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Mass Grave Sites in Sri Lanka: History and Legal Framework

Sophie Bisping

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International Centre for Ethnic Studies

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Mass Grave Sites in Sri Lanka: History and Legal Framework

by

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Mass Grave Sites in Sri Lanka
History and Legal Framework

Background and context of the mass grave sites in Sri Lanka, including the historical and legal framework.

Legal Framework and International Law

Investigation and Documentation

Conclusion and Recommendations

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The first part of the paper is devoted to a general discussion of the
 problem. It is shown that the problem is of a very general nature
 and that it is closely connected with the theory of the
 differential equations of the second order. The second part of the
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1. Introduction

The Sri Lankan civil war lasted three decades, officially starting in 1983 and ending in 2009. The war pitted the Sinhalese-dominated Sri Lankan Government against the Liberation Tigers of Tamil Eelam (LTTE) insurgent group, who campaigned to establish an independent state for the Tamil minority in the Northern and Eastern Provinces (Anandakugan 2020). The conflict officially began in July 1983, a month that saw violent riots targeting Tamils in Colombo, later becoming known as “Black July”. Lasting three decades, the fighting ended in May 2009, when government security forces announced that they had killed the LTTE leader. While more than ten years have passed since the end of the conflict, many issues remain unresolved. One of these is the high number of mass graves that have been discovered on the island. In 2014, a report from the Asian Human Rights Commission listed the existence of 28 mass graves (Ilangamuwa 2014) and four more have been discovered since then. By aggregating sources from press articles, government press releases, and human rights organisations, this report has arrived at a total of 32 reported mass graves.¹ Six of these sites are known graves created following the tsunami disaster in 2004 and, as such, are not the focus of this report. With regard to the other sites, only a few official investigations have taken place. Yet none has led to prosecutions nor to the identification of victims despite the Government’s legal obligation to do so in domestic and international frameworks, and in spite of calls from local communities for exhumations.²

Citizens campaigning for exhumations are sometimes also involved in the political struggle to have enforced disappearances recognised and the issue addressed by government officials. It is often suspected that some of the victims in mass graves are persons who have been forcibly disappeared.³ Sri Lanka has the world’s second highest number of cases registered with the *United Nations Working Group on Enforced or Involuntary Disappearances*: it is estimated that between 60,000

1 See the table in the Annex 1 for specific information on each site and its discovery.

2 See, for example, the case of the mass grave at Kaluwanchikudy, where 66 villagers and relatives of Muslim war victims demanded that the grave be exhumed in order to organize a proper burial (Wijedasa 2014). In the case of the grave at Sooriyakanda, villagers also called for exhumation (Borham and Arachchi 2018).

3 The Preamble and Article 2 of the *International Convention for the Protection of All Persons from Enforced Disappearance* define an *enforced disappearance* as the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorisation, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.

to 100,000 people were subject to enforced disappearances since the beginning of the war in 1983 (Ganguly 2021). The investigations of mass graves could lead to much needed answers for the families of the disappeared and also shed light on the potential responsibility of the Government in events of mass violence that occurred during the war. However, campaigning for the investigation of enforced disappearances does not always overlap with a desire to exhume mass graves, as there are some activists for groups such as *Mothers of the Disappeared* and *Families of the Disappeared* who are unwilling to accept the death of their missing loved ones. Furthermore, mass graves can also be the result of other crimes aside from enforced disappearances. Nonetheless, when asked about the implications of exhumation for the political struggle of these groups, Brito Fernando, President of the civil society group *Families of the Disappeared*, affirmed that all discovered mass graves should be exhumed, the victims identified and their remains returned, because it would allow families to properly mourn their loved ones (Brito Fernando 2022).

Knowledge of these sites and of the laws that pertain to their discovery, investigation, and commemoration is sparse and scattered across different sources. The current report aims to remedy this situation based on a review of governmental documents, media sources, literature from human rights organisations, and interviews with Sri Lankan activists and lawyers active in 2022.⁴ This work first gathers the known information about these sites and provides an overview of the main sites that were investigated. It then establishes the legal frameworks under which mass graves can be investigated and the rights of the victims and their families protected. This information will be useful not just for human rights lawyers in Sri Lanka, but also for any person wanting to be better informed about this issue. A primary aim of this report is to render more accessible the laws governing every step of the management of mass graves in a post-conflict society, from their discovery to their commemoration. Simultaneously, this report offers some lessons drawn from previous mass grave investigations around the world. This might inform future discussions among civil society actors on the issues of enforced disappearance and accountability in Sri Lanka.

⁴ The people interviewed for the purpose of this report include Brito Fernando - President of *Families of the Disappeared*, the author Sarah Kabir, the scholar Chulani Kodikara, and the activist Ruki Fernando.

The scope of this work is limited to mass graves, defined here as a burial site containing the remains of three or more unidentified victims, where the “circumstances surrounding the death and/or the body-disposal method warrant an investigation as to their lawfulness” (Klinkner 2020, 4). Yet, there is no international legal consensus on the definition of a mass grave (Callamard 2020). Some define it as two or more bodies buried together (Minnesota Protocol 2017, 110), while for others, it has to be six or more individuals (Haglund, Connor, and Scott 2001). Forensic experts describe mass graves as a “burial site containing the remains, often commingled, of numerous persons” (Pass and Embar-Seddon 2015), with sites taking “the forms of a trench, pit, well organised or sectioned and with variable body densities.” (Fernández-Álvarez et al 2016, 10). The UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions adds the prerequisite that the site be presumed to “be linked to mass human rights violations and/or that it triggers an obligation to investigate” (Callarmard 2020, 4). Thus, mass graves also have the potential of providing evidence for various human rights violations. The terminology used in this report has been drawn from forensic scientific literature. The term ‘excavation’ is thus used to denote the removal of earth to find buried remains and other types of evidence. It typically refers to the removal of non-human buried evidence. ‘Exhumation’ refers to the specific action of disinterring bodies that have been found. Both actions are involved in the investigation of a mass grave.

