# LST REVIEW

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## SRI LANKA'S WITNESS PROTECTION LAW, RECENT PROPOSED AMENDMENTS, A COMMENTARY AND COMPARATIVE STANDARDS

## THE 2011 ANNI REPORT ON SRI LANKA'S NATIONAL HUMAN RIGHTS COMMISSION AND THE 2011 APF FORUM

LAW & SOCIETY TRUST

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*Editor's Note .....*

In its Volume 18, Joint Issue 246 & 247 April & May 2008, the *LST Review* published the initial draft of Sri Lanka's Bill on Assistance and Protection to Victims of Crime and Witnesses along with a relevant Determination of the Supreme Court (SC Special Determination 1/2008, SCM 02.04.2008) and a commentary by the *Law & Society Trust* on the contemplated legislation.

In sum, the Supreme Court suggested particular amendments to the draft law, in particular recommending that a decision to grant protection must be clarified in order to ensure that one body established under the law does not grant protection only to have it removed by another. It was observed that victims and witnesses should have confidence in the process which itself ought to be streamlined so as to minimize the risks of sensitive information about victims and witnesses being leaked.

Importantly, (and reflecting a concern raised by analysts and legal practitioners who had examined the Bill), the Court pointed out that the Protection Division should be independent and also separated from the functions of investigation and prosecution. The initial draft contemplated the Protection Division as being located within the Department of the Police. The draft was moreover critiqued by the Court for lacking specificity as to the criteria on which protection will be granted, what protection mechanisms are available, how long protection will continue and whether there would be a mechanism providing for appeals from such decisions. Precise amendments to the clauses of the Bill were detailed by the judges.

Subsequent to these developments in 2008, this Bill has been undergoing modifications, though quite unfortunately there have been no public consultations on the same and the status of the amendment process has been secretive.

In this Issue of the Review, we publish a comprehensive review of the draft law by *Susan Appleyard* who also examines some of the proposed amendments to the Bill, drafted under the aegis of the Ministry of Justice. This examination is conducted in the background of applicable international standards and pertinent comparative regional and international practices. Each clause of the Bill, along with the proposed amendment, is examined, positive aspects are noted and negative provisions are critiqued with suggested further amendments against the relevant clauses. There is little doubt that this analysis will prove to be of much value to the discussion process on the draft law. Appleyard also examines the impact and relevance of the draft

"Justice in Matters involving Child Victims and Witness of Crime" Bill dated October 2010.

Generally it may be said that much of the recommendations by the Supreme Court have been taken into account in the redrafting of the clauses of the Bill as seen in Annex 11 of this essay. However, it is a predominant concern that the Protection Division remains within the scope of the Department of the Police, despite valid criticisms having been raised as to the necessity for it to be independent thereof. There is a compelling logic to the argument that the Protection Division should function independently from the mainstream police structure. As practical experience in Sri Lanka has shown, the involvement of police officers in the threatening of witnesses and victims of crime has been clearly evident and documented beyond all doubt. In this context, entrusting the Department of the Police with the task of establishing and maintaining the Protection Division carries with it, certain obvious dangers. The risk of undermining the very basis on which protection is offered, is high. The Supreme Court also expressed concern as to this fact in its Determination.

It is particularly disappointing therefore that these concerns appear not to have been taken into account. However, the possibility of further amendments being made to the draft which, as reported, is yet undergoing the amendment process, cannot be ruled out. It would indeed be salutary if the Ministry of Justice opens the existing draft as it is, to the general public and invites representations. Such public involvement in the legislative drafting process is a matter of course in countries such as India, South Africa and even those developing jurisdictions such as Nepal. It is a pity that Sri Lanka should lag far behind in this regard.

The Review publishes as the second focal point in this Joint Issue, a review of Sri Lanka's National Human Rights Commission (NHRC), written by ***B. Skanthakumar*** as part of the annual review by the Asian Non-Governmental Network on National Human Rights Institutions (ANNI). This review reflects previous concerns raised in ANNI reports in regard to the independence of the NHRC and expresses serious concern regarding the fact that no new Commissioners were appointed during the entirety of 2010.

As a matter of practical critique regarding the functioning of the NHRC, it also looks at its effectiveness on the ground, noting that during 2010, many of the NHRC's recommendations were disregarded by relevant state authorities thereby eroding its authority still further. This was a direct result of the undermining of the NHRC and other ostensibly independent constitutional commissions on the police and the

public service failure, by the executive.

The 17th Amendment to the Constitution had prescribed that the persons appointed by the President must be first nominated by an independent Constitutional Council (CC). Instead of adhering to this fundamental constitutional duty, the CC itself was allowed to lapse by the executive, which then made its own unilateral appointments to the commissions, including the NHRC. Later, even this fig leaf of conforming to constitutional requirements was abandoned and once the terms of existing members lapsed, no new members were appointed during 2010. The deleterious impact of these developments is specifically examined in this report.

Further, the paper looks at the 18th Amendment to the Constitution which, in late 2010, replaced the CC with a powerless Parliamentary Council. New Commissioners were appointed to the NHRC in early 2011 by executive fiat under this new amendment but negative public perception as to the independence and integrity of the country's foremost human rights monitor, established with much expectation in 1996 remained largely unchanged.

This analysis concludes with several long standing recommendations, expressing the hope that despite continuing concerns as to its independence from government, the reconstitution of the HRCSL 'may be regarded as a pre-condition for its rejuvenation.'

As a final contribution in this Issue, the *Review* publishes the Concluding Statement of The Asia Pacific Forum (APF) of National Human Rights Institutions at its Sixteenth Annual Meeting & Biennial Conference, held from 6th to 8th September 2011 in Bangkok, Thailand

*Kishali Pinto-Jayawardena*

# WITNESS ASSISTANCE AND PROTECTION IN SRI LANKA

*Susan Appleyard*[*]

Witness assistance and protection is fundamental in any country as it enables witnesses to provide testimony in order to obtain truth, justice and reparations for past crimes and human rights violations. Where systematic impunity exists, particularly following a period of internal armed conflict the demand for witness assistance and protection will be greater as will the challenges for providing assistance and protection. This is the situation that prevails in Sri Lanka today. The right to witness protection is guaranteed under international human rights law. This right derives from law and standards regarding the obligation to provide a remedy for violations of human rights, fair trial rights and the rights to life, liberty and security.

## The Asian context

No country in South Asia has witness protection legislation. In response to this remarkable gap some governments, courts, law commissions and civil society are undertaking efforts to develop and encourage adoption of witness assistance and protection legislation. In 2004 the Supreme Court of India, in the *Best Bakery case*, held that,

> "legislative measures to emphasise prohibition against tampering with witnesses, victims or informants have become imminent and the inevitable need of the day. ... Witness protection programmes are imperative as well as imminent in the context of alarming rates of somersaults by witnesses".[1]

This judgment precipitated the preparation of an extensive report on witness identity protection by the Law Commission of India.

In November 2009, the Supreme Court of Nepal, ordered the Government to formulate legislation for the protection and assistance of victims and witnesses. The International Commission of Jurists (ICJ), a non-governmental organization working on the legal protection of human rights and comprising eminent jurists from across the world, found that there "has been little progress in implementing the Court's ruling, though the Ministry of Home Affairs has formed a task force in response to the ruling, and a draft law was recently made public by the National Law Commission".[2] Two bills that will establish a truth and reconciliation commission and a commission to investigate conflict-era disappearances, both include the provision of "measures to ensure security, particularly to women and children, and to provide financial assistance to those appearing before the commissions".[3]

In Bangladesh a draft law has been prepared by the Law Commission. There has been extensive pressure from the High Court and civil society in regard to witness protection for female witnesses. In June 2011, amendments to the rules of the Bangladesh International Crimes Tribunal authorized the tribunal to

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[1] *Zahaira Habibulla H. Sheikh v. State of Gujarat* (2004) 4 SCALE 377, 395, 399. This finding was reiterated in 2006 by the Supreme Court in *Zahaira Habibulla Sheikh v State of Gujarat.*

[2] International Commission of Jurists, *Witness Protection in Nepal: Recommendations from international best practices ("Witness Protection in Nepal")*, August 2011, p. 9.

[3] ICJ, *Witness Protection in Nepal*, p.12.

ensure the physical well-being of victims and witnesses. Human Rights Watch, however, found that these amendments did not go far enough, reporting harassment and threats to defense lawyers and witnesses.[4] SAARC, the South Asian Association for Regional Cooperation, has not formally discussed witness protection and conventions on terrorism and drugs do not refer to witness protection.

Several countries in South East and East Asia, have witness protection legislation and programmes including Hong Kong, Indonesia, the Philippines and Thailand. ASEAN, the Association of South East Asian Nations, has discussed witness protection in relation to transnational crimes and explicitly includes a reference to the need to study the possibly of creating a regional programme on witness protection in its Plan of Action to Combat Transnational Crime of 1999.[5]

## 2 The post conflict context

The end of internal armed conflict is usually accompanied by a transitional period during which victims of serious human rights and humanitarian law violations have a right under international law to seek truth, justice, and reparations. Well-documented global experience demonstrates that progress towards reconciliation and a durable peace is impeded by the absence of effective transitional justice mechanisms. Witness protection is a critical component of these programs as it has the potential to ensure perpetrators and their associates who remain in positions of power cannot harm witnesses who testify against them. Where those responsible for the past violations remain within the government, the state will often be unwilling or unable to provide independent and accountable protection for witnesses of crime. In such contexts robust mechanisms capable of responding to potential interference by the state will be necessary. An additional factor in post conflict countries is the level of common and organized crime, which often increases following an internal armed conflict, and presents new forms of intimidation and threats to those who pursue justice whether for current or past crimes.

Comparative experiences from other post-conflict environments, such as Colombia, Guatemala, Kosovo, Peru, Sierra Leone and South Africa, can be of assistance as Sri Lanka looks to address witness assistance and protection needs in the post-conflict environment.

### The witness protection context in Sri Lanka

The almost 30 year internal armed conflict in Sri Lanka came to an end in May 2009, following the military defeat of the Liberation Tigers of Tamil Eelam (LTTE). Victims of crimes and human rights violations during that conflict and during Sri Lanka's two armed insurrections, await truth, justice and reparations. Delivering truth, justice and reparations to these victims is in part dependent on the provision of witness assistance and protection which would allow witnesses to provide testimony free of fear.

This report focuses explicitly on the assistance and protection needs of witnesses of conflict-related crimes and human rights violations in Sri Lanka. While the needs of this category of witnesses will be similar to witnesses of other types of crimes such as organised crime, trafficking or domestic violence, witnesses of conflict-related crimes are unique in that in many cases the Sri Lankan State itself is a primary source of risk. It is anticipated that in the future, courts and commissions in Sri Lanka will be involved in establishing the truth and delivering justice and reparations for human rights violations that took place in the context of the conflict. At that time, witness assistance and protection will be essential.

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[4] Human Rights Watch, *Bangladesh: Stop Harassment of Defense at War Tribunal*, 2 November 2011.
[5] http://www.aseansec.org/16133.htm

Witnesses in Sri Lanka are vulnerable to individual and institutionalised sources of threat, both from state and non-state actors. The current Government of Sri Lanka, for the most part, is led by the same actors who controlled the Government in the final stage (2006-2009) of the war with the LTTE. Senior Government officials as well as members of the military and police are the same persons accused of ordering or direct involvement in serious crimes and human rights violations. Their continued role in governance heightens the risk to witnesses of such crimes involving state officials. On a local level, the continued service of individual soldiers or police officers responsible for crimes places witness of those crimes at risk. Former leaders of groups that were armed during the conflict such as the Karuna Group and TMVP, hold positions of power within the Government, again placing witnesses of crimes committed under their leadership at risk. In the past, the LTTE posed an extremely high risk to witnesses of their crimes. However, with the physical elimination of most of the LTTE's leadership, the killing and capture of thousands of cadres in May 2009 and the current disorganisation and weakening of the LTTE internationally, this risk is significantly reduced.

While the war has come to an end, the continued militarisation of society and State in Sri Lanka, combined with the continued military presence in former conflict areas and the continued application of the Prevention of Terrorism Act,[6] contribute to a climate of fear and heightened risk for witnesses. This law creates a context in which the principle of legality is not operative creating an environment of impunity in which witnesses and victims fear reprisals and have little confidence in State-controlled protection mechanisms. Furthermore, despite the end of the war, serious human rights violations continue to take place in Sri Lanka.

The need for assistance and protection for witnesses of human rights violations is not a new phenomenon in Sri Lanka. For instance, witnesses with information on the more than 20,000 enforced disappearances by the state and by the JVP in the late 1980s and early 1990s faced death threats by perpetrators who continued to work at high positions in the army and the police. In the special report of the 1994 Western, Southern and Sabaragamuwa Disappearances Commission, the parents and family members of the disappeared children complained that "officials of the security forces who were responsible for the abduction of their loved ones were still working in those same places." As a result the Commissioners' categorised a particular group of family members of the disappeared as "inhibited complainants" and came to the view that legal proceedings could not take place until such time as their security is assured.[7]

Numerous national and international actors recognise the significant risk facing witnesses in Sri Lanka. Members of the judiciary are concerned about victim and witness security in relation to crimes committed during the war. For example, in his judgment of March 2007, concluding the inquest into the murder of the 17 ACF (*Action Contre La Faim)* aid workers, Magistrate Jinadasa stated,

> "I take note of the fact brought to my notice of the prevailing climate of insecurity in the region which inhibits witnesses coming forward to give evidence, and inform that such

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[6] Analysis of several organisations finds that the PTA (Prevention of Terrorism Act) does not comply with international human rights law and enables the security forces to systematically violate human rights; see Amnesty International, *Sri Lanka's new parliament must drop emergency laws,* 20 April 2010; *International Commission of Jurists submission to the Committee against Torture on the Examination of the combined Third and Fourth Periodic Reports of Sri Lanka,* 20 October 2011; Human Rights Watch, *Sri Lanka: 'Bait and Switch' on Emergency Law,* 7 September 2011.

[7] Special Report of the 1994 Western, Southern and Sabaragamuwa Disappearances Commission, submitted to the President on 31 May 1997, 8 and 43, cited in International Commission of Jurists, *Post War Justice in Sri Lanka: Rule of law, the criminal justice system and commissions of inquiry,* January 2010, 139.

witnesses who are willing to give significant evidence could do so in confidence to Court."

Intimidation and killing of witnesses of alleged state crimes during the conflict has been well documented by the University Teachers for Human Rights (Jaffna) (UTHR(J)). For example:

- Balachandran (40) who was an important witness in the case of the five students killed on the foreshore in Trincomalee on 2 January 2006 was killed in August 2006. Local sources believed that a naval lieutenant was involved in Balachandran's killing.[8]

- Meera Mohideen who was the sole survivor and eye witness of 11 Muslim laborers attacked (ten of them were hacked to death), allegedly by the Special Task Force on 17 September 2006. Mr Mohideen, seriously injured in the attack, was forcibly moved to two different hospitals in Sinhalese areas by the police and then reportedly moved to an STF (Special Task Force) camp where he was held for a few days. He was forced to make a statement accusing the LTTE while held in the Amparai hospital.[9]

- Witnesses in the case of the killing of 17 ACF aid workers on 4 August 2006 have been intimidated and physically attacked.[10]

Intimidation and threats to witnesses continues today in Sri Lanka. For example, in October 2011, Frederica Janz, the editor of the *Sunday Leader*, received a threatening letter criticizing her involvement as a witness in the trial of former army commander General Sarath Fonseka. She has filed a complaint with the police, but has not received any protection. [11] While not related to the conflict, a retired public school teacher who gave evidence on a corruption case to an inquiry committee was attacked in October 2011, when shots were fired at his house. [12] These two cases reflect the real and imminent danger witnesses continue to face in Sri Lanka.

The UN Secretary-General's Panel of Experts on Accountability in Sri Lanka[13] and Amnesty International found evidence of harassment of witnesses in the context of the Government-established Lessons Learned and Reconciliation Commission. For example, Amnesty International found that,

> "In November 2010 people who came forward to give evidence before the LLRC in Kayts Island, Jaffna were reported by NGO observers to have been threatened by armed men alleged to be members of the EPDP [a pro-state formerly armed group]. In

[8] The University Teachers for Human Rights (Jaffna), Special Report No. 24: *The Five Students Case in Trincomalee*, 19 April 2007, http://www.uthr.org/SpecialReports/spreport24.htm#_Toc160272431

[9] The University Teachers for Human Rights (Jaffna), Special Report No. 25: *From Welikade to Mutur and Pottuvil: A Generation of Moral Denudation and the Rise of Heroes with Feet of Clay*, 31 May 2007, http://www.uthr.org/SpecialReports/spreport25.htm#_Toc168410546

[10] The University Teachers for Human Rights (Jaffna), Special Report No. 33: *Third Anniversary of the ACF Massacre: A Travestied Investigation, Erosion of the Rule of Law and Indicators for the Future of Minorities in Lanka*, 4 August 2009, http://www.uthr.org/SpecialReports/spreport33.htm

[11] Reporters Without Borders, *Death Threats Against Newspaper Editor*, 2 November 2011.

[12] Asian Human Rights Commission, *Sri Lanka: Witness to a corruption case's home attacked; investigation needed*, 24 October 2011.

[13] UN Secretary-General's Panel of Experts on Accountability in Sri Lanka, *Report*, 31 March 2011, para. 333-337.

subsequent sessions there were reports that witnesses and Commissioners were photographed by members of the security forces."[14]

The United Nations' Human Rights Committee,[15] the UN's Committee on the Rights of the Child,[16] and the UN's Special Rapporteur on extrajudicial, summary or arbitrary executions[17] have all raised concern about the security of witnesses in the context of Sri Lanka's armed conflict. They have also raised concern about the negative impact that a lack of witness assistance and protection has on investigations and securing justice. Likewise, the International Independent Group of Eminent Persons (IIGEP) established by the Government of Sri Lanka to observe the work of the Presidential Commission of Inquiry in 2006, found that in the context of the Commission,

> "[w]ithout a comprehensive system of victim and witness protection, and demonstrated Government competence and willingness to implement such a system, critical witnesses are unlikely to come forward. Perhaps more than any other factor, this impediment inhibits any effective future pursuit of the filing of indictments, convictions, and appropriate accountability for the alleged grave human rights violations under review."[18]

Witness protection is also a serious issue outside the context of conflict-related crimes, with a recent report finding that:

> "Intimidation of witnesses is not an isolated practice resorted to only on the part of the police/armed forces during times of emergency and war. Instead, it is a common practice among law enforcement agencies and has been manifested even in normal times, by police officers in Sri Lanka. Accused of torture, the law enforcement officers are kept in their positions, despite indictment and are thus afforded an opportunity to threaten and even kill witnesses."[19]

Thus there is no reason to believe that intimidation and killings of witnesses in Sri Lanka will come to an end now that the conflict is over.

Other actors within the judicial process in Sri Lanka, including judges and lawyers face significant risk as a result of their efforts to seek justice in relation to crimes committed by the State, armed groups associated with the State and the LTTE. Threats to the security of judges, lawyers and prosecutors as a result of their work can seriously impede successful prosecutions of those responsible for human rights violations or other crimes.

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[14] Amnesty International, *When will they get justice: Failures of Sri Lanka's Lessons Learnt and Reconciliation Commission*, September 2011, 53.

[15] Human Rights Committee, *Concluding Observations on Sri Lanka*, 2003, CCPR/CO/79/LKA, [9].

[16] Committee on the Rights of the Child, *Concluding Observations on Sri Lanka*, 2010, CRC/ C/LKA/CO/3-4, [79].

[17] Special Rapporteur on extrajudicial, summary or arbitrary executions, *Report on his visit to Sri Lanka*, 2006, E/CN.4/2006/53/Add.5, [56 and 72].

[18] IIGEP, *The Presidential Commission's public inquiry process so far falls short of international norms and standards*, 6 March 2008.

[19] Kishali Pinto-Jayawardena, *The Rule of Law in Decline: Study on Prevalence, Determinants and Causes of Torture and other forms of Cruel, Inhuman or DegradingTreatment or Punishment in Sri Lanka*, The Rehabilitation and Research Centre for Torture Victims, RCT, Denmark, 2009.

For example, Colombo High Court Judge Ambepitiya, who was murdered along with his body guard in November 2004, was at risk from a range of actors in Sri Lanka. He had sentenced several policemen and soldiers to death for their role in the massacre of 27 Tamil detainees at the Bindunuwewa detention camp in 2000 (who were later acquitted) and was about to begin hearing the case of five soldiers accused of murdering eight Tamil civilians in Mirusuvil in 2000. He had sentenced the leader of the LTTE to a jail term of 200 years for his role in the bombing of the Central Bank in 1996. He had also imposed harsh sentences in drug related cases. Five men associated with a drug dealer were found guilty of his murder.

Tamil judges serving in the North and East and actively pursuing justice for crimes that took place during the war found themselves intimidated and at risk.[20] As past crimes committed by all actors in the war in Sri Lanka are prosecuted, judges will be increasingly placed in a potentially dangerous situation as they are required to adjudicate the responsibility of armed actors, including the state, for past crimes.

Lawyers, particularly Tamil lawyers, working both in the justice system and for constitutional and law reform have been targeted. For example:

- In July 1999, Neelan Thiruchelvam was assassinated by an LTTE suicide bomber. He was a member of parliament and a practicing lawyer at the time of his killing;
- In October 2006, Nadarajah Raviraj was assassinated, allegedly on orders of State actors. He was a TNA member of parliament, a practicing lawyer and at the time of his death was a member of the Civil Monitoring Committee looking into extrajudicial killings, abductions and murders;
- In January 2000, Kumar Ponnambalam was assassinated. He was a practicing lawyer who regularly defended individuals detained under the Prevention of Terrorism Act and was publicly supportive of the LTTE's political philosophy.

The Sri Lankan Government has systematically created an environment in which lawyers taking on cases involving alleged "terrorists" are at risk. In December 2006, the Government of Sri Lanka expanded its Emergency Regulations in such a way that lawyers advising persons engaged in "terrorism" could themselves become criminally liable for providing legal advice.[21] Even though Emergency Regulations were pruned down in May 2010 and were allowed to lapse altogether at the end of August 2011, the possibility of these Regulations being re-imposed at any given moment in time remains a valid concern. In October 2008, the International Bar

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[20] *Supra* note 10, see Sections 10, 12 and 13.

[21] Under Regulation 7 of the 2006 Regulations, a person who gives advice to any person or group who engage in "terrorism" would commit an offence punishable by up to 10 years imprisonment. Section 7 does not refer to the need to establish intention (*mens rea*) to give advice to assist the act of terrorism, as would normally be required to establish a criminal offence. This Regulation held out the possibility of it being used against lawyers providing legal advice to individuals detained under emergency law even though it was not actually used for that purpose in any particular case. Though no longer in force, this Regulation was an effective warning to members of the legal profession.

Association wrote to the Government of Sri Lanka raising concern about a "notice" sent to lawyers who represented suspected terrorists, calling them "traitors" and making death threats.[22] This followed a grenade attack on the home of lawyer J.C. Weliamuna in September 2008. This intimidation then extended to include lawyers representing clients who speak out against abuses of the Government, for example, in July 2009, the Sri Lankan Defense Ministry's website labelled as "traitors" the five lawyers representing the Leader Publications. The editor of the Sunday Leader was assassinated in January 2009.

Judges, lawyers and witnesses are in a precarious situation in Sri Lanka and require guarantees of protection to enable the truth to emerge and the justice system to function effectively.

**The Government's response to witness assistance and protection needs in Sri Lanka**

The Government of Sri Lanka has frequently recognised the need for witness protection legislation and mechanisms.[23] A drafting process was initiated in 2000 which accelerated significantly in 2007, as a result of increased international scrutiny, and culminated with the tabling of an "urgent bill" in the Sri Lankan Parliament in June 2008. In May 2008, the Government of Sri Lanka agreed to pass and implement witness protection legislation during the Universal Periodic Review of Sri Lanka by the Human Rights Council. In October 2008, the Minister for Disaster Management and Human Rights, Mahinda Samarasinghe, stated that, "[t]he Govt. hopes that the passage of ['Assistance and Protection of Victims of Crime and Witnesses of Crime Bill'] will enhance public confidence in the law enforcement process and lead to greater participation in investigations and prosecutions by the general public".[24] Despite the stated urgency associated with the passing of the bill, three years later the Bill is yet to be passed. Due to the dissolution of Parliament in 2010 for the purpose of elections, this Bill is no longer tabled and no new bill is known to have been tabled in Parliament.

Government mandated witness assistance and protection has been attempted on one occasion in Sri Lanka. The mandate of the 2006 "Presidential Commission of Inquiry to investigate and inquire into serious violations of human rights" included the provision of "protection and assistance to the Commissioners, and officials of the Commission of Inquiry, members of the International Independent Group of Eminent Persons, and witnesses of the Commission of Inquiry, who may in the opinion of the said Commission of Inquiry require such protection or assistance".[25] The Organisation, Structure and Rules of Procedure issued on 16 January 2007 elaborated that a Victim and Witness Assistance and Protection Unit would be established that

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[22] International Bar Association, *Sri Lanka: Death threats made to Sri Lankan lawyers*, 4 November 2008.

[23] Statement by Minister Mahinda Samarasinghe at the Universal Periodic Review of Sri Lanka, 13 May 2008; "Response of the GoSL to the US State Department Country Reports on Human Rights Practices – 2007"; Statement by Prof Rajiva Wijesinha, Secretary-General of SCOPP (Secretariat for Coordinating the Peace Process), at a seminar on Conflict in Sri Lanka: Road Ahead, held at the Bandaranaike Centre for Ethnic Studies, on 26-27 March 2008.

[24] Statement by Minister Mahinda Samarasinghe at the United Nations General Assembly, 63rd Session, Third Committee in New York, 23 October 2008, <http://www.priu.gov.lk/news_update/Current_Affairs/ca200810/20081023sl_protects_hr_amidst_challenges.htm>.

[25] Mandate of the Presidential Commission of Inquiry to investigate and inquire into serious violations of human rights, P.O. No:CSA/10/3/8, signed by the President of Sri Lanka, http://www.pchrv.gov.lk/full_mandate. html

on the direction of the Commission would ensure "that victims and witnesses have a conducive environment in which they could appear before the Commission and provide testimony to the Commission without fear of possible intimidation, harassment or retaliation".[26]

Thus the Government of Sri Lanka clearly recognised the potential threat to the security of those with information regarding the 16 crimes under investigation by the Commission and the need to provide assistance and protection to enable the truth in the cases to be told. However, after detailed review of witness security in two cases under consideration by the Commission and the work of the Commission's Victim and Witness Assistance and Protection Unit, the UTHR(J) found that even staff of the Unit, including a Senior DIG (Deputy Inspector General of police), had fears for their safety. UTHR(J) concluded:

> "The protection unit had been rendered ineffective while witnesses were being actively intimidated by the investigative unit and the plight of the witnesses ... shows that anyone giving testimony against the security forces and remaining in Lanka would face a serious threat to sanity and security. ... The best advice that the witness protection unit has given witnesses is that they cannot give any protection."[27]

Given this context, for witness assistance and protection to function effectively in Sri Lanka, a commitment to re-establishing the rule of law and ending authoritarianism will first be needed.

**Analysis and recommendations regarding witness protection legislation in Sri Lanka**

This section reviews four documents related to witness protection legislation in Sri Lanka, to develop recommendations for future legislation in Sri Lanka on witness assistance and protection. The four documents are:

(i) The Rules of Procedures of the Presidential Commission of Inquiry to investigate and inquire into serious violations of human rights. This document is referred to as "the Rules of Procedure" throughout.

(ii) The Bill titled "Assistance and Protection to Victims of Crime and Witnesses", presented to the Sri Lankan Parliament on 6 June 2008 by the Minister of Justice and Law Reforms.* The Parliament to which this Bill was presented was dissolved in February 2010 in advance of elections. A witness protection bill has not been presented to the new Parliament. This document is referred to as "the Bill", throughout.

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[26] Organisation Structure and Rules of Procedure of the Presidential Commission of Inquiry to investigate and inquire into serious violations of human rights, issued on 16 January 2007, http://www.pchrv.gov.lk /aboutus.html.

[27] UTHR(J), *Special Report 33: Third Anniversary of the ACF Massacre: A Travestied Investigation, Erosion of the Rule of Law and Indicators for the Future of Minorities in Lanka*, 4 August 2009.

* Editors Note - The 2008 draft law was published in *LST Review*, Volume 18, Joint Issue 246 &247 April & May 2008

(iii) The proposed amendments to the "Assistance and Protection to Victims of Crime and Witnesses" Bill, of July 2009 to be moved at the Committee stage of the afore-mentioned Bill. This document is referred to as "the proposed amendments", throughout and is reproduced as Annex Two in this paper.

(iv) The draft law titled "Justice in Matters involving Child Victims and Witness of Crime" dated October 2010. This document is referred to as "the draft law on child witnesses", throughout.

International law does not provide detailed guidance on what should be included in legislation related to victim and witness assistance and protection. International standards, observations of international bodies, rules of procedure of international courts, jurisprudence of regional courts, domestic laws and domestic courts, practice and academic writing provide some insight into best practice in witness assistance and protection. A detailed presentation of references to witness protection in such documents can be found in the report of the International Commission of Jurists (ICJ) titled "Witness Protection in Nepal: Recommendations from International Best Practices", extracts of which is published as Annex 1 to this paper.

