Committees are composed of five members, two appointed by the Government of Sri Lanka, two by the LTTE and one international monitor appointed by the Head of the SLMM.

The SLMM has its headquarters in Colombo and offices in six of the eight districts in the north and east (Jaffna, Trincomalee, Batticaloa, Amparai, Mannar and Vavuniya) and a liaison office in Killinochchi.[15] The CFA does not expressly permit the SLMM to establish monitoring offices in Killinochchi and Mullaitivu, both LTTE-controlled areas. Until early 2006 two naval monitoring teams operated from Trincomalee and Jaffna but they were forced to suspend operations due to security risks, especially after a number of serious incidents at sea.

After the European Union listed the LTTE as a "terrorist organisation" in May 2006, the LTTE said that they were not going to guarantee full security for EU citizens, thus forcing EU members of SLMM to leave the country.[16] Consequently, from 1 September 2006, the SLMM was functioning with only 30 monitors from Iceland or Norway, compared to the original strength of 60. The SLMM is continuing to keep a presence in all six districts in line with the CFA, although in some offices, such as Mannar and Amparai, its officers are present less frequently than before September 2006.

The decision to closely link the role of the monitors and the role of the facilitators of the peace process at times placed the SLMM in a difficult position. Their role in regard to drawing attention to violations of the CFA was sometimes seen as potentially destabilising the peace process. The SLMM has found it especially difficult to verify abuses after the recent escalation in violence, because the Government has denied its monitors access to certain incidents (including, for instance, to Muttur, the scene of the killing of 17 humanitarian workers in Trincomalee District in August 2006). The LTTE has also frequently limited access of the SLMM. Monitoring tends to be limited to recording complaints and publicly releasing statistics on trends in CFA abuses. The Government and LTTE have frequently failed to act on recommendations of the SLMM.

The Senior Human Rights Adviser to the UN Country Team

Since mid-2004, a Senior Human Rights Adviser (SHRA) has been posted in Sri Lanka. The Adviser is attached to the United Nations Country Team and works with the Resident Coordinator, United Nations agencies and national partners. The role of the SHRA is to advise and support strategies to protect human rights and build the human rights capacity of local institutions, civil society and the United Nations itself. This includes helping to develop the capacity of the Human Rights Commission, including by the deployment of a small number of international UN Volunteers to the Commission's regional offices. These volunteers are deployed to strengthen the Commission's monitoring and protection work. The SHRA has also provided advice and support to the Commission's work with internally displaced people and the monitoring of tsunami assistance programs. The SHRA has recently been strengthened by two international staff on temporary assignment. The SHRA is working with the Ministry of Disaster Management and Human Rights on various technical cooperation projects (e.g. reporting of Sri Lanka to international human rights treaty bodies) and training initiatives. The SHRA has also played an advisory role in the establishment of the Presidential Commission of Inquiry (CoI) and Independent International Group of Eminent Persons (IIGEP) and related witness protection programmes.

[15] The Liaison Office in Killinochchi does not have a monitoring mandate.
[16] Interview with then Head of SLMM, *The Nation*, 20 August 2006.

The role and capacity of the SHRA is extremely limited when compared to OHCHR offices in countries such as Angola, Bosnia and Herzegovina, Burundi, Cambodia, Colombia, the Democratic Republic of the Congo, Guatemala, Mexico, Nepal, Serbia and Montenegro (including Kosovo) and Uganda or indeed with human rights components in UN peace operations in countries such as Afghanistan, Burundi, Côte d'Ivoire, the Democratic Republic of Congo, Ethiopia/Eritrea, Liberia, Sierra Leone, the Sudan and Timor-Leste.

The Views of the High Commissioner for Human Rights

The United Nations High Commissioner for Human Rights in her address to the United Nations Human Rights Council in September 2006 stated:

> *"There is an urgent need for the international community to monitor the unfolding human rights situation as these are not merely ceasefire violations but grave breaches of international human rights and humanitarian law".*

On 14 March 2007, the High Commissioner in an interactive debate at the Council stated that:

> *"I continue to be concerned that there needs to be also a very robust but forward-looking human rights capacity in Sri Lanka to deal with the clearly deteriorating human rights and humanitarian situation, in particular cases of abductions, disappearances and the management of the severe displacement, particularly in the east".*

The High Commissioner continued by saying that "we would of course like to envisage the possibility of establishing an OHCHR office in Sri Lanka".

The Presidential Commission of Inquiry and Independent International Group of Eminent Persons

The President of Sri Lanka committed on 4 September 2006 to establishing an international commission of inquiry to probe abductions, enforced disappearances and extrajudicial killings in all areas of the country.[17] Two days later the Government announced that instead of an international enquiry, it would establish a national investigation observed by a group of eminent persons.[18]

The Commission of Inquiry (CoI), was set up in November 2006 and is mandated to investigate "incidents involving alleged serious violations of human rights" since 1 August 2005. The terms of reference specifically name 15 incidents of abductions, enforced disappearances and unlawful killings to be investigated, including the assassination of the Foreign Minister Lakshman Kadirgamar in August 2005, the killing of 17 *Action Contre la Faim* (ACF) humanitarian aid workers in Muttur in August 2006 and the execution-style killing of five Tamil students in Trincomalee in January 2006. While it is possible for the CoI to investigate complaints of other incidents that have occurred since

[17] See http://www.news.lk/index.php?option=com_content&task=view&id=722&Itemid=44
[18] See http://www.news.lk/index.php?option=com_content&task=view&id=736&Itemid=51

August 2005, it is clear that the role of the CoI is not to monitor the ongoing situation.[19] The CoI is mandated to provide a confidential report to the President of Sri Lanka.

The Independent International Group of Eminent Persons (IIGEP) is mandated "to observe all the investigations and inquiries conducted by the CoI, with the view to satisfying that such inquiries are conducted in a transparent manner and in accordance with basic international norms and standards pertaining to such investigations and inquiries".[20]

In its first public statement on 11 June 2007 the IIGEP said that:

> *"In the current context, in particular, the apparent renewed systematic practice of enforced disappearances and the killings of the Red Cross workers, it is crucial that the Commission and the IIGEP not be portrayed as a substitute for robust, effective measures including national and international human rights monitoring".*

Similar commissions of inquiry have been set up in Sri Lanka in the past. For instance, in the mid-90s, four commissions of inquiry confirmed complaints of over 20,000 cases of enforced disappearances reported in the context of both the conflict in the north and east and an insurgency in the south.[21] The commissions took several years to complete their task. Their reports were published by the government of the day. However, very few of their recommendations have been implemented and very few of the 4000 cases recommended for further investigation and prosecution have so far resulted in successful prosecutions.[22] While these commissions carried out their work, high numbers of enforced disappearances continued in the north, with 623 reported cases in 1996 alone.[23]

Since his election as the President of Sri Lanka, Mahinda Rajapakse has established at least four commissions of inquiry related to human rights.[24]

The United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions, during his address to the United Nations Human Rights Council on 27 March 2007, made the following assessment:

> *Commissions of inquiry are, at their best, less than nimble and less than capable of addressing constantly evolving situations. And no one seriously believes that any national initiative will be able to meaningfully address abuses committed by the*

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[19] The Commission has added one further case to the original 15 in their mandate and may consider adding others.

[20] See http://www.pchrv.gov.lk/Observers.htm.

[21] In November 1994 President Kumaratunga set up three Presidential Commissions of Inquiry into Involuntary Removal or Disappearance of Persons (one for each region of the country) that had occurred in the country since 1 January 1988. All three Commissions submitted comprehensive reports in September 1997 without, however, having finished their work. The investigation of some 10,000 remaining complaints relating to these "old" cases was, therefore, entrusted to a fourth Presidential Commission of Inquiry. In total, the four commissions recorded more than 20,000 cases of disappearances. See report of the Working Group on enforced and involuntary disappearances (E/CN.4/2000/64/Add.1).

[22] See report of the Working Group on enforced and involuntary disappearances (E/CN.4/2000/64/Add.1).

[23] *Ibid.*

[24] International Crisis Group, *Sri Lankan's human rights crisis,* June 2007, p. 20-21.

LTTE even if it were to end – and this remains but a hope – violations committed by Government forces.

With its limited mandate, the IIGEP cannot carry out any of the human rights monitoring, verification, documentation and capacity building functions of a human rights field presence. Its sole role is to observe and monitor the compliance of the CoI's investigations with international standards.

In summary, any human rights field presence established in Sri Lanka would complement and not duplicate the CoI and IIGEP. The CoI is investigating and providing the President with a report on some specific past abuses and a field presence would focus on the ongoing protection of human rights and prevention of abuses.

Political Support in Sri Lanka for a Human Rights Field Presence

In early April 2007, the Tamil National Alliance (TNA), the main Tamil opposition alliance in Parliament, called for the stationing of United Nations monitors to look into the human rights situation in Sri Lanka.[25]

In May 2007, Ranil Wickremasinghe, the leader of Sri Lankan's opposition party, the United National Party (UNP), and former Prime Minister, stated that he would welcome monitoring and that it would help Sri Lanka in response to a question asked during a public event at the European Parliament.