Around the world, mass graves have many layers of significance (social, political, religious, and more) and the relevant literature has developed along interdisciplinary lines. While historians try to shed light on the circumstances and events that led to their creation, political scientists and philosophers have contributed theories on the genesis of mass violence and the political circumstances that allow for the creation of mass graves.⁵ Legal scholars have attempted to systematically analyse mass crimes (Anstett and Dreyfus 2016, 4) and create a legal framework to prosecute them, evaluating mass graves as criminal evidence. Forensic anthropologists and archaeologists have developed scientific procedures to determine the identity of victims and the time of death. In recent years, forensic sciences have increasingly been used to support humanitarian action by helping the correct and dignified

⁵ See for example the works of Hannah Arendt for philosophical theories on the genesis of mass violence. In recent decades, the increase in scholarship on mass violence has given rise to the field of genocide studies and publications such as the *Journal of Mass Violence Research, Genocide Research and Prevention*.

management of the deceased and documenting human rights violations, giving rise to the field of humanitarian forensics (Cordner and Tidball-Binz 2017). This report is informed by these academic conversations as well as the grey literature produced in the last decade.

There is an increasing availability of guidelines, protocols and best practice documents issued by NGOs regarding the complex process of investigating mass graves. Particularly influential was the 2020 *Bournemouth Protocol on Mass Grave Protection and Investigation*. This Protocol was written by scholars at Bournemouth University in partnership with the *International Commission on Missing Persons* (ICMP). It offers guidance on investigating and protecting mass graves by bringing legal rules and informed practice together to support the various actors involved with mass graves, from their discovery to their commemoration. This report draws from this Protocol to reflect on the place of mass graves in international legal frameworks.

However, *The Bournemouth Protocol* remains a publication offering a model that must be adapted to each situation. In striving for best practices, the recommendations of the Protocol may at times appear disconnected from the local resources available for the exhumation, investigation, identification of bodies, and commemoration of a mass grave. A successful forensic investigation requires gathering DNA data samples from surrounding communities into a DNA database, and lab procedures to identify each person, which is a lengthy and intensive process of data gathering. Author Adam Rosenblatt has described how mass grave investigations are marked by global inequalities, as there is a vast difference between the resources available in the Global North versus in the Global South (Rosenblatt 2020). Demands from international bodies for countries to investigate these sites sometimes seem blind to this difference.

An interrelated issue is the lack of a favourable political context to provide these resources. Many societies that have experienced instances of mass violence “have had to wait for a favourable political context to emerge, along with freer access to archives, before they could be documented” (Anstett and Dreyfus 2016, *Methodological Approaches*, 2). When excavating in unfavourable political contexts, it is important to consider societal risks of furthering divides. Scholars Elizabeth Anstett and Jean-Marc Dreyfus argue that, when the identification of

victims represents a risk of engendering more violence, it is important to consider if the problems created would outweigh the benefits expected from a reburial (Anstett and Dreyfus 2015, *Human Remains and Identification*, 4).

It is also important to situate the explanatory power we lend to forensic results. A forensic investigation is far from the only remedy to understand the circumstances leading to the creation of these sites. Since the mid-1980s, societies that have experienced mass violence have given increasing attention to material evidence rather than to survivors' narratives to construct an intelligible account of what happened (Anstett and Dreyfus 2015, *Human Remains and Identification* 7). This has been called the forensic turn (Dziuban 2017, 12). Though forensic evidence is necessary for a criminal investigation, it is not the only way of providing answers to a community. Furthermore, scholars Eric Stover and Rachel Shigekane suggest that the treatment of human remains as evidence for trials can sometimes overlook community needs for reburying their dead (Stover and Shigekane 2002). Especially if they are conducted by state security forces, forensic investigations of mass graves can create a feeling of insecurity for communities that have a history of violence with the State. Author Sarah Kabir suggests this might be the case in communities in the north and east of Sri Lanka, which are still heavily militarised.⁶ This in turn might result in those communities not trusting the results of the analysis, in which case forensic testing might not lead to a truth that is accepted by local communities.

Indeed, both Tamil and Sinhalese civil society groups argue that the current memorialisation and documentation of the civil war tend to be one-sided,⁷ potentially reinforcing divisions between communities. It is important to resist a triumphalist narrative in the search and identification of bodies, as such media stories can be instrumentalised for polarising messages that do not necessarily work towards reconciliation and healing. The sensitivity of this topic makes it especially susceptible to political instrumentalisation and media sensationalism.

⁶ For more detailed information see "The Forever War? Military Control in Sri Lanka's North", *International Crisis Group* 2014, available at <<https://www.crisisgroup.org/asia/south-asia/sri-lanka/forever-war-military-control-sri-lanka-s-north>>

⁷ See for example "Selective Memory: Erasure & memorialisation in Sri Lanka's North", report written for the Colombo-based *Centre for Policy Alternatives* in 2017, available at <<https://www.cpalanka.org/selective-memory-erasure-memorialisation-in-sri-lankas-north/>>; as well as "Situation Briefing No.4: Sri Lanka's Repression of the Tamil Polity's Right to Remember", article written by the Jaffna-based *Adayaalam Centre for Policy Research* in 2021, available at <<http://adayaalam.org/situation-briefing-no-4-sri-lankas-repression-of-the-tamil-politys-right-to-remember/>>

Still, authors and activists interviewed for this report emphasised the importance of fostering a discussion on what happened at the site itself. This has proven difficult with the mass graves that have so far been discovered in Sri Lanka. The investigations have not been able to establish coherent and inclusive narratives for the communities affected. In her writing about enforced disappearances, scholar Chulani Kodikara conceptualises the governmental discourse on this issue as one of erasure: both discursively, in terms of public denial of the magnitude of this issue, and physically, as the disappeared remain unaccounted for (Kodikara 2022). Once discovered, mass graves seem to become integrated into this logic of erasure. As the next section will show, governmental officials are quick to challenge that mass grave sites have anything to do with enforced disappearances and advance different hypotheses to explain their existence. This contributes to a lack of trust among local communities and international groups in the ability of the Government to successfully investigate and memorialise a mass grave site.