The ICJ has analysed legislation and practice from around the world regarding witness protection in contexts involving conflict and human rights violations including, Bosnia Herzegovina, Colombia, Croatia, Guatemala, Indonesia, Kenya, Kosovo, Peru, Serbia and Montenegro, Sierra Leone, South Africa and Sri Lanka. Several key documents, including the UN Office of Drug and Crime Control (UNODC) *Good Practices Manual*[28] and *Model Witness Protection Bill*,[29] the *Santiago Guidelines of 2008*[30] and the work of Chris Mahony on witness protection in Africa have also been analysed[31] The analysis is focused on four key areas of witness protection: (i) determining eligibility for protection; (ii) structure and operation of a witness protection mechanism; (iii) safeguards surrounding the initiation and termination of protection services; and (iv) the scope and nature of protection assistance. The analysis is reproduced in Annex I of this report. Drawing on this analysis, recommendations of principles have been developed that should guide the drafting of witness protection legislation to ensure protection of witnesses of human rights violations in a post conflict context, specifically Nepal. In light of the lack of international law or standards guiding witness protection legislation, in this report Sri Lanka's draft laws related to witness protection are evaluated in relation to the ICJ's analysis and recommendations.

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[28] United Nations Office on Drugs and Crime (UNODC), *Good practices for the protection of witnesses in criminal proceedings involving organized crime*, 2008 ("*Good Practices*").

[29] UNDCP, *Model Witness Protection Bill*, 2000 ("*Model Witness Protection Bill*")

[30] The *Santiago Guidelines on Witness and Victim Protection* (June 2008) are the outcome of a meeting of experts and prosecutors, organised by Attorney General's Office of Spain, the Office of the Public Prosecutor of Chile, Ibero-American Association of Public, United Nations Office on Drugs and Crime (UNODC) and EUROSOCIAL Justice ("*Santiago Guidelines*").

[31] Mahony, C., *The justice sector afterthought: Witness protection in Africa*, 2010, Institute for Security Studies, p. 167 ("*Witness Protection in Africa*").

## 1. Eligibility for protection and assistance

"Witness" should include people who have personally experienced (victim), seen, heard, or have information about a crime.

Victims of crimes should be able to seek assistance and protection insofar as they fall within the definition of witness. Victims and those associated with them should have additional rights and remedies resulting from their status as a victim regardless of their potential status as a witness. This report does not address victims' rights.

### 1.1 Witnesses who are criminally convicted or charged

The ICJ finds that alleged perpetrators, criminal suspects, persons convicted of an offence and serving a sentence and persons with a criminal record should be provided protection; and that "those not yet convicted should enjoy the presumption of innocence".[32] The ICJ goes on to state that "national and international examples generally recognise that in conflict and post-conflict countries it is important that protection is available to those who are criminally convicted or charged" and that this category of witnesses commonly includes "[m]embers of an armed non-state group who witness crimes while in detention" and "individuals, usually from a non-state armed group or demobilised army, who have surrendered or been captured and who have decided to assist the authorities", such as "members of state security forces testifying against members of their own units".[33]

This category of witnesses will be particularly relevant in Sri Lanka because members of the military, armed groups associated with the State such as the Karuna Group and TMVP and the LTTE were all responsible for past crimes and have all taken steps, including intimidation and in some cases, killing of witnesses, to ensure information about their involvement in past crimes is not disclosed. There are examples of members of the Sri Lankan police and military coming forward and providing information about human rights violations. Based on this past practice there is reason to believe that with effective witness protection mechanisms in place other individuals would come forward with information.

Given the involvement of the police, military and Government officials in carrying out and ordering crimes those members of the security forces who come forward with information about crimes committed by themselves and their colleagues and who are then prosecuted and sentenced will require significant protection measures to be taken to ensure their security from retaliation whilst in detention.

Protection of those convicted or charged is particularly important in Sri Lanka where torture and ill-treatment take place in prisons on an almost daily basis,[34] within the context of the past armed conflict and the context of regular policing. There is evidence of acquittals of police officers

[32] *Supra* note 3, p.15.
[33] *Supra* note 3, pp.42-43 (see Annex I, section 1.1 below).
[34] Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Report on his visit to Sri Lanka, 2008, A/HRC/7/3/Add.6, [91].

accused of torture as a result of a lack of evidence following threats, physical violence, sometimes murder experienced by witnesses of custodial torture.[35] Witnesses of custodial torture must be protected after filing a complaint whether they are in detention, on bail or have been released or acquitted.

The Rules of Procedures of the Presidential Commission did not specifically address witness protection issues for members of the State security and paramilitary forces or other armed groups, including the LTTE. There was a provision for special assistance measures and protection that could conceivably encompass members of armed groups.[36]

The Sri Lankan Bill does not exclude the provision of protection and assistance to individuals who have been criminally convicted or charged. However, as the Bill does not provide details on the types of protection measures available, it is difficult to assess whether or not protection measures sufficient to protect those convicted or charged, would be available.

**Future legislation should explicitly provide protection and assistance to the criminally convicted and charged and should establish special protection measures for this category of witnesses. These measures could include protection while in detention, protection for their families while they are detained, relocation to a detention facility in another country or relocation within the prison system.[37]**

Some witnesses who have themselves taken part in criminal activities become justice collaborators in the hope of "receiving immunity or at least a reduced prison sentence and physical protection for themselves and their families".[38] To guard against this some countries "clearly separate admission to a witness protection programme from any benefits that participants may be granted by the prosecution or court with respect to past criminal behaviour, and they provide that justice collaborators must serve some prison time for their crimes".[39] For example, the Indonesian law states that "[a] witness who is also an offender in the same case cannot be released from any legal charges if he/she is proven legally and convincingly guilty; nevertheless, his/her testimony can be used by the judge as a consideration to lessen the sentence".[40]

The Sri Lankan Bill does not provide nor deny immunity or reduced sentences for those involved in the crime associated with which they have provided information and are seeking protection.

**Future legislation should ensure that witnesses who themselves are a perpetrator in the**

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[35] See generally, Kishali Pinto-Jayawardena, *The Rule of Law in Decline: Study on Prevalence, Determinants and Causes of Torture and other forms of Cruel, Inhuman or DegradingTreatment or Punishment in Sri Lanka,* The Rehabilitation and Research Centre for Torture Victims, RCT, Denmark, 2009.

[36] Organisation Structure and Rules of Procedure of the Presidential Commission of Inquiry to investigate and inquire into serious violations of human rights, issued on 16 January 2007, http://www.pchrv.gov.lk /aboutus.html

[37] *Supra* note 3, 2011, p.44.

[38] UNODC, *Good Practices,* 19.

[39] *Ibid.,* p.20.

[40] Law of the Republic of Indonesia Number 13 Year 2006 on Witness and Victims Protection, Article 10(2).

**crime about which they are providing information cannot be provided with immunity in return for their testimony.**

### 1.2 Witnesses in non-criminal proceedings

Drawing on international standards and best practices, the ICJ finds that

> "[i]f a risk has been identified, protection should be extended to witnesses in non-criminal proceedings, including civil cases, inquests, military tribunals, and commissions, even if the violation is not criminalised domestically".[41]

The importance of witness protection in non-criminal proceedings is demonstrated in the inquest into the deaths of 17 ACF aid workers in Sri Lanka in August 2006, in which witnesses and family members were too scared to attend the inquest hearings, let alone, provide witness testimony. Recognising the great risk to witnesses, the magistrate who initially heard the case allowed witnesses to provide information in his chambers.

The Sri Lankan Bill ensures the availability of protection and assistance to witnesses in association with judicial or quasi-judicial proceedings, including commissions.[42]

**Future legislation should ensure the availability of protection and assistance to witnesses in association with judicial or quasi-judicial proceedings, including commissions.**

### 1.3 Witnesses to non-criminal or less serious offences

The ICJ's findings suggest that witness protection should be made available to witnesses of both non-criminal and less serious offences and provides several examples of jurisdictions that either provides discretion in regard to non-serious offences or that do not limit protection to any specific category of crime.[43]

The Sri Lanka Bill makes available assistance and protection to witnesses in relation to offences and "infringement of any fundamental right or the violation of any human right".[44] The Bill therefore does not limit provision of protection to specific categories of offences. By extending protection to witnesses of infringements of fundamental rights and human rights violations the Bill ensures protection is provided for witnesses of human rights violations even if they are not criminalised domestically. These provisions are welcome.

**Future legislation should ensure witness assistance and protection is available for non criminal and less serious offences.**

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[41] *Supra* note 3, p.47 (see Annex I, Section 1.2 below).
[42] Sri Lankan Bill, Part VIII, Article 36 (Definition of witness).
[43] *Supra* note 3, p. 47-49 (see Annex I, section 1.3 below).
[44] *Supra* note 42, Part VIII, Article 36 (Definition of witness).

### 1.4 Witnesses to the planning of an offence or human rights violation

The ICJ finds that assistance and protection should be available to witnesses who provide information to the authorities regarding the planning of an offence, "as part of broader policies to prevent crime and human rights violations".[45]

The Sri Lankan Bill specifically refers to commissioned offences.[46]

**Future legislation should adopt language similar to the South African law which includes the possibility of protection to witnesses to "any conspiracy, incitement or attempt to commit any offence".[47]**

### 1.5 Availability of protection before and after testimony

The ICJ finds that "the need for witness assistance and protection arises before, during and after the witness testifies (including post-sentence or acquittal)".[48] The ICJ further recommends that protection needs should be considered prior to investigators first approaching a witness and that "immediate" protection should be available to those who have not yet agreed to cooperate with a judicial or quasi-judicial process.[49]

The Sri Lankan Bill makes protection available to a witness who has

> "provided information or lodged a complaint or made a statement to any law enforcement authority or for having provided any testimony in any court or before a Commission or for instituting legal proceedings, pertaining to the commission of an offence or for the infringement of a fundamental rights for [sic] a violation of a human right, by any person".[50]

The Bill further provides that assistance and protection could be available to those who have provided information or lodged a complaint based on which "an investigation or inquiry **could** or has commenced or **is likely to commence**" (emphasis added).[51]

It appears that the Sri Lankan Bill provides for witness assistance and protection before, during and after the witness testifies, though this is not explicitly stated. It also appears that protection would be available immediately following the filing of a complaint, even if an inquiry has not yet commenced.

**Future legislation should explicitly state that protection will be available before, during**

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[45] *Supra* note 3, p.50 (see Annex I, section 1.4 below)
[46] *Supra* note 42, Part VIII, Article 36 (Definition of witness).
[47] Witness Protection Act 112 of 1998, as amended by Prevention and Combating of Corrupt Activities Act 12 of 2004 and Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, Section 1 "Definitions." ("South Africa Act")
[48] *Supra* note 3, p.50 (see Annex I, section 1.5 below)
[49] *Supra* note 3, pp.52-53 (see Annex I, section 1.5 below)
[50] *Supra* note 42, Part II, Article 4(3).
[51] *Ibid.*, Part VIII, Article 36 (definition of witness).

**and after testimony and that interim assistance and protection measures would be available to those contemplating filing a complaint.**

### 1.6 Those associated with victims and witnesses

The UNDCP Model Bill,[52] and the witness protection laws of several countries,[53] recommend and use the broadest definition by including in "witness" persons who "because of his or her relationships to or association with a person referred to in Subsection (i), may require protection or other assistance under this Act".

Extended household and community relationships in Sri Lanka are made more complex by the frequent displacement of the Tamil and Muslim populations living in the North and East. Many individuals travel to Colombo for work and come to live in boarding houses. The associations formed thus may not easily fall within accepted definitions of "family" and "household". It is also worth noting that protection options for educated urban dwellers will differ significantly from those that are feasible for vulnerable and frequently poor witnesses and their associates living in close-knit family and community environments in rural areas with less access to education and employment opportunities. Therefore, witness assistance and protection in Sri Lanka should be ready to include a broad range of associates of the witness, as determined by real-life circumstances. Protection will rarely extend to relocation and identity change reducing the perceived demands on a witness protection by including a broader range of associates.

Under the Rules of Procedure of the Presidential Commission's Witness Protection Unit "a member of the family, next of kin, dependent, significant others" could be provided protection because of their association with a witness. By including "significant others" the Rules of Procedure go beyond the common but limited group that protection can usually be provided to. While this is a welcome step it is not broad enough to include all those potentially at risk.

The Sri Lankan Bill limits the potential provision of protection to a family member or dependent of the witness or any other person of significant importance to the witness. [54] The inclusion of persons of significant importance is welcome. However, if it is the witness who defines "importance" some individuals requiring protection may be excluded.

**Future legislation should provide protection to anyone whom, because of his or her relationships to or association with a person defined to be a witness, may require protection or other assistance.**

### 1.7 Risk resulting due to membership of a particular group

Particularly during and after conflict, serious human rights violations, including massacres, may

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[52] UNDCP, *Model Witness Protection Bill*, Article 2(c(ii)).

[53] See for example, Kenya, *Witness Protection Act, 2006*, Article 3(2) and Hong Kong: *An Ordinance to provide for the establishment of a programme or the protection of certain witnesses and persons associated with witnesses, "Witness Protection Ordinance"* No 269 of 2000, Section 2 Part 1(c).

[54] *Supra* note 42, Part VIII, Article 36 (definition of witness).

have been witnessed by many individuals, including survivors. Intimidation, threats and reprisals can be directed against such groups in a targeted or indiscriminate manner. The risk may extend from family members to neighbourhoods and entire communities, or to identity based on religion or ethnicity. Harm may be directed at associates of witnesses – whether a determinate number of other potential witnesses or by pure association – before, during and after testimony. Particularly where ethnicity or religion is a conflict factor, testimony may provoke further tension and violence.[55]

The ICJ recommends that witness protection should be provided to "associates of a witness even if they themselves do not provide testimony. This may be necessary where there are multiple victims or witnesses to a particular abuse or where crimes were perpetrated against a particular ethnic or religious group."[56]

The political manipulation of identity-based ideologies by state and non-state actors in Sri Lanka raises all of these witness protection issues and complexities. Furthermore, in Sri Lanka there have been massacres with both survivors and witnesses who as members of that group may be at risk even if they personally have not yet planned to testify.

**Future legislation and a Sri Lankan witness assistance and protection programme will need to ensure protection to a wider group of at risk individuals as a result of their identity or as potential witnesses among a large group of witnesses of a particular crime or pattern of crimes.**

### 1.8 Other actors, who are not witnesses

The ICJ finds that "non- witnesses may require assistance and protection, such as judges, commissioners, defence lawyers, prosecutors, investigating officers, or expert witnesses" and that existing domestic protection measures for such actors may not be sufficient in countries where serious human rights violations continue to occur.[57]

As is demonstrated above, judges and lawyers in Sri Lanka, are at risk due to their profession.

**Future legislation should ensure that officials and experts involved in judicial or quasi-judicial processes are able to seek the full range of protections available to witnesses, when other protection mechanisms are unable to address their level of risk.**

## 2. Structure and operation of a witness protection mechanism

Confidentiality, partnerships, neutrality and transparency and accountability are the principles that should underscore any witness protection mechanism. UNODC provides detailed guidelines

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[55] Christopher Rudolph, "Constructing an Atrocities Regime" The Politics of War Crimes Tribunals", *International Organisation*, Vol. 55, No. 3 (Summer, 2001), 670.
[56] *Supra* note 3, p.15.
[57] *Supra* note 3, p.55 (see Annex I, section 1.7 below).

for the structure and operation of a witness protection mechanism.[58] The ICJ finds that in "post-conflict settings, additional measures may be necessary to address threat levels exacerbated by weak rule of law institutions, a lack of political will to address impunity, and a continuing risk of conflict".[59]

### 2.1 Institutional independence and accountability

The ICJ finds that "[d]ecisions about eligibility for entry, termination of service and scope of protection must be protected from political manipulation" and recommends that "[g]iven the vulnerability of government institutions to manipulation, any protection mechanism ... should retain formal and actual independence from the state security apparatus." [60] This view is also taken by UNODC, OHCHR and other expert bodies. [61] The ICJ further finds that "[i]n post-conflict countries, where perpetrators often continue to hold positions of power that potentially allow them to manipulate witness protection bodies, establishing a fully independent mechanism becomes increasingly important" [62] and presents Indonesia as an example of an attempt to achieve structural independence.

The Indonesian law establishes an independent Victim and Witness Protection Agency directly accountable to the President and reporting annually to the House of Representatives. A secretariat is formed, through Parliament's appointment of seven members with relevant professional experience. The ICJ finds, that while this structure removes several layers at which the witnesses security could be compromised, it does not entirely eliminate the potential for interference by the President. The ICJ therefore recommends that if such a structure is adopted Presidential oversight should "focus on broad operational direction and accountability, rather than individual cases of witness protection and assistance".[63]

#### The Sri Lankan Bill

The Sri Lankan Bill creates three bodies: (i) an overarching Advisory Commission responsible for policy and guidance; (ii) a National Authority which holds operational authority; and (iii) the Protection Division of the Police Department, which would implement protection measures.

**The Advisory Commission on Victims of Crime and Witnesses** (the "Advisory Commission"),[64] to which the National Authority reports, is composed of 11 people: the Chief Justice, Attorney General, the Inspector General of Police, or their nominees, the Chairman of the Legal Aid Commission, and the President of the Bar Association of Sri Lanka; five persons appointed by the Minister in charge of the subject of justice, who are academically or

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[58] UNODC, Good Practices 45-58.
[59] *Supra* note 3, p.56 (see Annex I, section 2 below).
[60] *Ibid.*, p.16.
[61] Office of the High Commissioner for Human Rights, *Right to the Truth*, para. 51 (citing Council of Europe, *Recommendations to member states on the protection of witnesses and collaborators of justice)*; UNODC, *Good Practices*, 45-58.
[62] *Supra* note 3, p.59 (see Annex I, section 2.1 below).
[63] *Ibid.*, p.59 (see Annex I, section 2.1 below).
[64] *Supra* note 42, Part IV, Article 17.

professionally qualified and/or experienced in medicine and more particularly psychological medicine, promotion and protection of human rights and fundamental rights, social service and welfare, probation or rehabilitation of victims of crime; and one person experienced in voluntary social service representing the non-governmental sector. The proposed amendments recommend the inclusion of one person who has experience in voluntary services in the promotion and protection of human rights.[65]

The Advisory Commission advises the Board of the National Authority on the policy and overall direction to be adopted by the Authority, the general performance and discharge of the duties and functions of the Authority, the manner in the duties and functions of the Authority should be given effect to. The Bill specifies that 'it shall be the duty' of the Board to act on any advice given by the Advisory Commission.[66]

**The National Authority for the Protection of Victims of Crime and Witnesses** ("the Authority"),[67] is composed of nine members[68] forming a Board of Management: including senior government officers namely the secretaries or the additional secretaries for the ministries responsible for justice, the Police Department, and human rights, a nominee of the Attorney General, a senior Deputy Inspector General nominated by the Inspector General of Police;[69] and four members elected from among persons who are academically and professionally qualified and have experience in the professions or fields associated with the criminal justice system appointed by the Minister in charge of the subject of justice in consultation with the President, the Chief Justice, and the Attorney-General.[70] The proposed amendments also recommend inclusion of four persons qualified in the area of human rights to be selected by the Minister in charge of the subject of human rights, Minister in charge of the subject of justice in consultation with the President, the Chief Justice, and the Attorney-General appoints the Chair of the Board.[71]

The Authority through a Board of Management ("the Board") performs six main functions.

1. Operational role: Provide assistance to victims and witnesses, including the power to investigate into complaints. Develop guidelines for the setting up and maintenance of the Victim and Witness Protection Division of the Sri Lanka Police Department and for the appointment, transfer and assignment of functions of police officers.

2. Advisory role: It is the main body charged with the duty to advise the state on

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[65] Proposed amendments, p. 9.
[66] *Supra* note 42, Part IV, Article 17(5).
[67] *Ibid.*, Article 11(1).
[68] The proposed amendments recommend 16 members, pp. 5-6.
[69] The proposed amendments recommend the inclusion of the secretaries or additional secretaries for women's affairs and for children and also a member of the National Human Rights Commission (see Proposed Amendments, p. 6).
[70] The proposed amendments recommend that these individuals be appointed by the Constitutional Council, but when it is not functioning they be appointed by the Minister in charge of the subject of justice in consultation with the President, the Chief Justice, the Minister in charge of the subject of human rights and the Attorney General (see Proposed Amendments, p. 5). Amid controversy in 2010, the 18th Constitutional amendment repealed the 17th Amendment which had established the Constitutional Council.
[71] *Supra* note 42, Part IV, Article 12(2). The proposed amendments recommend that this be the responsibility of the Constitutional Council when it is functioning, p. 5).

appropriate measures that should be undertaken to give effect to the entitlements of victims and witnesses either generally or on a case by case basis, review existing policies, legislation, practices and procedures ensure they conform with internationally recognized standards and best practices, promote and recommend a code of conduct relating to rights of victims of crime and entitlements of witnesses, recommend the development, adoption and implementation of measure of restitution and restorative justice.

3. Preventive role: Through conducting research related to crime reduction and impact and on witness protection and assistance, promoting community participation in crime prevention, promoting civil society participation in providing assistance to victims and witnesses.

4. Capacity building role: Sensitizing public officers on the needs of victims of crime and witnesses.

5. Confidence building role: Through its awareness and outreach programmes regarding rights and entitlements of victims and witnesses as well capacity building and sensitization for public officers and non governmental officers.

6. Accountability role: Preparing an annual report to the Parliament.

The Authority has wide powers in relation to obtaining information for the purpose of an investigation into the infringement of a right or entitlement of a victim or witness, which are made broader under the proposed amendments.[72]

The Authority has a Director General who is appointed in consultation with the Advisory Commission.[73] The Authority also has its own fund.[74]

**Victim and Witness Protection Division of the Sri Lanka Police Department ("the Division")**

A Protection Division is established as part of the Sri Lankan Police Department.[75] The Division will be headed by the Senior Deputy Inspector General of Police who is also a member of the Board of Management of the Authority.

The Division is to provide assistance and protection to victims and witnesses, to draw and implement a programme to provide such assistance from existing or potential threats, harm, reprisals, retaliation or intimidation. The Division is also responsible for conducting investigations, conducting a threat assessment before entering a victim or witness into the programme, entering into memorandums of understanding with victims and witnesses, deciding

[72] *Supra* note 42, Part IV, Article 14; Proposed amendments, p. 8.
[73] *Ibid.*, Part IV, Article 15.
[74] *Ibid.*, Part IV, Article 16.
[75] *Ibid.* Part V, Article 18(1).

what level of protection measures should be provided.[76]

The Bill does not specify the composition of the Division or the qualifications or expertise required to be a member of the Division. However, Article 18(2) implies that the Division will be staffed by police officers.

The Bill also does not specify whether the Division is based at the Colombo head office or is decentralized with branches in other parts of the country.

The draft law on "Justice in Matters involving Child Victims and Witnesses of Crime" ("draft law on child witnesses") of October 2010, proposes the establishment of a stand-alone "National Authority for the Protection of Child Victims and Witnesses".[77] While it is positive that the needs of child witnesses are being prioritised, their particular needs should be addressed within the regular framework of witness assistance and protection through provision of special protection measures for child witnesses and the hiring of specially qualified staff.

**Analysis of the proposed structure**

The Sri Lankan Bill is extraordinary in its excessive number and size of bodies associated with witness assistance and protection. No other law reviewed has more than one body, though some do create an appeal body. The organisational structure proposed in the Sri Lankan Bill is very problematic and should be significantly revised.

Firstly, the Bill is vague and ambiguous in relation to division of responsibility between the Commission, the Authority and the Division. The Supreme Court of Sri Lanka has stated that 'whilst the clear division of responsibility is important for efficient functioning of bureaucracy the lines of responsibility must be patently transparent and understandable to the victim and witnesses....'.[78] The existence of both an Authority and Commission serves no practical purpose and complicates the division of responsibilities.

Secondly, an excessive number of people, including a high number of Government officials, are involved in the Commission, the Authority and the Division. This creates a specific risk to witnesses from particular individuals, including those within the Government, who would come to know details regarding their protection. The large number of people involved also creates a generalised concern about confidentiality. The UNODC has found that the greatest risk of compromise comes from the human element within the process.[79] The fewer people involved the lower the chance of the programme being compromised.

Thirdly, it is not clear how the Authority will effectively perform its current functions and what capacity it has to perform those functions such as investigation, recording statements, or raising awareness. Therefore, invariably the Authority will rely on the Protection Division within the

[76] *Ibid.* Part V, Article 19 and 20.
[77] Draft law on child witnesses, Chapter I, Article 2(1).
[78] Supreme Court Determination No. 1/2008, p. 2
[79] *Supra* note 38, p.54.

Police Department to carry out these functions, which would defeat the purpose of the Authority.

Fourthly, the Division lacks independence from the Police Department with the Senior Deputy Inspector General of Police in charge of the Division.[80] Of equal concern, it is envisaged that the Division will be part of the Sri Lankan Police Department[81] and that police officers will function as the staff of the Division.[82]

Fifthly, the proposal to establish a stand-alone national authority specifically for the protection of child witnesses (and child victims) further complicates an already complicated witness protection arrangement.

The structure of a witness protection programme in Sri Lanka should be entirely revised. The alleged involvement of senior Sri Lankan officials in human rights violations renders it essential that Government officials are in no way involved in the oversight or operations of the witness protection programme. The lack of independence and politicisation of the police and military, combined with the need to protect witnesses from the Sri Lankan police and military,[83] render it essential that the witness protection programme be entirely separate from the police and military.

**Future legislation should establish a single witness protection and assistance agency in Sri Lanka, which should be composed of a small management body supported a secretariat.** The management body would have responsibility for tasks such as:

- "Establishing the aims and functions of the Witness Protection Programme. ...
- Establishing the necessary infrastructure at a national level, and possibly regional level, including the employment of the necessary administrative and support staff.
- Setting up sub-committees for the different localities who will be responsible for the witnesses in their areas.
- Determining the links and relationships between the programme and other support structures both within and outside of the state.
- Being responsible for the budget of the programme.
- Establishing a system of checks and balances within the programme to enhance accountability."[84]

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[80] *Supra* note 42, Part V, Article 18(3).
[81] *Ibid.*, Part V, Article 18(1).
[82] *Ibid.*, Part V, Article 18(2).
[83] Centre for Policy Alternatives, *Need for a Substantial Revision of the Victim and Witness Protection Bill*, 28 September 2007.
[84] Gareth Newham, Justice in Transition, *Keeping the Wolves at Bay: Issues and concerns in establishing a witness protection programme in South Africa.*

**The secretariat would be responsible for implementation of all aspects of witness assistance and protection, including special measures for child witnesses. The secretariat should, to the extent possible, exclude recruitment of members of the Sri Lankan Police, but where this is unavoidable should include a rigorous vetting process. Recruitment should broadly follow the guidance set out below. Priority should be given to the establishment of secretariat branch offices, particularly in the North and the Northeast, given the geographical patterns of the conflict.**

Sections below will refer to this envisaged "Witness Assistance and Protection Agency" and its Secretariat.

**2.2 Personnel**

Drawing on the guidance of UNODC, the Santiago Guidelines, the International Criminal Court and other sources, the ICJ sets out detailed recommendations regarding staffing a witness protection programme in a post-conflict country including:

- "Regulations should set out the qualifications required within the staff of the unit consistent with best practices, and might include expertise in: witness protection and security; legal and administrative matters; human rights and humanitarian law; logistics and administration; psychology and psycho-social counselling; children, including the use of child soldiers; elderly persons; healthcare; interpretation and translation; and caste and other forms of discrimination.

- Particular attention should be given to ensure staff capacity to protect and assist victim witnesses of sexual and gender-based violence.

- Applicants should be carefully vetted to ensure they are not associated with human rights abuses.

- Staff who are not part of the witness protection program, but who come into contact with witnesses, such as investigators, should be trained and provided with a good practices manual to ensure they do not expose a witness to further risk.

- The need for the protection mechanism to have its own independent intelligence gathering capacity."[85]

Other than limiting recruitment of staff for "the Division" to police officers, the Sri Lankan Bill does not provide any guidance on staffing the Division. The Bill provides that "the Authority" will issue guidelines for recruitment.[86]

**Future legislation should incorporate principles to guide staff recruitment. These principles should include the following requirements: suitably qualified, multidisciplinary,**

[85] *Supra* note 3, pp.16-17 (see Annex 1, section 2.2 below).
[86] *Supra* note 42, Part V, Article 18(2).

**no previous involvement in human rights abuses, and capacity to work with victims of trauma. The following principles for provisions related to staffing should also be included in future legislation: full-time, voluntary, long tenures, appropriate salaries and benefits, provision of on-going training and assistance/staff can be sought from other countries with similar experiences. Future legislation should empower a relevant authority to establish detailed guidelines for recruitment and staffing. These guidelines should comply with the ICJ's recommendations.**

### 2.3 Funding

The ICJ recommends that "the government should ensure, through allocations in the national budget, supplemented by donor support as needed, sufficient funding for the unit. There should be built-in flexibility, allowing for rapid disbursements and access to supplemental funding for emergencies".[87] The ICJ further finds that "in post-conflict countries, costs may be much greater during the formation and operation of truth and reconciliation mechanisms or tribunals. While the regular budget for a protection programme should come from the State budget, in such extenuating circumstances donors funds or supplementary funding may be sought".[88]

The Sri Lankan Bill establishes a Fund to be voted by parliament for the use of the Authority.[89] The Fund can be used for compensation to victims of crime and their dependent family members, expenses incurred by the victim, expenses incurred in providing assistance and protection to the victims and witnesses, and a part of the sum of money that is required by the Authority for the performance and discharge of its duties. It is not clear if the Fund can be used to pay salaries of the Director General and other staff. It is also not clear how this Fund can be used in relation to the Protection Division or the Advisory Commission. There is no reference to an emergency fund for unexpected expenditures such as a sudden increase in the number of witnesses seeking assistance or protection.

The Bill does not establish a fund for the Protection Division or the Advisory Commission. If the Protection Division is to rely on funds allocated to the general budget of the police department, its independence, accountability and operational capacity would be constantly in jeopardy.