On 4 June 2007, the LTTE's Peace Secretariat requested the EU to "ask Sri Lanka to allow international human rights monitors to the island". Though this was not accompanied by any commitment to allow full access for such a presence to LTTE-controlled areas.

In April 2007, the Civil Monitoring Commission, a multiparty committee for monitoring enforced disappearances, abductions, extrajudicial killings, and arbitrary arrests and detentions, held a public event after which a public statement was issued that includes a call for international monitoring:

"Set up an independent international monitoring mechanism in Sri Lanka that can investigate the disappearances of our loved ones in an independent manner and could work with the government, all relevant actors including Civil Monitoring Commission and all human rights defenders, to hold those accountable, prevent future disappearances and bring an end to the culture of impunity."

Sri Lankan organisations and networks, both locally and in the diaspora, have consistently called for the establishment of a human rights field presence in Sri Lanka.

[25] Daily Mirror, 6 April 2007.

II. How Would a Human Rights Field Presence Work?

Section II of this paper seeks to illustrate how some other field presences have functioned. It is essential to recognise at the outset that every field presence has a unique combination of features suited to the particular country.

Functions of Field Presences of OHCHR

While the mandate of an international human rights field presence varies depending on the agreement in relation to a particular country, such a presence usually provides a visible presence to help dissuade abuses. Through quiet diplomacy and public advocacy it identifies immediate action that all parties should take in response to human rights violations. It also seeks to promote longer term reforms and increase the capacity of national institutions. Any presence would encourage and seek to increase the space for local state and non-governmental human rights actors to operate effectively and support those individuals and organisations to do more to protect human rights. The presence would seek to play a convening or bridging function between civil society, government authorities, UN agencies and international NGOs and experts. The field presence would be able to help human rights actors in-country to activate UN human rights bodies and mechanisms.[26]

A general framework for the activities of an OHCHR field presence (as opposed to a human rights component of a UN peacekeeping operation) is normally set out in a MoU between the relevant government and OHCHR.

In some countries in conflict, as part of peace talks, the parties to the conflict have included human rights commitments in peace agreements, or even concluded a separate human rights agreement, and invited the United Nations to monitor compliance with the agreements.

The establishment of a field presence would help to deepen dialogue between the United Nations and the Government of Sri Lanka on human rights issues of mutual concern and promote collaborative mechanisms through which to assist the Government of Sri Lanka to respond to these mutual concerns.

Mandate, Size and Location of an OHCHR Field Presence

For an international human rights field presence to be credible, it would need to have a range of capacity-building and monitoring functions. It would need to be able to verify allegations of human rights violations by all parties to the conflict and be present throughout the country. It would need to have access to all LTTE-controlled areas, to government and state authorities, and other parties involved in the conflict. The MoU would need to allow the presence to interview anyone freely and in private and to receive information from all sources. It should also be mandated to provide capacity-building and technical assistance to national institutions, with a view to supporting longer

[26] See Michael O'Flaherty (ed), *The Human Rights Field Operation: Law, Theory and Practice*, Ashgate, United Kingdom, 2007, also see descriptions of various OHCHR field presences for example: Cambodia - www.ohchr.org/english/countries/kh/summary.htm, Nepal - www.ohchr.org/english/countries/np/summary.htm, Timor Leste - www.ohchr.org/english/countries/tp/summary.htm.

term reform. Any presence would need to be able to interact freely with civil society, including local human rights organizations. The field presence would need to have the right to issue public statements and reports and would report to the High Commissioner for Human Rights.

The MoU would also need to include a commitment from the authorities to take responsible and remedial action necessary to comply with Sri Lanka's human rights obligations, including investigating and prosecuting those responsible for violations.

Decisions about the size and composition of the field presence and where in the country staff would be stationed, would be based on the needs of the situation in the country and OHCHR's mandate. Both national and international staff should include a sufficient number of female employees in non-administrative functions. It is not clear yet how many staff that would be required in Sri Lanka.

In Guatemala, a headquarters was established in Guatemala City and eight regional and five sub-regional offices where opened. By the end of 1995 there were around 300 staff, 211 of them internationals from 36 countries. The mandate of MINUGUA was set out in the Comprehensive Agreement on Human Rights which provided a dual mandate: "to verify compliance with a series of commitments on human rights and to strengthen national human rights institutions".[27]

In Nepal, five regional offices were set up. Approximately 50 international staff were recruited. In addition, a similar number of national staff (including national human rights officers, translators, administrative and logistical staff) were engaged.

In Rwanda, a broad agreement was signed between the High Commissioner for Human Rights and the Prime Minister of Rwanda in September 1994. It mandated OHCHR to carry out investigations into violations of human rights; to monitor the ongoing human rights situation and through their presence to help prevent possible human rights violations from occurring; to implement programmes of technical cooperation; to cooperate with other international agencies in charge of re-establishing confidence; to report to the High Commissioner. In August 1995 the High Commissioner, during a visit to Rwanda, reached an agreement with the Government that "as many as 147 human rights field officers would be deployed, so as to cover each of the communities of the country".[28]

The office in Cambodia, established in October 1993. Today the priorities of the Office include documenting and responding to reports of serious violations of human rights, enabling non-governmental and civil society advocacy organizations to work in a safe environment, contributing to efforts to establish accountable public institutions and a professional judiciary with recognized integrity, as well as to the lawful management of land and natural resources for the benefit of Cambodia's people. Most of OHCHR Cambodia staff are based in the main office in Phnom Penh, with a small presence in a regional office in Battambang.[29]

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[27] Franco, L. and Kotler, J., Combining institution building and human rights verification in Guatemala: The challenge of Buying in without selling out, in Henkin, Alice H. (ed.), *Honoring Human Rights: From peace to justice: Recommendations to the international community,* The Aspen Institute, Washington DC, 1998.

[28] Martin, I., After Genocide: The UN Human Rights Field Operation in Rwanda, in Henkin, Alice H. (ed.), *Honoring Human Rights: From peace to justice: Recommendations to the international community,* The Aspen Institute, Washington DC, 1998.

[29] http://www.ohchr.org/english/countries/kh/summary.htm

OHCHR's office in Colombia was established in 1996 through an agreement signed by the Government of Colombia and the United Nations. The Office observes the human rights situation in the country and adherence to international humanitarian law; advises State and Government authorities and institutions on how to ensure compatibility with international instruments; advises representatives of civil society; provides technical cooperation and assistance to State and Government authorities and institutions and to representatives of civil society in strengthening the national capacity to protect human rights; and promotes and disseminates human rights and international humanitarian law. Work is conducted from the office in Bogotá and from subregional offices in Bucaramanga, Cali and Medellín.[30]

Is it Necessary to have an Agreement between the Government and the LTTE in Order to put a Human Rights Field Presence on the Ground?

During 2003, there were negotiations between the Government and the LTTE on the content of a draft Declaration on Human Rights Principles prepared by an international adviser on human rights to the peace process. The declaration was due to be adopted by both parties during peace talks at Hakone, Japan in March 2003. The adviser was also asked to produce a human rights road map. According to official records, the parties agreed on the need for a declaration and an acceptable mechanism to monitor human rights standards.[31] However, after the peace-talks collapsed in April 2003, the declaration and road map were never adopted. As neither the declaration nor road map were made public, it is not known what was the nature of the proposed monitoring mechanism and what institution, if any, had been proposed to take on this role.

The experience of other countries, including Colombia, the Democratic Republic of Congo, Nepal and Sierra Leone show that it is possible to set up an international human rights field presence in the absence of a peace agreement between warring parties.

OHCHR's office in Colombia was established in 1996 in the midst of the civil war. In early 2005, the Government of Nepal signed a Memorandum of Agreement with OHCHR, despite the ongoing armed conflict between the Government and the Communist Party of Nepal (CPN) (Maoist). The CPN (Maoist) unilaterally declared its willingness to cooperate with the Office.

OHCHR's office in the Democratic Republic of the Congo (DRC) was established in 1996, in the midst of a conflict affecting the DRC and neighbouring countries.[32] In 1999 a human rights component was also included in the peacekeeping operation (MONUC).

In other countries in conflict, a human rights presence has been established following specific human rights agreements but before a formal peace accord.

The establishment of the UN Human Rights Verification Mission in Guatemala (MINUGUA) in 1994, followed the signing of a Human Rights Agreement between the Government and the armed

[30] http://www.ohchr.org/english/countries/co/summary.htm
[31] See http://www.norway.lk/peace/peace/sixth/sixth.htm
[32] http://www.ohchr.org/english/countries/zr/summary.htm

opposition, which provided for the UN to monitor both parties' adherence with human rights standards and to strengthen national human rights institutions.[33] This set the stage for the negotiation of a series of other accords leading to a final agreement almost two years later.

The experience in El Salvador indicates the important facilitative role that human rights measures can play in a peace process. The Human Rights Agreement in El Salvador gave the Government and the *Frente Farabundo Martí para la Liberación Nacional* (FMLN) a way to break a negotiating deadlock. Implementing the human rights measures helped to move the process forward and to build confidence between the parties to address issues that lay at the heart of the conflict.[34]

The LTTE

While country situations differ, the experience of other countries such as Nepal is that the agreement between OHCHR and the Government could permit engagement with "all relevant actors, including non-state actors"[35] or similar language. This would permit the field presence also to focus on human rights in areas outside of government control.