This work is divided into three sections. The first provides historical context and synthesises knowledge of the main sites and their investigations. The second establishes the relevant domestic and international legal instruments that could frame the discovery, investigation, and commemoration of a mass grave. The third section discusses best practices in the management of these sites in post-conflict societies, based on theoretical perspectives and international guidelines. In the annexes, the reader will find a table of the known sites (Annex 1), relevant international and foreign jurisprudence (Annex 2), the laws mentioned throughout the report (Annex 3), and further guidelines for mass grave management from non-governmental organisations (Annex 4).

This report attempts to lay the groundwork for further research on the topic. It is one part of a larger project on mass graves, led by the *International Centre for Ethnic Studies* in Colombo. It will be followed by the creation of a documentary and seminars with civil society actors on the topic. Scholarship on mass graves and activists argue that adequate investigations and memorialisation of these sites are important for a sustainable post-conflict reconciliation process in Sri Lanka. Yet there remains a lack of reliable and verified information about these sites. This report centralises the available information and links it to the legal knowledge relevant to these sites. We first delve into the history of the sites that have been investigated.

2. History of Main Investigations

Though 32 graves have been listed, only seven have been excavated: in Sooriyakanda, Chemmani, Jaffna, Matale, Kalavanchikudy, and two in Mannar. After a brief overview of the events that most probably led to the creation of these sites, this section focuses on the investigation of each of the seven sites, from the moment of discovery to the conclusion of the investigations. While some of the investigations overlap in time, this section will tackle these sites one by one, in chronological order of their discovery. Information is sparse on the specific events that caused these mass graves to be created. Given the unequal amount of information on the sites, it is difficult to systematically provide the same level of detail for each mass grave. This section presents what the author was able to gather. For a more systematic presentation of the information on each site, the table in Annex 1 can be helpful. The map published by the *Asian Human Rights Commission* (Ilangamuwa 2014) is helpful to locate the seven sites that will be discussed.



Source: Ilangamuwa, Nilantha. "Sri Lanka, the island of mass graves", *Asian Human Rights Commission*, 3 June 2014, <http://www.humanrights.asia/news/ahrc-news/AHRC-ART-043-2014/>.

A brief look at Sri Lanka's history is necessary to situate these sites in their larger context. The Sri Lankan civil war, from 1983 to 2009, was the context in which many massacres occurred. There were several violent clashes that do not fit within the civil war narrative, but feature in the suspected causal events for mass graves on the island. As in many civil wars, the exact details about these events are often blurry. The complexity of interactions between and within each community cannot always be subsumed in the larger dichotomy of the LTTE and the Sri Lankan Government. Four examples of such interactions are particularly important to touch upon.

First, over the course of its political ascension in the north and east of the island, the LTTE was involved in clashes with other Tamil groups campaigning for Tamil independence. This led to fighting between groups, notably in 1986 when members of the LTTE killed more than 100 fighters from another rebel group, the Tamil Eelam Liberation Organisation (TELO) (Cronin-Furman and Arulthas 2021).

Secondly, in the centre and south of the island, the years 1987 to 1989 saw the insurrection of the Marxist-Leninist political group Janatha Vimukthi Peramuna (hereafter JVP; translated as 'People's Liberation Front'). The party was mainly composed of Sinhala Buddhist citizens and the uprising was violently repressed by the government security forces. This event has been thought to be the origin of mass graves in Sooriyakanda and Matale.

A third source of violence has been the protracted tension between the LTTE and Muslim populations in the north. This resulted in the 1990 expulsion of Muslims from the Northern Province and the 1992 killing of the Muslim population of the village of Palliyagodella by the LTTE forces (McGilvray and Raheem 2007) ignoring the interests and concerns of the island's 8 percent Muslim (or "Moorish").

Fourthly, the Indian Peace Keeping Forces were deployed from 1987 to 1990 to support the Sri Lankan Government in its efforts to broker peace with the LTTE. It was a period during which numerous battles were fought between the Indian Peace Keeping Forces and the LTTE in the Northern Province

Human rights advocacy groups have been aware of the existence of mass graves in Sri Lanka since at least 1992 (Human Rights Watch 1992, 6). However, it was

only in 1994, under the Government of Chandrika Kumaratunga and the Sri Lanka Freedom Party (SLFP) that a first investigation was opened (Wickramasinghe 2014, 165). Her Government presented itself as seeking peace and established four different commissions of inquiry to investigate the enforced disappearances that took place from 1988 to 1994 (Wickramasinghe 2014, 309). These commissions worked between 1994 and 2000.⁸ Between 1994 and 1997, the commissions received 27,526 cases of disappearances of which they investigated 16,742 (Senanayake 2018, 111) and listed 12 mass graves sites.⁹ Their final report was published in 1998. Between 1998 and 2022, an additional 20 graves were reported, as indicated by the Asian Human Rights Commission and other governmental reports.