The Bill potentially limits the possibility of seeking funds from foreign sources for the assistance and protection of witnesses, through Article 20(3).

Availability of funds for witness protection was an issue of concern during the most recent Presidential Commission of Inquiry in Sri Lanka. The IIGEP found that "[the Commission] does

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[87] *Supra* note 3, p.17.
[88] *Supra* note 3, p.63 (see Annex I, section 2.3 below).
[89] *Supra* note 42, Part IV, Article 16 and Part VII, Article 27.

not have sufficient funds to offer adequate assistance to those in need of protection from possible retaliation for appearing before the Commission".[90]

**Future legislation should establish a fund for the Witness Assistance and Protection Agency, to which the Secretariat has access and of which the management body has oversight. There should be built-in flexibility, allowing for rapid disbursements and access to supplemental funding for emergencies. The funds should come from the national budget, except in extenuating circumstances, such as during periods of heightened need. In such circumstances it should be possible for funds to be received from international sources.**

**Sri Lanka should also take steps toward developing a joint regional fund, perhaps through SAARC, to assist countries in South Asia with witness assistance and protection.**

### 2.4 Financial transparency

The ICJ recommends that "regulations should provide for regular audits of finances and evaluations of effectiveness, without prejudicing the integrity or security of the unit's operations".[91]

The Sri Lankan Bill does not have provisions to ensure security of financial records that might otherwise be linked to the identity and location of witnesses, during audits.

**Future legislation should explicitly state how the audit will be conducted in a manner that ensures the protection of witnesses receiving assistance and protection following best practice from around the world.**[92]

## 3. Initiation and termination of protection and assistance

### 3.1 Authority to grant entry to the program

All witness protection legislation delegates authority to grant protection to a witness to either members of a witness protection unit or to other officials. The ICJ finds that "[i]n post conflict settings there are particularly strong arguments for vesting authority in members of an independent witness protection unit, given the likelihood of a conflict of interest where state actors and their associates are alleged as perpetrators".[93] For this reason, in the case of Sri Lanka, authority to grant entry into a witness protection programme should be vested in the protection agency itself, rather than Government officials. A relevant example is South Africa,

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[90] IIGEP, *Public Statement*, 15 April 2008.
[91] *Supra* note 3, p.17.
[92] Several options for how security could be ensured are set out in ICJ's *Witness Protection in Nepal*, 64 (see Annex I, section 2.4 below)
[93] *Supra* note 3, p.65 (see Annex I, section 3.1 below)

where the Director of the Office for the Protection of Witnesses is given responsibility for admissions.[94]

In the Sri Lankan Bill, the Division may undertake the admission of a victim or witness into its Victim and Witness Protection Programme upon:

a) a request made by a victim of crime or witness;

b) a recommendation made by the Authority;

c) a report submitted by a law enforcement agency or a public officer; or

d) a notification received from a court or a commission.[95]

While the Bill appears to place sole responsibility in the hands of the Division regarding the decision of who will receive assistance and protection, this is not the case. The Authority, whose composition includes several senior Government officials, is deeply involved in decisions regarding provision of assistance. For example, Article 20(2) allows the Authority to provide protection and Article 22(1) provides special powers to the Authority to provide protection to particularly vulnerable witnesses. As a result several senior Government officials will be involved in, or have knowledge of, decisions regarding admission of witnesses. In the context of Sri Lanka this would place witnesses in direct risk.

The Bill, further confuses authority to provide protection by allowing Commissions themselves to provide protection.[96] While it is welcome that Commissions can refer cases for protection, the responsibility for entry into a witness protection programme and the provision of protection should be vested solely in an independent witness protection agency.

**Future legislation should provide that authority grant admissions be vested only in the Secretariat of the Witness Assistance and Protection Agency, under the auspices of the Director of that Agency.**

### 3.2 Criteria for admission

The UNODC, OHCHR and the ICJ all highlight the importance of developing criteria against which to measure eligibility for admission into a witness protection programme. The criteria must be flexible, objective and transparent. Such criteria could include: the level of threat, certainty of the risk, foreseeability of acts of reprisal or intimidation, applicants personality, value of the witnesses testimony to the prosecution, importance and gravity of the case. The ICJ further sets out criteria that should be included in post-conflict countries such as, institutional

[94] South African Act, Article 10 and 11.
[95] *Supra* note 42, Article 19(2).
[96] *Ibid.*, Article 20(2).

affiliations of the alleged perpetrator, if the case is high-profile or emblematic, level of impunity and lack of law and order in the country.[97]

The Sri Lankan Bill does not provide any guidance on admission criteria.

**Future legislation should include criteria similar that set out in the laws of Bosnia and Herzegovina or South African. In addition more specific criteria for conflict related witnesses could also be included, such as those criteria set out in the ICJ report.**

### 3.3 Defining the threat and evaluating the risk

Many witness protection laws provide some criteria for assessing threat and risk to the witness. The ICJ finds that "[a]ll major decisions – including entry, termination, and scope of protection – must be made on the basis of an independent threat/risk analysis".[98] In Colombian, for example, it is required that the risk be "extraordinary" to enable the witness to enter the programme and defines "extraordinary" as (i) specific, (ii) concrete, (iii) present, (iv) relevant, (v) serious, (vi) clear and perceptible, (vii) exceptional, and (viii) disproportionate.[99] The threat and risk assessment should be carried out by an independent body.

The ICJ also advises that "a witness protection mechanism has its own independent capacity for collecting intelligence information for use in its threat and risk assessment". Where human rights violations are involved, "normal state apparatus for collecting and analysing intelligence information may be unreliable, and could endanger witnesses and victims".[100]

The need for an independent and uniform threat and risk assessment is particularly important in Sri Lankan given concerns raised regarding inadequate threat assessments by witness protection officers during the most recent Presidential Commission of Inquiry.[101] The need for independent intelligence gathering is also of great importance given the involvement of State officials in human rights violations, for which witnesses require protection.

While the Sri Lankan Bill provides that a "threat assessment" must be carried out prior to the provision of protection, it does not provide any criteria or guidance for that assessment.[102] The involvement of Government officials in the Authority and police officers in the Division, who are both responsible for threat assessments, will result in a threat assessment that lacks independence. Furthermore, Article 21(3) appears to allow the involvement of officers-in-charge of police stations where a request for protection is made, to be involved in the initial threat assessment. While it is welcome that this article potentially makes available immediate protection, local police officers should not be involved in threat assessments.

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[97] *Supra* note 3, p.67 (see Annex I, section 3.2 below)
[98] *Supra* note 3, p.68 (see Annex I, section 3.3 below).
[99] Resolution of the Office of the Attorney General No. 0-5101 of 2008, Article 5.
[100] *Supra* note 3, p.69 (see Annex I, section 3.3 below)
[101] Amnesty International, *Twenty years of make believe: Sri Lanka's commissions of inquiry*, June 2009, 32.
[102] *Supra* note 42, Part V, Article 19(3).

**Future legislation should provide detailed criteria and guidance on threat and risks assessments, such as those criteria included in the Colombian law. The legislation should also empower the Secretariat of the Witness Assistance and Protection Agency to conduct all threat and risk assessments.**

### 3.4 Memorandum of understanding (MoU)

The ICJ finds that "[f]ormal consent of a witness, victim, family member, or associate to receive assistance or protection is essential, based on an explanation of the threat and risk assessments and the range of measures available. This consent should be documented in a confidential MoU." The ICJ goes on to say that "[p]rotection and assistance officers may be held liable for breaches of the MoU or gross acts of negligence or other forms of misconduct that result in harm to the witness".[103] The European Committee on Crime Problems provides detailed guidance on MoU content.[104]

Clarity in regard to protection measures is particularly relevant in the context of Sri Lanka where Amnesty International found that during the most recent Presidential Commission of Inquiry the Commission's capacity to protect witnesses who came forward was misrepresented through public announcement.[105] Furthermore, witnesses in Sri Lanka may include people from rural communities who will have little experience with the justice system or contracts in general. Policies and practices around the discussions of and the signing of an MoU must be sensitive to this and efforts must be made to ensure that information is provided to the witness in a language they understand and in a manner they are comfortable with.

The Sri Lankan Bill states that the witness must enter into a memorandum of understanding with the Division.[106] However, the Bill provides no details on the purpose or content of the MoU.

**Future legislation, or accompanying regulations or guidelines, should include a list of proposed content for memorandums of understanding, similar to the list proposed by the European Committee.**

**Future legislation should also ensure that staff of the Witness Assistance and Protection Agency can be held liable for breaches of the MoU or acts of gross negligence.**

### 3.5 Termination and voluntary exit

Witnesses may choose to leave a witness protection programme for a variety of reasons. Measures should be put in place to ensure the witness can voluntarily leave protection in the safest possible manner. Protection may also be terminated by the witness protection agency. The

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[103] *Supra* note 3, 18.

[104] European Committee on Crime Problems, Committee of Experts on Criminal Law and Criminology Aspects of Organised Crime (PC-CO), *Report on Witness Protection (Best practice survey)*, Restricted PC-CO (1999) 8 Rev, Strausbourg (24 March 1999).

[105] Amnesty International, *Twenty years of make believe: Sri Lanka's commissions of inquiry*, June 2009, 32.

[106] *Supra* note 42, Article 19(4).

individual or body that has power to terminate protection should be independent of the government, for similar reasons provided above in regard to admissions.

In the Sri Lankan Bill, the Authority, the Division or a Commission can terminate protection.[107] The Authority includes several senior Government officials and the Division is composed of police officers. Therefore under the current witness protection structure proposed for Sri Lanka, the power to terminate protection would lack independence. Furthermore, a commission should not be involved in providing or terminating witness protection.

**Future legislation should give the Director of the Witness Assistance and Protection Agency authority to terminate protection and assistance.**

The criteria for potential termination should be made known to the witness when agreeing to enter the programme and should be set out clearly in witness protection legislation. Based on good practices around the world UNODC provides guidance on criteria for termination of assistance to the witness, including:[108]

- Security is compromised by the actions of the witness or his or her inability to honour obligations;
- The witness violates the rules laid down in the memorandum of understanding;
- The witness refuses to give evidence in court;[109]
- The seriousness of the threat against the witness's life has lessened.

The basis for termination set out in the Sri Lankan Bill is broadly similar to the UNODC's suggestions.[110] However, the inclusion of "breach of the peace" or the provision of false information, opens up space for wrongful termination of protection and assistance. The independence of the individual/body empower to order termination, is essential to ensure such criteria are not abused.

**Future legislation should ensure that termination criteria comply with UNODC's good practices. Legislation should also ensure the removal of assistance and protection be conducted in a manner that does not expose the witness to increased risk. Notification of termination should be provided well in advance of termination. An appeal mechanism should be available and witness should be informed of this mechanism when their protection or assistance is terminated. Protection should not be terminated while an appeal is underway.**

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[107] *Supra* note 42, Part V, Article 20(5).
[108] *Supra* note 38, pp.73-74.
[109] In Thailand, if a witness refuses to testify, protection will only be removed if that refused is deemed to be "irrational" by authorities. Witness Protection Act BE 2546 (2003) of Thailand, Section 12(4).
[110] *Supra* note 42, Part V, Article 20(5(b)).

### 3.6 Right to review

The ICJ finds that an independent and confidential review mechanism should be provided within the framework of witness protection and assistance.[111] The ICJ recognises the challenge of establishing such a mechanism is the maintenance of "independence and confidentiality while extending consideration of sensitive information to the appeal body".[112] Some jurisdictions, such as Hong Kong, establish an independent appeal board which has the power to review admission, termination and some specific protection measures.[113]

The Sri Lankan Bill does not provide for any review of appeal mechanism.

**Future legislation should establish an appeal mechanism for appeals related to admission, termination and specific protection measures. Lessons should be drawn from experiences of Hong Kong's and Kenya's appeal bodies.**

## 4 The scope and nature of protection and assistance

Witness assistance and protection measures can be largely divided into three categories. A witness may require measures from one or all of these categories. The ICJ describes the categories as:

> "Witness Assistance: This assistance is primarily meant to prevent retraumatisation, and to protect a witness's capacity to provide effective testimony. Providing such assistance is not the same as protecting physical security.
>
> Protection measures: These are security measures that can be considered up to a certain threat level as an alternative to identity change or relocation.
>
> Identity change and relocation: This step involves more permanent and life altering witness protection measures such as identity change and/or relocation".[114]

Three different time periods must be taken into account in relation to each of the above. These are pre-testimony, testimony, post testimony. The time period prior to official complaint or immediately following a complaint is another unique time period during which interim protection measures should be made available. The Sri Lankan Bill does not specify which protection measures will be offered at each stage.

The OHCHR recommends that there should be separate divisions in a witness protection agency for witness assistance and witness protection.

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[111] *Supra* note 3, p.19.
[112] *Supra* note 3, p.73 (see Annex I, Section 3.7 below).
[113] Hong Kong: An Ordinance to provide for the establishment of a programme for the protection of certain witnesses and persons associated with witnesses, No. 269 of 2000, Part III, Sections 13 and 14.
[114] *Supra* note 3, p.74 (see Annex I, Section 4 below).

**Future legislation in Sri Lanka should provide for separate divisions within the Secretariat of the Witness Protection Agency.**

An additional protection measure is the deterrent effect of criminalising intimidation of witnesses and sharing of information regarding witnesses.

### 4.1 Assistance and protection for uniquely vulnerable witnesses

Some categories of witnesses will be vulnerable in unique ways depending on their personal characteristics or the characteristics of the crime they have witnessed. This may include witnesses who are criminally convicted (discussed above), child witnesses, witnesses of sexual violence (particularly when they are also the victim), witnesses with physical or mental disabilities, etc. Uniquely vulnerable witnesses will require specialised assistance and protection measures which may vary at different stages of the justice process. Legislation or regulations should set out in detail the unique forms of assistance and protection that are available. Staff must be recruited into the Witness Assistance and Protection Agency with skills in these specific areas of assistance and protection. Divisions within the Witness Assistance and Protection Agency tasked specifically with ensuring assistance and protection to the uniquely vulnerable may need to be established. This is likely to be the cases particularly in regard to child witnesses.

The draft law on child witnesses provides a wide range of mostly welcome assistance and protection measures for child witnesses at all stages of the justice process. In some instances the assistance and protection measures outlined in the draft law are far more detailed than in the witness protection bill of 2008, such as the measures available to protect the identity of the child witness. [115] Many of these measures should be incorporated into future legislation and be available to both child and adult witnesses.

**Future legislation should ensure special assistance protection measures are available for uniquely vulnerable witnesses. The legislation should allow, where necessary, the creation of units within the Witness Assistance and Protection Agency, focused on the protection of such witnesses.**

### 4.2 Witness Assistance

The ICJ finds that "[a]ssistance programs support witnesses who have decided to cooperate with a justice process. They provide logistical, legal, financial, medical and psycho-social services to ensure that a witness's welfare is not adversely affected by testifying. Particularly important are measures to minimise the emotional impact of testifying and avoid re-victimisation".[116] Assistance provided to witnesses by the Victim and Witness section of the Special Court for

[115] Draft law on child witnesses, Chapter IX, Article 61.
[116] *Supra* note 3, p.74 (see annex I, Section 4.1 below).

Sierra Leone,[117] the Rules of Procedure of the International Criminal Court,[118] and the UNODC review of good practices[119] all provide detailed lists of assistance measures that should be provided to witnesses. The Sri Lankan Bill does not explicitly provide for witness assistance measures.

**Future legislation should include details of available witness assistance measures in line with best practice from the ICC, UNODC and the Sierra Leone Special Court.**

### 4.3 Witness protection measures

Protection measures can be divided into preventative measures, security measures and procedural measures.

**4.3.1 Preventive measures include:** identifying a secure method of establishing contact; limiting the number of contacts; where appropriate, using intermediaries to initiate contact with an individual and assist in arranging meetings; explaining relevant security issues and procedures to the individual in advance or at the start of any interaction or meeting; creating a viable cover story for the individual to explain travel; selecting a suitable interview and meeting locations; following any interactions, assuring that the individual has a reliable means to activate protection services; and adhering to a high level of confidentiality, restricting access to information on a need-to know basis.[120]

The Sri Lankan Bill does not explicitly provide for any preventative measures.

**Future legislation should include preventative measures in line with the best practice of the ICC.**

**4.3.2 Security measures include:** temporary change of residence to a relative's house or a nearby town and concealment of the witness' whereabouts; close protection, such as regular patrolling around the witness's house, and police escort for daily activities, possible protection of the witness's workplace by security personnel, escort to and from the court and provision of emergency contacts; arranging with the telephone company to change the witness's telephone number or assign him or her an unlisted number; monitoring the mail and telephone calls; installing security devices, such as security doors, alarms or fencing; providing warning devices and mobile phones with emergency numbers; minimising public contacts with uniformed police; and using discreet premises to interview and brief the witness.[121]

The Sri Lankan Bill makes available some of the recommended protection measures, such as measures necessary to ensure prevention of the witness seeing the accused at the venue of the

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[117] The Special Court for Sierra Leone, *Best-Practice Recommendations for the Protection & Support of Witnesses: An evaluation of the witness & victims section of the special court for Sierra Leone*, 2008, 5.

[118] International Criminal Court, Rules of Procedure and Evidence, Rule 16(b).

[119] *Supra* note 38, p.28.

[120] Best practice of the International Criminal Court cited in ICJ, *Witness Protection in Nepal*, p.78 (see Annex I, section 4.2 below).

[121] *Supra* note 38, p.29-30; See also ICJ, Witness Protection in Nepal, pp.78-80 (see Annex I, section 4 below).

trial or inquiry,[122] security to the person and property; temporary housing or accommodation; permanent re-location, including housing; temporary or permanent employment; and provision of necessary finances.[123]

Based on past experience it will be particularly important to ensure physical security as witnesses have in the past been murdered in Sri Lanka. It will also be important to ensure protection at the location where testimony is given as during the most recent Presidential Commission of Inquiry two witnesses were intimidated on the premises of the Commission where they had come to give testimony.[124]

**Future legislation should expand the security protection measures available to include at least those stipulated by UNODC.**[125]

**4.3.3 Procedural measures** are court-ordered protection measures provided for in witness protection legislation. They involve measures to protect the witnesses identity; prevent re-traumatisation; and protection physical security. Drawing on the International Criminal Tribunal for the former-Yogoslavia (ICTY), UNODC and others, the ICJ presents a detailed range of procedural measures.[126]

These procedural measures, for example, include protecting identity: use of pseudonyms or delaying disclosure of identity, expunging names or identifying information from public records, limitations on the media, *in camera* proceedings, use of screens, use of video link from a separate location, etc. Further, an important measure is minimising trauma: use of witness' pre-trial statement, presence of accompanying persons during testimony, prohibiting aggressive cross-examination, limiting number of times a witness may be examined, asking questions through the presiding judge, psychologist or other appropriate person, etc. In addition, mitigating security risks is a key concern and includes changing the venue of the trial, use of contempt charges in response to threatening behaviour in court, increasing general security measures around and in the premises, etc.

The Sri Lankan Bill provides some procedural measures specifically related to identity protection. They are: "(b) the conduct of either the entirety or part of the judicial or quasi-judicial proceedings *in camera*; (c) the prevention of the identity of and the background information pertaining to the victim of crime or the witness from being disclosed; (d) adoption of appropriate measures to prevent disclosure of the identity and the entirety or part of the testimony of such a victim of crime or witness, to persons other than the accused concerned and his pleader. The measures adopted shall include the power to direct media institutions, media

[122] *Supra* note 42, Part VI, Article 23(3(c)).
[123] *Ibid.*, Part V, Article 20(1).
[124] Amnesty International, *Twenty years of make believe: Sri Lanka's commissions of inquiry*, June 2009, 31.
[125] *Supra* note 38, pp.29-30.
[126] *Supra* note 3, pp.80-87 (see Annex I, Section 4.2 below).

personnel and other specified persons from publishing, broadcasting, telecasting or otherwise disseminating information pertaining to the identity of the victim or the witness concerned". [127]

The Sri Lankan Bill lacks many of the procedural protective measures, particularly those to minimise trauma and to mitigate security risks.

**Future legislation should include a full range of procedural protective measures such as those set out by the ICJ.**

Extensive debate has taken place in Sri Lanka in regard to the use of use of **video conferencing** as a protective measure. In regard to video conferencing the ICJ finds:

> Witness testimony through video-conferencing is not necessarily at odds with an accused's right to a fair trial if still afforded the opportunity to cross-examine the witness. Rule 71(d) of the ICTY Rules of Procedure and Evidence allows testimony to "be given by means of a video-conference." [128] In *Prosecutor v. Delalic, Mucic, Delic & Landzo* (Part I), the ICTY Trial Chamber allowed witnesses to testify by video-conferencing on the basis that the testimony was sufficiently important to make it unfair to proceed without it. It insisted, however, that the accused should not be prejudiced in the exercise of his right to confront the witness.
>
> Article 18(18) of the Organised Crime Convention calls on States Parties to "make use of video-conferencing as a means of facilitating the taking of testimony from witnesses residing in a different State Party's jurisdiction". [129] Video conferencing may be combined with image and voice distortion measures to increase witness anonymity as necessary. [130] The Council of Europe Committee of Ministers also recommended the use of video-conferencing as well as audiovisual recording of statements made by witnesses and justice collaborators during the preliminary phase of the procedure, while taking into account the right of the accused to challenge the evidence given by a witness. [131] The Committee on the Rights of the Child has drawn attention to the importance of ensuring "child witnesses and victims the possibility of giving testimony by video or audio". [132]

The need for videoconferencing in Sri Lanka is twofold. Firstly, some witnesses to very serious conflict related crimes have received asylum in foreign countries as a result of the extreme risk they faced from the Government of Sri Lanka as witnesses to serious crimes. Witnesses in the ACF case and the case of the five students killed on Trincomalee foreshore are two examples. These witnesses cannot return to Sri Lanka to give evidence in a Sri Lankan court or

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[127] *Supra* note 42, Part VI, Article 23(3).
[128] Rule 71(d), Rules of Procedure and Evidence, The United Nations International Criminal Tribunal for the former Yugoslavia, UN Doc. IT/32/Rev.22.
[129] Cited in UNODC, *Good Practices,* 38.
[130] *Ibid.*, 37-38.
[131] Council of Europe, *Recommendation,* Article 17.
[132] Committee on the Rights of the Child, *Concluding Observations on Sierra Leone,* CRC/C/OPSC/ SLE/CO/1, 2010, para. 37.

commission due to the extreme risk they face inside Sri Lanka. The use of video conferencing is the only safe option for such witnesses. A second basis for the need for video conferencing in Sri Lanka, would be witnesses who remain in Sri Lanka, perhaps because of the sluggish and difficult process of seeking asylum, but are in hiding due to the extreme risk they face because of their status as witnesses. An appearance in a courtroom would place such witnesses as such extreme risk that it is inconceivable that they be asked to give testimony in person.[133]

The use of video conferencing in the most recent Presidential Commission of Inquiry in Sri Lanka was viewed as a very positive contribution to finding the truth in two cases under consideration. One Commissioner stated,

> "The cancellation of the programmed video-conferencing on the directions of the presidential secretariat was a major setback. There were very good prospects of reaching satisfactory conclusions in the ACF aid workers case, the Trincomalee youth case, and, perhaps, in a few other cases, but these were sharply diminished as a result of that directive."[134]

The Sri Lankan Bill does allow for video conferencing[135] however with restrictions which undermine the potential effectiveness of this tool by involving public officials.[136] The proposed amendments, further restrict the potential protective benefits of video conferencing. There are three main issues of concern.

Firstly, a witness testifying from a secure, remote location inside Sri Lanka is obliged to be accompanied by a judicial officer or a public officer designated by the court or commission.[137] The potential involvement of a "public officer" creates the possibility of increased risk for the witness. If the witness is testifying from a location outside of Sri Lanka they must be accompanied by a competent person designated by the court or commission on the recommendation of the Attorney-General and the Foreign Secretary.[138] The involvement of Government officials in the selection of the "competent person", increases the risk to the witness. The proposed amendments allow an official of the "relevant law enforcement authority and provides that the lawyer for the defence may be present at the remote location.[139] The presence of law enforcement officials or the defence attorney increases risk to the witness.

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[133] There would be other reasons for the need for video conferencing in cases in Sri Lanka for example involving children or sexual violence. These are beyond the scope of this paper.

[134] Devanesan Nesiah, former member of the CoI, cited in Amnesty International, *Twenty years of make believe: Sri Lanka's commissions of inquiry,* June 2009, 36.

[135] *Supra* note 42, Part VIII, Article 29.

[136] It is assumed that "testimony through audio visual link" refers to a live link between the witness and the court that would facilitate examination and cross examination. Though a "live-link" may be restricted in cases involving children where pre-trial testimony may sometimes be recorded and used in place of live testimony.

[137] *Supra* note 42, Part VIII, Article 29(a).

[138] *Ibid.*, Part VIII, Article 29(b).

[139] Proposed amendments, pp. 11 & 16 (new Articles 32(2(b)) and 34(3)).

Secondly, proposed amendments require the accompanying public officials to report to the court or commission body regarding the location, identity, and any circumstance of the witness.[140] On the basis of this report, the court or commission can accept or reject witness evidence. The proposed amendments allow counsel representing the Attorney General, the legal representative of the witness and the legal representative of anyone who may be adversely affected by the statement to access the report and question the officer who prepared it.[141] The breadth of the report and the widely allowed access to it place the witness in direct risk. Thirdly, the proposed amendments provide that the Government must grant permission to establish a video-conferencing link to a witness in a foreign country. Officials appointed by the Office of the Attorney General of ministries of Justice or Foreign Affairs can prohibit video-conferencing if they find it "is not in the national interest, including national security to obtain the testimony or statement".[142] This amendment creates the possibility of Government interference in court proceedings.

**Future legislation should empower the Witness Assistance and Protection Agency to establish video conferencing links, to control access to the remote location and confidential and sensitive information and to reserve to judges the authority to decide whether testimony is admissible.**

### 4.4 Relocation and/or identity change

Those witnesses who are at the greatest risk may require relocation and/or identity change to ensure their security. These protection measures may be temporary or permanent. Change of identity is a complex and detailed process which has significant negative impacts on a person's life. Identity change is usually carried out after the trial has ended and is limited to only those witnesses whose life can be protected through no other measure. Internal relocation usually includes the use of safe houses and secure or secret accommodation located throughout the country and may include a permanent relocation.

The Sri Lankan Bill provides for re-identification and re-location,[143] however serious consideration needs to be given to the practical plausibility of identity change and re-location in a country as small as Sri Lanka. Before the implementation of a witness protection programme, a country should obtain formal agreements for the international relocation of witnesses. Standing arrangements within the South Asian region would be the most appropriate way to address international re-location needs that will arise for all South Asia countries. International re-location for Sri Lankan witnesses who intend to give evidence against members of the LTTE, will require careful consideration as international networks may still pose potential risk to such witnesses even outside Sri Lanka.

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[140] Proposed amendments, p. 16 (new Articles 34(2(a-e))).
[141] *Ibid.*, pp. 16 & 17 (new Articles34(4)).
[142] *Ibid*, p. 13 (new Article 33(1(a))).
[143] *Supra* note 42, Part V, Article 20(1(c and f)).

Article 22(3) of the Sri Lankan Bill potentially limits the development and use of formal relationships with foreign countries, which would limit the potential for international relocation of the most at risk witnesses. It states that,

> "The Authority, the Division or a Commission shall not obtain the assistance of any foreign government or foreign or international organisation, in providing assistance or protection to a victim of a crime or a witness, without the prior sanction of the Attorney-General and the Secretary to the Ministry of the Minister in charge of the subject of Foreign Affairs."[144]

While the Ministry of Foreign Affairs should perhaps be involved in the initial establishment of international relocation agreements, once the framework is established there should be no on-going need for the involvement of the Ministry in the relocation of individuals. This would expose the individual to increased risk as in some cases it is the Sri Lankan Government that poses the greatest risk to the witnesses.

A further consideration in relation to international relocation is the need for guidelines regarding when a witness will be permitted to return and the need for rehabilitation of witnesses in order to assist them to reintegrate into society. The overriding objective is to rehabilitate the victim or witness and return him or her to normal life as soon as possible after giving evidence.

**Future legislation should maintain clauses allowing for relocation and identity change. Future legislation should allow the possibility of international relocation and should limit involvement of the Ministry of Foreign Affairs to the negotiations of framework agreements only. Future legislation should also allow for the development of guidelines or regulations related to the effective and safe return of individuals who have relocated or changed their identity.**

### 4.5 Legal sanction for offences against witnesses

The ICJ recommends that "[a]cts of violence or intimidation against witnesses or their associates should be criminalised, investigated, prosecuted and punished, as should divulging information with the intent of putting the witness at risk. These offences should not be bail-able and hearings should take place promptly."[145]

The Sri Lankan Bill creates a long list of offences related to the intimidation or physical harm of witnesses in Part III. Part III also ensures that providing information regarding a witness that may place that witness at risk, is also a criminal offence. Other positive provisions in this

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[144] *Supra* note 42, Part VI, Article 22(3). This is slightly altered in the proposed amendments to also prevent solicitation of assistance and to prevent assistance from any national (as well as international) organization, Proposed amendments, 9.

[145] *Supra* note 3, p.21.

Section are that these offences will be non-bailable and that such cases will essentially be fast tracked by the courts.[146]

**Future legislation should maintain clauses related to criminalising intimidation or physical harm of witnesses and providing information regarding a witness that may place that witness at risk. These offences should be non-bailable and cases pertaining to such offences should be fast-tracked.**

[146] *Supra* note 42, Part III, Article 9.

## ANNEX I

## Extracts from "Witness protection in Nepal: Recommendations from international best practices", International Commission of Jurists, August 2011.