In Nepal, the establishment of an office by OHCHR was welcomed publicly and in communications with OHCHR by the leadership of the CPN (Maoist). The latter announced publicly on 11 August 2005 that it was their policy to allow OHCHR-Nepal to travel to any part of the country affected by the conflict, to investigate incidents, visit prisoners under the control of the CPN (Maoist) and to interview members of its units. During the conflict, officers of OHCHR met regularly with CPN (Maoist) leadership at the national and local level to raise concerns about human rights abuses and urge implementation of recommendations for prevention and accountability.

In Sierra Leone, the UN human rights team was able to have high level access to the rebel leadership. Frequent attempts to engage with the rebel leadership may have contributed to the announcement of the Revolutionary United Front (RUF) on 21 February that they "would take punitive measures against any members who would violate human rights" and that they "condemn all human rights violations and atrocities including amputations, mutilations, maiming, rape, etc., perpetrated against the civilian population". In May 1999, the UN delivered an *Aide Memoire* to the RUF leadership drawing their attention to the consequences of patterns of abuses under international criminal law.[36]

The SLMM has interacted with the LTTE in relation to "hostile acts against civilians" in violation of Article 2.1 of the CFA, including on cases of child recruitment, torture and abduction. On some occasions the victims were released as a result. According to the SLMM, cooperation from the LTTE was more effective in Government-controlled areas than in LTTE-controlled areas, due to a general lack of access to LTTE controlled areas, including to victims living in those areas. Bearing in mind

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[33] Henkin, Alice H. (ed.), *Honoring Human Rights: From peace to justice: Recommendations to the international community*, The Aspen Institute, Washington DC, 1998.

[34] Bell, Christine "Negotiating Justice? Human Rights and Peace Agreements", *Report by the International Council on Human Rights* (2006) pp. 24-25.

[35] Memorandum of Understanding between the Office of the High Commissioner for Human Rights and His Majesty's Government of Nepal, 11 April 2005.

[36] O'Flaherty M., Case study: The United Nations Human Rights Field operation in Sierra Leone, in Michael O'Flaherty (ed), *The Human Rights Field Operation: Law, Theory and Practice*, Ashgate, United Kingdom, 2007.

this experience, it is important that at least the LTTE should make a written and public declaration that it would grant the field presence unfettered access to carry out its functions without any hindrance in areas under the control of the LTTE.

In 2004 the LTTE established the Northeast Secretariat on Human Rights which developed a "Northeast Charter on Human Rights". This Charter was never formally endorsed by the LTTE. In February 2007, the LTTE appointed a spokesperson for Human Rights and Humanitarian Affairs. The Secretariat, the Charter, and the appointment of the Spokesperson have not resulted in any discernable improvement in respect for human rights by the LTTE.

Current and Future Human Rights Violations

A recent study of nine field presences found that every mission examined had some incremental positive impact on civilian safety and that "although causality is nearly impossible to ever prove in these settings, this evidence suggests that an international presence moderates or diminishes abusive behaviour".[37] As a field presence demonstrates its credibility and authority and increasingly understands the subtleties of the political situation it can play an increasingly significant protection role.

In Nepal, an OHCHR Office was set up in mid-2005. In early 2006, a unilateral ceasefire which had been declared by the CPN (Maoist) came to an end. Despite the end of the unilateral ceasefire targeted killings decreased in the subsequent period partly due to the work of OHCHR-Nepal. In addition, a widespread pattern of enforced disappearances by the security forces came to a halt after OHCHR established its office in Nepal. The CPN (Maoist) released a number of people taken hostage. The OHCHR presence also supported the creation of space for public debate, not only in Kathmandu, but also through its visible presence in the districts. While none of these improvements can be said to be the singular outcome of the OHCHR presence, OHCHR played a significant role in these successes. More widely, OHCHR is said to have contributed to creating a climate that allowed the conflict to move to a political solution. As of November 2006, a Comprehensive Peace Agreement is in place and the country will hold elections to a Constituent Assembly, a key step in an ongoing peace process.

In Sierra Leone the presence of the human rights team within the UN peacekeeping operation was critical to the peacebuilding process. The human rights team had high-level access to the government, the rebel leadership and the peace negotiations. This contributed to the involvement of the human rights community in the peace-talks as observers, enabling them to have an impact on the inclusion of human rights in the peace agreement. There were also some improvements in the ongoing human rights situation in the country in the areas of: recruitment of child combatants, fair trial standards and conditions of detention, situation of individual's abducted by the rebels and the rebels granting limited humanitarian access, and some temporary reductions in amputation and mutilation.[38]

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[37] See L. Mahony, *Proactive Presence: Field strategies for civilian protection*, Report by the Centre for Humanitarian Dialogue, Geneva, 2006.
[38] *Ibid.*

In El Salvador, ONUSAL began a process of active verification involving a systematic process of gathering evidence of human rights violations and intervening in cases of severe violations. Through this work they were able to significantly contribute to decreasing specific violations, such as arbitrary detention. ONUSAL was established before a ceasefire was achieved. The mission made a significant contribution to the success of the peace process by improving the country's internal situation.[39]

B.G Ramcharan, the former Acting High Commissioner for Human Rights, has documented the preventive role of human rights field operations in Bosnia, Cambodia and Colombia, and has concluded that the preventive role of these operations is undeniable.[40]

[39] Garcia-Sayan, D., The experience of ONUSAL in El Salvador, in Henkin, Alice H. (ed.), *Honoring Human Rights: From peace to justice: Recommendations to the international community,* The Aspen Institute, Washington DC, 1998.
[40] See B.G. Ramcharan, The Protection methods of human rights field offices, in Ramcharan (ed.), *Human rights protection in the field,* chapter 9.

The Human Rights Commission of Sri Lanka; Sombre Reflections and a Critical Evaluation

Law& Society Trust, Sri Lanka[*]

Introduction

This report serves as a critique and evaluation of the performance of the Human Rights Commission of Sri Lanka (referred to variously as the Commission or HRC in the subsequent analysis) over the past 15 months (since May 2006). This is the duration for which the newly appointed Commissioners[1] have held office; a time period during which the legitimacy, independence, integrity and performance of the Commission have suffered serious blows.

Established in terms of Act, No. 21 of 1996 (hereafter the HRC Act), the HRC has been in existence for over a decade during most trying and challenging times due to conflict in the North/East of the country as well as due to the escalation of human rights violations in all parts of the country. Enforced disappearances, extra judicial executions, severe infringements of liberty rights including arbitrary arrests and incommunicado detention have been consistently evidenced during this period. Practices of torture on the part of law enforcement officers even during the times of relative peace have been identified as an 'endemic problem".[2] The response of the HRC to these problems had always been faltering due to a variety of problems mainly associated with its limited authority and scarce resources. Commitment difficulties of former Commissioners (as most Commissioners have been employed on a part time basis), has also been a problem. Even at times that the appointed Commissioners functioned to their best of their capacity, the lack of enforcement powers of the Commission have resulted in their orders/directives being by-passed by governmental authorities.

The observation by a former Chairperson of the HRC summed up the situation very well. Thus;

> "Furthermore, our discussions with the police and other individuals and agencies have revealed that the police had not really been trained in basic investigative skills. For some reason, the training was more of a paramilitary nature. Torture is often a short cut to getting information, and as a result it is systematic and widespread.....we are not talking about isolated cases of rogue policemen: we are talking about the routine use of torture as a method of investigation. It requires fundamental structural changes to the police force to eradicate these practices....We also do not have a clear policy on protection and that is something that

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[*] Written by Researcher Amal de Chickera and edited by Deputy Director, Law & Society Trust/head, Civil & Political Rights Programme, Kishali Pinto-Jayawardena. The contribution made by Co-ordinator, Human Rights in Conflict Programme, Ruki Fernando, is appreciated. The Report was submitted as part of the documentation for the 12th Annual Meeting of the Asia Pacific Forum of National Human Rights Institutions (APF sessions) in Sydney, September 2007

[1] New Commissioners under the chairmanship of former Supreme Court Justice P. Ramanathan were appointed unilaterally by President Mahinda Rakapakse without the constitutionally mandated approval of the Constitutional Council (CC) on 19th May 2006. Justice Ramanathan passed away on 7th of December 2006. President Rajapakse then appointed Justice Ananda Coomaraswamy (the current Chairman of the HRC) in his place.

[2] *Vide* interview by the London based organisation REDRESS with then Chairperson of the HRC Radhika Coomaraswamy in the Reparation Report Issue 5 May 2005, a bi-annual journal of the Redress Trust

has been raised, but again we do not have enough resources. We intervene to make the police provide protection. At the end, the NHRC as an informal body makes recommendations".[3]

The current crisis is however far greater than the problems posed by structural challenges in regard to the functioning of the Commission. Grave questions have arisen as to the very independence of the Commission from the government. This is cause for serious concern, specially due to the steep escalation in human rights violations in the country due to renewed conflict. Seemingly, there is a direct correlation between this concern and the arbitrary appointment of new Commissioners by the President in May 2006. The Commission, which has statutory functions to fulfil, and international standards to maintain in its work, continues to distance itself from this mandate; it is fast taking on the image of a puppet institution which has compromised its legally binding duty by the people in order to tacitly support the increasing human rights violations of the government through its silence and inaction. It is imperative therefore that the performance of the HRC during this period is rigorously evaluated as against its duties and functions as statutorily detailed and failures therein are critically reflected upon.