This report will delve deeper into the history of the main sites that were officially investigated by governmental actors. The sites will be featured chronologically based on their date of discovery: Sooriyakanda in 1994, Chemmani in 1998, the Jaffna Durayappa Stadium in 1999, Matale in 2012, Kalavanchikudy in 2014, and finally, two graves in the Mannar district in 2013 and 2018. These sites were chosen based on the magnitude of the graves (or suspected magnitude, in the case of Kalavanchikudy), and because they showcase the complexity of mass grave investigations in Sri Lanka. A few other sites have also been investigated, such as the sites in Mirusivil in 2000 and in Mankulam in 2020, (see Annex 1), and those investigation have faced similar difficulties as the ones illustrated in the cases below. Each subsection features the way in which the grave was discovered, the investigative steps that were taken, and their results, if any. Most investigative efforts have not been successful in identifying victims or in establishing clear narratives of the events that led to the grave or prosecuting responsible actors. The obstacles to these goals are manifold and will be explored throughout this report.

One obstacle was outlined in 2015 by the *UN Working Group on Enforced Disappearances*, who visited the mass grave sites in Matale and Mannar as well as the Governmental Analyst Department's DNA laboratory. It testified to "intimidatory tactics, threats, sexual abuse and other forms of coercion or

⁸ For more information on the work of these commissions, see Human Rights Watch, *Recurring Nightmare: State Responsibility for "Disappearances" and Abductions in Sri Lanka*, 6 March 2008, Volume 20, No. 2(C), at page 20: <https://www.refworld.org/docid/47dofab62.html>

⁹ For more information, see *Country Situation in Sri Lanka*, Asian Federation Against Involuntary Disappearance, https://www.afad-online.org/voice/maiden_01/cs_srilanka.htm.

vigilance from some security and investigatory officers, particularly from officials believed to be from the Criminal Investigation Department (CID)” (OHCHR 2015), revealing problems with how mass grave investigations have been conducted. It recommended the establishment of an independent institution charged with the search for the disappeared, which would have free access to any state archive, and have the technical capacity, including forensic expertise, to conduct exhumations. This UN report was published shortly before the Sri Lankan Cabinet approved a bill to establish an institution dedicated to the search for missing persons. The *Office on Missing Persons* (OMP), established in May 2016, would thereafter be an observer on mass grave investigations, signalling a shift in governmental approaches to enforced disappearances. Its role will be further explored in section 3 on legal frameworks. Given its establishment in 2016, the OMP was only active in the last mass grave investigation analysed in this report, namely the second grave in the Mannar District, which was discovered in 2018.

It is hoped that exploring the history of mass grave investigations in Sri Lanka will help understand the challenges and obstacles to implementing the legal framework that will be laid out in the following section.

Sooriyakanda (1994)

In 1994, the Sri Lankan Government announced a project to install a Ceylon Electricity Board tower on a hill in the village of Sooriyakanda, near the town of Embilipitiya. An anonymous witness then contacted journalist Victor Ivan and the politician S. B. Dissanayake (a parliamentary member of the then opposition party) to reveal that a mass grave was located on this hill (Borham and Arachchi 2018). A team of politicians and media personnel visited the site in January 1994. Upon the discovery of human remains, they reported the incident to the Embilipitiya Magistrate’s Court (Borham and Arachchi 2018), who ordered official excavations to begin. As news of this site spread, people from the village and parents of missing persons in the region flocked to the site. According to the newspaper *The Sunday Observer*, it was the first mass grave excavation to officially take place in Sri Lanka (Borham and Arachchi 2018). Though Judicial Medical Officers oversaw the excavation, the site was not protected from the public and many people participated in the excavation, rarely following proper procedures to avoid damaging evidence. As a result, some skeletons were moved and separated from their clothes, further hindering the identification process.

The investigation estimated that the grave contained around 300 bodies (US Country Report on Human Rights Practices in Sri Lanka 1994). The identity of the victims was believed to be Sinhalese citizens and the investigation established that the grave was created during the Marxist-Leninist uprising of the JVP between 1987 and 89. At the time of the investigation, it was also believed that the grave contained the bodies of 48 schoolboys from Embilipitiya who were abducted and murdered in 1989 and 1990 by state agents. However, the investigation was halted and the bodies were not identified (Embilipitiya Disappeared Schoolchildren's Parents Organisation Fonds, 2022). More recent research on the events that occurred in Embilipitiya point to the fact that the bodies of children were not buried in Sooriyakanda, but rather in a place called Teak Forest, much closer to the places where the youths were forcibly disappeared (Embilipitiya Disappeared Schoolchildren's Parents Organisation Fonds, 2022). Despite the lack of clarity on the identity of the bodies, the investigation at Sooriyakanda prompted the prosecution of the suspected perpetrators of the enforced disappearances. The principal of the school and six soldiers were found guilty of murder, abduction and conspiracy with respect to 25 of the students and sentenced to 10 years of imprisonment (Hoole 2014).

Because of the lack of protection around the site, the Judicial Medical Officers decided to stop the investigation without a final forensic analysis. Most of the skeletons have yet to be identified. According to politician S. B. Dissanayake, this was because of the political framework of the investigation in 1994. He claimed that one of the objectives was to reveal the Sri Lankan Government's culpability in conducting extra-judicial killings linked to the Sinhalese JVP uprising, rather than focus on a process of reconciliation (Borham and Arachchi 2018). The location of the remains that were sent to the Magistrate were not revealed to the public and many families were unable to identify their missing kin. After the investigation was halted in 1995 no further developments were reported.¹⁰ Today, there is no memorial marker at the site, with only the towers of various telecommunication companies visible on the hill (Borham and Arachchi 2018).

¹⁰ In the U.S. Country Reports on Human Rights Practices in Sri Lanka, the case is mentioned every year from 1995 to 1999 as no progress made and not mentioned thereafter.