This Annex presents best practices from around the world for witness protection in cases involving human rights violations and are the basis for the recommendations in the main body of the report. The annex focuses on four areas: (i) determining eligibility for protection; (ii) structure and operation of a witness protection mechanism; (iii) safeguards surrounding the initiation and termination of protection services; and (iv) the scope and nature of protection assistance.

This review draws on the post-conflict experiences of many countries including Bosnia Herzegovina, Colombia, Croatia, Guatemala, Indonesia, Kenya, Kosovo, Peru, Serbia and Montenegro, South Africa and Sri Lanka. It also relies heavily on several key documents, including the UN Office of Drug and Crime Control Good Practices Manual[1] and Model Witness Protection Bill,[2] the Santiago Guidelines of 2008[3] and the work of Chris Mahony on witness protection in Africa.[4] *

### 1. Eligibility for Protection and Assistance

Witness protection legislation should clearly set out the different types of witnesses who are eligible for witness protection measures. It is essential to decide in advance whether a particular mechanism will offer services to witnesses who are criminally charged or convicted; witnesses in noncriminal proceedings; witnesses of different types offences; witnesses to the planning of an offence; and witnesses who have not yet testified, are currently testifying or have testified. Decisions will also need to be made regarding the inclusion of associates of the witness; individuals associated with groups vulnerable as a result of the case; and the inclusion of other actors involved in the case, such as judges, prosecutors and lawyers.

The International Criminal Court (ICC)'s protection mechanism is not limited to testifying witnesses, but rather extends to "all witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses."[5] For the purposes of its protection policy, a "witness" includes a person who has started the process of providing a formal witness statement, or whom the ICC's Office of the Prosecutor (OTP) has identified as a potential witness in the proceedings. Under

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[1] United Nations Office on Drugs and Crime, Good practices for the protection of witnesses in criminal proceedings involving organized crime, 2008 ("Good Practices")

[2] UNDCP Model Witness Protection Bill, 2000 ("Model Witness Protection Bill")

[3] The Santiago Guidelines on Witness and Victim Protection (June 2008) are the outcome of a meeting of experts and prosecutors, organised by Attorney General's Office of Spain, the Office of the Public Prosecutor of Chile, Ibero-American Association of Public, United Nations Office on Drugs and Crime (UNODC) and EUROSOCIAL Justice ("Santiago Guidelines").

[4] Mahony, C., The justice sector afterthought: Witness protection in Africa, 2010, Institute for Security Studies, p. 167

[5] International Criminal Court, Rules of Procedure and Evidence, adopted by the Assembly of States Parties, First session, New York, 3-10 September 2002, UN Doc. PCNICC/200/1/Add.1 (2000), Rule 17(2) (a) ("ICC Rules of Procedure and Evidence")

* Ed Note; Due to lack of space, specific country examples in certain instances are not cited in this Issue.

this definition, the unit may offer protection and assistance to witnesses as well as screened individuals who have not yet given a statement.

One threshold question for the OTP is whether the available protection measures are sufficient to manage the risk to the witness. The OTP has a policy of not interacting with a person at risk if the protection tools are not adequate to mitigate or manage the risk, and will seek alternative means of gathering evidence. It will only proceed with a witness at risk in exceptional circumstances where no adequate alternative evidence is available, collection cannot be postponed, and the person decides to continue cooperation after having been properly informed of the lack of sufficient protection measures.

### 1.1 Witnesses who are criminally convicted or charged

Some laws provide for unique protection measures for this category of witnesses. In a study on witness protection associated with the prosecution of war crimes perpetrated in the Balkan states, Human Rights Watch found that "[m]any crimes will be impossible to prove unless former members of the military, paramilitary, or police units testify against their comrades."[6]

In a conflict or post-conflict scenario this category of witnesses could include: members of an armed non-state group who witness crimes while in detention. The most common example is a detainee becoming a witness to his or her own torture, or to the torture or extrajudicial killing of other detainees; or "justice collaborators," a term frequently used in the organised crime setting. In the conflict or post-conflict setting, this would include individuals, usually from a non-state armed group or demobilised army, who have surrendered or been captured and who have decided to assist the authorities. Also included in this category are members of state security forces testifying against members of their own units.

In conflict and post-conflict countries it is important that protection is available to those who are criminally convicted or charged. The well-documented patterns of custodial torture and ill treatment in many countries that have experienced conflict make the provision of protection to those accused and convicted essential.

Protection measures should be made available to charged and convicted witnesses, including protection while in detention, protection for their families while they are detained and international relocation options, although most countries are reluctant to receive convicted offenders.[7] Croatian law establishes protection measures (such as relocation within the prison system, or facilitation of presence in court by a Protection Unit) for the accused or convicted.[8] However, witnesses who are charged or criminally convicted in a separate or related crime are not always guaranteed witness protection. Their known or potential criminality is often taken into account when deciding if they can be granted access to witness protection measures and the type of measures they can receive.

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[6] Human Rights Watch, Justice at Risk: War Crimes Trials in Croatia, Bosnia Herzegovina, and Serbia and Montenegro, October 2004, p. 20 ("Human Rights Watch, Justice at Risk").

[7] UNODC, Good Practices, pp. 20-21.

[8] Witness Protection Act, 2003, Official Gazette no. 163/2003 ("Croatian Law"), Articles 17 and 27. Article 27 states that an individual being prosecuted for a criminal offence committed prior to a change of identity will be tried for that offence with her/his real identity and that the Protection Unit will ensure the individual's presence in court.

### 1.2 Witnesses in non-criminal proceedings

Witnesses may also be at risk in non-criminal proceedings, including civil proceedings, judicial inquests, and commissions of inquiry.

**Civil proceedings.** In a conflict or post-conflict setting the State may deliberately obstruct criminal proceedings by failing to investigate crimes or failing to bring indictments or charges against the perpetrator, particularly where powerful individuals and institutions are implicated. In such cases victims may sometimes pursue remedies in civil courts.

**Military tribunals.** A State may invoke the jurisdiction of military tribunals to shield military personnel from being tried before civilian courts. Even where military jurisdiction is legitimately established, these cases are likely to give rise to witnesses protection needs.

**Judicial inquests.** Judicial inquests may also present risks to witnesses. For example, in the Sri Lankan inquest into the death of 17 aid workers in August 2006, family members were too frightened to attend hearings or testify. Recognising the risk to witnesses, the magistrate who initially heard the inquest allowed witnesses to provide information in his chambers.[9]

**Commissions.** National human rights commissions and post-conflict commissions of inquiry take a variety of forms (including transitional justice institutions) and are another form of non-criminal proceeding for which witness protection is essential. Whether the commission has the power to recommend prosecution or not, individuals with vested interests in preventing the truth from emerging may threaten witnesses to ensure that they are not implicated in past crimes.

Notwithstanding the need for witness protection in non-criminal proceedings, especially in countries affected by internal armed conflict or complex emergencies, in many jurisdictions, vulnerable witnesses in non-criminal quasi-judicial or administrative proceedings, such as civil proceedings, military tribunals, judicial inquests and commissions of inquiry, are either excluded from protection or their status is ambiguous. Other jurisdictions extend protection to witnesses in non-criminal proceedings.

The OHCHR's 2009 report to the Human Rights Council on the right to the truth emphasises the need to extend witness protection beyond criminal proceedings to "other accountability mechanisms, including those of a quasi- and non-judicial nature, such as human rights commissions and truth and reconciliation commissions".[10] Similarly, the Special Representative on the situation of human rights defenders in her report on Indonesia stated that protection should extend to individuals that provide information in non-criminal cases.[11]

The Basic Principles and Guidelines on the Right to a Remedy recommend that protection should be available in regard to "judicial, administrative, or other proceedings that affect the interests of the

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[9] Muttur Magistrates Court, Case No. B.R. 843/06, 7 March 2006.

[10] Office of the High Commissioner for Human Rights, The Right to Truth, UN Doc. A/HRC/12/19, Twelfth session, Agenda item 2.

[11] Report of the Special Representative of the Secretary-General on the situation of Human Rights Defenders on her mission to Indonesia, UN Doc. A/HRC/7/28/Add.2, (January 2008).

victims."[12] Likewise, the Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity call for "[e]ffective measures [to] be taken to ensure the security, physical and psychological well-being, and, where requested, the privacy of victims and witnesses who provide information to the commission."[13]

As a general principle, protection measures should be based on an identified level of risk, independent of the type of proceedings. If a risk has been identified, protection should be extended to witnesses in noncriminal proceedings, including civil cases, inquests, military tribunals, and commissions, even if the violation is not criminalised domestically.

**1.3 Witnesses to non-criminal or less serious offences**

In many jurisdictions, the nature and scope of protection afforded to witnesses is determined in part by the nature of the offences involved. For instance, the Organised Crime Convention requires that witness assistance and protection be provided in cases involving "serious" offences (with possible sentences of four years).[14]

This could exclude vulnerable witnesses in non-criminal proceedings as well as witnesses of crimes that do not carry high sentences but present a serious threat to victims and witnesses, such as domestic violence cases.[15] Witnesses to crimes or violations of international human rights law that have not been incorporated into domestic law (such as enforced disappearance) may also be precluded from accessing protection. Crimes that may not be viewed as "serious offences", such as destruction of property, may take on a more serious dimension under international criminal law when committed as part of a widespread or systematic attack against a particular group of people.

In his report on witness protection in Africa, Chris Mahony notes the benefits of a phased approach, particularly where the justice system as a whole lacks competence and independence. He notes that witness protection programs that focus first on "crimes of a non-politically sensitive nature would establish the protective framework for prosecution of more politically sensitive crimes upon reform of the criminal justice system."[16]

Examples of legislation limiting protection to "serious" offences include the following:

The **Philippines** law limits protection to cases involving grave felonies.[17] In **Hong Kong**, the authorities take into account the "seriousness of the offence".[18] **Croatian** law allows protection only in cases that involve grievous crimes, crimes with elements of violence, and organised crime.[19] In **Peru**, protective measures can be adopted only in criminal proceedings related to a specific range of serious crimes, which include crimes against humanity, genocide, enforced disappearance and

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[12] Right to a Remedy, Principle 12(b).

[13] Impunity Principles, Principle 10.

[14] *Supra note 7*, p. 26.

[15] *Ibid.*

[16] *Supra* note 4, Mahoney, Witness Protection in Africa, p. 167.

[17] Philippines Act, Section 3(a).

[18] Hong Kong Ordinance, Part II 3(c).

[19] Croatian Law, Article 3.

torture.[20]

Other countries allow the protection mechanism to exercise discretion to provide services in 'non-serious' cases, for example: **Thai** law provides for "special protection measures" in certain cases,[21] but allows the Witness Protection Bureau to provide protection in other cases it deems appropriate.[22]**South African** law limits protection and assistance to a schedule of offences, but allows the director of the unit to provide protection in any case if he or she deems it necessary. The **Guatemalan** law, **Indonesian** law and the **Colombian** law do not limit protection to any specific category of offences. The **Indonesian** law provides special assistance to victims of serious human rights violations.[23] The **Colombian** law requires witnesses of human rights violations and breaches of international humanitarian law to be included in the Protection Programme irrespective of whether or not a criminal proceeding has been initiated.[24] In addition, the Colombian Law states that "special protection" will be provided to witnesses, victims and participants to criminal proceedings involving alleged human rights violations and breaches to international humanitarian law, "when the security of those persons so requires".[25] The **Council of Europe** Committee of Ministers Resolution does not limit witness protection to particular offences. However, the focus is largely on organised crime, terrorism and violations of international humanitarian law. The resolution also states that "no terrorism-related crimes should be excluded from the offences" eligible for witness protection.[26]

### 1.4 Witnesses to the planning of an offence or human rights violation

Witnesses will sometimes provide information to the authorities regarding the planning of an offence. Assistance and protection should be available to such witnesses as part of broader policies to prevent crime and human rights violations.

### 1.5 Availability of protection before and after testimony

The need for witness assistance and protection arises before, during, and after the witness testifies (including post-sentence or acquittal). It is triggered from the first interaction creating the risk until that risk is removed.[27] This continuity is particularly important in post-conflict settings in which individuals responsible for crimes may occupy positions of power and thus pose a threat to witnesses. At key stages of the proceedings and at regular intervals after they are finished, the risk level should be reassessed and decisions taken about whether or not to extend protection measures. If a lower level of risk is identified, it may also be possible to replace existing protective measures with lesser measures that adequately manage the residual risk.

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[20] Law 27378 of Peru, Articles 1 and 7.

[21] The Thai Act includes cases related to national security, narcotics, money laundering, anticorruption, customs, sexual offences related to luring of a person for the sexual gratification of another, organised crime and crimes punishable by a minimum ten year sentence.

[22] Thailand Act, Section 8.

[23] Indonesian Law, Article 6.

[24] Colombian Law, Article 67.3.

[25] *Ibid.*, Article 79.1.

[26] Council of Europe, Recommendation, Article 11.

[27] OHCHR's Right to Truth, referring to lessons learned in Sierra Leone, highlights the need for pre-testimony and testimony assistance protection and assistance, para. 53; *Supra note 7*, p. 27.

The Basic Principles and Guidelines on the Right to a Remedy includes a recommendation for States to take measures

> [...] to minimise the inconvenience to victims and their representatives, protect against unlawful interference with their privacy as appropriate and ensure their safety from intimidation and retaliation, as well as that of their families and witnesses, before, during and after judicial, administrative, or other proceedings that affect the interests of victims".[28] (emphasis added).

Most jurisdictions provide for protection against risks before, during and after formal proceedings. In **South Africa**, assistance and protection are available to a "person who is or may be required to give evidence, or who has given evidence in any proceedings."[29] **Kenya** and **Hong Kong** follow the UNDCP model law: "a person who has given or agreed to give evidence."[30] In **Bosnia Herzegovina,** the law addresses risks associated with a witness's "willingness to testify". The law highlights the need for assistance and protection "if the danger is only realised after the termination of criminal proceedings and if the danger is a result of having testified during the proceedings".[31] In **Croatia**, any "endangered person" is entitled to assistance and protection if his or her testimony is "important... for the criminal proceeding". The law does not limit protection to specific stages of the proceedings.[32] The **Philippines** law provides protection before, during and after testimony.[33] In **Peru**, the prosecutor is responsible for making decisions about protective measures before the trial, while the judge is responsible while "a criminal proceeding is ongoing".[34]

**Protection prior to the filing of a formal complaint or agreement to testify**

Without protection from this early stage, witnesses and victims may be reluctant to cooperate with investigators. Protection needs should therefore be considered prior to investigators first approaching a witness.

The Santiago Guidelines[35] recommend immediate protection "prior to threat assessment in order to protect the life and integrity of the candidate for protection", and regular protection "when a candidate conditions his/her cooperation with the judicial system to the provision of protection."[36] Immediate protection would cover witnesses who have not yet agreed to cooperate with a judicial or quasi-judicial process.[37] The Council of Europe Committee of Ministers Resolution recommends that

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[28] UN. Right to a Remedy, Principle 12 (b).

[29] South Africa Act, Section 1, "Definitions.".

[30] Model Witness Protection Bill, Part I (2(c(i))); Kenyan Amendment Act, Article 4, Repeal and replacements of Section 3, new Article 3(1)(a); Hong Kong Ordinance, Part 1(a).

[31] Bosnian Law, Article 2(2)

[32] Croatian law, Articles 1 and 2(1).

[33] Philippines Act, Section 3.

[34] Peru: Decree No 020-2001-JUS, Articles 6 and 7.

[35] Santiago Guidelines.

[36] *Ibid.* Chapter 2(3).

[37] The Indonesian law opens the door to this kind of early protection: "[w]itness means people who can provide information for the purpose of investigation, litigation, prosecution, and examination in court proceedings on an offence..." (emphasis added). However, a later article clarifies that assistance and protection begins only after the "investigation stage starts." Indonesian Law, Article 8.

protection be available before, during and after the trial[38] and goes on to recommend that "protection measures could be adopted on an urgent and provisional basis before a protection programme is formally adopted".[39]

### 1.6 Family members or other associates of the witness

Witness protection laws commonly require that protection be available to family members and associates of the witness, although definitions of these terms may vary. The **UNDCP model bill**[40] and the **Hong Kong** law[41] extend protection to anyone who "because of his or her relationships to or association with a person [who meets the definition of witness in the law] may require protection or other assistance".

### 1.7 Other non-witness individuals and groups

Non-witnesses may require assistance and protection, such as judges, commissioners, defense lawyers, prosecutors, investigating officers, or expert witnesses. International law and standards obligates the State to protect security and justice sector actors. Existing domestic legislation may in some cases provide protection measures for some or all of these actors. However, such measures may be inadequate in countries where serious human rights violations continue to occur.[42] In serious cases, it may be necessary to make available the full range of protections available under witness assistance and protection legislation to such actors.

## 2. Structure and Operation of a Witness Protection Mechanism

This section provides guidelines for the establishment of a witness protection programme, including governance structures, recruitment of staff, funding, and financial accountability. The United Nations has developed principles to help guide the establishment of witness protection mechanisms.[43] The 2008 Santiago Guidelines have expanded on these principles. In post conflict settings, additional measures may be necessary to address threat levels exacerbated by weak rule of law institutions, a lack of political will to address impunity, and a continuing risk of conflict.

### 2.1 Institutional independence and accountability

Any protection mechanism must be able to protect witnesses from threats and intimidation, and be accountable through transparent oversight mechanisms when it fails to perform its role effectively. The mechanism cannot therefore fall under the control or influence of alleged perpetrators of crime or human rights violations.

Although methods for achieving independence vary, there is general agreement among the UNODC,

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[38] Council of Europe, Recommendation, Article 2.

[39] *Ibid.*, Article 25.

[40] Model Witness Protection Bill, Article 2(c)(ii).

[41] Hong Kong Ordinance, Section 2 Part 1(e).

[42] See, for example, the recommendation of the Special Representative on the situation of human rights defenders about the inclusion of experts among those who can seek protection under the Indonesian law (UN Doc. A/HRC/7/28/Add.2, para. 27).

[43] *Supra note 7*, pp. 45-58.

OHCHR, and other expert bodies about the necessity of "[...] (a) separation [of the protection function] from the investigation; (b) confidentiality of procedure and operations; and (c) organisational autonomy from the regular police."[44]

According to a 2009 OHCHR report, the "prevailing wisdom" regarding the appropriate nature and scope of authority for witness protection, requires that it "be disconnected from individual prosecutors, investigators or defense counsel, in order to carry out their assessments in an objective way." The OHCHR endorsed the recommendation made in 2005 by the Council of Europe that

> [...] staff dealing with the implementation of protection measures should be afforded operational autonomy and should not be involved either in the investigation or in the preparation of the case where the witness/collaborator of justice is to give evidence. Therefore, these functions should be separated organisationally. However, an appropriate level of cooperation/contact with or between law-enforcement agencies should be ensured in order to successfully adopt and implement protection measures and programmes.[45]

The UNODC[46] describes, without endorsing, a range of options for delegating authority for witnesses assistance and protection, including overall management by the chief executive of the police force;[47] the ministry of justice, the ministry of the interior or the state prosecutors office, with overall management vested in the chief executive of the respective institution;[48] or a multidisciplinary body with representation from law enforcement, prosecutorial, judicial and government authorities.[49] The Santiago Guidelines recommend that witness assistance and protection programs be located within the prosecutor's office. Other options include linking the protection programme to an arm of the police or establishing a stand-alone body.

A range of witness protection mechanisms exist globally, with varying levels of effectiveness and conformity with the basic principles of independence and accountability.

In post-conflict countries, where perpetrators often continue to hold positions of power that potentially allow them to manipulate witness protection bodies, establishing a fully independent mechanism becomes increasingly important. The **Indonesian** law is one example of an attempt to achieve this structural separation. It establishes an independent Victim and Witness Protection Agency directly accountable to the President and reporting annually to the House of Representatives. Parliament appoints seven members with relevant professional experience, who are served by a secretariat.[50] Reporting directly to the Prime Minister or President, removes several layers at which security of a witness could be compromised. However, it does not eliminate the problem of interference, and the witness protection agency has needed to advocate continuously for its

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[44] *Ibid.*, p. 46.

[45] Office of the High Commissioner for Human Rights, Right to the Truth, para. 51 (citing Council of Europe, Recommendation).

[46] *Supra* note 7, pp. 45-46.

[47] For example, in Australia, Austria, Canada, Hong Kong, New Zealand, Norway, Slovakia, and the UK.

[48] For example, in Colombia, the Netherlands, the Philippines, South Africa, the US.

[49] For example, in Italy, cited in UNODC Good Practices, p. 46.

[50] Indonesian Law, Chapter III.

independence. To ensure independence and professionalism, oversight in any form should therefore focus on broad operational direction and accountability, rather than individual cases of witness protection and assistance.

### 2.2 Staffing

Witness protection must be multi-faceted to ensure effective protection as well as prevention of further trauma and re-victimisation. The UNODC has developed detailed recommendations regarding criteria for staffing witness protection programs.[51] These recommendations, reinforced by the Santiago Guidelines, are applicable to witness protection in post-conflict countries with some additional considerations. The recommendations include:

**Qualifications:** Staff will be required in a wide range of disciplines, with adequate professional experience in their field and adequate security clearance.

**Psychological profile:** Recruitment should be based on an assessment of the candidates that indicates, among other traits, a high level of integrity and the ability to maintain confidentiality.

**Full-time force:** The core staff should be full-time, although part-time staff may be used for physical protection against low-level threats and at the regional or local level.

**Volunteer force:** Employment within a witness assistance and protection programme should not be compulsory. There should be a mix of genders, ages, and personalities reflective of the society at large.

**Tenure:** Staff should be retained in the programme for longer periods than would usually be the case in other departments.

**Salaries and benefits:** Because staff will often be on call constantly, and be required to respond to emergencies and work long hours, some programs provide additional salary and benefits.

**Training:** There should be regular, multidisciplinary training that is coordinated and standardised at a national level.

**Outsourcing:** Some services may be outsourced to professionals or NGOs, such as medical care, while psychological support is usually kept in-house. Outsourcing must not compromise confidentiality.

The ICC's Rules of Procedure recommend staff with expertise in areas such as (a) witness protection and security; (b) humanitarian and criminal law; (c) logistics administration; (d) psychology in criminal proceedings; (e) gender and cultural diversity; (f) children, in particular traumatised children; (g) elderly persons; (h) persons with disabilities; (i) social work and counselling; (j) healthcare; and (k) interpretation and translation.[52]

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[51] *Supra* note 7, pp.47-49.

[52] Rule 19, Expertise in the Unit, ICC Rules of Procedure and Evidence.

**Additional staffing considerations: Working with trauma**

Post-traumatic stress disorder is common among victims of conflict related crimes. It is therefore essential that witness protection programs in post-conflict countries recruit staff with experience in assisting victims of trauma.

The **Rome Statute** explicitly includes provisions requiring that the ICC's Victims and Witnesses Unit has staff with expertise in trauma, including trauma related to sexual violence.[53]

The Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity similarly states that "[s]ocial workers and/or mental health-care practitioners should be authorised to assist victims, preferably in their own language, both during and after their testimony, especially in cases of sexual assault."[54]

Lessons learned from the SCSL underscore the need of female medical personnel to treat survivors of gender-based violence.[55] The SCSL has recommended that only investigators and attorneys with experience and specialised training working with children handle such cases in order to prevent or minimise their trauma, and that all investigators and attorneys receive training in child rights, child protection and interviewing children.[56]

Some additional considerations when staffing a witness protection programme in a post-conflict country include technical advice and support during programme establishment from experts familiar with post-conflict witness protection needs and strategies; conflict and cross-cultural sensitivity and technical capacity (including, where necessary, the use of neutral international interpreters and staff) to respond to issues regarding ethnic, religious, geographic or other group identification; vetting of staff to exclude perpetrators or their associates; ensuring that any members of affiliated institutions (i.e. the police) do not jeopardise witness assistance and protection; and protection measures and responsibilities for the protection of staff of the witness protection program.

### 2.3 Funding

A well-designed witness protection programme should have adequate and flexible funding. Staff must have ready access to funds as witness needs arise for food, accommodation, and transport. In addition, a portion of the funds should be earmarked for urgent protection cases that may involve costly

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[53] Rome Statute, Article 43(6).

[54] Impunity Principles, Principle 10(b).

[55] The Special Court for Sierra Leone, Best-Practice Recommendations for the Protection & Support of Witnesses: An evaluation of the witness & victims section of the special court for Sierra Leone (2008) ("SCSL, Best Practices"), p. 25. The Coalition on Women's Human Rights in Conflict Situations recommended that the "ICTR should fill the position of 'gender advisor' in order to ensure the presence of an overseer for gender training for all of the relevant staff ". Coalition on Women's Human Rights in Conflict Situations, The Protection of Women as Witnesses and the ICTR (2002).

[56] Included in the Principles and Procedures for the Protection of Children in the Special Court, Special Court of Sierra Leone, cited in War Crimes Studies Centre, Child Witnesses at the Special Court for Sierra Leone (2006) ("War Crimes Studies Centre, Child Witnesses"), p. 18.

relocation.[57]

In many cases funding is inadequate. For example, the International Group of Eminent Persons mandated to observe the Presidential Commission of Inquiry in Sri Lanka, found that the body "does not have sufficient funds to offer adequate assistance to those in need of protection from possible retaliation for appearing before the Commission".[58]

The UNODC recommends that, at the regional level, countries establish a joint fund to "help fund witness protection programs and promote cross-border cooperation".[59] Such an arrangement could be beneficial in South Asia, as Bangladesh, India, Nepal and Sri Lanka are all considering the establishment of witness assistance and protection programs that must address relocation problems as well as cross-border crime.

The UNODC's analysis of the cost of providing witness protection services suggests that while such services are expensive to supply, funding arrangements can be developed to keep costs manageable:[60]

The ICC applies a number of assessment measures intended to reduce the strain on the protection system (as well as on the protected persons). These include applying protective measures proportional to identified risks, and least intrusive to the lives of the person at risk and their families; minimising the time period during which protective measures are taken; considering recourse to participation in the ICC Protection Programme as a measure of last resort; and providing all relevant information to persons entitled to protection for them to take an informed decision on whether to engage with the Prosecution.[61]

In post-conflict countries, costs may be much greater during the formation and operation of truth and reconciliation mechanisms or tribunals. While the regular budget for a protection programme should come from the State budget, in such extenuating circumstances donors funds or supplementary funding may be sought.

### 2.4 Transparency

The Santiago Guidelines emphasise the importance of ensuring that "information provided with regard to operational expenses reflects only general information and not data that can be linked to the identity or location of witnesses." The UNODC[62] outlines several different options for balancing transparency in financial reporting:

## 3. Initiation and Termination of Protection and Assistance

This section sets out guidelines for determining who should receive services from a witness protection and assistance program, and under what circumstances it would be permissible to terminate services. It presents guidance on the establishment of an admissions authority; criteria for admission; appeals

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[57] *Supra* note 7, p. 51.

[58] International Group of Eminent Persons, Public Statement, 15 April 2008.

[59] *Supra* note 7, p. 51.

[60] *Ibid.*, pp. 52-53.

[61] International Criminal Law Services, expert review comments (June 2011).

[62] *Supra* note 7, p. 58.

procedures for admission; informed consent prior to admission; termination of protection; and review of termination.

### 3.1 Authority to grant entry to the program

Authority to grant protection and assistance must be delegated by legislation to members of a witness protection unit, or to other officials; for example, a minister, police commissioner, attorney general or to a multidisciplinary body. Whatever the mechanism, political decisions must not undermine the functional independence and technical assessments of the programme.[63] In many countries this power is granted to government officials.

In a post-conflict setting, there are particularly strong arguments for vesting the authority in members of an independent witness protection unit, given the likelihood of a conflict of interest where state actors and their associates are alleged as perpetrators.

### 3.2 Criteria for receiving protection

The OHCHR's report Right to Truth states that it is important to develop eligibility criteria that is flexible, objective and transparent.[64] Most laws define criteria against which a witness's application is assessed before admission to a witness protection programme:[65] These criteria include the level of threat to the applicant's life, freedom or property that is linked to a applicant's interaction with the judicial proceedings; the reasonable certainty of the risk to which the applicant is exposed; the foreseeability of acts of reprisal or intimidation, or the fact that acts of reprisal or intimidation have already happened; the applicant's personality/personal situation and psychological fitness; the danger that the applicant, particularly if a former collaborator of the defendant, may pose to the public if relocated under a new identity; the critical value of the applicant's testimony for the prosecution and the impossibility of gaining such knowledge elsewhere; the importance of the case in dismantling criminal organisations or identifying persons involved in other crimes related to the offence under investigation; and the gravity of the crime.

Admission criteria in post-conflict countries should also evaluate: institutional affiliations of the alleged perpetrator and associated actors, past and present and the current capabilities of the individual or institution; whether the case is high profile and emblematic of patterns of violations, thereby increasing the threat level and challenge of mitigating risks; the level of impunity, general lack of law and order, influence of corruption and armed groups; and international or domestic pressure for a genuine investigation and prosecution. If this pressure is significant, it increases likelihood of threats yet also affords some protection. The complex interplay between these factors requires skilful, contextualised analysis.

### 3.3 Assessing threat and risk

Properly assessing the threat and risk to an individual is the cornerstone of the work of a witness and victim protection mechanism. All major decisions including entry, termination, and scope of protection - must be made on the basis of an independent threat/risk analysis. When an investigation

[63] *Supra* note 7, p. 60.

[64] OHCHR, Right to Truth, para. 50.