Lack of Cooperation of the HRC with Critical Civil Society Organisations

It was expected that LST would carry out this evaluation in partnership with the HRC, as an exercise which would be mutually beneficial, objective and balanced. However, the Commissioners, after agreeing to meet with a staff member of LST on the 6th of August 2007, refused to dialogue or engage with him, showing their clear disinterest to be party to such an exercise and refusing to share statistical and other information which would have rendered this evaluation more comprehensive and meaningful[4]. It appeared that the Commissioners believe that their accountability to the people does not extend to being subjected to review, or to the sharing of basic information including statistics on complaints registered and addressed, with a socially responsible organisation.

Even more disturbingly, LST's staff member was informed by one of the Commissioners that the HRC has powers of contempt that it will not hesitate to use whenever appropriate. **This amounted to an implied warning to the recipient staff member that civil society organisations do not have the right to engage in critiques of the HRC which is in itself, is a wholly unacceptable position.** Such veiled threats of contempt powers are extremely problematic at a time when contempt has been used to stifle freedom of expression of activists and ordinary citizens to an extent that the United Nations Human Rights Committee has called upon Sri Lanka to enact a Contempt of Court Act.[5]

The flippant and even threatening manner in which the Commissioners treated a human rights activist from an established organisation, gave LST first hand experience of drastic changes in the attitudes of the HRC Commissioners. The results of this meeting, on the one hand, further establish the need to review and critique the Commission. On the other hand however, the scope of this evaluation has

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[3] *Ibid*

[4] See Forum Asia 'Disengagement, threats and abuse of NGOs by the Sri Lankan Human Rights Commission – a letter to Prof. Kyong-Whan Ahn'. August 13th 2007

[5] Fernando vs Sri Lanka Case No 189/2003, Adoption of Views on 31, March, 2005) which involved a violation of ICCPR 9(1) as a result of the arbitrary sentencing of a lay litigant for contempt by the Supreme Court. In this case, the government has replied to the Committee saying that it could not implement the Views since it would be construed as an interference with the judiciary.

been curtailed as a result, as LST has been denied access to information which has been publicly accessible in the past and which would have served as indicators of the HRC's work.

This being the case, LST was compelled to carry on its evaluation without further input from the HRC.

Structure and Focus of the Report

The primary focus of this report is evaluation of the deterioration of the statutory functioning of the HRC over the past 15 months. LST is well aware of the inherent limitations that the HRC has always possessed, including statutory and structural limitations.[6] The powers of the HRC are limited to mediation or conciliation.[7] Its mandate is limited only to violations of the limited number of fundamental rights as guaranteed by the Sri Lankan Constitution (as opposed to interventions on the much wider basis of violations of "human rights"). Further, the HRC is not empowered to approach courts directly as is the case in other countries. Relevant rules that would have permitted the HRC to refer cases to the appropriate court in terms of Section 15(3) (b) of the HRC Act have not been yet prescribed by the Supreme Court. At no point has the HRC proactively moved to request the Court to prescribe such Rules of Procedure. The HRC also lacks the capacity to conduct detailed investigations of a criminal nature into complaints of torture and is blocked by law enforcement officers at every point of the investigative process.[8]

Whilst being mindful of these existent problems which have been exhaustively examined in the previous NGO report to the Asia Pacific Forum in 2006[9] and in the other critiques referred to above, this report focuses instead on practical aspects of the crisis that the Commission is facing at the moment in a manner that complements the structural focus. The performance of the Commission will be evaluated in the context of its existing obligations and its own strategy plan. It will also be compared to its own performance in the past (under previous Commissioners who faced the same statutory and structural inhibitions). By doing so, the report will look at:

1. What the Commission is mandated to deliver by statute and international convention,
2. How past Commissions have lived up to this mandate,
3. What the present Commission has promised to deliver in terms of its Strategic Plan

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[6] See Pinto-Jayawardena, Kishali, 'One Step Forward and Two Steps Backwards; The Problematic Functioning of Sri Lanka's National Human Rights Commission (NHRC') in 'Discussions on National Human Rights Institutions of the Asia-Pacific', Law & Society Trust Review, Volume 12 Issue 225 July 2006; Fernando, Basil, 'The National Human Rights Commission and the National Police Commission' in 'Sri Lanka; State of Human Rights, 2005', Law & Society Trust and Satkunanathan, Ambika 'Human Rights Commission' in 'Sri Lanka: State of Human Rights 2000' Colombo 2000 Law & Society Trust

[7] In the past, failure to develop proper procedures for investigations into torture resulted in HRC's officers settling torture cases for minimal amounts of money. Following sustained protests by activists, the HRC decided in 2004, during the term of its previous (and constitutionally appointed) Commissioners that it would not mediate/conciliate complaints regarding torture.

[8] For example, a circular issued by the Police Department some years back allowed the HRC to inspect only the cells of police stations but not the entire precincts of the station including the toilets and the kitchen, which are the very places in which torture is practiced. A wider power of inspection was not allowed without prior notice which defeated the very purpose of such monitoring

[9] See Pinto-Jayawardena, Kishali, *supra*

The Report will then critique and analyse the performance of the present Commission. This analysis will be preceded by a brief history of the HRC, describing the structure of the Commission and highlighting the unconstitutional appointment of the new Commissioners.

Background and Context

The Structure of the Commission and its Past Work

The Human Rights Commission of Sri Lanka was established in terms of the HRC Act and has been in existence for over a decade during which time it has operated amidst many limitations and constraints. According to Section 3 of the HRC Act, the Commission shall comprise five members, appointed by the President on the recommendation of the Constitutional Council, of which one shall be made chairperson. Article 41B of the Constitution[10] states that *'no person shall be appointed by the President as the Chairman or a member of any of the Commissions (including the HRC)... except on a recommendation of the (Constitutional) Council.*

Whilst initially the Commission failed to deliver as expected, since 2000 or so, the Commission responded in part to sustained public critiques of its performance and attempted to proactively engage in its mandate to uphold, promote and protect human rights in Sri Lanka, despite the statutory, financial and practical constraints that it perennially faced.

Such efforts were evidenced in the areas of police abuse and custodial torture, internally displaced persons (IDPS) and victims of the tsunami. During this period, the Commission was mindful of the importance of fostering constructive and meaningful relationships with civil society and international actors. It embarked on building strong partnerships with the international community and civil society, and attempted to enhance the credibility and visibility of the Commission, increasing its capacity in terms of resources (through donor aid) and continuing discourse with other stakeholders in the human rights field. It is regrettable therefore that this constructive relationship has been in steep decline during the period of the current Commission.

The Commission has its head office in Colombo, with regional offices in Ampara, Anuradhapura, Badulla, Batticaloa, Jaffna, Kalmunai, Kandy, Matara, Trincomalee and Vavuniya. The Commission also expanded its programmes by establishing an internally displaced persons (IDP) Unit in 2002[11] and the DRMU[12] - its Tsunami Unit in early January 2005. The Disaster Relief Monitoring Unit (DRMU) set up regional offices in all tsunami affected districts (except LTTE controlled areas and Gampaha) further extending the reach of the Commission.

[10] See the 17th Amendment to the Constitution
[11] The National Protection and Durable Solution for Internally Displaced Persons Project
[12] The Disaster Relief Monitoring Unit

The Unconstitutional Appointments of the New Commissioners

The 17th Amendment clearly vested the duty of recommending members and chairpersons to be appointed to Commissions (including the HRC) solely in the hands of the Constitutional Council (CC). [13] The President therefore acted in excess of his authority and in violation of the Constitution when he appointed persons to the HRC and other commissions including the National Police Commission (NPC) without such persons being nominated by the CC. In fact, a few of the existing Commissioners at the time refused the invitation of the President to extend their term, precisely due to the unconstitutional nature of the appointments process.

General concern expressed nationally and internationally that these arbitrary appointments would compromise the independence, credibility and performance of the Commission was high.[14] The UN High Commissioner for Human Rights expressed concern stating that she hopes the *'standing and independence of the Commission will not be compromised by the ongoing controversy over the appointments of its members.'*[15] Given this context, there was concern that the existing programmes and partnerships of the Commission would suffer with the new appointments, closing one more door in the face of victims of human rights violations seeking redress and justice.

Evaluating these concerns with the actual performance of the HRC thereafter, there is undoubtedly reasonable cause for apprehension that the country's main monitor of rights abuses has seriously lapsed in its statutory duties. Whilst the Commission has formulated a seemingly progressive strategic plan for the period of 2007 – 2009, its grandiose objectives have been completely belied by the actions of its own Commissioners over the past few months. Before discussing these details however, it would be helpful to examine the mandate of the Commission as espoused by international conventions, domestic law and internal planning.