Chemmani (1998)

The site in Chemmani came to be known in 1998 through the testimony of the former army officer Somaratne Rajapakse. In 1998, he and eight other soldiers were sentenced to death for the rape and murder of a young Tamil girl named Krishanti Kumaraswamy and the killing of her family (Bala 2017) that occurred in 1996. During his trial, Rajapakse claimed he knew of the existence of mass graves located near the village of Chemmani containing up to 400 bodies of Tamil citizens buried by security forces in 1996 (US Country Report on Human Rights Practices in Sri Lanka 1999). This had allegedly happened as government security forces recaptured the Jaffna peninsula from the LTTE (Human Rights Watch 2008).

In July 1998, The Ministry of Defence announced that the allegation would be examined by the police and the site visited by forensic experts. Despite the Attorney General filing a request for exhumations at the Chemmani site with the Jaffna Magistrate's Court in January 1999, exhumation did not start immediately. Due to mounting local and international pressure on the Government, the site was visited by government experts to collect samples in March 1999 (US Sri Lanka Report 1999). In 1999, Amnesty International issued statements demanding the exhumation at Chemmani respect international standards, so that it would be impartially conducted and that any evidence would be admissible in court (Amnesty International 1999).

In June 1999, excavations started with international observers, and the skeletal remains of two people were found and later identified as two Tamil men who had disappeared in 1996. In August and September 1999, five of the nine soldiers convicted in the Kumaraswamy case indicated 16 different sites where they were ordered to bury between 120 and 140 bodies. Upon exhumation, 13 additional bodies were uncovered. The governmental forensics report published in December 1999 revealed that 10 of the individuals showed clear signs of physical assault and murder, while the cause of death was undetermined for the other three. Of a total of 15 bodies found, 13 are still unidentified. The nine soldiers convicted in the Kumaraswamy case disclosed the names of 20 security force personnel who were allegedly responsible for the extra-judicial killings in Chemmani. Initial charges were laid against these individuals and the Attorney General stated that the Government would have to confirm the identity of those involved in the killings

(US Sri Lanka Report 1999). However, no arrests were made in response to those allegations.

Rajapakse and four of the nine soldiers convicted in the Kumaraswamy case were sentenced to death, three were acquitted, and one passed away (*Somaratne Rajapakse others v. Hon. Attorney General*, 2003). While they had provided the names of alleged perpetrators involved in the creation of the Chemmani mass graves, this information was not made available to the public. Furthermore, the Defence Ministry's Board of Investigation, established in 1996 to investigate disappearances of individuals who were arrested by the Government's army forces in Jaffna, did not make its report public (Bopage 2017). This prevented corroborating information between enforced disappearances and the extra-judicial killings mentioned by Rajapakse and his fellow soldiers.

In 2006, the Asian Human Rights Commission blamed the lack of identification of the 13 remaining bodies on "unfinished exhumations, inconclusive DNA tests, and political resistance" (Asian Human Rights Commission 2006). The initial charges against the security forces members did not lead to any prosecutions and the investigation had come to a standstill by 2006 (BBC Sinhala News 2006). The site is not officially commemorated.

Jaffna Durayappa Stadium (1999)

In March 1999, skeletal remains of several persons were found by municipal workers during excavations for the construction of the Durayappa Stadium in Jaffna (Bopage 2017, 30). The local police force investigated the site on 7th April, 1999, and exhumation took place the following May. These excavations were done in the presence of a Jaffna district judge and a Judicial Medical Officer (JMO). According to the 2000 *U.S. Department of State Country Report on Human Rights Practices in Sri Lanka*, the forensic evidence suggested that these remains were about 10 years old. At that time, the Indian Peacekeeping Force was occupying Jaffna and were thus implicated because of this discovery (U.S. Department of State Country Report on Human Rights Practices in Sri Lanka 2000).

Three different exhumations revealed a total of 49 bodies suspected to be the skeletons of Tamil victims killed during the occupation of the Northern Province by the Indian Peace Keeping Force in 1987 (Iqbal 2010). However, there was little

community outreach to help determine the identity of the victims. The Jaffna-based civil society group *University Teachers for Human Rights* argued that there was no attempt at identifying the perpetrators, since different groups were in possession of the territory in a short period of time. The Indian Peace Keeping Force was there until the end of 1989, the LTTE was in control of the area from September 1990 to October 1995, after which the Sri Lankan Army took control (UTHR Special Report 1999). The remains were sent to Colombo for identification in 1999, but government officials did not issue any further statements (Associate Press 1999). The site remains as the Durayappa Stadium, with no official mention about the mass grave. It is now a sports venue on the Jaffna peninsula and is used for a variety of activities.

Matale (2012)

In a similar fashion to the discovery of the Jaffna Durayappa Stadium grave, the grave at Matale (Central Province) was found by construction workers while laying the foundation for the Matale General Hospital in early 2012. In November 2012, the Magistrate Judge, Chathurika De Silva ordered the site to be exhumed (Bopage 2017). The site was overseen by Judicial Medical Officer Ajith Jayasena and the forensic archaeologist Raj Somadeva. Based on physical artefacts found, Somadeva dated the site from between 1986 and 1990, which would correspond to the time when the JVP insurrection occurred. The site was allegedly the epicentre of the Sri Lankan security forces' violent suppression of the uprising (Al-Jazeera 2013). The forensics report reveals that several skeletons bore the marks of torture and extreme violence, including decapitation, dismemberment and concealment. The placement of the skeletons in two layers also indicated that the site was a mass grave rather than a burial site (Somadeva 2013). By February 2013, the remains of 154 people had been exhumed, making it the largest grave discovered in the south of the country.