[65] Including in Bosnia Herzegovina, Hong Kong, the Philippines, Indonesia, Kenya Peru and Guatemala.

begins (or even prior to this if possible), an assessment should be made of the general level of threat to persons interacting with the court. Witness protection may also be required as an immediate, interim measure while an individual assessment is being carried out.[66]

A threat is the possibility that someone will harm somebody else's physical or moral integrity or property. The level of threat is estimated by assessing the desire of a source of threat to engage in a potentially harmful activity; the expectation, or subjective level of confidence of the source of the threat successfully carrying out a potentially harmful activity; the resources, or means available to the identified source of the threat to carry out a potentially harmful activity; and the information available to a source of threat to carry out a potentially harmful activity. The risk to a witness is determined by weighing this threat against the likelihood of harm and the consequence of that harm.

### 3.4 Independent intelligence capacity

It is advisable that a witness protection mechanism has its own independent capacity for collecting intelligence information for use in its threat and risk assessment. When witnesses and victims of human rights violations involving State actors are involved, the normal State apparatus for collecting and analyzing intelligence information may be unreliable, and could endanger witnesses and victims.

The international tribunals have set up models for the sharing of intelligence information between the witness protection and prosecutorial branches of the tribunals, taking into account issues of protection and confidentiality. At the ICC, the OTP and the VWU have agreed on the principle of full sharing of security-related information. Where a source cannot be shared due to the confidentiality of the investigations or the neutrality of the VWU, the information itself and the source should be available for the risk assessment.

In Chris Mahoney's analysis of the ICTR, he identified under-developed intelligence-gathering capacity as a major weakness in the effectiveness of the witness protection unit. He recommended a review, not only of witness protection staff capacity but also staff with investigatory roles for the prosecutor, who in the case of the early ICTR lacked the capacity to prevent disclosure of witness' identities. He also emphasised the importance of access to local intelligence and an understanding of local culture and languages as key to successful protection.[67]

### 3.5 Informed consent to enter witness protection

Full, prior and informed consent of witnesses is critical for their successful participation in a witness protection program. Consent is normally documented in a memorandum of understanding (MoU) setting out mutual expectations between the State and the witness, and including any family members or associates that will be covered in the agreed measures. Translation may be necessary to ensure full comprehension. The signed document should be kept confidential and maintained in a secure facility, but should be accessible to the witnesses.

The undertakings must be reasonable, avoiding expectations that cannot be met or misunderstandings about mutual commitments. The 2006 Presidential Commission of Inquiry in Sri Lanka ran into

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[66] *Supra note 7*, p. 62.

[67] *Supra* note 4, Mahony, Witness Protection in Africa, pp. 164-168.

problems when its public announcements exaggerated its capacity to protect witnesses.[68]

The review of the Special Court of Sierra Leone recommended that "[w] itness protection and support units ...ensure clear guidelines are in place regarding what witnesses will receive at all stages of the testimony process, with particular attention to the post-testimony phase" and that they "[d] eliver clear, consistent and repeated directions on what the witness can expect to receive—and ensure the witness receives this".[69]

According to the European Committee on Crime Problems, a MoU should include: Confirmation of free choice of the individual to enter the program; the goal of the protection programme; the obligation of the protection service to take the necessary measures to protect the individual and his/her relatives; the fact that the duration of the protection measures depends upon the assessed risks; the obligation of the individual to keep his or her former identity, old address, role in the criminal proceedings and details of the protection programme secret; the obligation of the individual to restrain from any activities that could enlarge the risk for herself, her relatives, or the staff of the protection programme; the obligation of the witness to co-operate fully in the criminal proceedings; arrangements for outstanding accounts, mortgages, contracts and other financial obligations of the witness of victim; and the conditions under which participation will end, including a diminished threat, failure to follow the rules, commission of a crime, or any act that could endanger the individual, her relatives, or the protection programme.[70]

There is a range of practice internationally as to whether or not a MoU constitutes a legally binding contract. The principle question is whether or not State officials can be held liable for harms resulting from action or inaction in violation of the MoU. Liability is excluded by statute in some jurisdictions for harms arising in relation to the good faith discharge of duties.[71] However, in some countries, a MoU is legally binding and its implementation subject to judicial review.[72]

**3.6 Termination of assistance**

The relationship between a victim or witness and the State may continue for an indefinite period, after formal proceedings have concluded. Circumstances may change and new threats may arise. Even if financial assistance is discontinued, other protection measures may still be required.

On the other hand, early termination of financial and other assistance may arise if the original terms of the MoU are not met, or if the witness decides to withdraw from the programme due to hardship or other personal considerations. In the latter case, there may be ways for the programme to continue a lesser level of protection through coordination with local authorities.

The UNODC describes the standard reasons for early termination of assistance, all of which must be

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[68] Amnesty International, Twenty Years of Make Believe: Sri Lanka's Commissions of Inquiry (June 2009), p. 32.

[69] SCLS, Best Practice, p. 2.

[70] European Committee on Crime Problems, Committee of Experts on Criminal Law and criminological aspects of organised crime (PC-CO), Report on Witness Protection (Best practice survey), Restricted PC-CO (1999) 8 REV, Strasbourg (24 March 1999).

[71] Statutory exclusions of liability exist in the U.S. (Federal Criminal Code and Rules, Title 18, Chapter 224, Sections 3521(a)(3); Hong Kong Ordinance, Section 16.

[72] *Supra* note 7, at p. 65.

explained to the witness prior to the initiation of the program. They may include that:[73] security is compromised by the actions of the witness or his or her inability to honour obligations; the witness violates the rules laid down in the memorandum of understanding;[74] the witness refuses to give evidence in court[75] and the seriousness of the threat against the witness's life has lessened.

Some jurisdictions further elaborate on grounds for early termination. In **Croatia**, for example, the following constitute grounds for termination:[76] namely, expiry of the contract between the protection unit and the witness; a criminal proceeding has been brought against the included person; an included person turns down an offer of employment; or a foreign country requests the termination of the protection of an included person who has been relocated to its territory.

### 3.7 Right to review

Administrative or judicial review of decisions by a protection authority is permitted in many jurisdictions. A key issue in these cases is the need to maintain independence and confidentiality while extending consideration of sensitive information to the appeal body.

## 4. The Scope and Nature of Protection and Assistance

To the extent possible, witnesses should be protected without dramatic changes to the living conditions that they are accustomed to. Three types of assistance and protection mechanisms are usually available, each responding to a particular threat level identified in the risk assessment. Each type of assistance and protection needs to be clearly identified in statutory frameworks and related regulations.

Witness Assistance: This assistance is primarily meant to prevent re-traumatisation, and to protect a witness's capacity to provide effective testimony. Providing such assistance is not the same as protecting physical security. Witnesses' needs will need to be individually assessed.[77]

Protection measures: These are security measures that can be considered up to a certain threat level as an alternative to identity change or relocation.

Identity change and relocation: This step involves more permanent and life altering witness protection measures such as identity change and/or relocation.

### 4.1 Witness assistance and counseling

Assistance programs support witnesses who have decided to cooperate with a justice process. They provide logistical, legal, financial, medical and psycho-social services to ensure that a witness's welfare is not adversely affected by testifying. Particularly important are measures to minimise the

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[73] *Supra* note 7, at 73-74.

[74] For example, a serious breach of the MoU can lead to termination of protection in the Philippines (Philippines Act, Section 6).

[75] In Thailand, termination is possible if the refusal to testify is deemed "irrational" by authorities, Thailand Act, Section 12(4).

[76] Croatian Act, Article 41.

[77] *Supra* note 7, p. 28.

emotional impact of testifying and avoid re-victimisation.

Such measures are especially important in conflict and post-conflict countries because judicial and quasi-judicial justice processes are heavily dependent on witness testimony, in part due to limited capacity to collect and analyse forensic evidence.[78] In addition, in a post-conflict environment, the risk of being re-traumatised is high, particularly for children and victim-witnesses of sexual and gender-based crimes.

The review of the work of the Victim and Witness Section of the Special Court for Sierra Leone describes witness assistance in detail. The majority of witnesses required protection and assistance primarily during testimony period. The assistance services provided during this period included: accommodation for the witness (and sometimes dependents) in secure quarters, with 24-hour electricity, TV, and other simple forms of entertainment; food, toiletries and other basic requirements; financial allowance as recompense for lost wages; an initial medical assessment, and all medical provisions; 24-hour support from a psychosocial support officer at the accommodation facility, and provision of counseling and emotional support; a briefing to ensure familiarisation with the courtroom and its procedures; and psychosocial support during the witnesses' preparation with their legal team.[79]

The ICC Rules of Procedure also provide for a range of assistance measures including: assistance in obtaining legal advice and representation, and providing legal representatives with adequate support, assistance and information;[80] gender-sensitive measures to facilitate the participation of victims of sexual violence at all stages of the proceedings;[81] assisting victims and witnesses in obtaining medical, psychological and other appropriate assistance;[82] and regard to the needs of children, elderly persons and persons with disabilities.[83] Where trained professionals are available to offer support, witnesses are more willing to report crimes, cooperate with prosecutors, and offer reliable testimony.[84] For this reason, civil society organisations and professionals, such as doctors, nurses, psychologists, with specialised skills play a key role in providing these kinds of assistance.

Based on lessons learned from the experiences of the ICTR, the Coalition on Women's Human Rights in Conflict Situations recommends that extra steps be taken in the initial investigation phase to ensure that the welfare of potential witnesses is not harmed. The Coalition urges that the investigator acquire a detailed knowledge of (i) the domestic and international law and standards in regard to sexual violence; (ii) the possible stigma attached to sexuality and sexual violence in the area; (iii) the local or national structures that may be able to provide assistance to victims of torture, including rape. The report also recommended that psychological support be made available to any women who are interviewed.[85]

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[78] Evidence of this is found in the review of the Special Court for Sierra Leone. SCSL, Best Practice, p. 5.

[79] *Ibid.*, p. 6.

[80] ICC Rules of Procedure and Evidence, Rule 16(b).

[81] *Ibid.*, Rule 16(c).

[82] *Ibid.*, Rule 17(2)(a)(iii).

[83] *Ibid.*, Rule 17(3).

[84] See: for example, Kelly Dedel, Witness Intimidation, Problem-oriented Guides for Police,Problem-Specific Guides Series No.42, U.S Department of Justice, Office of Community Orientated Policing Services (July 2006).

[85] Coalition on Women's Human Rights in Conflict Situations, The Protection of Women as Witnesses and the

Experience from Sierra Leone's Special Court shows that special care should be taken at the initial investigation stage to ensure confidentiality and anonymity of child witnesses.[86] The Guidelines on Justice in Matters involving Child Victims Witnesses of Crime clearly lay out the content of children's right to receive effective assistance in a range of areas (financial, legal, counseling, health, social and educational services, physical and psychological recovery services)[87] and the types of professionals who should provide such services.[88] The Principles and Procedures for the SCSL also recommend taking care to ensure the full and informed consent of child witnesses and their parents or guardians.[89]

The OHCHR report on the right to the truth recommends that there should be separate divisions within a witness protection unit for witness assistance and witness protection.[90] This will help ensure that staff with particular skill-sets concentrate their work in their areas of expertise.

### 4.2 Protection measures

An assessment may determine that intimidation and harassment fall short of an immediate threat to life or can be addressed effectively without resorting to significant intervention.[91]

#### Prevention

Many systems require persons involved in the judicial process to use best practices to prevent risks. At the ICC, the parties to the proceedings and the VWU employ the following best practices to reduce security risks: identifying a secure method of establishing contact; limiting the number of contacts; where appropriate, using intermediaries to initiate contact with an individual and assist in arranging meetings; explaining relevant security issues and procedures to the individual in advance or at the start of any interaction or meeting; creating a viable cover story for the individual to explain travel; selecting a suitable interview and meeting locations; following any interactions, assuring that the individual has a reliable means to activate protection services and contact the Prosecution and the VWU if a security need arises; and adhering to a high level of confidentiality, restricting access to information within the Prosecution and the VWU on a need-to-know basis.

#### Security measures

Security measures can be taken to protect a witness either before relocation and identity change or instead of relocation and identity change. The UNODC's report lists a range of protection measures, including:[92] temporary change of residence to a relative's house or a nearby town and concealment of the witness' whereabouts; close protection, such as regular patrolling around the witness's house, and police escort fordaily activities, possible protection of the witness' workplace by security personnel,

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ICTR (2002).

[86] War Crimes Studies Centre, Child Witnesses, p. 18.

[87] Guidelines on Justice in Matters involving Child Victims Witnesses of Crime, Section IX.

[88] *Ibid.*, Section XV.

[89] War Crimes Studies Centre, Child Witnesses, p. 18.

[90] Office of the High Commissioner for Human Rights, Right to the Truth, A/HRC/12/19, 21 August 2009, para. 53.

[91] *Supra* note 7, p. 29.

[92] *Supra* note 7, pp. 29-30.

escort to and from the court and provision of emergency contacts; arranging with the telephone company to change the witness's telephone number or assign him or her an unlisted number; monitoring the mail and telephone calls; installing security devices, such as security doors, alarms or fencing; providing warning devices and mobile phones with emergency numbers; minimising public contacts with uniformed police; and using discreet premises to interview and brief the witness.

Some laws also provide discretion to provide any other protection measures if necessary. For example, the **Colombian** Law allows a range of measures, including physical protection, social assistance, change of identity and of residence and all the temporary or permanent measures that might be necessary for preserving the physical and moral integrity and the integrity of the family unit of the witness.[93]

To reduce the risk to witnesses moving to and from court and in public areas nearby, there should be separate and secure waiting areas for witnesses, the use of pagers to avoid long waiting periods, and the use of video monitoring in public areas around courtrooms. The **Colombian** law provides that every time a witness has to appear before any authority, the Attorney General or the head of the Office for Protection and Assistance to Victims, Witnesses, and Officers of the Office of the Attorney General must establish adequate mechanisms without prejudice to the protection of his or her identity.[94]

Recognising heightened risk during the period of giving testimony, the Witness and Victim Section of the Special Court of Sierra Leone provided a 24-hour guard at a secure accommodation. Only essential staff were given access, and visitors were not allowed. Witnesses were able to leave the compound but their movements were monitored by security personnel.[95]

The ICC created an IRS, which is a 24-hour emergency response system for persons facing a serious threat of imminent harm as a result of their interaction with the Court. It includes, but is not limited to, the immediate removal of a person at risk whenever feasible, placement in a temporary safe location with constant close personal protection if required, and other immediate, temporary local protective measures, in collaboration with local service providers if required.[96]

Specific categories of vulnerable witnesses such as children (especially former child soldiers), victims of torture or sexual assault, and victims suffering mental health problems, should be guaranteed special protection provisions. The Special Court for Sierra Leone in particular recommends discretion in attempts to locate child witnesses in order to avoid exposing them to security risks.[97] The Court also recommends only approaching the most resilient child witnesses, and only those who are already resettled with their families or communities.[98]

A further consideration is protecting in-custody witnesses who may be at risk from other inmates, such as the defendant or associates, especially in cases of organised crime. Witnesses may also be at risk whilst receiving treatment in hospital. Armed escorts or guards should be available where

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[93] Colombian Law, Article 69.1. See also Guatemalan Law, Article 8 (e).

[94] Colombian Law, Article 74.

[95] SLCS, Best Practice, p. 6.

[96] International Criminal Law Service, expert review comments (June 2011).

[97] War Crimes Studies Centre, Child Witnesses, p. 18.

[98] *Ibid.*

necessary. The Guidelines on Justice in Matters involving Child Victims Witnesses of Crime recommend: "court ordered restraining orders; pretrial detention of the accused; 'no contact' conditions in bail agreements; placing the accused under house arrest."[99] The implementation of such recommendations, especially when applied to a broader range of cases, must respect the due process rights of the accused.

**Procedural measures**

In addition to the above measures, court-ordered protection measures, often implemented in response to motions for witness-related protection made at the beginning of a trial or proceeding, can mitigate the risk of a witness being identified or exposed to harm. This section presents three broad categories of procedural protection measures to (i) protect identity, (ii) prevent re-traumatisation, and (iii) protect physical security. Use of these measures will depend on the nature of the testimony, the seriousness of the alleged offence, the age of the witness, and the behaviour of the accused and his or her associates. Drawing largely on the practices of the ICTY, the UNODC[100] and others[101] propose the following measures:

Protecting identity

- Ensuring legal representation of victims and witnesses, permitting proper protection of witness during examination;

- The use of pseudonyms or delaying of the disclosure of identity (including to accused and defense counsel) prior to trial[102] or during the enti re proceeding,[103] and expunging names and identifying information from public records;

- Preventing the identification of victims and witnesses to the public and media, including limitations on the media during court proceedings;[104]

- Temporarily excluding the defendant during court proceedings; conducting hearings in camera and closed hearings; using audio-video recordings of statements; reading statements at trial without the witness being present;[105] distorting a witness's image or voice at trial; using

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[99] Guidelines on Justice in Matters involving Child Victims Witnesses of Crime, Section XII(b)(c) and (d).

[100] *Supra* note 7, pp. 31-41.

[101] Coalition on Women's Human Rights in Conflict Situations, The Protection of Women as Witnesses and the ICTR, 2002; UNICEF Serbia, Good Practice in Juvenile Justice: Promoting Legislation to Protect Child Victims in Criminal Proceedings; EU-led Stability Pact for South Eastern Europe Task Force on Trafficking in Human Beings, Special Protection Measures for Trafficking Victims Acting as Witnesses, Portoroz, Slovenia, 26-27 March 2003.

[102] Council of Europe, Recommendation, Article 17.

[103] See: *Prosecutor v. Tadic,* No. IT-94-1-T, 10 August 1995, Trial Chamber II of the International Criminal Tribunal for the Former Yugoslavia; see also Council of Europe, Recommendation, Articles 18 to 21; and Rule 69 of the Rules of Procedure and Evidence for the International Criminal Tribunal for Rwanda (June 1995).

[104] See: Council of Europe, Recommendation, Article 17.

[105] See generally: Gerald Gahima, Testimony before the House Armed Services Committee on the Practice of International Criminal Tribunals and their Relevance to Military Commission in Light of *Hamden v. Rumsfield,* United States Institute for Peace (26 July 2006).

screens to hide witnesses, video link allowing testimony from a separate location; giving evidence before a commissioner or judge;

- Using the address of the office of the prosecutor as for service of process.[106]

Minimising trauma

- Using a witness' pre-trial statement or preliminary hearing statement without summoning the witness before the court;[107]

- Allowing an accompanying person to be present for psychological support, especially important for child-witnesses;

- Prohibiting the defendant from cross-examining the witness or victim;

- Avoiding confrontation of the witness with the accused in the case of child witnesses;

- Prohibiting improper or aggressive cross-examination by the defense;

- Limiting the number of times a child witness may be examined;[108]

- Having the presiding judge, psychologist, pedagogue or social worker ask questions to a child or other vulnerable witness.

Mitigating security risks

- Changing the venue of the trial;

- Charging contempt or obstruction of justice for threatening behaviour in court; and

- Increasing general security measures in and around the premises of the tribunal.

Witness anonymity

The use of witness anonymity is perhaps the most extreme method of identity protection, and its use has been controversial. In 1995 in *Prosecutor v. Tadic*, the ICTY, set out a five-part test used to

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[106] Law 27378 of Peru, Article 22.4

[107] This is also recommended by the Council of Europe Committee of Ministers: "using statements given during the preliminary phase of the procedure as evidence in court when it is not possible for witnesses to appear before the court or when appearing in court might result in great and actual danger to the witnesses/collaborators of justice or to people close to them; pre-trial statements should be regarded as valid evidence if the parties have, or have had, the chance to participate in the examination and interrogate and/or cross-examine the witness and to discuss the contents of the statement during the procedure". Council of Europe, Recommendation, Article 17.

[108] See Committee on the Rights of the Child, Concluding Observations on Sierra Leone, UN Doc. CRC/C/OPSC/SLE/CO/1, (2010), para. 37, which raises concern regarding the lack of a formal limit on the number of interviews to which a child may be subjected.

decide when witnesses anonymity is permissible:[109]

(1) There must be an existence of a real fear for the safety of the witness;

(2) The prosecution must show that the witness's testimony is sufficiently relevant and important to the case;

(3) There must be no prima facie evidence of a witness's unworthiness in any way;

(4) There is no witness protection programme in existence; and

(5) There are no less restrictive protection measures available.

Furthermore, where the identity of the witnesses was not disclosed to the defendant:

(1) Judges must be able to observe the demeanour of the witness in order to assess the reliability of the testimony;

(2) Judges must be aware of the identity of the witness;

(3) The defense must be allowed ample opportunity to question the witness on matters unrelated to his or her identity or his or her current whereabouts;

(4) The identity of the witness must be disclosed where there is no longer any reason to fear for his or her safety.

However, this decision came at an early stage of the first case at the ICTY, and it has not been followed again. The ICTY and the ICC have repeatedly found witness anonymity to be in violation of international standards concerning the fairness of the proceedings and right of the accused.[110]

The Council of Europe Committee of Ministers has also set out guidelines for witness anonymity:

1 Any decision to grant anonymity to a witness in criminal proceedings will be made in accordance with domestic law and European human rights law.

2 Where available, and in accordance with domestic law, anonymity of persons who might give evidence should be an exceptional measure. Where the guarantee of anonymity has been requested by such persons and/or temporarily granted by the competent authorities, criminal procedural law should provide for a verification procedure to maintain a fair balance between the needs of criminal justice and the rights of the parties. The parties should, through this procedure, have the opportunity to challenge the alleged need for anonymity of the witness, his/her credibility and the origin of his/her knowledge.

3 Any decision to grant anonymity should only be taken when the competent judicial authority finds that the life or freedom of the person involved, or of the persons close to him or her, is seriously

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[109] *Prosecutor v. Dusko Tadic*, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, ICTY Trial Chamber (10 August 1995), Case No. IT-94-1, para. 62 to 66.

[110] International Criminal Law Services, expert review comments (June 2011).

threatened, the evidence appears to be significant and the person appears to be credible.

When anonymity has been granted, the conviction should not be based solely, or to a decisive extent, on the evidence provided by anonymous witnesses.[111]

The Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity emphasises the need for measures to protect identity of witnesses during commissions of inquiry, stating that:

> Information that might identify a witness who provided testimony pursuant to a promise of confidentially must be protected from disclosure. Victims providing testimony and other witnesses should in any event be informed of rules that will govern disclosure of information provided by them to the commission. Requests to provide information to the commission anonymously should be given serious consideration, especially in cases of sexual assault, and the commission should establish procedures to guarantee anonymity in appropriate cases, while allowing corroboration of the information provided, as necessary.[112]

Local protective measures

Local protective measures enhance the security of a person's place of residence, and may render relocation unnecessary. Depending on the risk profile, the infrastructure and the resources available, the following may be appropriate local protective measures:

**Increased patrolling**: request national authorities, such as the police, to increase their mobile presence in specific areas to enhance the security for persons living there.

**Neighbourhood watch schemes**: engage local communities to promote community oriented programs in compliance with the applicable legal framework and in consultation with competent authorities. Such programs aim to provide a safe and secure environment and to deter and prevent any suspect intrusion into the neighbourhood.

**Increased residential security measures**: apply physical security improvements to a person's surroundings, such as improved doors, locks, alarm systems or communication mechanisms.

**Close protection**: request national authorities or other authorised security providers to provide a guard service in compliance with national law.

Video conferencing

Witness testimony through video-conferencing is not necessarily at odds with an accused's right to a fair trial if still afforded the opportunity to cross-examine the witness. Rule 71(d) of the ICTY Rules of Procedure and Evidence allows testimony to "be given by means of a video-conference."[113] In

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[111] Council of Europe, Recommendation, Articles 18 to 21.

[112] Impunity Principles, Principle 10(d).

[113] Rule 71(d), Rules of Procedure and Evidence, The United Nations International Criminal Tribunal for the former Yugoslavia, UN Doc. IT/32/Rev.22. 309 *Ibid.*, pp. 37-38.

*Prosecutor v. Delalic, Mucic, Delic & Landzo* (Part I), the ICTY Trial Chamber allowed witnesses to testify by video-conferencing on the basis that the testimony was sufficiently important to make it unfair to proceed without it. It insisted, however, that the accused should not be prejudiced in the exercise of his right to confront the witness.

Article 18(18) of the Organised Crime Convention calls on States Parties to "make use of video-conferencing as a means of facilitating the taking of testimony from witnesses residing in a different State Party's jurisdiction".[114] Video conferencing may be combined with image and voice distortion measures to increase witness anonymity as necessary.[115] The Council of Europe Committee of Ministers also recommended the use of video-conferencing as well as audiovisual recording of statements made by witnesses and justice collaborators during the preliminary phase of the procedure, while taking into account the right of the accused to challenge the evidence given by a witness.[116] The Committee on the Rights of the Child has drawn attention to the importance of ensuring "child witnesses and victims the possibility of giving testimony by video or audio".[117]

**Self-protection measures**

Some countries provide assistance to low-risk witnesses to aid them in their own self-protection, without entry into a protection program. This may include the provision of financial support to relocate.[118] However, experience has shown that making payments to witnesses at risk is rarely sufficient for them to protect themselves. Financial payments should only be made within a broader protection strategy, and should be recorded and disclosed to the defense.

When a risk is linked closely to the area where the person is staying, assistance may be needed to move to a safer location. The assistance provided should consist of limited financial and logistical support. Prior to providing this assistance, the feasibility and modalities of the move, including its short-term impact and long-term consequences, should be assessed.

**4.3 Relocation and/or identity change**

Relocation and/or identity change are reserved for high-risk witnesses. Identity change is usually carried out after a proceeding has ended and is limited to those witnesses whose life cannot be protected by any lesser measure. The effectiveness of this measure depends in part on its combination with relocation, including the use of safe houses. Both relocation and identity-change may be necessary in conflict and post-conflict countries, but witnesses will often remain at risk due to the relatively small size and close-knit nature of communities in some of these countries. In the most extreme circumstances, witnesses will need to be relocated to a foreign country.

Agreements with foreign countries can help to protect witnesses when the State is unable or unwilling to provide sufficient protection against reprisals for their participation in criminal or other proceedings. Even where relocation abroad is an option, it is important to select countries where

[114] Cited in UNODC, Good Practices, p. 38.

[115] *Ibid.*, pp. 37-38.

[116] Council of Europe, Recommendation, Article 17.

[117] Committee on the Rights of the Child, Concluding Observations on Sierra Leone, CRC/C/OPSC/SLE/CO/1, 2010, para. 37.

[118] *Supra note 7*, p. 41.

witnesses will not be exposed to continuing threats as a result of international networks of terrorist groups, organised crime syndicates or armed groups. The UNICEF Guidelines on the protection of child victims of trafficking draw attention to the potential need for trafficked children's international relocation and resettlement due to the risk of retaliation from traffickers against whom evidence has been provided. The Guidelines further recommend measures to ensure the security of the child's family members in the country or place of origin, transit or destination.[119] A final consideration is the need to include measures to assist the victim or witness to return to normal life in their home country once the threat level has fallen to an acceptable level.

[119] UNICEF, Guidelines on the protection of child victims of trafficking, 2006, para. 10.4.

**ANNEX II**

# THE REVISED WITNESS PROTECTION LAW IN SRI LANKA:

## ASSISTANCE AND PROTECTION TO VICTIMS OF CRIME AND WITNESSES BILL

Proposed Amendments to be moved at the Committee Stage of the Bill

Long title - Replace the long title with the following:-

"AN ACT TO PROVIDE FOR THE SETTING OUT OF RIGHTS AND ENTITLEMENTS OF VICTIMS OF CRIME AND WITNESSES AND THE PROTECTION AND PROMOTION OF SUCH RIGHTS AND ENTITLEMENTS; TO GIVE EFFECT TO APPROPRIATE INTERNATIONAL NORMS, STANDARDS AND BEST PRACTICES RELATING TO THE PROTECTION OF VICTIMS OF CRIME AND WITNESSES; THE ESTABLISHMENT OF THE NATIONAL AUTHORITY FOR THE PROTECTION OF VICTIMS OF CRIME AND WITNESSES, CONSTITUTION OF A BOARD OF MANAGEMENT, THE ADVISORY COMMISSION ON VICTIMS OF CRIME AND WITNESSES AND THE VICTIMS OF CRIME AND WITNESSES ASSISTANCE AND PROTECTION DIVISION OF THE SRI LANKA POLICE DEPARTMENT; PAYMENT OF COMPENSATION TO VICTIMS OF CRIME; ESTABLISHMENT OF THE VICTIMS OF CRIME AND WITNESSES ASSISTANCE AND PROTECTION FUND AND FOR MATTERS CONNECTED THEREWITH OR INCIDENTAL THERETO"

Page 1, (1) Clause 1 - Delete lines 3 to 5 (both inclusive) and substitute the following:-

"Short title and dates of operation

1. (1) This Act may be cited as the Assistance and Protection of Victims of Crime and Witnesses Act No ... of 2008

(2) The provisions of this Act, other than this section, shall come into operation on such date or dates as the Minister may from time to time appoint by Order published in the *Gazette*. Different dates may be appointed by the Minister for the coming into operation of different Parts of this Act."