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[13] According to Article 41 B of the 17th Amendment to the Constitution, it is the duty of the Constitutional Council to nominate persons to be appointed by the President as chairpersons and members of key commissions including the HRC, the National Police Commission (NPC) as well as approve other nominations to important posts such as appointments to the Court of Appeal and the Supreme Court, the Attorney General, the Inspector General of Police (IGP) as well as to the Judicial Services Commission. However, the Constitutional Council has still not been formed ostensibly due to disputes between the smaller parties in Parliament over the nomination of their representative to the CC. This dispute, which could have been easily resolved by the President or the Speaker (who is the Chairman of the Council) has been allowed to drag on for over one and a half years without settlement, thereby allowing the President to make his own appointments to the commissions as well as to the specified public offices. Many of the appointments to the NPC and HRC have predominated with his supporters or persons lacking strong commitment to rights protection.

[14] See, among many statements on these appointments, the following; Statement of the Commonwealth Human Rights Initiative, Friday 26 May 2006; Statements by the Asian Human Rights Commission (AHRC), May 10, 2006, May 19, 2006, May 23, 2006, May 27, 2006, May 29, 2006, May 30, 2006 , June 1, 2006, , June 2, 2006, June 3, 2006, and June 4, 2006; Statement of Forum Asia *'Open letter to the President on the arbitrary appointment of Commissioners to the National Human Rights Commission'* 20th May 2006.

[15] See Louise Arbour, UN High Commissioner for Human Rights *'Letter to Mahinda Samarasinghe, Minister for Disaster Management and Human Rights'* 30 June 2006.

Mandate, Obligations and Strategic Plan

The basic functions and duties of the HRC are set out in the HRC Act. In addition to these explicit statutory provisions, the Commission is also bound in principle to uphold the internationally recognised Paris Principles relating to the status and functioning of national institutions for the protection and promotion of human rights. Finally, the Commission itself has drafted a strategic plan for the period of 2007 – 2009, which sets out the goals, objectives and activities that the HRC intends to pursue within this period.

The HRC Act

Section 10 of the HRC Act sets out the functions of the Commission. Accordingly, it is obligated to inquire into and investigate complaints regarding procedures and infringements of fundamental rights; advise and assist the government in formulating legislation and administrative directives; make recommendations to the government to ensure that domestic laws and practices are in accordance with international human rights standards; make recommendations to the government on subscribing or acceding to international human rights instruments; and to promote awareness and provide education with regard to human rights.[16] Section 11 stipulates the powers of the Commission including the powers to investigate infringements of human rights, intervene in court proceedings relating to human rights infringements, monitor the welfare of persons in detention and make recommendations for improving their conditions, research into and promote awareness of human rights and to *'do all such other things as are necessary or conducive to the discharge of their functions'.*[17] The Commission is also obligated to report to parliament on an annual basis in addition to any other special reports it may submit on specific matters.[18]

The Paris Principles

When compared with the internationally recognised Paris Principles, the mandate of the HRC is rather narrow. However, past Commissions have been creative in their approach to their mandate and have therefore, been able to broaden it through their actions. One example is the importance placed by the Commission on Social Economic and Cultural Rights in the past, even though Sri Lanka's Constitution does not directly recognise such rights as fundamental rights justiciable by invocation of the jurisdiction of the Supreme Court.

The Paris principles are divided into four sections:

A. **Competence and Responsibilities** – According to this section, *'a national institution shall be vested with competence to protect and promote human rights'*[19], *'given as broad*

[16] Section 10 (a – f) of the HRC Act
[17] Section 11 (a – h) of the HRC Act
[18] Section 30 of the HRC Act.
[19] Principle A 1 of the Paris Principles

a mandate as possible'[20] and responsibilities pertaining to submitting opinions, recommendations and reports to the government on legislative and administrative instruments and violations of human rights; promoting and ensuring the harmonising of domestic standards with international ones; encouraging the ratification of international instruments, cooperating with the UN and its agencies; and contributing towards human rights education and awareness.[21]

B. **Composition and Guarantees of Independence and Pluralism** – This is an extremely important section of the Principles. Accordingly, the appointment of members to a national institution *'shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces involved in the protection and promotion of human rights'*[22]. National institutions should have adequate infrastructure and funding (which ensures independence from the government)[23] and perhaps most importantly, the appointment of members *'shall be effected by an official act which shall establish the specific duration of the mandate.'*[24] Whilst the 17th Amendment to the Constitution was a step in the right direction in terms of upholding the Paris Principles, the arbitrary appointments of the new Commissioners show clear disregard for these international principles (as well as the Constitution).

C. **Methods of Operation** – This section sets out seven methods of operation for national institutions, including freely considering any questions falling within their competence, hearing any person and obtaining any information necessary for assessing situations, addressing public opinion directly through the press – particularly to publicise their opinions and recommendations, maintaining consultation with other bodies responsible for the protection and promotion of human rights and develop relations with NGOs devoted to protecting and promoting human rights and related fields.[25]

D. **Additional Principles Concerning the Status of Commissions with Quasi-Jurisdictional Competence** – These Principles deal with the manner in which a national institution should address complaints and petitions.

The Strategic Plan of the HRC

The HRC intends to fulfil its above obligations through the goals, objectives and activities set out in its Strategic plan for the years 2007 – 2009. This plan follows the 2003 – 2006 strategic plan which was drafted and implemented by the previous Commission under the chairpersonship of Dr. Radhika Coomaraswamy. The present plan re-emphasises certain activities and objectives which were in the former plan as well as incorporating new ones. Interestingly, the goals of the new plan remain exactly the same as the old, namely:

[20] Principle A 2 of the Paris Principles
[21] Principle A 3 of the Paris Principles
[22] Principle B 1 of the Paris Principles
[23] Principle B 2 of the Paris Principles
[24] Principle B 3 of the Paris Principles
[25] Principle C (1 – 7) of the Paris Principles

1. *Stronger institutions and procedures for human rights protection and a human rights culture among all authorities, awareness and accountability*
2. *Public awareness on fundamental and other human rights and a willingness and capacity to enforce them*
3. *The development of the commission into an efficient organisation, able to fulfil its mandate to promote and protect human rights for everyone in Sri Lanka*
4. *A final resolution – equality in dignity and rights of all the people in the country, resulting from respecting and protecting fundamental and human rights of all in Sri Lanka.*[26]

Whilst there are many objectives and activities set out under these broad goals, the strategic plan gives priority to the following:

- To protect human rights and uphold the rule of law and strengthen monitoring mechanisms.
- To improve and adopt new techniques to handle fundamental rights cases.
- To strengthen the HRC Act.
- To create a *Bills Watch* team.
- To give special attention to vulnerable groups, especially conflict and tsunami affected IDPs, elders, migrant workers, the disabled, women and children.
- To develop an appropriate human rights education system through developing strong human rights networks among government institutions, INGOs, NGOs and UN Agencies.
- To strengthen labour rights.
- To improve the administrative efficiency of the Commission.
- To assist in the Peace Process.[27]

The above is an extremely cursory glance at the functions and obligations of the HRC according to international norm, domestic law and the internal planning of the Commission.

The Strategic Plan presents a positive picture, which (on paper) appears to satisfactorily meet the obligations of the Commission as per the HRC Act and more importantly, international norms. Sadly however, the performance of the Commission as contrasted to the grandiose objective set out in the Strategic Plan has been grossly minimal; in reality, it has neglected its duties, broken relationships with civil society and shrunk its mandate. The stark difference between what the HRC has put down on paper and the manner in which these objectives have been translated into action is cause for grievous concern and raises questions of institutional indifference, inefficiency and at the worst, deliberate collusion with the government as opposed to being an independent monitor of human rights violations as statutorily mandated.

[26] See Human Rights Commission of Sri Lanka *Strategic Plan 2003 - 2006 & Strategic Plan 2007 - 2009*
[27] Please see Human Rights Commission of Sri Lanka *Strategic Plan 2007 - 2009*

The Performance of the New Commission

Despite the above ambitiously conceived strategic plan, the HRC has successfully managed to further minimise its scope and capability through its actions, decisions and inactions over the last year as discussed below. It is possible to identify trends and an unarticulated shift in the priorities and mandate of the Commission.

Breaking Partnerships with the Human Rights Community

As stated above, the HRC has a history of strong partnership with other players in the Human Rights community, be they NGOs, INGOs or the UN and its agencies. Principles C 6 and 7 of the Paris Principles too emphasise the importance of fostering such good relations. However, the reception given to an LST staff member by the Commissioners clearly marked a shift in attitude. The Commissioners subjected the staff member to a general criticism of all NGOs, refused to discuss any matters raised by him and stated that they are not under obligation to disclose information to the general public, as they are not accountable to them.[28] This manner of response has been evidenced in relation to other non-governmental organisations who have publicly expressed strong criticism of the unconstitutional appointments process of the Commissioners. On the other hand, the response of the HRC to other organisations has been different; for example, the HRC shared statistical information with PAFFREL[29], which in turn published this information in a recent report.[30] The PAFFREL report which named the LTTE, the Karuna Faction and the Underworld as the three main perpetrators of violence appeared to downplay credible reports of the involvement of elements of the government in extra judicial executions and enforced disappearances.'[31] It is perhaps a moot point as to whether the engagement of the HRC is currently limited to non governmental organisations perceived as engaging in a 'soft critique' of the government rather than with civil society in general. This poses serious questions regarding the independence of the HRC and its capacity to act in the best interest of safeguarding human rights of individuals in all circumstances.