After the exhumation of the grave, Judge De Silva called witnesses to come forward in March 2013. Some claimed that the site was close to a place where the Sri Lankan Army's Gajaba Regiment had tortured people. Lawyers for the JVP supported 13 families who claimed to have relatives buried at the site, and the Bar Association of Sri Lanka also intervened (Bala 2017). Upon the recommendation of Somadeva's report, some of the remains were sent for radiocarbon testing at a lab in the United States called *Beta Analytic, Inc.* The samples were sent without

any documentation on the chain of custody of this evidence. In November 2014, the Criminal Investigation Report informed the court that the *Beta Analytic, Inc.* results indicated that the samples dated from before 1950 (Ratnawalli 2014). Professor Somadeva testified that the samples may have been contaminated, as the site was not well protected and was filled twice with rainwater. The samples were not sent to another laboratory to confirm the results of *Beta Analytic, Inc.*

In June 2013, the then president Mahinda Rajapaksa established a Presidential Commission of Inquiry to investigate the grave (Colombo Telegraph 22 June 2013). The Presidential Commission disregarded Professor Somadeva's testimony in favour of the results of *Beta Analytic Inc.* and transferred the case to the Attorney General's Office in 2015. The President of the group *Families of the Disappeared*, Brito Fernando, recounts that activists protested every day in front of the court and collected affidavits from victim's families. Judge De Silva was receptive to these documents and to the protests. However, when the case was transferred to the Attorney General's Office, De Silva was dismissed and replaced by a new judge who was not receptive to the protests and refused to consider the affidavits collected by activists (Brito Fernando 2022). The newspaper *The Colombo Telegraph* suggests that this Presidential Commission of Inquiry also had an interest in closing the investigation given Gotabaya Rajapaksa's involvement in suppressing the JVP uprising (Colombo Telegraph, 22 June 2013). Although the Commission submitted a report to the subsequent President, Maithripala Sirisena, in 2015, it was not made public and the case was closed thereafter. There is no official memorialisation of the place, but the Asian Human Rights Commission has attempted to commemorate this site by offering Vesak Day reflections close to the site (Colombo Telegraph, 24 May 2013). It was uncertain if those commemorations were still taking place at the time of writing this report in 2022.

Kalavanchikudy (2014)

In 2014, a resident of Kalavanchikudy (Eastern Province) petitioned the local court to investigate a site he claimed contained the remains of around 100 Muslim victims (Bangkok Post 2014). The site was further suspected to contain the bodies of the 168 citizens taken captive and executed at the Kurukkalmadam beach by a group of LTTE cadres from Kalmunai on 12th July, 1990 (Business Standard 2014).

The order to excavate was issued by the Kalavanchikudy Circuit Magistrate A. M. Rihal, but the case was overseen by Judge Abdul Gafoor. The excavation was initially scheduled to start on 01st July, 2014, but was postponed to 24th November, 2014, because the police claimed they needed more time to gather forensics experts (Bala 2017). Given that the mass grave is in a Tamil area, local civil society organisers worked to encourage Tamil citizens to come forward and share testimonies on the potential identity of the victims (Bala 2017). By 2018, Judge Gafoor had postponed exhumations and further investigation once more. The reason given for this decision was that more dialogue between Tamil and Muslim communities was needed to help gather information on the mass grave, which could facilitate the identification of victims (Bala 2017). By August 2022, investigations had still not taken place.

Mannar (2013)

In 2013, construction workers for the National Water Supply and Drainage Board were laying a new water pipe when they uncovered skeletal remains next to a well-known temple in the village of Thiruketheeswaram in the Mannar district (Northern Province). The site was excavated in different stages between December 2013 and March 2014. The remains of 83 individuals were found (US Country Report 2016).

Several hypotheses were put forth by government actors. In March 2014, the Director General of the state-run Department of Archaeology, Senerath Dissanayake, reported that the “bodies had been buried systematically,” indicating that the site was in fact a graveyard that was about 50 years old (Aneez 2014). This was later disputed as historical plans of the village never showed the existence of a graveyard (Groundviews 2014). Furthermore, a team of forensic experts, led by the local Judicial Medical Officer, stated that bodies had been buried in several layers at the site, in a way untypical of a cemetery (Veerasingham 2014).

The former Rajapaksa Government publicly stated that these deaths were caused by either the LTTE or the Indian Peace Keeping Forces (US Country Report 2016). Simultaneously, Sri Lanka’s major Tamil party, the Tamil National Alliance (TNA), called for an independent international probe into the grave (Veerasingham 2014), which did not take place.

In August 2014, bone fragments were found in an abandoned well near this mass grave. While a forensic examination was planned, human rights experts expressed

concerns that “the excavation methods used by the Government possibly rendered meaningful forensic analysis impossible” (US Country Report 2016) because of the potential contamination of the samples and because some of the bodies had been fragmented by earth-moving machinery before the discovery was reported (Haviland 2014). The investigation was stalled until the discovery of another nearby site where more bodies were uncovered.

Mannar (2018)

In May 2018, another site was discovered at a construction site in the town of Mannar. Human remains were first found on 28th May, 2018 by construction workers digging the land to expand a state-owned wholesale and retail chain known as Sathosa, next to the A14 highway in Mannar (Wijesinghe 2018).

Lawyers representing relatives of the disappeared suspected that the remains belonged to Tamils who had been abducted, tortured and killed by state security forces (Wijesinghe 2018). Saliya Peiris, the then head of the Office on Missing Persons, met relatives of the disappeared in the district and confirmed that the OMP was closely observing the excavations. With the support of the Office on Missing Persons, excavations revealed a mass grave containing more than 300 skeletons, including those of 28 children (OHCHR 2019).