(2) Clause 2 (1) Delete line 9 and substitute the following:-

"(a) set out, uphold and enforce the rights and entitlements of victims of" ; and

(2) Delete line 13 and substitute the following:-

"(b) provide assistance and"

Page 2, (1) Clause 2 - (1) Delete line 4 and substitute the following:-

"(e) set out duties and responsibilities of State, judicial',

(2) Delete line 13 and substitute the following:-

"accepted norms, standards and best practices relating to the":

(2) Clause 3 - (1) Delete line 18 and substitute the following:-

" (a) to be treated with equality, fairness and with respect for his"; and

(2) Delete line 26 and substitute the following:-

"harm, including threats, intimidations, reprisals or retaliations,"

Page 3, Clause 3 - (1) Delete line 1 and substitute the following:-

"(e) to be informed by the relevant authorities-",

(2) Delete line 3 and substitute the following

"of any harm which he has suffered, including civil remedies available for obtaining damages and the relevant periods of prescription applicable thereto;"

(3) Immediately after line 25, insert the following:-

"(f) To present either orally or in writing a complaint pertaining to the commission of an offence and the right to have such complaint recorded by a police officer in any police station or other unit or division of the Police Department and to have such complaint impartially and comprehensively investigated by the relevant investigating authority," ; and

(4) Immediately after line 33, insert the following:-

"(h) without prejudice to any on-going or concluded investigation, to obtain certified copies of Cause of Death forms, Post Mortem Reports, Medico-Legal Reports of the Registrar of Finger Prints, Reports of the Government Analyst and any other report of an expert and reports filed in the Magistrate's Court by the Police, as required by sections 115, 116 and 120 of the Code of Criminal Procedure Act:

Provided however, where an application is made for the purpose of obtaining certified copies of Reports referred to in this paragraph, the Magistrate to whom such application is made shall be required to inquire from the Police, as to whether the issue of such Report would

prejudice the on-going investigations being carried out by them to which those Reports relate, and where the release of any one or more of the Reports is likely to prejudice the on-going investigations, the Magistrate shall refuse the issue of such Report or Reports, as the case may be;"

**Page 4**, Clause 3 - (1) Immediately after line 8, insert the following:-

"(j) to present written communications or make representations through legal counsel to an investigator who is conducting an investigation into the offence committed against (sic) such victim of crime or to be a subordinate officer, and to be entitled to receive a response to such communications or representation made;";

(2) Delete line 13 and substitute the following:-

"Commission or other tribunal determines for reasons to be recorded, that his";

(3) Delete line 19 and substitute the following:-

"to receive any assistance and information required to attend and";

and

(4) Delete lines 34, 35 and 36 and substitute the following:-

"had impacted on his life, including his body, state of mind, employment, profession or occupation, income, family life, quality of life, property and any other aspects concerning his life;"

**Page 5**, Clause 3 - (1) Delete lines 7,8 and 9 and substitute the following:-

"impacted on his life, including his body, state of mind, employment, profession or occupation, income, family life, quality of life, property and any other aspects concerning his life;" and

(2) Delete lines 13 to 18 (both inclusive) and substitute the following:-

"committed an offence, to receive notice thereof and to submit through the Authority to the person granting such pardon or remission, the manner in which the offence committed had impacted on his life, including his body, state of mind, employment, profession or occupation, income, family life, quality of life, property and any other aspects concerning his life."

**Page 6**, Clause 4 - Delete line 13 and substitute the following:-

"(2) A witness shall not be harassed, intimidated, coerced or violated in any manner whatsoever, during or thereafter."

**Page 7,**(1) Clause 5 - Delete line 8 and substitute the following:-

"(a) any harassment, intimidation, coercion, violations or suffering from loss or damage in," and

(2) Clause 6 - Delete line 20 and substitute the following:-

"6. It shall be the duty of every public officer, including the members of the Armed Forces and police officers and every"

**Page 8,** Clause 7 - Delete line 24 and substitute the following:-

"twenty thousand."

**Page 9,** Clause 7 - Delete line 32 and substitute the following:-

"(a) any harassment, intimidation, coercion, violation, physical or mental suffering, loss."

**Page 10,** Clause 7 - Delete line 14 and substitute the following:-

"Seven years and to a fine of rupees fifteen thousand."

**Page 11,** Clause 7 (1) Delete line 7 and substitute the following:-

"rupees fifteen thousand.";

(2) Delete line 24 and substitute the following:-

"exceeding seven years and to a fine of rupees fifteen thousand."; and

(3) Delete line 32 and substitute the following:-

"fine of rupees fifteen thousand."

**Page 12,** Clause 7 - Delete line 16 and substitute the following: -

"fifteen thousand"

**Page 13,** (1) Clause 9 - Delete line 13 and substitute the following:-

"cancelled and such person shall be place on remand till";

(2) (1) Immediately after line 15 insert the following:

" PART IV

SUSPENSION OF INSTITUTION OF CRIMINAL PROCEEDINGS" and

(3) Clause 10 – Delete lines 16 to 31 (both inclusive).

**Page 14,** Clause 10 - Delete lines 1 to 33 (both inclusive)

**Page 15** Clause 10 - Delete lines 1 to 32 (both inclusive)

**Page 16** Clause 12 - (1) Delete line 17 and substitute the following:-

"(a) (i) four appointed members selected from among persons";

(2) Delete lines 22, 23, and 24 and substitute the following:-

"Constitutional Council:

Provided however, until the appointment of the members of the Constitutional Council, the member to be appointed under this sub-paragraph shall be appointed by the Minister in charge of justice, in consultation with the President, the Chief Justice, the Minister in charge of the subject of Human Rights and the Attorney General:

Provided further, where upon being informed of a vacancy arising among the members appointed to the Board under this paragraph the Constitutional Court fails to appoint a member to fill such vacancy within one month of being so informed, the Minister in charge of the subject of Justice in consultation with the President, the Chief Justice, the Minister in charge of the subject of Human Rights and the Attorney General, shall, in compliance with the requirements of this paragraph, appoint a person to fill such vacancy."

(3) Immediately after line 24 insert the following:-

"(ii) four persons selected from among persons who are academically or professionally qualified and have experience in professions or fields of professional activity associated or connected with the promotion and protection of human rights, appointed by the Minister in charge of the subject of Human Rights; and"

**Page 17,** (1) Clause 12 (1) Immediately after line 4, insert the following:-

"(iv) Secretary to the Minister of the Minister in charge of the subject of Women's Affairs (sic) or an Additional Secretary to the said Ministry nominated by such Secretary;

(v) Secretary to the Ministry of the Minister in charge of the subject of Children or an Additional Secretary to the said Ministry nominated by such Minister;

(vi) a member of the Human Rights Commission of Sri Lanka established by the Human Rights Commission of Sri Lanka Act, No 21 of 1996, nominated by such Commission;"

(2) Immediately after line 8, insert the following:-

"Provided that where the two subjects specified in sub paragraphs (iv) and (v) of this paragraph are assigned to or remain in charge of a single Minister, the Secretary to the Ministry of that Minister alone shall be eligible to become a member of the Board under this paragraph.";

(3) Delete lines 9, 10 and 11 (both inclusive) and substitute the following:-

"(2) The Constitutional Council shall appoint the Chairman of the Board from"; and

(4) Immediately after line 13, insert the following:-

"Provided however, until the appointment of the members of the Constitutional Council, the member to be appointed as Chairman under this subsection shall be appointed by the Minister in charge of the subject of Justice, in consultation with the President, the Chief Justice, the Minister in charge of the subject of Human Rights and the Attorney General:

Provided further, where upon being informed of a vacancy arising in the post of Chairman appointed under this subsection the Constitutional Council fails to fill such vacancy within one month of being so informed, the Minister in charge of the subject of Justice in consultation with the President, the Chief Justice, the Minister in charge of the subject of Human Rights and the Attorney-General, shall, appoint another member of the Board to fill such vacancy."

(2) Clause 13 - (1) Delete line 27 and substitute the following:-

"regarding an alleged infringement or imminent infringement of any right or,"; and

(2) Delete line 30 and substitute the following :-

"infringement and to require any relevant authority to take such appropriate corrective measures in that regard in order."

**Page 18** , Clause 13 - Delete lines 1, 2 and 3.

**Page 19,** Clause 13 - (1) Immediately after line 8, insert the following:-

"(j) prepare and make available on request to any court or a Commission or any other person, the internationally accepted norms and best practices pertaining to the reception of evidence through contemporaneous or near contemporaneous audio-visual linkage;" and

(2) Delete line 21 and substitute the following:-

"(k) promote and ensure the observance and."

**Page 20,** Clause 13 - (1) Delete line 19 and substitute the following:-

"(n) promote the development, adoption and,"

(2) Delete line 23 and substitute the following:-

"(o) promote the development, adoption and"

**Page 21** Clause 13 - Immediately after line 31, insert the following:-

"(2) Where the Authority makes any recommendations to any person or authority or requires any person or authority to carry out any measures under subsection (1), it shall be the duty of such person or authority, as the case may be:-

*(a)* to give effect to such recommendation or carry out such measures and report back to the Authority of such fact; or

*(b)* Where the person or the Authority concerned is unable to give effect to the recommendations or carry out the measures, to report back to the Authority of such inability, giving reasons for the same.

(3) For the purpose of ensuring that any recommendations or the measures are given effect to or carried out adequately and in a proper manner by the person or authority concerned under paragraph (a) of subsection (2), the Authority shall have the power to monitor all activities performed by such person or authority in giving effect to the recommendations or carrying out the measures concerned."

**Page 22,** Clause 14 - (1) Delete lines 2 to 5 (both inclusive) and substitute the following:-

"(a) for the purpose of conducting an investigation or an inquiry into an alleged infringement or an imminent infringement of a right or entitlement of a victim of crime or witness:-"

(2) Delete line 22 and substitute the following:-

"(iv) interview and record the statement of any person other than:"

(3) Immediately after line 31, insert the following: -

"(vi) enter into, inspect, examine or observe and record any event, location or process taking place in any place, including in an investigation, inquiry, trial or other proceeding;

(vii) make an appropriate order and direct, advice or recommend the adoption of such measures for the promotion or protection of the rights and entitlements of a victim of crime or a witness, as the case may be, or for remedying any damage caused as a result of the infringement of the rights or entitlement of the relevant victim of crime or the witness, as the case may be;"

Page 23, Clause 14 - (1) Delete line 15 and substitute the following:-

"(f) subject to the provisions of subsection (3) of section 24, solicit, accept and receive donations, gifts, bequests;" and

(2) Immediately after line 27, insert the following:-

"(2) A person who fails to comply with any requirement imposed by the Authority under paragraph (a) of subsection (1) shall be guilty of an offence and on conviction be punishable with a term of imprisonment not exceeding two years and to a fine not exceeding rupees ten thousand."

Page 24, Clause 15 - Immediately after line 11, insert the following:-

"(4) The Board may delegate to the Director General any of the duties and functions of the Authority and such of its powers as may become necessary to perform and discharge the duties and functions so delegated."

Page 25, Clause 17 - (1) Delete line 22 and substitute the following:-

"(v) the Chairman of the Legal Aid Commission, established by the Legal Aid Law, No 27 of 1978;" and

(2) Delete line 24 and substitute the following:-

"(i) five members appointed by the Minister in charge of the subject."

Page 26, Clause 17 - (1) Delete line 7 and substitute the following:-

"(ii) one person appointed by the Minister in charge of the subject of,"

(2) immediately after line 16, insert the following:-

"(iii) one person appointed by the Minister in charge of the subject of Justice on the recommendation of the Minister in charge of the subject of Human Rights, who has experience in voluntary social service in the promotion and protection of Human Rights."

**Page 27**, Clause 18 - Delete line 31 and substitute the following:-

"harassment, coercion or violation being committed on victims of crime."

**Page 28**, Clause 19 - Immediately after line 7, insert the following:-

(2) It shall be the duty of the Division to take all such steps as may be necessary to create awareness among the public about the Victims of Crime and Witnesses Assistance and Protection Programme drawn up by it under subsection (1), including what action may be taken by a victim of crime or a witness in the event of facing any threat, harm, reprisal, retaliation, intimidation and the manner in which victims of crime or witnesses may apply for and obtain assistance and protection under such Programme."

**Page 32**, Clause 22 - (1) Delete lines 24 and 25 and substitute the following:-

"not solicit or obtain any assistance from any foreign government or national, foreign or international organization, in providing assistance";

(2) Delete line 29 and substitute the following:-

"Foreign Affairs, the grant of which shall be considered and decided upon by the Attorney-General and such Secretary, as expeditiously as possible."

**Page 33**, Clause 23 - Delete line 23 and substitute the following:-

"unnecessarily harassed, intimidated, coerced, violated or influenced."

**Page 39** - (1) Delete line 25 and substitute the following:-

"TESTIMONY THROUGH AUDIO-VISUAL LINKAGE"

Clause 29 - (2) Delete lines 26 to 33 (both inclusive) and substitute the following:-

"Recording of evidence or statement through contemporaneous audio-visual linkage

**32.** (1) A court conducting an identification parade, a non summary inquiry or any other inquiry or a trial, or a Commission conducting an investigation or inquiry or any law enforcement authority conducting an

investigation, may, if it be in the best interest of justice and is found necessary:-

(a) as a measure of protection to be afforded to a victim of crime or witness; or

(b) on grounds of expediency,

and taking into consideration the best interest of the victim of crime or witness, record any evidence or a statement of such victim of crime or witness, by securing such testimony or statement without his personal attendance before such court, Commission or law enforcement authority, as the case may be, through technical means by which contemporaneous or near contemporaneous audio – visual linkage between the court, the Commission or the law enforcement authority, as the case may be, and any other location (hereinafter referred to as the "remote location"), whether within or outside Sri Lanka, from where such person testifies or makes the statement, could be established.

(2) The court, the Commission or the law enforcement authority, as the case may be, shall, prior to the reception and recording of the testimony or statement, satisfy itself that the audio –visual linkage concerned is technically accurate and reliable, and –

(a) Where such remote location is situated within Sri Lanka, a judicial officer or a public officer designated by the court, the Commission or the law enforcement authority concerned:

or

(b) where such remote location is situated outside Sri Lanka, a competent person designated by the court or the Commission or the relevant law enforcement authority concerned, on the recommendation of the Attorney General and the Secretary to the Ministry of the Minister in charge of the subject of Foreign Affairs,

is present at such remote location, from where the victim of crime or witness seeks to testify or make the statement.

(3), Prior to commencing the reception and recording of the testimony or statement of the victim of crime or witness from the remote location designated under subsection (2),

the court, the Commission or the law enforcement authority concerned shall, on the recommendation of the Attorney General, the Secretary to the Ministry of the Minister in charge of the subject of Justice and the Secretary to the Ministry of the Minister in charge of the subject of Foreign Affairs and subject to the provisions of section 33, obtain from the Authority:-

(a) assistance necessary to obtain any approval or authorization that may be required from a designated competent authority of the country in which the aforementioned remote location is situated; and

(b) financial and other resources necessary for the establishment and the functioning of the relevant audio-visual linkage.."

**Page 40**, (1) Clause 29 - Delete lines 1 to 16 (both inclusive); and

(2) Immediately after line 16 insert the following:-

"PART IX

GENERAL"

**Part 41**, Clause 34- Immediately after line 26, insert the following:-

"may in consultation with the Minister in charge of the subject of Human Rights and on the recommendation of the Authority, make."

**Page 44**, Clause 36 Immediately after line 26, insert the following:-

"written communication" includes a letter transmitted in any medium whatsoever, such as by ordinary registered post, by facsimile and electronic mail."

NEW CLAUSES

**Page 23** Immediately after line 27, insert the following:-

**"inquiry to be conducted by a Panel.**

15 (1) An inquiry into any complaint or information regarding an alleged infringement or imminent infringement of a right or entitlement of a victim of crime or of a witness, shall be carried out by a Panel consisting of three members of the Board, elected by the members from among themselves. The Board shall nominate one of the members of the Panel to be its Chairman.

(2) The provisions of sub – paragraphs (i) to (iv) of paragraph (a) of section 14 shall apply to and in respect of the conduct of an inquiry by a Panel.

(3) In the case of a division of opinion among the members of the Panel regarding any matter being inquired into by it, the opinion of the majority shall prevail,

(4) At the conclusion of an inquiry under this section, the Panel shall submit to the Board a report on the same, along with its recommendations on the matter inquired into.

(5) On receipt of the report of a Panel, the Board shall take such action on the same as to it shall deem fit and appropriate.".

**Page 24** Immediately after line 11, insert the following:-

**"Director-General to assist in Investigations** 17. In the conduct of an investigation or inquiry under this Act, the Board shall be assisted by the Director - General and the Board may delegate to the Director-General such of the functions and powers of the Authority as it shall consider necessary, for such purpose."

**Page 39** Immediately after line 25, insert the following:-

**"Interference in the discharge of duties etc,.** 31. Any person who without lawful authority Interferes or obstructs or attempts to interfere or obstruct any court, Commission, Authority, Board , Advisory Commission, Division or any public or judicial officer, in the exercise, discharge or performance of any power, function or duty, under this Act, shall be guilty of an offence under this Act and shall on conviction by the High Court be liable to a term of imprisonment not exceeding seven years and to a fine not exceeding rupees twenty thousand."

**Page 40** (1) Immediately after line 16, insert the following:-

**"Authority not required to provide assistance under section 32 in certain circumstances** 33. (1) Where under subsection (3) of section 32, the Attorney General, the Secretary to the Ministry of the Minister in charge of the subject of Justice and the Secretary to the Ministry of the Minister in charge of the subject of Foreign Affairs recommends, that:-

(a) it is not in the national interest including national security, to obtain the testimony or statement of the victims of crime or witness concerned from the remote location; or

(b) the court, the Commission or the law enforcement authority concerned does not possess a reasonable basis to conclude that it would be necessary in the best interest

of justice or it is expedient or as a measure of protection it is in the best interest of the victim of crime or witness concerned, to receive and record his testimony or statement through contemporaneous audio –visual linkage from the remote location; or

(c) It would not be feasible to secure the testimony or the statement of the relevant victim of crime or witness from the remote location, identified under subsection (1) of section 32, the Attorney General shall convey his opinion to the court, Commission or the law enforcement authority concerned. However, where the Attorney-General is of the opinion that it would be in the interest of justice to secure such testimony or statement from any other appropriate alternate remote location, the Attorney-General may recommend to the court, the Commission or the law enforcement authority, as the case may be, of such alternate location.

(2) Where the Attorney- General has expressed an opinion that the recording of evidence or the securing of a statement of any victim of crime or witness from a particular remote location is inappropriate, the court, the Commission or law enforcement authority concerned, shall not proceed to receive and record the testimony or statement of the relevant victim of crime or witness through contemporaneous audio –visual linkage from such remote location, and consequently the Authority shall not be required to provide any necessary assistance and financial or other resources to the court, Commission or the law enforcement authority, as the case may be, under subsection (3) of section 32. However where the court, the Commission or the law enforcement authority, as the case may be, decides to change the remote location recommended by the Attorney General under subsection (1), such court, Commission or the law enforcement authority, as the case may be, may proceed, to obtain the assistance of the Authority under subsection (3) of section 32.

(3) Where a court or a Commission is dissatisfied with the opinion expressed by the Attorney General under subsection (1), such court or Commission, as the case may be may either on its own motion or on the motion of the relevant victim of crime or the witness or his legal representative, refer the matter to the Court of Appeal, stating the grounds for its dissatisfaction. The Court of Appeal shall, having examined the material submitted by the court or a Commission and having heard the Attorney- General, and where a motion is submitted by the victim of crime or witness or his legal representative, having heard such party, determine and make an order

as to whether in the circumstances of the case, the relevant court or the Commission, as the case may be, should receive the evidence or record the statement of the victim of crime or the witness concerned through contemporaneous audio – visual linkage from the remote location originally identified by the relevant court or the Commission, as the case may be or from the remote location recommended by the Attorney-General or from any other remote location as may be identified by the Court of Appeal.

(4) Where the Court of Appeal determined under subsection (3) that the evidence or the statement of the victim of crime or the witness concerned to be recorded from a particular remote location specified in the order, the Authority shall make every endeavor to provide the necessary assistance to the court or the Commission concerned, to receive the evidence or record the statement through contemporaneous audio –visual linkage from such remote location.

Procedure in recording testimony or statement

34 (1) A court or a Commission intending to record the testimony of a victims of crime or witness under provisions of section 32, shall initially cause the statement to be recorded and serve such statement on the Attorney General, the victim of crime or witness and to any person whose legal rights may be affected by such testimony or to their legal representatives, and where the remote location is situated outside Sri Lanka, issue not less than sixty days notice or where the remote locations situated within Sri Lanka, issue not less than thirty days notice, to all such parties concerned, of the scheduled date of the recording of the testimony of the victim of crime or witness concerned.

(2) The judicial officer or the person designated by a court or Commission under subsection (2) of section 32, to be present at the remote location concerned from which the victim of crime or witness propose to testify or make the statement, shall be required to make his observations where necessary by interviewing the victim of crime or witness concerned and any other relevant person, and submit a report to the court or the Commission, as the case may be, on the following matters:-

(a) the location from which the victim of crime or witness testified or made the statement;

(b) the identity of the person who seeks to testify or make the statement;

(c) any facts or circumstances that would indicate whether any threat, inducement or promise had been offered to the victim of crime or witness;

(d) any facts or circumstances that would indicate whether there existed a conducive environment from which the victim of crime or witness could testify; and

(e) any other relevant facts or any matter in respect of which the court or the Commission, as the case may be, had required such person to report on.

(3) An Attorney-at-law representing any person against whom the testimony of a victim of crime or witness is sought to be used or may be used, shall be entitled to be present at the remote location from which the victim of crime or witness testifies and observe the proceedings.

(4) A counsel representing the Attorney General, the legal representative of the relevant victim of crime or witness and the legal representative of any person whose legal rights may be adversely affected by the testimony or statement of the victim of crime or the witness, as the case may be, shall be entitled to examine the report submitted under subsection (2), and question the judicial officer or the designed person who submitted the report and make representations to the court or to the Commission regarding the circumstances under which the relevant victim of crime or witness has testified or made the statement and the environment prevailing in such remote location.

(5) The court or the Commission, as the case may be, shall upon considering the report submitted under subsection (2), the evidence given by the judicial officer or the designated person submitting the report, the submissions made by the counsel referred to in subsection (4) and any other relevant material before such court or Commission, reach its decision as to whether it would be in the best interest of justice to receive the evidence or statement concerned given through such contemporaneous audio- visual linkage, and on the admissibly and use of such evidence or statement recorded.

Receiving or recording testimony through audio visual linkage to be according to this Part.

**35.** No court, Commission or law enforcement authority shall receive or record the testimony or statement of any victim of crime or witness through contemporaneous audio- visual linkage, save and except in accordance with requirements laid down for the same by the provisions of this Part of this Act."

(2) Immediately after line 31, insert the following:-

**"Provisions of this Act to prevail over other laws**

**38.** The provisions of this Act shall have effect notwithstanding anything to the contrary in any other written law and accordingly, in the event of any conflict or inconsistency between the provisions of this Act and such other written law, the provisions of this Act."

**Page 41** Immediately after line 11, insert the following:-

**"The Authority deemed to be a scheduled institution within the meaning of the Bribery Act**

**41.** The Authority shall be deemed to be a Scheduled Institution within the meaning of the Bribery Act and the provisions of that Act shall be construed accordingly.

**Actions against a body of persons**

**42.** Where an offence under this Act is committed by a body of persons then:-

(a) If that body of persons is a body corporate, every director, manager, chief executive officer and secretary of that body corporate;

(b) If that body of persons is a firm, every partner of that firm and its chief executive officer;

(c) If that body of persons is an unincorporated body, every individual who is a member of such a body and its chief executive officer; and

(d) If that body of persons is a local authority or any other authority appointed by or under any law relating to local authority to act on behalf of such local authority, the Chairman of such local authority,

shall be guilty of such offence:

Provided however any director, manager, chief executive officer and secretary of any body corporate or every partner and chief executive officer of any firm or every member and chief executive officer of an unincorporated body or the Chairman of a local authority, as the case may be, shall not be guilty of an offence under this section, if he proves to the satisfaction of the court that such offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence."

# 'SILENT AND POWERLESS': THE HUMAN RIGHTS COMMISSION OF SRI LANKA IN 2010*

*B. Skanthakumar**

## I. Overview of the Human Rights Context in Sri Lanka

The year 2010 was the first full year since Sri Lanka emerged from almost three decades of civil war, following the decisive military victory over the Liberation Tigers of Tamil Eelam (LTTE) in the preceding May. The island continued to be governed under an island-wide state of emergency, only partially modified in the course of the year[1], while the Prevention of Terrorism Act that falls far short of international human rights standards was neither repealed nor amended.[2]

Meanwhile, two crucial elections for the presidency and parliament in January 2010 and April 2010 respectively – the outcomes and fall-out from which will condition the political environment for human rights promotion and protection in the coming years – dominated the first quarter of 2010.

As one analyst observed, "The defeat of the LTTE's secessionist insurgency in 2009 provided the government an unprecedented opportunity to move in the direction of ethnic reconciliation, constitutional reform for greater democratization, and enhanced regional autonomy for ethnic minorities to help prevent future secessionist movements." However, the government had chosen the path of "...regime consolidation instead. The dominant thinking within the regime appears to have been premised on the assumption that there were no minority issues that needed to be addressed on a politically urgent basis because the LTTE had been crushed".[3]

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* First published in *2011 ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia*, FORUM-ASIA, Bangkok 2011 at pp. 234-261, http://forumasia.org/documents/ANNI Report2011.pdf. All matters of law and fact are as at 31 July 2011.

* Economic, Social and Cultural Rights programme, Law & Society Trust (LST). The cooperation received in the course of field-investigation from the Human Rights Commission of Sri Lanka (HRCSL) and civil society activists, in Colombo and two selected provinces, is appreciated. Miyuru Gunasinghe's research assistance is gratefully acknowledged. Emerlynne Gil inspired the title and is thanked for her guidance and encouragement while working as ANNI coordinator until February 2011.

[1] *Changes to Emergency Regulations: CRM examines recent amendments*, E 01/05/2010, Civil Rights Movement of Sri Lanka, Colombo, 15 May 2010.

[2] Wasana Punyasena, "The Legacy of Emergency Rule", *dissenting dialogues*, No. 1, November 2010, pp. 9-12, http://www.srilankademocracy.org/files/dissenting_dialogues_Nov_2010.pdf.

[3] Jayadeva Uyangoda, "Sri Lanka in 2010: Regime Consolidation in a Post-Civil War Era", *Asian Survey* (Berkeley, CA.), Vol. 51, No. 1 (January/February 2011): 131-137 at 134; on some issues of concern to ethnic minorities see, Minority Rights Group International, *No war, no peace: the denial of minority rights and justice in Sri Lanka*, London 2011, http://www.minorityrights.org/10458/reports/no-war-no-peace-the-denial-of-minority-rights-and-justice-in-sri-lanka.html.

There was a sharp decrease in the number of enforced disappearances and extra-judicial killings particularly in the conflict-zone of the Northern and Eastern provinces with the end of the war. Nevertheless, serious human rights violations persisted: for example, the disappearance on 24 January 2010 of the media-worker and political activist, Prageeth Eknaligoda[4] who remains missing at time of writing; and that of the human rights defender and community leader, Pattani Razeek on 11 February 2010.[5]

There were a number of arbitrary killings of alleged criminals and suspects while in custody,[6] with no reaction from the government or independent inquiries into these incidents, once again underlining the impunity enjoyed by state actors for serious crimes. Custodial torture remains entrenched and is routinely used by law enforcement agencies to extract confessions on fabricated charges.[7]

There continued to be threats to freedom of expression and opinion in 2010, including the temporary sealing of an opposition newspaper and detention of its editor,[8] and an arson attack on the *Siyatha* media organisation in July.[9] Dozens of media workers remained in self-exile abroad, and there was no progress in the investigation on the killing of a prominent newspaper editor in the preceding year. Self-censorship is widely prevalent in the print, radio and television media, while cyber-media sites critical of the government have experienced various forms of interference.

In addition to continuities of human rights violations from the recent past, there were also new issues arising from the conduct of the end of the war and its aftermath.

The warring sides are alleged to have behaved in ways that, if proven, would amount to "serious violations of international humanitarian and human rights law; many would amount

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[4] Olindhi Jayasundere, "Eknaligoda's wife files Habeas Corpus", *Daily Mirror* (Colombo), 5 March 2010, http://print.dailymirror.lk/news/news/5261-eknaligodas-wife-files-habeas-corpus-.html.

[5] Razeek's death was subsequently established at the end of July 2011, see Hiran Priyankara Jayasinghe, "Missing NGO worker's body found in partly built house", *The Sunday Times* (Colombo), 31 July 2011, http://www.sund aytimes.lk/110731/News/nws_24.html. He was an Executive Committee member of the Asian Forum for Human Rights and Development (FORUM-ASIA) at time of abduction.

[6] Bureau of Democracy, Human Rights and Labor, *2010 Country Reports on Human Rights Practices: Sri Lanka*, Department of State, Washington DC 2011, http://www.state.gov/documents/organization /160476.pdf, p. 2.

[7] Basil Fernando (ed.), *Sri Lanka Torture Cases 1998-2011*, Asian Human Rights Commission, Hong Kong 2011, http://www.humanrights.asia/countries/sri-lanka/countries/sri-lanka/resources/special-reports/AHRC-SPR-001-2011- SriLanka.pdf; Asian Human Rights Commission, *Sri Lanka: A report on 323 cases of police torture*, 24 June 2011: "There have been minor forms of criminal investigation into torture by the country's National Human Rights Commission. However, rather than being thorough investigations in a criminal law sense, these investigations are more like mediation sessions similar to a labour tribunal", http://www.humanrights. asia/news /ahrc-news/AHRC-STM-085-2011.

[8] "Sore Winners: How not to celebrate a victory", *The Economist* (London), 4 February 2010, http://www.econ omist.com/node/15452859.

[9] Damith Wickremasekera, "Siyatha slams Police, Fire Brigade, *The Sunday Times* (Colombo), 1 August 2010, http://sundaytimes.lk/100801/News/nws_24.html.

to war crimes and crimes against humanity"[10], according to the Panel of Experts appointed by the United Nations Secretary-General, to advise him on an accountability process relevant to the nature and scope of alleged violations during the final stages of the war in Sri Lanka.