The reluctance to speak and share information with other actors in the human rights arena is not limited to the Commissioners alone. The staff in the regional offices of the HRC, are also reluctant to speak, perhaps for different reasons. LST was repeatedly informed by HRC personnel, that they could not share information with us from regional offices, as they had been directed to channel all information to the centre for further dissemination from there. This is a new development, as LST's past experience with the very same personnel (during the term of the previous Commissioners) had been that they were willing to share experiences and information with responsible and committed groups.

The change in attitude towards other actors in the human rights community is a clear signal of the change in the role that the HRC sees for itself. Open statements regarding their non-

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[28] See *Forum Asia 'Disengagement, threats and abuse of NGOs by the Sri Lankan Human Rights Commission – a letter to Prof. Kyong-Whan Ahn'. August 2007*

[29] People's Action for Free and Fair Elections

[30] PAFFREL *'Programme on interventions by PAFFREL, on abductions, disappearances and killings etc.*

[31] See CMC, FMM & LST *'First in a series of submissions to the Presidential Commission of Inquiry and public on human rights violations in Sri Lanka'* August 23, 2007

accountability to the people and the apparent confidence that the HRC can successfully operate without maintaining meaningful partnerships with other actors are cause for grave concern

Limiting the Scope of the Mandate of the HRC

Despite the comprehensive nature of the strategic plan of the HRC, in reality, the Commission has only acted to limit its scope and effectiveness. Some concrete examples will illustrate the extent of the problem. In one instance, the Note of the Secretary to the HRC (29th June 2006) stated that the HRC had decided to stop inquiring into the complaints of over 2000 enforced disappearances of persons in the past, viz," for the time being, unless special directions are received from the government." Astoundingly, this decision was justified purportedly on the basis that "the findings will result in payment of compensation, etc." Due to this minute being leaked to the media and activists by concerned staffers of the HRC, sustained criticism of the HRC resulted in the revocation of this decision while the Minister of Human Rights issued a statement stating that the HRC did not need to wait for directions to be issued by the government when acting in pursuance of its statutory mandate. It must be noted that though these inquiries re-commenced and were carried out during the current period under scrutiny, the commitment with which the inquiries are being engaged in, is subject to reasonable doubt considering the circumstances.

In another more recent instance, an administrative decision was made by the Commission (through internal circular No.7 dated 20.06.2007) to stipulate a three months limitation from the date of incident of the alleged violation of human rights in respect of the acceptance of such complaints by the HRC. The Act establishing the HRC does not stipulate a time limit within which a complaint must be accepted. The HRC (in its previous term) had detailed that, excepting allegations of torture, complaints accepted must be lodged within one year of the alleged human rights violation. Complaints submitted in regard to incidents not coming within this time frame were accepted at the discretion of the Commission. However, the current Commissioners' decision drastically reduces that time period to three months with a rider that acceptance of complaints in regard to incidents later than three months would be at the discretion of the Commission. [32] This condition of three months, applies without exception to all cases, thus including complaints of torture/enforced disappearances as well.

This decision is unacceptable on many fronts. In the first instance, as stated before, the Act under which the Commission is established does not stipulate a time limit and consequently the imposition of such a time limit by circular is *per se* contrary to the provisions of the Act. From another perspective, the inclusion of even complaints of serious human rights violations within this short time frame has grave implications for the role of the HRC in the current climate of renewed war and the question arises as to whether such a time period has been stipulated with the express objective of numerical reduction of the number of complaints accepted by the HRC so as to project a misleading picture as to the severity of the rights violations being committed.

[32] See *Chitral Perera, 'An open Letter to the Chairperson of the Human Rights Commission' July 2007*

It must be further pointed out in this regard that there is a constitutionally prescribed one month timeframe for all fundamental rights petitions to the Supreme Court[33] which has made the operation of the constitutional remedy very difficult for victims. Many who seek redress at the HRC are victims who have failed to satisfy the one month requirement of the Supreme Court for various reasons. By drastically reducing the HRC complaints' time frame, a significant percentage of persons would not have either option available to them.

The manner in which the HRC put this decision into action is also questionable. There was no public awareness raising campaign on the new time frame, no rational justification for the reduction (except to state that large numbers of complaints were being lodged which is in itself an unacceptable decision for stipulation of a restrictive time frame) and no attempt to engage the public in any discussion regarding the decision.

Inaction of the HRC

Over the past one and a half years, Sri Lanka's human rights record has degenerated into crisis proportions. The Government, LTTE and other militant factions have collectively marginalised and violated the human rights of the people; all with equal impunity. These violations have been documented and commented upon domestically as well as internationally.[34]

To quote one example;

> *'The resumption of war between the Sri Lankan government and the Liberation Tigers of Tamil Eelam (LTTE) has been accompanied by widespread human rights abuses by both sides. While the LTTE has continued its deliberately provocative attacks on the military and Sinhalese civilians as well as its violent repression of Tamil dissenters and forced recruitment of both adults and children, the government is using extra-judicial killings and enforced disappearances as part of a brutal counter-insurgency campaign.*[35]

In this context, one would imagine that the HRC would be inspired to work tirelessly with the people, document violations, call for justice and publicise the escalating crisis. Unfortunately, the predominant reaction of the HRC has been silence and inaction. The failure of the HRC, to in the very least, engage in continuing and consistently strong public statements on the prevalent crisis of human rights violations is a flagrant violation of its statutory obligations (as recognised by Principle C 3 of the Paris Principles). This has been reflected upon in the following manner.

> *'Since its appointment in May 2006, the present Human Rights Commission has issued no reports on high-profile human rights violations, disappearances, the Emergency*

[33] Article 126 (2) of the Constitution of the Democratic Socialist Republic of Sri Lanka.
[34] Report of Phillip Alston, UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions; Mission to Sri Lanka, 28 November – 6 December 2005, published in *LST Review, Vol. 16, Issue 221 March 2006.*
[35] International Crisis Group *'Sri Lanka's Human Rights Crisis'* 14th June 2007

Regulations or any other matter. It has occasionally published some figures on complaints but these are incomplete or contradictory[36]

The prioritised objectives of the HRC according to its Strategic Plan includes protecting human rights and upholding the rule of law, giving special attention to vulnerable groups including IDPs and assisting in the peace process. However, these are objectives which the Commissioners are clearly satisfied to confine to theoretical concepts alone. Following, are just two specific instances of inaction on the part of the HRC, in direct violation of its statutory obligations:

- **IDPs** – As stated above, the HRC has an IDP Unit which has been operational since 2002. However, despite the escalating IDP crisis over the past few months, and repeated concerns being raised by NGOs and UN agencies, the HRC has remained stubbornly silent. When LST, as part of a coalition of NGOs, visited the Batticaloa district in order to monitor the resettlement of IDPs, the absence of the HRC on the field told the story of an indifferent, non-independent institution which did not take its mandate seriously. The HRC articulated at the time (which was two months after the initial displacement took place) that it was planning to visit the area which was not a satisfactory reason to advance by a unit purportedly dedicated to the well-being of IDPs. Furthermore, even though NGOs were refused access to areas where the government was forcibly resettling IDPs, the HRC made no attempt to either visit the area itself, or to lobby for the right of NGOs to visit them.[37]

- **Humanitarian workers and the Media** – The past year has seen humanitarian workers and the media being increasingly targeted by violators of human rights. Since January 2006, at least seven journalists have been murdered. Numerous other journalists have been abducted, physically attacked, threatened or forced into exile.[38]

According to the International Crisis Group;

Most seem to be targeted because they are seen as actively supporting the LTTE,[39] *have criticised the government too strongly or revealed information the government did not like,*[40] *or are linked to opponents of the government.*[41]

The Defence Secretary himself allegedly threatened an editor of the Daily Mirror after publishing a particular article.[42]

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[36] *ibid*
[37] See CPA, INFORM, IMADR and LST *'Batticaloa Field Mission'* May 2007 for details.
[38] The Sunday Leader *'The war on the media'* April 22 2007.
[39] For example, the killing of two in an armed attack on the offices of the Uthayan newspaper in Jaffna, in May 2006, carried out in broad daylight in a government controlled area, "Uthayan attack condemned", www.bbc.co.uk/sinhala/news/story/2006/ 05/ 060503_cpj_uthayan.shtml.
[40] The murder of Sinhala journalist Sampath Lakmal de Silva seems likely to have been connected to his writings on sensitive military and criminal topics, Dharisha Bastians and Santhush Fernando, "Messenger killing: shrouded in mystery", *The Nation*, 9 July 2006.
[41] International Crisis Group *'Sri Lanka's Human Rights Crisis'* 14th June 2007
[42] Free Media Movement, *'Sri Lanka's Defence Secretary threatens editor'*, 17 April 2007.