The excavation was halted in 2019, after a disparity was found by the Mannar Magistrate Court between the carbon dating of the remains and the expert opinions of investigators. Based on artefacts recovered from the site, some claimed that the remains could not have been more than 30 years old, but the samples analysed (again by *Beta Analytics, Inc.*) belonged to the period between 1477-1719 (Thomas 2019). The halt on further excavations was supposed to last only three months until more conclusive evidence was found, but it was only recently lifted in February 2022 (Journalists for Democracy in Sri Lanka 2022).

There was another complication to the case, as lawyers appearing on behalf of the families of the disappeared issued complaints against the Chief Judicial Medical Officer, Dr. Saminda Rajapakshe, claiming he had misled investigation activities. In response, on 10th March, 2020, the Mannar Magistrate decreed that attorneys appearing on behalf of the families of the disappeared were legally ineligible to appear in courts on behalf of the victims. Lawyers for the victims’ families

contested this and filed a review petition at the Vavuniya High Court to challenge the legitimacy of this order. This review contributed to the suspension of the Mannar mass grave proceedings until February 2022 (CHRD Sri Lanka), when the Mannar High Court Judge, Justice Illanchelian, ruled in favour of the families of the disappeared and ordered the resumption of excavations.

This judgement was rendered after an ongoing campaign by families of the disappeared and their attorneys to be more involved in the investigation process. As a result, the order of the Mannar High Court stated that relatives of the disappeared and their lawyers would be allowed to attend the investigations. Ten people will be granted permission to attend on the days of excavation and others will have to remain 30 meters away from the site. Journalists will be able to gather information at the excavation site for 10 minutes every hour (Journalists for Democracy in Sri Lanka 2022). This signalled a shift in considering the rights of the families to be involved in mass grave investigations. However, as of December 2022, the excavation in Mannar had not resumed. Local police affirmed that it would necessitate a demolition of shops in the grave's vicinity, as well as closing a pipeline that supplies water to the town, making the excavation process difficult (*The Leader* 2022).

The seven sites described in this section are the main sites that have been investigated and excavated in Sri Lanka since 1994. None of these investigations led to the persecution of suspected perpetrators of these crimes. Of the numerous bodies uncovered, only two were identified in the Chemmani site. Consequently, relatives of the victims have not been able to receive reparations or justice. There are many more sites that have been recorded without being investigated. While little information exists on these sites, domestic and international laws indicate that they should be investigated. The following section lays out how both domestic and international laws present a framework through which mass graves should be investigated.

3. Legal Framework

Mass graves are complex sites that involve different regulations and legal frameworks. From the discovery to the commemoration of a site, there are several steps in the management of a mass grave, each involving legal regulations. The international legal norms on the management of mass grave sites were outlined in 2020 by *The Bournemouth Protocol on Mass Grave Protection and Investigation*, in partnership with the *International Commission on Missing Persons*. *The Bournemouth Protocol* outlines seven different steps: discovery and safe reporting, protection of the site, investigation, identification, return of human remains, justice, and commemoration (Klinkner 4). In the Sri Lankan context, a few legislative instruments cover several of these steps simultaneously. Thus, when adapting this to the Sri Lankan legal context, a division of five steps was found more suitable to prevent repetition of the same laws. The legal framework for mass grave management in Sri Lanka is organised as such:

- A. Discovery
- B. Investigation and identification
- C. Prosecution
- D. Rights of the families
- E. Commemoration

These steps often overlap. For example, the rights of families can be considered from the moment of discovery and throughout the investigation process. For simplicity, each step will be treated as following on from the previous. Each subsection will consider relevant domestic laws before discussing the international obligations that Sri Lanka is under. In the domestic context, the *Code for Criminal Procedure*, and the *Office on Missing Persons (Establishment, Administration and Discharge of Functions) Act No. 14 of 2016* (hereafter, *OMP Act*) prove themselves particularly useful. The OMP functions under the Ministry of Justice and its establishment allowed for the consolidation of disparate laws around the issue of enforced disappearances and mass graves.¹¹ When it was established, some advocates for the families of the disappeared doubted its credibility and ability to

¹¹ For more on the history, function, and limitations of the OMP, see Isabelle Lassée, “The Sri Lankan Office on Missing Persons: Truth and justice in tandem?”, *International Review of the Red Cross* (2017), 99 no.2, 619–639. See also the 2020 OMP Annual Report.

be an impartial actor in mass grave investigations, but it was still perceived as a competent authority. However, several Sri Lankan authors and activists mention that the OMP has lost credibility since the change of government in 2019, which led to a change in its leadership and in severe budget cuts (Fernando 2022).

In international law, international human rights law and international humanitarian law¹² are relevant to mass grave investigations. While Sri Lanka is a signatory to most UN treaties that set out legal responsibilities pertaining to mass grave sites, those treaties become binding in domestic law through the passing of national legislation.¹³ Therefore, while the State itself is accountable to the International Court of Justice, if it is found to violate its treaty obligations, citizens cannot raise a similar claim domestically against their own government if there is no equivalent domestic law that has been passed. This results in a slower integration of human rights conventions into the domestic system. For example, Sri Lanka ratified the *International Convention for the Protection of All Persons from Enforced Disappearance* in 2016 but passed implementing domestic legislation only in 2018.

Furthermore, Sri Lanka is not party to the International Criminal Court, which has jurisdiction to investigate and prosecute individuals responsible for committing genocide, crimes against humanity, war crimes and crimes of aggression. Thus, except in the unlikely case that the United Nations Security Council votes to refer the situation of Sri Lanka to the International Criminal Court, this recourse in international human rights law remains inaccessible.

Though it may seem obvious, it is important to note that the creation of mass graves is illegal under both domestic and international law. In domestic law, the *Cemeteries and Burial Grounds Ordinance No. 9 of 1899*, as amended in 2005, states that all burials should be registered (article 15) and that the proper authority should ensure that “all burials within the cemetery are conducted in a decent

¹² International human rights law applies to states during both peace time and war times, but international humanitarian law (consisting mainly of the Geneva Conventions and Customary Rules) applies only during wartime.