Thousands of Tamils suspected of being LTTE combatants or of involvement in acts of terrorism have been held in preventive detention in both legal and extra-legal facilities ranging from 'rehabilitation camps', to the Boosa Detention Centre, to the Terrorist Investigation Division.[11] Among almost 12,000 persons who had been detained as they fled the war-zone, around half of that number were in the custody of state security agencies as at the end of 2010, with no charges framed against them. Some of those released after "rehabilitation" alleged they faced threats, harassments and restrictions over their freedom of movement.[12]

Over the course of 2010, hundreds of thousands of Tamils interned in closed camps until December 2009, returned or were resettled in their areas of origin. Issues that impeded return or affected those who were resettled included the prevalence of unexploded ordinances and landmines; access to food, health-services, sanitation, education, transport and especially lack of durable shelter and livelihood opportunities.[13]

The UN Committee on Economic, Social and Cultural Rights in its concluding observations and recommendations on Sri Lanka's implementation of its international obligations drew attention to issues of concern including the application of the Covenant in the domestic legal system; indigenous peoples' rights; social development of estate sector communities; rights

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[10] Para 424, *Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka*, United Nations, New York, 31 March 2011, http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf, on p. 115. Para 422: "The credible allegations involving conduct by the Government of Sri Lanka [are]...(i) killing of civilians through widespread shelling; (ii) shelling of hospitals and humanitarian objects; (iii) denial of humanitarian assistance; (iv) human rights violations suffered by victims and survivors of the conflict, including both internally displaced persons (IDPs) and suspected LTTE cadres; and (v) human rights violations outside of the conflict zone, including against the media and other critics of the Government. The credible allegations involving conduct by the LTTE [are]...(i) using civilians as a human buffer; (ii) killing civilians attempting to flee LTTE control; (iii) using military equipment in the proximity of civilians; (iv) forced recruitment of children; (v) forced labour; and (vi) killing of civilians through suicide attacks", on p. 115.

[11] Amnesty International, *Forgotten Prisoners: Sri Lanka uses anti-terrorism laws to detain thousands*, ASA 37/001/2011, February 2011, http://www.amnesty.org/en/library/asset/ASA37/001/2011/en/64530ad7-76a6-4fb1-8f46-996c8543daf8/asa370012011en.pdf; International Commission of Jurists, *Beyond Lawful Constraints: Sri Lanka's Mass Detention of LTTE Suspects*, September 2010, http://www.icj.org/ dwn/database /BeyondLawfulConstraints-SLreport-Sept2010.pdf; Human Rights Watch, *Legal Limbo: The Uncertain Fate of Detained LTTE Suspects in Sri Lanka*, February 2010, http://www.hrw.org/en/reports/2010/02/02/legal-limbo-0.

[12] (Rev. Fr.) Jeyabalan Croos, Deanne Uyangoda and Ruki Fernando, *Threats, Harassment and Restrictions on Former Detainees and their Families in Vanni*, Law & Society Trust, Colombo, 11 May 2011, http://www.lawandsocietytrust.org/web/images/PDF/note11may2011.pdf.

[13] Internal Displacement Monitoring Centre, *Sri Lanka: IDPs and returnees remain in need of protection and assistance*, 14 January 2011, http://www.internal-displacement.org/8025708F004BE3B1/%28httpInfoFiles%29/03D15A8CBF11229DC12578180036CD93/$file/Sri+Lanka+-+January+2011.pdf.

of persons especially children with disabilities; gender-discriminatory provisions in the general and personal laws; discrimination against women in the labour-market; impacts of and alternatives to out-migration for women and their families; anti-union discrimination especially in export processing zones; lack of universal social security coverage; high incidence of domestic violence against women and children; prevalence of child labour; lack of adequate shelter and acceleration of forced evictions; overcrowded and inhuman prisons; prevalence of malnutrition among women and children; lack of basic sexual and reproductive health services; absence of a rights-oriented mental health law; low public investment in education and high rate of non-completion; non-introduction of human rights and peace education in the school curricula, among others.[14]

At time of writing, the HRCSL's Annual Reports for 2009 and 2010 have not been published, and there is no official record of its programme of work, its public pronouncements (if any), nor its recommendations to the authorities and their execution in the period under review. Therefore, the sources for this report are field-interviews with the HRCSL in Colombo and in two provinces in which it has regional offices, as well as civil society activists in those districts; partial responses to a structured questionnaire from the HRCSL head office and follow-up interview with a senior executive officer; media reports; personal observation, and communications from human rights defenders.

The HRCSL's semi-autonomous National Protection and Durable Solutions (NPDS) for Internally Displaced Persons project ('IDP Project') released its 2010 annual report[15] on time, albeit avoiding analysis and critical comments on protection concerns and the non-adherence of state actors to some of the UN's Guiding Principles on Internal Displacement. A point of satisfaction is that by the end of 2010, the English-language website of the Human Rights Commission had been revamped, and is now regularly updated with information on its public activities,[16] although the Sinhala and Tamil-language mirror sites are non-functional. The NPDS project has also consistently maintained a good online information portal with relevant resources and information on its activities.

This report critically reviews developments and issues impinging on the independence, accountability, effectiveness and transparency of the Human Rights Commission of Sri Lanka,[17] between January and December of 2010, but with reference to one significant

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[14] *Sri Lanka: Concluding observations of the Committee on Economic, Social and Cultural Rights*, E/C.12/LKA/CO/2-4, 9 December 2010, http://www2.ohchr.org/english/bodies/cescr/cescrs45.htm; reprinted along with a parallel report from civil society organisations, http://www2.ohchr.org/ english/bodies/cescr/ docs/ngos/IMADR_CESCR45_SriLanka.pdf, in *Law & Society Trust Review* (Colombo), Vol. 21 (Nos. 279 & 280), January & February 2011. Also translated and published by the Movement for National Land and Agricultural Reform (MONLAR) and the Law & Society Trust (LST) in Sinhala and Tamil.

[15] National Protection and Durable Solutions for Internally Displaced Persons Project, Human Rights Commission of Sri Lanka, http://www.idpsrilanka.lk/index.php.

[16] Human Rights Commission of Sri Lanka, http://hrcsl.lk/english/.

[17] For an overview of the HRCSL see Mario Gomez, "Sri Lanka's New Human Rights Commission", *Human Rights Quarterly* (Baltimore, MD), Vol. 20, No. 2 [1998], pp. 281-302; and B. Skanthakumar, "'Window-

development within the first quarter of this year, that is, the reconstitution of the Commission in February 2011 through the appointment of new members.

## II. Independence of the Human Rights Commission

For the entirety of 2010, no members were appointed to the Human Rights Commission. The three-year term of the previous Commission had ended in June 2009, and only the Chairman continued to be in office until the end of 2009 (as he had been appointed six months later than the other members). The ramifications of the absence of Commissioners for the effectiveness of the HRCSL will be discussed in the following section. One direct consequence was that there were no public pronouncements on human rights issues in 2010, as "policy decisions related to the Commission cannot be taken in the absence of a Chairman and Commissioners".[18]

From mid-2009 onwards, there was no announcement of the government's intentions as to when new members would be appointed to the HRCSL among other statutory institutions. Presumably, the government's attention into the first half of 2010 was on winning two key elections, as well as fending off international pressure regarding its prosecution of the final phase of the war through the establishment of the 'home-grown', Lessons Learned and Reconciliation Commission (LLRC).

After the 2010 parliamentary elections, it transpired that the government was dragging its feet until it could enact a constitutional amendment that would pave the way for direct appointments by the Executive to bodies that were created for the purpose of oversight and control over the practices and policies of state actors including the Executive.

Suddenly, in September 2010, the *Eighteenth Amendment* to the Constitution was rushed through parliament as an "urgent bill", where the government's massive majority assured it smooth passage. Legal challenges from civil society organisations before the Supreme Court that centred on the process by which it was enacted in haste, as well as concerns over the substance of the bill especially, the undermining of people's sovereignty through the further concentration of power in the Executive, failed to sway the apex bench and the amendment entered into law on the ninth of that month.[19]

The *Eighteenth Amendment* abolishes the Constitutional Council, created through the *Seventeenth Amendment* to the Constitution in 2001 for the purpose of broad-basing the

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Dressing'? The National Human Rights Commission of Sri Lanka", *Law & Society Trust Review* (Colombo), Vol. 20 (No. 262), August 2009, pp. 5-26, http://www.lawandsocietytrust.org/web/images/PDF/HRCSL%20Report%202009.pdf,

[18] Mandana Ismail Abeywickrema, "HRC unable to make Recommendations on Current Investigations", *The Sunday Leader* (Colombo), 2 May 2010, http://www.thesundayleader.lk/2010/05/02/HRC-unable-to-make-recommendations-on-current-investigations/.

[19] See generally, Rohan Edrisinha and Aruni Jayakody (eds.), *The Eighteenth Amendment to the Constitution: Substance and Process*, Centre for Policy Alternatives, Colombo 2011.

selection and appointment of members to the Human Rights Commission, alongside statutory institutions such as the Judicial Services Commission, the National Police Commission, the Election Commission, the Public Service Commission, the Commission to investigate allegations of Bribery and Corruption, the Finance Commission, the Delimitation Commission, and some high offices of state.

Henceforth, members of these bodies can lawfully be appointed at the sole discretion of the President, who is only obliged to receive non-binding "observations" from a newly created 'Parliamentary Council' that replaces the Constitutional Council. The Parliamentary Council comprises five persons, namely the Prime Minister, the Speaker, the Leader of the Opposition, a nominee of the Prime Minister who shall be a member of parliament, and a nominee of the Leader of the Opposition who shall be a member of parliament.[20] Therefore, of the five individuals, there is an automatic majority of three in favour of the government.

Among other obnoxious clauses, the *Eighteenth Amendment* removes term limits on the Executive Presidency allowing the incumbent to contest indefinitely beyond a second term and therefore also entrenching his authority over government and the State. These sweeping constitutional reforms have enhanced further the powers of the incumbent President, and formalised the national human rights institution's subordination to government.

Since the calculated paralysis of the Constitutional Council after March 2005, the Executive has in fact made direct appointments to several Commissions including the HRCSL. Thus, the previous batch of members of the Human Rights Commission, were appointed in 2006 in violation of the constitutional provision then in force (the *Seventeenth Amendment* of 2001 as un-amended[21]) and contrary to the selection and appointment norms stipulated in the 'Paris Principles'.

There was no transparency in the selection process nor were the members who were handpicked in 2006 associated with the defence of human rights. Their subsequent actions and omissions, as well as the rapid deterioration in the HRCSL's relations with human rights organisations and defenders, only justified the apprehension that greeted their appointment.

Arguably therefore, the Constitution has now simply been 'corrected' by the *Eighteenth Amendment*; through adjustment of the supreme law of the land, to suit the reality of its repeated and ongoing abuse and manipulation by government.

For several months thereafter, there was no word on the reconstitution of statutory commissions. Suddenly, in February 2011 – and a few weeks before the government was to

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[20] Article 41A, *Constitution of the Democratic Socialist Republic of Sri Lanka*, as amended by section 5 of the *Eighteenth Amendment to the Constitution*, http://www.lawnet.lk/downloads/18thAmendmenAct-E.pdf.

[21] *Seventeenth Amendment to the Constitution of the Democratic Socialist Republic of Sri Lanka* 2001 (as unamended by the *Eighteenth Amendment* in 2010), http://www.priu.gov.lk/Cons/1978Constitution/Seventeenth Amendment.html.

despatch a high-level delegation to the 16th Session of the United Nations Human Rights Council later that month – an announcement was made of fresh appointments to the Human Rights Commission.[22] The timing of the revival of the national human rights institution was perceived as an attempt by the government to parry criticism of the country's human rights record[23] ahead of a rumoured critical resolution at the Human Rights Council.[24]

The new members of the Human Rights Commission are the former Inspector-General of Police, Mr. T. E. Anandarajah; a former educationalist associated with civil society organisations, Mrs. Jezima Ismail; the former Government Analyst, Dr. M. A. J. Mendis; and a private medical practitioner, Dr. Bernard de Zoysa. The fifth member, who was also appointed by the President to chair the new Commission, is retired Supreme Court Justice Priyantha Perera.[25]

The enabling legislation of the HRCSL provides that, "The Commission shall consist of five members, chosen from among persons having knowledge of, or practical experience in, matters relating to human rights".[26] There is no stipulation as to the representation of women, only of "minorities", which in the Sri Lankan context is equated with ethnic minorities. There is also no requirement as to a transparent and participatory selection process and the plural representation of civil society in the composition of the Commission, as recommended by the 'Paris Principles'[27] and in the 'General Observations'[28] of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC) Sub-Committee on Accreditation.

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[22] Wilson Gnanadass, "'Independence' of HRC under scrutiny", *The Nation* (Colombo), 20 February 2011, http://www.nation.lk/2011/02/20/newsfe1.htm.

[23] Political Editor, "Lanka faces multi-pronged attack on human rights", *The Sunday Times* (Colombo), 27 February 2011, http://sundaytimes.lk/110227/Columns/political.html.

[24] Wilson Gnanadass, "No resolution against Lanka as feared', *The Nation* (Colombo), 6 March 2011, http://www.nation.lk/2011/03/06/news1.htm.

[25] Ranjith Ananda Jayasinghe, "Five members for the Human Rights Commission", *Lankadeepa* (Colombo), 16 February 2011 (in Sinhala). For their official profile and bio-data see Human Rights Commission of Sri Lanka, 'Members of the Commission' at http://hrcsl.lk/english/?page_id=475.

[26] S. 3(1), Human Rights Commission of Sri Lanka, Act No. 21 of 1996, http://hrcsl.lk/english/ACT/english.pdf.

[27] *Paris Principles: Composition and guarantees of independence and pluralism*, Para 1: "The composition of the national institution and the appointment of its members, whether by means of an election or otherwise, shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the promotion and protection of human rights", UN General Assembly Resolution A/RES/48/134, 4 March 1994, http://daccess-ddsny.un.org/doc/UNDOC/GEN/N94/116/24/PDF/N9411624.pdf?OpenElement.

[28] *ICC Sub-Committee on Accreditation General Observations*, Sec. 2.2: "The Sub-Committee notes the critical importance of the selection and appointment process of the governing body in ensuring the pluralism and independence of the National Institution. In particular, the Sub-Committee emphasizes the following factors: a) A transparent process; b) Broad consultation throughout the selection and appointment process; c) Advertising vacancies broadly; d) Maximizing the number of potential candidates from a wide range of societal groups; e) Selecting members to serve in their own individual capacity rather than on behalf of the organization they represent", June 2009, http://www.asiapacificforum.net/services/internationalregional/icc/sub-committeeon accreditation/downloads/generalobservations/General_Observations_June_2009.pdf.

The statutory requirement for representation of "minorities" has been followed in the recent appointments too, through selection of one Tamil and one Muslim (who is also the only woman member). Since 2006, the government has favoured the appointment of retired senior judicial officers to chair the Human Rights Commission.

A statement by a group of concerned citizens articulated the reaction of critical civil society actors to the reconstitution of the Human Rights Commission, when it drew attention to the process by which the appointments to its governing body had been made, as well as the suitability of some appointees to the role of leadership of the national human rights institution.[29]

"There is no transparency regarding the process by which the appointees were selected...as long as the present arbitrary process of appointments to independent institutions is in operation, public faith in those bodies will be minimal".[30] The statement went on to observe, "We seriously question the suitability of those who have served in the police or the armed forces to serve as members of the Human Rights Commission. A large proportion of complaints received by the HRCSL are against excesses by the police or the armed forces. Victims of such excesses may be reluctant to come before the HRCSL for fear of breach of confidentiality and reprisals and, more importantly, of lack of impartiality."

In media interviews shortly after the reconstitution of the Commission, its new Chairman responded indirectly to some of these criticisms and misgivings by insisting that that he would safeguard the independence of the HRCSL and would enhance its effectiveness through proposing amendment of its parent act enabling its recommendations to be self-enforcing.[31] "I want to ensure the whole HRCSL is reactivated. It won't be a dormant commission", asserted (Ret.) Justice Priyantha Perera.[32]

## III. Effectiveness of the Human Rights Commission

In 2010, despite the absence of members, the HRCSL continued its routine activities such as receiving complaints, conducting inquiries, visits to police stations, prisons and detention centres and camps for internally displaced-persons, and human rights awareness programmes for state officials.

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[29] On this latter issue, see the polemic by Colombo University law academic Prathiba Mahanamahewa, "Should the 18th Amendment be tainted by appointments?" *Lankadeepa* (Colombo), 6 March 2011 (in Sinhala).

[30] "Friday Forum statement on Recent Appointments to the Human Rights Commission of Sri Lanka", *Daily FT* (Colombo), 25 March 2011, http://www.ft.lk/2011/03/25/friday-forum-issues-statement-on-recent-appointments-to-the-human-rights-commission-of-sri-lanka/.

[31] Wilson Gnanadass, "I will ensure impartiality, says SLHRC chief", *The Nation* (Colombo), 6 March 2011, http://www.nation.lk/2011/03/06/newsfe2.htm.

[32] Wilson Gnanadass, "Commissioners move to amend Human Rights Act", *The Nation* (Colombo), 27 February 2011, http://www.nation.lk/2011/02/27/news1.htm.

The government finally acceded to repeated requests by the HRCSL for expansion of its permanent staff cadre from 167 (since it began operating in 1997) to 195 persons, which is a modest increase of 28.[33] However, the HRCSL's IDP project had to manage with only 27 persons, although its approved staff cadre is 72.[34] Some regional offices especially in conflict-affected districts do not have the full complement of staff especially legal and investigations officers. Also, the approved staff cadre (of seven) is the same for each regional office and does not reflect the size of the population, geographical nature of the region, nor the scale of violations experienced in those areas. There is scarcity of staff with specialised skills especially in communicating the role and work of the Commission through media advocacy both at head and regional offices.[35]

Some regional offices in majority Sinhala-speaking areas are unable to receive and inquire into complaints lodged in Tamil but unfortunately do not treat this with seriousness because Tamil-speakers may be bilingual or are assisted by Sinhala-speakers. Since 1987, Tamil is an official language in Sri Lanka, and the violation of the rights of Tamil-speakers is an infringement of their fundamental rights.[36]

The HRCSL is also financially under-resourced by government. Its budgetary allocation of around LKR118 million (under USD1.1 million) in 2011, is only slightly higher than in the previous year. The Commission has blamed its financial constraints for the backlog in processing of complaints, staff shortages at its regional offices in particular, and difficulty in relocating its head office from its current cramped rented premises.[37] Regional offices report the lack of suitable vehicles to conduct inspections and investigate complaints, and shortfalls in allocations from the head office to meet the costs of fuel, vehicle-repairs and maintenance, and in renting premises that are more centrally located and therefore more accessible and visible to the public.

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[33] Human Rights Commission of Sri Lanka, *Report to the 15th Annual Meeting of the Asia Pacific Forum of National Human Rights Institutions*, Bali, Indonesia 3-6 August 2010, p. 6, http://www.asiapacificforum.net /about/annual-meetings/15th-indonesia-2010.

[34] National Protection and Durable Solutions for Internally Displaced Persons Project, Human Rights Commission of Sri Lanka, *Annual Report 2010*, http://www.idpsrilanka.lk/html/Project%20Reports/ProjectProposal/ Reports/Annual%20Reports/2010%20Annual%20Report,%20NPDS%20for%20IDPs%20Project,%20HRCSL. pdf, p. 10.

[35] Interview with HRCSL Director of Inquiries and Investigations, in Colombo, on 25 May 2011.

[36] For further discussion see B. Skanthakumar, 'Official Languages Policy and Minority Rights' in Elizabeth Nissan (ed.), *Sri Lanka: State of Human Rights 2007*, Law & Society Trust, Colombo 2008, pp. 330-375; and Minority Rights Group International, *No war, no peace: the denial of minority rights and justice in Sri Lanka*, London 2011, http://www.minorityrights.org/10458/reports/no-war-no-peace-the-denial-of-minority-rights-and-justice-in-sri-lanka.html, pp. 26-28.

[37] Indika Sri Aravinda, "HRC cash strapped", *The Sunday Leader* (Colombo), 17 July 2011, http://www.thesunday leader.lk/2011/07/17/hrc-cash-strapped/.

The HRCSL received 9,901 complaints in 2010.[38] This was a reduction of 21 percent from the previous year. The head office in Colombo which also receives complaints from the adjacent districts of Gampaha and Kalutara accounted for 4,205 complaints, whereas the 10 regional offices accounted for 5,696 complaints. This represented a reduction of 21 percent in comparison to the previous year.

There is no analysis available from the Commission as to whether this reduction is a reflection of an improved human rights situation on the island, or the lack of public confidence in the institution because of its dysfunction in the absence of appointed members, or some other reason. However, regional coordinators claimed that their handling of complaints was not impeded by the absence of Commissioners, as around 90 percent are resolved through conciliation at the local level.

Of the complaints, more than 14 percent were employment-related issues, that is, allegations by public servants of unfairness in promotions, increments, transfers and the like. Other significant complaints included issues of torture, arrest, detentions, harassment and school admissions. In the post-war context, regional offices confirm that there are fewer complaints of missing persons and custodial torture in conflict-affected areas, and an increase in the number of complaints relating to domestic violence, child abuse, and inter-personal land disputes, which are referred to other agencies as these are deemed not to fall within the competence of the HRCSL.

17 percent of complaints received by the head office were ruled to be outside of the HRCSL's mandate. No information is available on the nature of those complaints, nor specific grounds for their exclusion. This is a matter for concern because it is alleged that the HRCSL has excluded a complaint as serious as abduction, by persons identifying themselves as police officers, on the basis that it fell outside of their mandate.[39]

The highest number of complaints recorded outside of the head office, were in its regional office in Vavuniya in the Northern Province, which is nearest to the districts most affected in the last phase of the war in late 2008 and early-to-mid 2009; and where around 270,000 Tamils internally displaced during that period were detained in so-called 'welfare centres' and denied freedom of movement until December 2009.

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[38] Human Rights Commission of Sri Lanka, "HRCSL received 9901 complaints in the year 2010", 3 March 2011, http://hrcsl.lk/english/?p=1543.

[39] Asian Human Rights Commission, *Sri Lanka: Abductions and unfair advantage held as matters falling outside Sri Lanka's Human Rights Commission (HRCSL)*, 21 March 2011, http://www.humanrights. asia/news/ahrc-news/AHRC-STM-044-2011. This instance is reminiscent of the HRC's initial reluctance to record a complaint on the disappearance of Prageeth Eknaligoda in 2010, discussed in B. Skanthakumar, 'Sri Lanka: Atrophy and Subversion of the Human Rights Commission' in *2010 ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia*, FORUM-ASIA, Bangkok 2010, at pp. 215-217, http://forum-asia.org/2010/ANNI2010_TEXTONLY.pdf;

There is no breakdown of complaints available but the majority of the 2,642 complaints recorded in Vavuniya appear to relate to "missing persons",[40] presumably, individuals who were separated from their families during flight from the war zone, or individuals who were detained in temporary camps, or individuals who may have been removed for questioning by security agencies either during screening at a checkpoint or from one of the camps and whose whereabouts are unknown.

Therefore, as detailed above, the HRCSL continued to receive complaints and conduct inquiries into those deemed to fall within its mandate. However, where the complaints could not be settled through conciliation, the "[HRCSL] can't make any recommendations without the Commissioners. We are not empowered to issue recommendations",[41] admitted its then senior-most executive officer. Consequently, of nearly 7,500 complaints received since January 2010, as of August of that year some 5,500 remained unresolved.

One regional non-governmental organisation protested: "Impeding avenues of complaint making and the subsequent inquiries is, quite blatantly, part of the state policy of guaranteeing impunity to the perpetrators, who, in the vast majority of cases are agents of the state itself. The dysfunctionalism of the Sri Lankan Human Rights Commission by the State is nothing less than deliberate."[42]

Within the first quarter of 2011, the Human Rights Commission has recorded 1,295 complaints; one in four of which it determined fell outside of its mandate and were therefore rejected for inquiry and investigation.[43] Once again, the main categories of complaint were employment, torture, harassment, arrest and detention, school admissions, and police inaction as presented below.

| CATEGORY | PERCENTAGE |
|---|---|
| Employment | 15.8 |
| Torture | 7.8 |
| Harassment | 7.5 |
| Arrest and Detention | 7.3 |

[40] Interview with HRCSL Director of Inquiries and Investigations, in Colombo, on 25 May 2011.

[41] BM Murshideen, "SLHRC Overloaded with Unresolved Cases", *Daily Mirror* (Colombo), 27 August 2010, http://print.dailymirror.lk/news/news/19733.html.

[42] Asian Human Rights Commission, "*No action on 12,000 complaints registered at the Human Rights Commission of Sri Lanka*", 27 August 2010, http://www.humanrights.asia/news/ahrc-news/AHRC-STM-186-2010.

[43] Human Rights Commission of Sri Lanka, "Commission records 1295 complaints in the first four months of 2011", 24 June 2011, http://hrcsl.lk/english/?p=1643.

In the absence of duly-appointed members, the already limited authority of the Human Rights Commission (HRCSL) *vis-à-vis* government institutions was seriously undermined. Numerous complainants who had received orders in their favour even in 2009, when at least its previous Chairman was still in office, found that the respondent institution chose to simply disregard the HRCSL.

Thus, the state-owned Sri Lanka Broadcasting Corporation breached its written undertaking to the HRCSL not to make a permanent senior staff appointment until appropriate guidelines for recruitment were in place.[44] In another instance, the HRCSL had recommended that the State Engineering Corporation revoke politically-motivated transfers of its employees and to formulate fair and transparent procedures instead; but five months later, no action had been taken to reinstate those victimised for their political allegiances.[45]

The public education sector is another where there has been ongoing obstruction of recommendations of the HRCSL especially in the North-Central province regarding the non-appointment of Directors of Education.[46] According to one teachers' trade union, the HRCSL has not been pursuing the non-implementation of its recommendations vigorously. In another instance, the HRCSL is alleged to have referred a complaint regarding the appointment procedure for a school principal for the attention of the Secretary of the Education Department who is himself named in the complaint!

Further, the same trade unionist claims that the HRCSL staff are often been unreceptive to representations and communications from his union; and have objected, on occasion, to the presence of union officials in inquiries concerning one of their members.[47] He believes that many of the delays and sometimes even failure of investigations is because the HRCSL is not firm enough with state institutions in insisting that senior officials who are familiar with the matter at hand and have the authority to take remedial action are present in person at hearings. "What is the use of the Human Rights Commission", he asked, "if its recommendations are not implemented?"[48]

The HRCSL claims it is hamstrung in the processing of complaints by delays on the part of the relevant state institution in responding to communications from the Commission; and that

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[44] Neranji Kohona, "SLBC has breached the agreement with the HRC", *Ravaya* (Colombo), 9 January 2011 (in Sinhala).

[45] "The recommendations of the Human Rights Commission have been disregarded", *Ravaya* (Colombo), 31 October 2010 (in Sinhala).

[46] Buddika Mahesh Wijesooriya, "The Commission focuses attention on the Secretary to the Ministry acting against its initial directions", *Lakbima* (Colombo), 29 April 2011 (in Sinhala).

[47] Personal communication from Joseph Stalin, General Secretary of the Ceylon Teachers' Union, in Colombo, on 4 July 2011.

[48] Nabeela Hussain, "HRC recommendations not implemented – Teachers' Union", *Daily Mirror* (Colombo), 7 May 2010, http://print.dailymirror.lk/news/news/9983.html; Prasad Nirosha Bandara, "Human rights orders are not implemented – Ceylon Teachers' Union", *Ravaya* (Colombo), 6 March 2011 (in Sinhala).

sometimes there is also "lack of interest" [49] on the part of the complainant in pursuing the complaint for example, in providing the Commission with the additional information or documentation required. However, it is accepted that education sector officials have been particularly resistant to the implementation of HRC recommendations; in contrast to the greater cooperation received from district and divisional secretariat officers as well as the elections department in 2010.

While the re-constitution of the Human Rights Commission after February 2011 holds out the promise of greater effectiveness, the historical record of the institution – irrespective of the personality and human rights credentials of its members – is sobering. As one legal commentator observed in a close analysis of the HRCSL's past performance: "At its very best and when unwillingly prodded to some action in particularly egregious cases of human rights violations, its orders have been routinely ignored by officials and government bodies."[50]

## IV. Engagement with the International Human Rights System

National human rights institutions (NHRIs) are required in the Paris Principles to engage with the international human rights system in furtherance of their mandate to promote and protect human rights. The forms of engagement that are explicitly enumerated are:[51]

- Promoting and ensuring the harmonisation and implementation of national laws, regulations and practices with international human rights instruments ratified or acceded to by the State;
- Encouraging ratification or accession and implementation of those international human rights instruments to which the State is not yet a party;
- Contributing to State Reports to international and regional human rights bodies from an independent perspective, and;
- Cooperating with the United Nations, its affiliated organisations, regional institutions and national human rights institutions in other countries.

The International Coordinating Committee's Sub-Committee on Accreditation (ICC-SCA) in its authoritative commentary on the Paris Principles ('General Observations') has emphasised the "importance for NHRIs to engage with the international human rights system, in particular the Human Rights Council and its mechanisms (Special Procedures Mandate

[49] Interview with HRCSL Director of Inquiries and Investigations, in Colombo, on 25 May 2011.

[50] Kishali Pinto-Jayawardena, "Focus on Rights: Pressing for improved democracy in Sri Lanka", *The Sunday Times* (Colombo), 6 March 2011, http://www.sundaytimes.lk/110306/Columns/focus.html. Disclosure: Ms. Pinto-Jayawardena is also (Consultant) Deputy Director of the Law & Society Trust.