Humanitarian workers too have been targeted in unprecedented numbers. Whilst the most quoted case is the killing of 17 ACF aid workers in Muttur in August 2006, a total of 60 humanitarian workers and religious leaders have been abducted and killed in 2006 and 2007.[43] The HRC embarked upon an inquiry regarding the extra judicial killings of the 17 ACF workers only several months after the complaint from ACF was recorded at its regional offices and that too, after repeated letters were sent requesting the HRC to act in accordance with its statutory mandate.

The HRC should cultivate a special relationship with the media and other human rights workers (as per C 4,6 & 7 of the Paris Principles). However, there has been no show of solidarity, public denunciation or call for justice in regard to any of these incidents.

Conclusion

As stated above, this report does not serve as a comprehensive evaluation of the functioning of the HRC. However, certain trends have been identified, and relevant conclusions may be arrived at thereto.

If one were to summarise the journey of the HRC since 2006, it would be as follows:

- In May 2006, the President by-passed the Constitution by appointing new Commissioners to the HRC without the nominations being made by the Constitutional Council;
- The new Commissioners drafted a strategic plan which *prima facie* satisfies their obligations according to international norm and domestic statue;
- The actions and inactions of the HRC have however completely belied the objectives of the strategic plan and have resulted in the deliberate breaking of relationships with civil society organisations, self imposition and *ultra vires* limitations of its statutory mandate as well as inaction in circumstances when the committed, swift and needed action on the part of the HRC has been needed most during a situation of renewed conflict and grave violations of human rights of Sri Lankans.

This sequence of events leads to two logical conclusions.

- Firstly, that the HRC has no independence and it does not have the capacity, resolve or independence to carry out its mandate.
- Secondly, that the HRC has intentionally changed its attitude, neglecting its statutory mandate towards the people, and is functioning merely to 'cover up' human rights violations of state actors;

[43] See CMC, FMM & LST *'First in a series of submissions to the Presidential Commission of Inquiry and public on human rights violations in Sri Lanka'* August 23, 2007

Undoubtedly, these are not desirable conclusions that can be arrived at regarding the functioning of the country's premier human rights monitor. It is clear that the Human Rights Commission of Sri Lanka has drastically fallen short of its legally binding mandate in regard to the protection and advancement of humans rights.

Concerns Raised by the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Novak*

Mission Visit to Sri Lanka, 1st to 8th October 2007

Context and challenges in the promotion and protection of human rights

At the outset, I should state that I have full appreciation for the challenges the Government faces from the violent and long-lasting conflict with the Liberation Tigers of Tamil Eelam (LTTE). Notwithstanding the difficult security situation the Government is faced with, Sri Lanka in principle is still able to uphold its democratic principles, ensure activities of civil society organizations and media, and maintain an independent judiciary.

Scope of the visit

I should explain that it was my intention at first to assess the situation of torture and ill-treatment in the entire territory of the country, and to examine not only torture and ill-treatment allegedly committed by the police and other security forces of the Government of Sri Lanka, but also those allegedly committed by or on behalf of other parties to the present conflict, including the LTTE. Indeed the most serious allegations of human rights violations that come to light, including those related to torture and ill-treatment, are in relation to the conflict and are alleged to be committed by both Government and non-State forces, including the LTTE and the TMVP-Karuna group.

However, since the Government insisted that the armed forces no longer kept detainees within their facilities and therefore no identifiable detention facilities existed, and also did not permit me to travel to Kilinochchi in order for me to conduct meetings with the LTTE leadership and visit their detention facilities, I am not in a position to draw conclusions in relation to the practice of torture and ill-treatment in the particular context of the conflict. The primary focus of my findings therefore relate to torture, ill-treatment and conditions of detention in the ordinary context of the criminal justice system, including with respect to the Emergency Regulations.

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* Mr. Nowak was appointed Special Rapporteur on 1 December 2004 by the United Nations Commission on Human Rights. As Special Rapporteur, he is independent from any government and serves in his individual capacity. He has previously served as member of the Working Group on Enforced and Involuntary Disappearances; the UN expert on missing persons in the former Yugoslavia; the UN expert on legal questions on enforced disappearances; and as a judge at the Human Rights Chamber for Bosnia and Herzegovina. He is Professor of Constitutional Law and Human Rights at the University of Vienna, and Director of the Ludwig Boltzmann Institute of Human Rights.

The practice of torture

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

Over the course of my visits to police stations and prisons, I received numerous consistent and credible allegations from detainees who reported that they were ill-treated by the police during inquiries in order to extract confessions, or to obtain information in relation to other criminal offences. Similar allegations were received with respect to the army. Methods reported included beating with various weapons, beating on the soles of the feet (*falaqa*), blows to the ears ("telephono"), positional abuse when handcuffed or bound, suspension in various positions, including *strappado*, "butchery", "reversed butchery", and "parrot's perch" (or *dharma chakara*), burning with metal objects and cigarettes, asphyxiation with plastic bags with chilli pepper or gasoline, and various forms of genital torture. This array of torture finds its fullest manifestation at the TID detention facility in Boossa.

Intimidation of victims by police officers to refrain from making complaints against them was commonly reported, as were allegations of threats of further violence, or threatening to fabricate criminal cases of possession of narcotics or dangerous weapons. Detainees regularly reported that *habeas corpus* hearings before a magistrate either involved no real opportunity to complain about police torture given that they were often escorted to courts by the very same perpetrators, or that the magistrate did not inquire into whether the suspect was mistreated in custody. Medical examinations were frequently alleged to take place in the presence of the perpetrators, or directed to junior doctors with little experience in documentation of injuries.

Accountability and prevention

In general, I note that Sri Lanka already has many of the elements in place necessary to both prevent torture and combat impunity, such as fundamental rights complaints before the Supreme Court in relation to Art 11 of the Constitution, indictments and prosecutions based on the 1994 Convention against Torture Act, bringing suspects before magistrates within the statutory 24 hour period, formal legal medical examinations by trained forensic experts (Judicial Medical Officers), and investigations and visits by the National Human Rights Commission (NHRC).

The commitment of the Government to prevent torture is also demonstrated by the establishment of mechanisms by the Inspector General of Police and the Attorney General's Office specifically to investigate allegations of torture (e.g. the Special Investigations Unit and the Prosecution of

Torture Perpetrators Unit). Moreover, with respect to my mandate the Government regularly continues to provide clarifications and up-dates with regard to communications related to such violations.

However, a number of shortcomings remain, and most significantly, the absence of an independent and effective preventive mechanism mandated to make regular and unannounced visits to all places of detention throughout the country at any time, to conduct private interviews with detainees, and to subject them to thorough independent medical examinations. It is my conviction that this is the most effective way of preventing torture. In the case of Sri Lanka, I am not satisfied that visits undertaken by existing mechanisms, such as the NHRC, are presently fulfilling this role, or realizing this level of scrutiny.

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

Given the high standards of proof applied by the Supreme Court in torture related cases, it is regrettable that the facts established do not trigger more convictions by criminal courts.

Conditions of detention

As far as conditions of detention are concerned, the Government provided me with statistics indicating severe overcrowding of prisons. While the total capacity of all prisons amounts to 8,200, the actual prison population reaches 28,000. That poor conditions of detention can amount to inhuman and degrading treatment is well established in the jurisprudence of several international and regional human rights mechanisms. In Sri Lanka the combination of severe overcrowding with antiquated infrastructure of certain prison facilities places unbearable strains on services and resources, which for detainees in certain prisons, such as the Colombo Remand Prison, amounts to degrading treatment in my opinion. The lack of adequate facilities also leads to a situation where convicted prisoners are held together with pre-trial detainees in violation of Sri Lanka's obligation under Art 10 of the International Covenant on Civil and Political Rights. Although the conditions are definitely better in prisons with more modern facilities, such as Polonnaruwa and the Female Ward of the New Magazine Prison, the prison system as a whole is in need of structural reform.

During my visit of various police stations I observed that detainees are locked up in basic cells, sleeping on the concrete floor and often without natural light and sufficient ventilation. While I am not concerned about such conditions for criminal suspects held in police custody for up to 24 hours, these conditions become inhuman for suspects held in these cells under detention orders pursuant to the Emergency Regulations for periods of several months up to one year. This applies both for smaller police stations, such as at Mt. Lavinia, and especially for the headquarters of the CID and TID in Colombo, where detainees are kept in rooms used as offices during the day-time, and forced to sleep on desks in some cases.

Corporal punishment in prisons and the death penalty

I appreciate the recent abolition of corporal punishment in Sri Lanka, however, in Bogambara Prison I received disturbing complaints of cases of corporal punishment corroborated by medical evidence. I am pleased to report that the Government has initiated an inquiry to look into this matter. On the death penalty, I am encouraged by the policy of Sri Lanka not to carry out death sentences for over thirty years. Nevertheless, courts continue to sentence persons to death, which leads to a considerable number of condemned prisoners living for many years under the strict conditions of death row.

Preliminary recommendations

On the basis of my preliminary findings I recommend, *inter alia*, that the Government:

· Design and implement comprehensive structural reform of the prison system aimed at reducing the number of detainees, increasing prison capacities and modernising the prison facilities;

· Remove non-violent offenders from confinement in pre-trial detention facilities, and subject them to non-custodial measures (i.e. guarantees to appear for trial, at any other stage of the judicial proceedings and, should occasion arise, for execution of the judgment);

· Ensure separation of remand and convicted prisoners;

· Ensure separation of juvenile and adult detainees, and ensure the deprivation of liberty of children to an absolute minimum as required by Art 37 (b) CRC;

· Reduce the period of police custody under the Emergency Regulations;

· Establish appropriate detention facilities for persons kept in prolonged custody under the Emergency Regulations;

· Investigate corporal punishment cases at Bogambara Prison as well as torture allegations against the TID, mainly in Boossa, aimed at bringing the perpetrators to justice;

· Abolish capital punishment or, at a minimum, commute death sentences into prison sentences;

· Develop proper mechanisms for the protection of torture victims and witnesses;

· Establish centres for the rehabilitation of torture victims;

· Ensure that magistrates routinely ask persons brought from police custody how they have been treated and, even in the absence of a formal complaint from the defendant, order an independent medical examination in accordance with the Istanbul Protocol;

· Ratify the Optional Protocol to the Convention against Torture, and establish a truly independent monitoring mechanism to visit all places where persons are deprived of their liberty throughout the country, and carry out private interviews;

· Expedite criminal procedures relating to torture cases by, e.g., establishing special courts dealing with torture and ill-treatment;

· Allow judges to be able to exercise more discretion in sentencing perpetrators of torture under the 1994 Torture Act;

· Ensure that all allegations of torture and ill-treatment are promptly and thoroughly investigated by an independent authority with no connection to the authority investigating or prosecuting the case against the alleged victim;

· Ensure all public officials, in particular prison doctors, prison officials and magistrates who have reasons to suspect an act of torture or ill-treatment, to report *ex officio* to the relevant authorities for proper investigation in accordance with Art 12 CAT;

· Ensure that confessions made by persons in custody without the presence of a lawyer and that are not confirmed before a judge shall not be admissible as evidence against the persons who made the confession;

· Establish an effective and independent complaints system in prisons for torture and abuse leading to criminal investigations;

· Ensure security personnel shall undergo extensive and thorough training using a curriculum that incorporates human rights education throughout and that includes training in effective interrogation techniques and the proper use of policing equipment, and that existing personnel receive continuing education; and

· Establish a field presence of the Office of the UN High Commissioner for Human Rights with a mandate of both monitoring the human rights situation in the country, including the right of unimpeded access to all places of detention, and providing technical assistance particularly in the field of judicial, police and prison reform.

I encourage the international community to assist the Government of Sri Lanka to follow-up on these recommendations."

The Special Rapporteur shared his preliminary findings with the Government at the close of his mission, to which the Government responded with constructive comments. He is pleased to report that the Government will appoint a high-level task force to study his recommendations, consisting of public sector stakeholders and members representing judicial and civil society sectors. The Special Rapporteur will submit a comprehensive written report on the visit to the United Nations Human Rights Council.

29 October 2007

Book Review by Judge C.J. Weeramantry

The Protection of Culture, Cultural Heritage and Cultural Property

By Justice A. R. B. Amerasinghe

Published by the National Heritage Trust - Sri Lanka & Sarvodaya Vishvalekha
2006
299 pages, Price Rs. 1200

Justice A.R.B Amerasinghe, one of Sri Lanka's pre-eminent legal scholars, has added another work of distinction to his list of publications. It is based on a keynote address he delivered at the Annual Meeting of the International Council of Monuments and Sites in 2005. The Antiquities Ordinance and the Eppawala case are additional sections of the book.

It is a publication which deals with a topic of great importance and urgency to a country like Sri Lanka which is such a rich repository of cultural treasures. It points out, with references to a number of specific illustrations, some of the many threats to the preservation of our cultural heritage and cultural property.

There are numerous factors which result in these threats. The pressure for development, the inflow of tourists, the lack of adequate physical and legal protection for cultural objects and the lack of public sensitivity are some of these.

All these need to be addressed by a concerned public, a vigilant administration and a more sensitized legal system.

International law has long recognized the importance of the preservation of cultural heritage and cultural property. This recognition has been manifested in a series of documents and is so well accepted that it can be said to be a principle of customary international law, which all nations are expected to accept and give effect to, through their legal systems.

What is needed is a translation of these well-accepted international principles into domestic laws and regulations. This means also that there should be an efficient administrative system which ensures that the law in the books is translated into the law in the field. No amount of book law is effective unless there is an efficient practical system to give effect to this law.

Justice Amerasinghe's work is a timely reminder of all these aspects.

a. Historical

One of the many interesting features of Justice Amerasinghe's work is the richness of its historical references. His illustrations range from Greek and Roman times to the period of the Crusades, from Henry Viii's acquisition of monasteries in England to the French Revolution and the Napoleonic Wars and finally to the devastation of cultural objects in the two World Wars. The references to the literature on the subject both legal and non legal are also extensive. In fact this book can be likened to a guided historical and literary tour through the ages and is for this reason a very satisfying and rewarding intellectual experience.

b. Historical Objects

It is also rich in illustrations from Sri Lankan history of the importance attaching to historical and cultural objects. This book contains a detailed account for example of the attempts made throughout Sri Lankan history to preserve and honour the Sacred Tooth Relic.

c. Colonialism

The book also raises in the minds of the reader the question whether and in what way reparation can be made to nations for the plunder of their historic objects such as occurred during the art confiscations of the Napoleonic Wars and the transfers to Britain of cultural riches from all parts of the world, of which the Elgin Marbles are just one example. Hopeful signs of recognitions of such a duty of restoration are the recent agreement by the Metropolitan Museum of Art in New York to restore to Italy in 2008 a 2500 year old painted bowl. The book also refers to works of art stolen from Sri Lanka, one of which was an 1826 painting of the Temple of Mulkirigala.

d. Wartime

Damage done in times of war is so serious and far reaching that various international conventions contain express provisions against such deprivations. From the deliberate destruction of Carthage and of every shred of evidence of its heritage in 149 BC to the Nazi regime's deliberate destruction of entire cities and traces of Jewish presence in Europe, Justice Amerasinghe gives examples of the devastation caused by war. This has a lesson for us in an age when terrorism likewise spares nothing that stands in its way. Examples are rife throughout the world of the havoc caused to the cultural heritage by terrorism.

e. Peacetime

Just as Justice Amerasinghe's book deals with the unimaginable damage done to historic buildings and cultural objects by war, it is also a useful reminder of the special efforts that need to be mounted even in times of peace to preserve a country's cultural heritage. He illustrates this point by referring to the attack on 25th January 1998 on the entrance to Dalada Maligawa. It is difficult to imagine what dire consequences could have followed had any damage occurred to the relic chamber. There can be few more telling examples of the enormous importance of protecting objects which are an integral part of the nation's cultural heritage.

f. Irrigation

Sri Lanka's ancient irrigation works are another feature calling for special attention. This unique system is a treasure not only of Sri Lanka but the world at large because it is widely considered to be the leading irrigation system ever devised. Justice Amerasinghe has referred in this context to the principle of sustainable development which emphasizes the need for weighing the opposing claims of development and sustainability — a consideration which was much in the minds of those responsible for our ancient irrigation system. This irrigation system aimed both at achieving the maximum use of natural resources (eg: the edict that not a drop of water was to flow into the sea without first serving the needs of irrigation) while at the same time ensuring that whatever development took place was not at the expense of sustainability and the rights of future generations.

In this context, reference can also be made to the teachings of religion, for all religions stress the importance of preserving the rights of future generations and protecting the environment.

The conflict between protection and development is indeed a theme that runs through the entirety of this subject and needs to be borne in mind in all phases of any proposed development project.

An example par excellence of this problem is provided by mining projects of which one of the most topical for Sri Lanka is the Eppawala Project.

This is of special interest to me in view of the exploitation of the phosphate deposits of Nauru which I had occasion to investigate when I chaired the Nauru Commission of Inquiry. This is an outstanding example of the exploitation of a natural resource to the extent that not even a half inch of top-soil was left in the mined-out areas. I have recorded the dangers of this in my book *Nauru- Environmental Damage Under International Trusteeshz* and the case of Nauru is an object lesson to all countries that are considering the proposals of foreign mining companies to exploit mineral resources.

In Sri Lanka there is a danger that exploitation of these resources may well occur in the areas of some of our most precious historic sites. Whatever the financial benefit to be gained from such an enterprise, we cannot afford it, and this is a matter which needs most careful consideration not only by the authorities but by the general public as well. Justice Amerasinghe draws attention to this and the Eppawala Judgment highlights the importance of the issues involved.

To summarize, Justice Amerasinghe's work is a repository of important and interesting historical information — a guide to the areas that need attention and a reference to the important legal principles involved. It is a book to be read with pleasure and profit by all who are interested in the preservation for future generations of the achievements and mementos of the past.

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