[51] *Paris Principles: Competence and Responsibilities*: Para 3 (b–e) respectively, UN General Assembly Resolution A/RES/48/134, 4 March 1994, http://daccess-ddsny.un.org/doc/UNDOC/GEN/N94/116/ 24/PDF/N9411624 .pdf?OpenElement.

Holders) and the United Nations Human Rights Treaty Bodies. This means generally NHRIs making an input to, participating in these human rights mechanisms and following up at the national level to the recommendations resulting from the international human rights system."[52] The ICC-SCA has underlined that, a "key function" of an NHRI is "encouraging ratification or accession to international human rights instruments".[53]

The enabling legislation that created the Sri Lankan Human Rights Commission in 1996 partially reflects these expectations when it provides that the functions of the Commission shall be to *inter alia*:

- "[Make] recommendations to the Government regarding measures which should be taken to ensure that national laws and administrative practices are in accordance with international human rights norms and standards" and;

- "[Make] recommendations to the Government on the need to subscribe or accede to treaties and other international instruments in the field of human rights".[54]

Recently, including the year under review, there has been minimal contact by the HRCSL with the international human rights system. In 2010, the HRCSL apparently contributed some information requested by the Government of Sri Lanka in compiling its response to the List of Issues raised by the UN Committee on Economic, Social and Cultural Rights towards its review of the State Report in November. It is unclear what information was submitted but one can surmise it was statistical or updates on its own programme of work, rather than analytical or critical in nature.

In any case, the HRCSL has not submitted reports to UN treaty-bodies and Special Procedures. According to senior staff of the HRCSL, while aware of their responsibilities in this regard, the institution has been hampered by its lack of capacity, specifically human resources, to undertake this work. It is, they affirm, the HRCSL's intention to attend to this shortcoming in future.[55]

There are of course other means by which the HRCSL could already play a part in the international human rights system aside from say the clearly laborious and specialised task of preparing parallel reports to the expert committees created in the core international human rights treaties ratified or acceded by Sri Lanka. These could include simple communications of information to relevant UN Special Procedures Mandate Holders on human rights violations or imminent violations transmitted by email or fax. However, none are known to have been sent in 2010 or in the preceding few years.

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[52] Section 1.4, *ICC Sub-Committee on Accreditation General Observations*, June 2009, http://www.asiapacificforum.net/services/international-regional/icc/sub-committee-on-accreditation/downloads/general-observations/General_Observations_June_2009.pdf.

[53] Section 1.3, *ICC Sub-Committee on Accreditation General Observations*, June 2009, http://www.asiapacificforum.net/services/international-regional/icc/sub-committee-on-accreditation/downloads/general-observations/General_Observations_June_2009.pdf.

[54] Section 10 (d) and (e) respectively, *Human Rights Commission of Sri Lanka Act*, No. 21 of 1996, http://hrcsl.lk/english/ACT/english.pdf.

[55] Interview with the Chairman, Additional Secretary (Legal) and Director of Inquiries and Investigations, in Colombo, on 6 May 2011.

Further, UN Special Rapporteurs (SR) have asked, and on several occasions, for an official invitation from government to visit the island for the purpose of fact-finding, but to no avail. Most recently, in 2010, the SR on Human Rights Defenders made such a request,[56] as did the Independent Expert on Minority Issues,[57] but in both cases neither received a positive response from the government.

The HRCSL should publicly encourage the government to be forthcoming when requests such as these are received in the interests of ensuring full implementation of Sri Lanka's international obligations as well as for greater understanding between the UN human rights system and one of its state parties. While in the absence of members in 2010, the HRCSL may have been constrained in raising these issues with government; it is to be hoped that it will be more vigorous on this score in the future.

## V. Promotion and Protection of Human Rights Defenders

In 2010, the UN Secretary-General (UNSG) reported on intimidation and reprisals against individuals and groups who co-operate or seek to co-operate with the United Nations, its representatives and mechanisms on human rights promotion and protection. Sri Lanka is explicitly cited as an example of a country in which there is de-legitimisation of the activities of human rights organisations, human rights defenders and independent journalists.[58] Concern is expressed in the report over the physical and psychological integrity of dozens of human rights defenders in Sri Lanka who have been subject to media hate campaigns, threats, harassment and intimidation in relation to legitimate activities in defence of human rights including international advocacy. The UNSG has called upon states to ensure that "all acts of intimidation and reprisal are promptly and effectively prosecuted and addressed in an appropriate manner in order to combat impunity...and victims provided with appropriate remedies".[59]

In response to a proposal from human rights defenders (HRDs) in 2009, the Human Rights Commission identified its Director of Inquiries and Investigations as the focal point for HRDs and civil society. However, this mechanism has not succeeded in addressing the broader problem of the promotion and protection of the rights of human rights defenders and women human rights defenders as a group, rather than being confined to inquiries into specific complaints from individual human rights defenders. In 2010, there was only one complaint logged: concerning police inaction following intimidation and threat of violence against an opposition politician.[60]

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[56] Para 7, *Report of the Special Rapporteur on the Rights of Human Rights Defenders, Margaret Sekaggya*, A/HRC/16/44, 20 December 2010, http://www2.ohchr.org/english/bodies/HRCouncil/docs/16session/A-HRC-16-44.pdf.

[57] Para 5, *Report of the Independent Expert on Minority Issues, Gay McDougall*, A/HRC/16/45, 16 December 2010, http://www2.ohchr.org/english/bodies/HRCouncil/docs/16session/A-HRC-16-45.pdf.

[58] Para 40-43, *Report of the Secretary-General on cooperation with the United Nations, its representatives and mechanisms in the field of human rights*, A/HRC/14/19, 7 May 2010, http://www2.ohchr.org/english/bodies/HRCouncil/docs/14session/A.HRC.14.19_en.pdf.

[59] Para 56, *Report of the Secretary-General on cooperation with the United Nations, its representatives and mechanisms in the field of human rights*, A/HRC/14/19, 7 May 2010, http://www2.ohchr.org/english/bodies/HRCouncil/docs/14session/A.HRC.14.19_en.pdf.

[60] Nabeela Hussain, "Bahu goes to HRC", *Daily Mirror* (Colombo), 28 December 2010, http://www.dailymirror.lk/news/8648-hr-filed-against-airport-attack.html.

At regional offices there are no focal points for human rights defenders, and worse still, there appears to be no familiarity with the UN Declaration on Human Rights Defenders.[61] The rationale for such a mechanism was also not evident to regional coordinators who point to the existing process for inquiries and investigations as adequate to handle complaints from local human rights defenders. There is an urgent need for the education and training of HRCSL staff on the scope of state obligations towards human rights defenders.[62] It is also necessary to clear the confusion both conceptually and institutionally between focal points for human rights defenders as distinct from focal points for civil society organisations and activists in general.

The Human Rights Commission of Sri Lanka could play an important role through public denunciations of all acts of intimidation and reprisal; conducting investigations on its own initiative, which are then made public; and in making public its communication of information concerning such acts, and the findings of its inquiries, to international human rights mechanisms including relevant UN special procedures. It could also upload the UN Declaration on Human Rights Defenders on its website and disseminate the Sinhala and Tamil translations. These are but a few examples of the public acts of solidarity that national human rights institutions can manifest towards human rights defenders.[63]

Also in 2010, the UN Special Rapporteur on Human Rights Defenders recommended that national human rights institutions "integrate a gender dimension in the planning and implementation of all programmes and other interventions related to human rights defenders including through consultation with relevant organizations" and "support the documentation of cases on violations against women defenders and those working on women's rights or gender issues".[64] It is to be hoped that the HRCSL will positively act on this advice in the course of its strategic planning in 2011.

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[61] *Declaration on the Right and Responsibility of Individuals,Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, A/ RES/ 53/ 144, 8 March 1999, http://www.unhchr.ch/ huridocda/huridoca.nsf/%28symbol%29/a.res.53.144.en.

[62] See further, UN Special Rapporteur on the situation of human rights defenders, *Commentary to the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, July 2011, http://www.ohchr.org/ Documents/Issues/ Defenders/CommentarytoDeclarationondefendersJuly2011.pdf.

[63] See also, Asian Forum for Human Rights and Development (FORUM-ASIA) and Asia Pacific Forum on Women, Law and Development (APWLD), *Defending the Defenders: Role of National Human Rights Institutions in protecting and supporting human rights defenders in Asia*, Joint submission to the 11th Annual Meeting of the Asia-Pacific Forum of National Human Rights Institutions in Suva, Fiji, 31 July–3 August 2006,http://www.forumasia.org/news/in_the_news/pdfs/Asian%20NGO%20position%20paper%20on%20HRDs%20for%20the%20APF-%20final.pdf; Reprinted in *Law & Society Trust Review* (Colombo), Vol. 16 (No. 225), July 2006, pp. 6-15.

[64] Para 110, *Report of the Special Rapporteur on the Rights of Human Rights Defenders, Margaret Sekaggya*, A/HRC/16/44, 20 December 2010, http://www2.ohchr.org/english/bodies/HRCouncil/docs/16session/A-HRC-16-44.pdf.

## VI. Implementation of References of the Advisory Council of Jurists

The Advisory Council of Jurists (ACJ) was established by the Asia-Pacific Forum of National Human Rights Institutions (APF) to advise it on the interpretation and application of international human rights law and to develop a regional jurisprudence in that area.[65]

The Council comprises individuals of eminence drawn from the higher judiciary, senior academics and human rights experts, nominated by member institutions. When the Sri Lankan Human Rights Commission lost its full membership of the APF in 2009 – following a sequence of events that began with downgrading to 'B' status by the ICC-SCA in 2007[66] – the opportunity for Sri Lanka to be represented on the ACJ was forfeited.

Since 1999, the ACJ has been requested by the APF to provide its opinion on nine issues or references of relevance to national human rights institutions in the discharge of their roles and functions in human rights promotion and protection in the region – most recently on Sexual Orientation and Gender Identity (2010). However, the Opinions that it presents are advisory, that is, in the form of recommendations and suggestions, and therefore are non-binding on APF member-institutions.

Nevertheless, in view of the institutional relationship between the APF and the ACJ, the longevity of the ACJ, the rigour and judiciousness of its opinions, and the considerable investment of time, human and financial resources on this body, one would anticipate that its analyses and at least some of its recommendations have informed and influenced APF members. Helpfully, some of its recommendations are even country-specific.

This report assesses the HRCSL's responsiveness to the first three ACJ Advisory Opinions: on Child Pornography on the Internet (2000); on the Death Penalty (2000); and on Trafficking (2002).

***Child Pornography on the Internet:*** The ACJ noted the competing rights of freedoms of expression, privacy and freedom of information and those which protect and promote the best interests of the child but concluded that given the proven physical and emotional harm inflicted on the child by pornography, it is the child's best interests that are paramount.

The ACJ recommended that Asia-Pacific states should strengthen their regulatory controls in this area through ratification of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (2000). It also proposed the establishment of a Standing Commission of the APF to develop a "model law in

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[65] Advisory Council of Jurists, *Terms of Reference* (as amended), http://www.asiapacificforum.net/acj.

[66] See B. Skanthakumar, 'Sri Lanka: Atrophy and Subversion of the Human Rights Commission' in *2010 ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia*, FORUM-ASIA, Bangkok 2010, at p. 210, http://forum-asia.org/2010/ANNI2010_TEXTONLY.pdf

consultation with internet service providers and monitor its operation", in addition to education, research and regulatory roles.[67]

The HRCSL has conducted awareness programmes on children's rights for public officials especially police officers, probation officers, state children's homes officers, social services ministry officers, local government officers and many others, however there is no indication that it has integrated the specific perspectives of this ACJ Reference within these programmes.

Furthermore, while the Government of Sri Lanka did indeed ratify the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography in 2006, there is no information available to confirm that the HRCSL publicly advocated and lobbied for this significant measure.

***Death Penalty***: The ACJ concludes that the death penalty is ineffective as a deterrent to crime, and draws attention to the possibility of error in the conviction of the accused as well as its disproportionate application to poorer groups within society. In the view of the ACJ, the death penalty has the effect of dehumanising the community and morally legitimises the taking of life.

While commending Sri Lanka for its ratification of the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and the Convention on the Rights of the Child (CRC), the Advisory Council of Jurists recommends ratification of the Second Optional Protocol to the ICCPR (aiming at the abolition of the death penalty).[68]

The ACJ observed that not all crimes that currently attract the penalty of death in Sri Lanka should be classified as "most serious crimes" (Article 6 of the ICCPR) and recommends that the national law be changed accordingly.

It also counsels against the re-implementation of the death penalty (which has been suspended for several years) and observes that the "resumption of executions and expansion of offences punishable by death in Sri Lanka would be contrary to the principles underlying a just and civilized society and contrary to the terms and spirit of the ICCPR to which Sri Lanka is a party".

Finally, the ACJ expressed its concern regarding the thousands of reported extra-judicial killings and disappearances since the late 1980s that are blamed on state security agencies, and observed that "Sri Lanka has an obligation to ensure that the rule of law is observed, that

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[67] Advisory Council of Jurists, *Reference on Child Pornography on the Internet* (2000), http://www.asiapacificforum.net/acj/references/child-pornography/downloads/child-pornography-on-the-internet/final.pdf, p. 5.

[68] Advisory Council of Jurists, *Reference on the Death Penalty* (2000), http://www.asiapacificforum.net/acj/references/death-penalty/related-files/reference-on-the-death-penalty/final.pdf, pp. 14-15.

law enforcement agencies are accountable and that extrajudicial killings and disappearances not continue".

The Human Rights Commission has most recently in July 2005, publicly expressed its opposition to the death penalty.[69] There is no information to hand, as to whether it has also advocated ratification of the Second Optional Protocol to the ICCPR.

The reintroduction of the death penalty is periodically canvassed by cabinet ministers and parliamentarians, and when questioned, there appeared to be some ambivalence within the Human Rights Commission on the issue.[70] It is important that the new members of the Commission categorically re-affirm the HRCSL's original position and also work towards abolition of the death penalty and ratification of the ICCPR's Second Optional Protocol.

***Trafficking***: The ACJ Reference makes several recommendations including (i) ratification (of the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children); (ii) implementation (legislative and administrative measures that accompany and even precede ratification); (iii) enforcement (co-operation between judicial, administrative and non-governmental agencies); (iv) victims' rights protection; (v) research and policy-making; (vi) education; and (vii) bilateral and multilateral cooperation including cross-border coordination and information-sharing.[71]

Sri Lanka signed the UN Protocol in 2000 and ratified the instrument in 2006. It has also signed the SAARC Convention on Preventing and Combating Trafficking of Women and Children for Prostitution in 2002. The SAARC Convention has been domesticated in national law (through Act No. 30 of 2005) and the Penal Code has been amended to include the offence of trafficking (through Act No. 16 of 2006).

The Human Rights Commission conducted training and education programmes on the prevention of human trafficking for law enforcement and other state officials most recently in 2006-2007.[72] These programmes were funded by an international non-governmental organisation engaged in the promotion of labour rights. It is not clear whether this training programme integrated the recommendations of the ACJ Reference, or was entirely framed by the specific issues of concern to the donor.

There is also no record of any ongoing monitoring by the Human Rights Commission in this area, nor whether it has engaged in advocacy around the specific recommendation of the ACJ

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[69] Sec. 3.4.5, Human Rights Commission of Sri Lanka, *2004-2005 Annual Report*, Colombo, 2006, pp. 58-59, http://hrcsl.lk/english/?page_id=135.

[70] Interview with the Chairman, Additional Secretary (Legal) and Director of Inquiries and Investigations, in Colombo, on 6 May 2011.

[71] Advisory Council of Jurists, *Reference on the issue of Trafficking* (2002), http://www.asiapacificforum .net/acj/references/trafficking/downloads/reference-on-trafficking/final_report.pdf.

[72] Sec. 2.3.2, Human Rights Commission of Sri Lanka, *Annual Report 2006 & 2007*, Colombo, 2008, http://hrcsl.lk/PFF/2006%20&%202007%20%20HRCSL%20Annual%20Report.pdf., p. 12.

Reference. An otherwise important research publication by the HRCSL in 2005 on human trafficking[73] is silent on this aspect, as are its annual reports.

In short, an overall assessment of the implementation of the first three References of the Advisory Council of Jurists does not indicate that these have influenced the Human Rights Commission of Sri Lanka in any discernible way. More than 10 years after these References were adopted by the APF, there is limited awareness and understanding of the work of the ACJ; and limited support for the ACJ's analysis and recommendations.

## VII. Consultation and Cooperation with Civil Society Organisations

The deterioration in relations between the Human Rights Commission and human rights defenders after the unconstitutional appointment of its members in 2006 has been an unhappy feature in previous ANNI reports. The Commissioners who served between 2006 and 2009 made no attempt to overcome the scepticism of critical civil society actors towards their commitment to human rights promotion and protection, and instead fed off, and into, the shrill anti-NGO rhetoric of the government.

Two national-level civil society forums were conducted in Colombo in 2010, on 26 March and on 24 September; within the framework of the 'Human Rights Joint Programme', which is funded by several UN agencies (primarily the United Nations Development Programme) until the end of 2011, and one of whose objectives is to strengthen the Human Rights Commission.

In the absence of members of the Commission, the staff appeared to be less inhibited in interactions with civil society actors. Understandably, they were occasionally defensive of the functioning and performance of the HRCSL under their watch. In their view, the carping by critics did not recognise the HRCSL's success in the resolution of most complaints through mediation; nor appreciated the political and resource constraints under which the institution operates, especially in a context when it was without members and relied on its senior executive officers to keep it afloat in stormy waters.

The format of the forums was to begin with a keynote speech by an invited 'expert', followed by presentation of recent activities, and occasionally perspectives, of the HRCSL, and then open discussion led by civil society activists. The composition of civil society representatives has differed between forums; and for some it will be their first encounter with the HRCSL's head office. Thus, the expectations and participation differs between those who are looking for information on the HRCSL's powers and functions; to individuals who will raise local issues or even allegations concerning themselves; to others interested in the HRCSL's

[73] Human Rights Commission of Sri Lanka, *Human Trafficking and National Human Rights Institutions: Co-operating to end Impunity for Traffickers and to secure Justice for Trafficked People*, Colombo, 2005, http://hrcsl.lk/PFF/Human%20Trafficking%20and%20National%20Human%20Rights%20Institutions%20-%20.pdf.

working methods and effectiveness, as well as acts and omissions concerning general issues, including of serious human rights violations. There is no report-back on concerns and proposals made by civil society organisations. The minutes of the forums is not publicly available, and is usually circulated at or shortly before the following forum.

It should be recalled that the Asia-Pacific Forum's own framework for partnership between national human rights institutions and human rights non-governmental organisations is for consultation processes that are "regular, transparent, inclusive and substantive"[74]. In Sri Lanka, there have not been spaces and opportunities for structured, continuous and intensive dialogue between the Human Rights Commission and human rights defenders in particular. For instance, there is no NGO liaison committee that meets between the large national forums. Instead, the HRCSL appears to have selective relationships with civil society organisations and individuals regarded as non-confrontational or non-threatening.

At regional level, civil society forums have been organised where there is UNDP funding, and not conducted where there is none, raising concerns over the HRCSL's commitment to ensure that collective and structured interactions are not confined to Colombo; and the willingness of its regional coordinators to engage with the plurality of civil society organisations in their region.

Some regional coordinators appear to view multi-stakeholder networks initiated by non-governmental organisations, for example on child protection, that include representatives of local and central governmental authorities and the HRCSL, as sufficient for interaction with civil society organisations.

The HRCSL also views its collaboration with non-governmental organisations – as resource persons for the latter's training programmes – as an illustration of its cooperation with civil society organisations. These are also of benefit to the HRCSL itself, in the absence of adequate funding to conduct its own human rights awareness programmes for police personnel, administrators, teachers and others, in fulfilling its mandate on human rights promotion and education. Further, there is no recognition by the HRCSL that it has anything to learn from human rights defenders and rights-holders.

## VIII. Conclusion and Recommendations

In the absence of members (between June 2009 and until February 2011), the intervening year was an *annus horribilis* for the Human Rights Commission of Sri Lanka (HRCSL). The senior staff sought to safeguard the institution, and its day-to-day functioning, to the best of their ability and exercising their own judgement. They did not have many allies, nor did they seek to find new ones.

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[74] Para 2.1, *Kandy Program of Action: Cooperation between national institutions and non-governmental organisations*, Kandy, Sri Lanka, 26-28 July 1999, http://www.asiapacificforum.net/support/training/regional-workshops/non-government-organisations.

Clearly, the HRCSL suffered a loss of authority in relation to state actors and agencies, and loss of credibility in its effectiveness as a national institution for the promotion and protection of human rights. Battered in the maelstrom of Sri Lanka's continuing human rights crisis and deepening state authoritarianism, the HRCSL was perceived to be silent and powerless.

In these circumstances, despite the transparently flawed process of selection of members in 2011, the absence of public consultation on nominees, and grave concerns over the human rights competence and consciousness of some among those appointed, the reconstitution of the HRCSL may be regarded as a pre-condition for its rejuvenation.

***Recommendations to the Government of Sri Lanka***

1. Repeal the Eighteenth Amendment and ensure the principle of independence in the selection and appointment of members to the Human Rights Commission.

2. Amend the Human Rights Commission Act – in consultation with the Human Rights Commission, parliamentarians, public administrators, civil society organisations and the general public – to enable enforcement of the HRC's recommendations.

3. Ensure parliamentary debate on the annual report of the Human Rights Commission.

***Recommendations to the Human Rights Commission of Sri Lanka***

1. Demonstrate independence of mind and spirit by raising and tackling controversial issues that violate or restrict human rights, including the continuance of the state of emergency, and being in solidarity with victims of human rights abuses and human rights defenders.

2. Nominate one among its members to be the focal point for human rights defenders within the Commission, and establish a systematic functioning mechanism for the HRCSL to relate to human rights defenders and women human rights defenders as a group.

3. Ensure that all members and staff are trained on the application of the Paris Principles, the ICC-SCA General Observations, and the References of the Advisory Council of Jurists, in addition to international human rights laws and standards, in the performance of their duties.

## SIXTEENTH ANNUAL MEETING & BIENNIAL CONFERENCE OF THE ASIA PACIFIC FORUM (APF) OF NATIONAL HUMAN RIGHTS INSTITUTIONS- CONCLUDING STATEMENT

6th to 8th September 2011, Bangkok, Thailand

1. The Asia Pacific Forum of National Human Rights Institutions (the APF), consisting of the national human rights institutions (NHRIs) of Thailand, Afghanistan, Australia, Bangladesh, India, Indonesia, Jordan, Malaysia, Maldives, Mongolia, Nepal, New Zealand, Palestine, Philippines, Qatar, Republic of Korea, Sri Lanka and Timor-Leste, held its Sixteenth Annual Meeting and Biennial Conference in Bangkok, Thailand from 6th to 8th September 2011.

2. The Forum Councillors expressed their deep gratitude and appreciation to the National Human Rights Commission of Thailand for hosting the conference.

3. Professor Amara Pongsapich, Chairperson of the National Human Rights Commission of Thailand and Chairperson of the APF made the welcome address and Professor Dr. Prawase Wasi, Chairperson of the National Reform Assembly of Thailand delivered opening remarks at the inaugural ceremony.

4. The Forum Councillors welcomed the participation of the Chairperson of the International Coordinating Committee of National Institutions (ICC) and representatives from the observer national institutions from Kazakhstan, Kyrgyzstan and Oman, the United Nations Office of the High Commissioner for Human Rights, the United Nations Development Programme, the United Nations Population Fund and UN Women, the parliaments and/or governments of Australia, India, Indonesia, New Zealand, Pakistan, Palau, Samoa, Singapore, Sweden, Thailand, United Arab Emirates and Vietnam, the intergovernmental organisations of the European Union and the Pacific Community, the Asian NGO Network on National Institutions (ANNI), the Indonesian Representative to the Association of South East Asian Nations' (ASEAN) Intergovernmental Commission on Human Rights, and approximately 70 international, regional and national non-governmental organisations (NGOs) and significant constitutional and academic institutions.

*The APF, during its open plenary sessions:*

5. Informed the Conference of the outcomes of the meeting of Forum Councillors held on the 6th September 2011, highlights of which included:

    - The unanimous election of the Chairperson of the National Human Rights Commission of Thailand to the position of Chairperson of the APF, and the Jordan

National Centre for Human Rights and the National Human Rights Committee of Qatar to the two positions of Deputy Chairpersons.

- The admission of the National Human Rights Commission of Bangladesh as an associate member of the APF.
- The election of APF member institutions to various positions on the ICC.
- The nomination of the NHRI from Jordan to host the ICC International Conference in 2012.
- The decision to establish a sub-committee of the Forum Council to consider the expansion of the APF's presence sub-regionally.
- The decision to accept with appreciation the offer of the NHRI from Qatar to host the Eighteenth APF Annual Meeting and Conference in 2013.

6. Recognised the importance of the roles of civil society in the promotion and protection of human rights, and thereby encouraging the cooperation between NHRIs and civil society both at the national and regional levels.

7. Forum Councillors thanked the National Human Rights Commission of Thailand for organising informal lunch discussions between participants and representatives of civil society organisations to discuss the issues of sexual orientation and gender identity, and the right to development.

8. Expressed appreciation to Professor Prawase Wasi, Chairperson of the National Assembly, for his opening remarks emphasising the linkages of human rights, human dignity, equality, civility and a new consciousness for the development of an integrated human rights system.

9. Expressed appreciation to H.E. Sihasak Phuangketkeow, former President of the United Nations Human Rights Council and Ms. Rosslyn Noonan, Chairperson of the ICC, for their insights into the role of NHRIs in the United Nations Human Rights Council. Forum Councillors reaffirmed the positive and practical contribution that NHRIs can make to the international human rights system.

10. Welcomed the reports of the representatives from the United Nations, including the Office of the High Commissioner for Human Rights, the United Nations Development Programme and the United Nations Population Fund on their activities in cooperation with the APF and its member institutions. Forum Councillors reaffirmed their wish to work in cooperation with UN agencies to ensure the practical realisation of the protection and promotion of human rights nationally, regionally and internationally.

11. Welcomed the reports of the governments of Australia, Palau, Samoa and Thailand and the intergovernmental organisations of ASEAN and the Pacific Community on activities undertaken to protect and promote human rights including support for NHRIs. In particular they welcomed the commitments made by the governments of Palau and Samoa to actively explore the establishment of NHRIs and offered these governments the support of the APF. The APF reaffirmed its commitment to support Asia Pacific governments in the establishment of NHRIs in compliance with the Paris Principles.

12. Welcomed the reports and proposals from ANNI and other NGOs developed at their meeting on 5th to 6th September 2011 with regards to the 'NHRI participation in UN mechanisms', 'Kandy Program of Action', 'Human Rights, Sexual Orientation and Gender Identity', 'Human Rights Defenders and the development of a reference to the APF Advisory Council of Jurists', and the 'Right to Development'. Forum Councillors expressed their appreciation for the constructive contribution of NGOs and thanked them for their submissions, participation and advocacy at the meeting. Forum Councillors agreed to carefully consider the NGO proposals in the development of the APF's regional activities.

13. Welcomed the reports from APF member institutions on the implementation of the recommendations of the APF's Advisory Council of Jurists reference on sexual orientation and gender identity. Forum Councillors took note of the report of NGOs during the lunch discussion on the human rights situation of persons with diverse sexual orientation and gender identity in the region and their recommendations to APF member institutions to be proactive in ensuring respect, protection and fulfilment of Lesbian, Gay, Bisexual and Transgender (LGBT) rights by, among other things, establishing a dialogue with LGBT communities, advocating for legal reform and promoting education on LGBT rights.

14. Forum Councillors recalled the outcomes of their 2009 regional workshop on the Yogyakarta Principles and the recommendations of the APF's Advisory Council of Jurists and requested that the secretariat continue to assist APF member institutions in the implementation of the recommendations.

15. Considered the issue of the right to development, particularly the challenges facing its realisation. Forum Councillors warmly thanked the Honourable Dr. Hassavut Vititviriyakul, President of the Supreme Administrative Court of Thailand for his keynote speech which emphasised the importance of appropriate structures and mechanisms to protect the right to development and other human rights to ensure that the benefits of development are fairly distributed.

16. Recalled that the 4th December 2011 marks the 25th anniversary of the adoption by the UN General Assembly of the Declaration on the Right to Development. The conference reiterated the notion that the right to development is not about charity, but enablement

and empowerment. The Declaration, while identifying obstacles to development and seeking to empower, individuals and peoples, calls for the creation of an environment of good governance at both national and international levels that enhances transparency and accountability of duty bearers.

17. Confirmed that the right to development can guide NHRIs responses to contemporary challenges. NHRIs have a unique role to play in promoting and implementing the right to development while carrying out their respective mandates.

18. Considered the situation of human rights defenders. NHRIs reaffirmed their role in being a 'defender of the defenders' and took note of the call of civil society organisations that NHRIs advocate for formal recognition of human rights defenders by governments through legislation or any other mechanism to ensure their protection.

19. Noted the importance of access to information, freedom of expression and the role of a free media (including new social media) in investigating human rights violations and raising awareness of the importance of human rights including the right to development.

20. Noting that development projects, both government and private sector, can have adverse impacts on communities, especially marginalised peoples. NHRIs reiterated that the prime responsibility of States is to respect, protect and fulfill human rights, including the right to development.

21. Noted recent developments in the Asia Pacific region, including the new awakening of Arab peoples. NHRIs support the struggle and aspirations of the peoples of the region to the right to freedom and the realisation of their human rights including the right to development.

22. Acknowledge the challenges of member NHRIs in situations of conflict such as Afghanistan and Palestine.

23. Acknowledged with appreciation the services and contributions made by Ms. Rosslyn Noonan, former Chief Commissioner of the New Zealand Human Rights Commission and the Chairperson of the ICC.

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