¹³ As such, Sri Lanka is categorised as a dualist country in its integration of international law in its domestic system. Therefore, while the State itself is accountable to international courts, if it is found to violate its treaty obligations, citizens of the state cannot raise a claim against their own government based on an international treaty if there is no equivalent domestic law. This was confirmed in 2006 through the case of *Singarasa v. Attorney General*, where the Supreme Court ruled that, although Sri Lanka had ratified the *International Covenant on Civil and Political Rights*, the rights contained could not be directly invoked because of a lack of domestic instruments.

and solemn manner, and that the graves are of a proper depth” (article 17(a)). In customary international humanitarian law (hereafter, CIHL), parties to a conflict must record all identifying information before the burial of human remains and mark the grave location (CIHL Rule 115). Furthermore, the dead must be disposed of in a respectful manner, with their graves respected and properly maintained (CIHL Rule 115). In the Sri Lankan context, however, it should be noted that the *Prevention of Terrorism Act (PTA)* and the *Emergency Regulations (ER)* have allowed security forces to dispose of bodies without inquest (US Country Report 1990).

The only circumstance in which mass graves are in accordance with international law is in the case of natural disasters (Perera and Briggs 2008), such as the 2004 tsunami which devastated Sri Lanka and caused more than 35,000 deaths. The creation of these graves should follow a specific procedure performed by trained personnel. Of the total of 32 graves discovered so far in Sri Lanka, six of them were created as a result of the tsunami and many were not made in accordance with international norms (Perera 2005). The details of these are included in Annex 1 of this report. The following section establishes the specific regulations for each step of a mass grave’s management and assesses why the existing laws have not been used to initiate a more proactive form of protection and investigation of these sites.

A. Discovery

While some mass grave sites have come to light through informants, some are discovered by accident by civilians (often during construction work). This section covers the responsibilities that are triggered from the moment of discovery to the official opening of an investigation.

Domestic framework

The *Code of Criminal Procedure Act No. 15 of 1979* outlines the legal obligation to report the finding of human remains. Section 21(b) states that any person “aware of any sudden or unnatural death or death by violence, or of any death under suspicious circumstances, or of the body of any person being found dead without it being known how such person came by death” has a legal obligation to report this incident to one of the following authorities:

- the nearest Magistrate's Court
- the Officer-in-Charge (OIC) of the nearest police station
- a Peace Officer
- the *Grama Seva Niladhari* (village officer) of the nearest village

If they do not report this finding, they have the burden to prove that they had a reasonable excuse for not doing so.

This duty also applies to police officers. According to Section 22(b) and (c), an officer who possesses information regarding the unexplained and unnatural death of a person and/or finds the "dead body of any person without it being known how such person came by death," must communicate such information to one of the following authorities:

- the nearest Magistrate
- the inquirer having jurisdiction
- to his/her own immediate superior

Once the local Magistrate Court is made aware of the existence of an unofficial grave site, the Office on Missing Persons should also be notified. In the case of an informant communicating the location of a mass grave directly to the OMP, the latter must apply to the local Magistrate Court with relevant territorial jurisdiction requesting an order of the Court to carry out an excavation of the suspected grave site (OMP Act, Section 12 (d)).

Section 13 (1) (k) (iii) of the *OMP Act* also states that the OMP is empowered to make recommendations to the relevant authorities, including the Magistrate and the experts conducting the exhumation, on how to handle unidentifiable and identifiable remains.

Once discovered and identified as a burial site, the place should be protected until an official investigation opens. Concerning the protection of the site, Section 14 of the *Cemeteries and Burial Grounds Ordinance No. 9 of 1899*, as amended in 2005, prohibits the removal of corpses from a site and also states that "nothing shall be taken to limit any powers (...) to order a post mortem examination for the purposes of the criminal law." Since the law explicitly foresees the possibility of subsequent examinations on buried human remains where necessary, this

provision could be read to entail the larger protection of mass grave sites in order for these examinations to be carried out successfully. Human remains belonging to unidentified individuals should thus not be cremated so as to facilitate further investigation.

The *Births and Deaths Registration Act No. 40 of 1975* also contains provisions pertaining to the procedure that needs to be followed when remains are discovered. Section 29 of the Act provides that, in the absence of relatives to give information pertaining to the death of an individual to the Registrar of Deaths, the person finding a body should “give information of the particulars relating to the death required under this Act to be registered as is known by such person or persons to the appropriate registrar, and shall, if called upon by that registrar, sign in his presence the register of deaths in the appropriate place.” In circumstances where human remains have been disposed of without assessing identity, there is a lack of clarity as to whether the Registrar of Deaths is expected to keep a record of the location where such remains are buried and whether there is a method of identification consistently utilised across the country to mark burial sites of unidentified human remains.

Given the lack of trust between the local population and state authorities in some regions of the country, it is likely that some citizens discovering human remains would not be enticed to report their discovery to local authorities. In the investigations found so far, only the graves found in Sooriyakanda in 1994 and in Kalavanchikudy in 2014 (where the excavation has yet to take place) were prompted by individual informers. There might also be a lack of knowledge among the population of their legal obligation to report. Furthermore, even when investigations were started, authorities have rarely respected the need to protect the site physically. In Sooriyakanda, evidence was damaged partly because of a lack of physical barriers to the site, allowing untrained citizens to participate in the excavation. In the case of the graves found in the Durayappa Stadium in Jaffna and below the General Hospital in Matale, construction was allowed to continue after the investigations stalled. This official lack of regard for these sites might implicitly discourage the population from reporting discoveries.

International framework

Sri Lanka ratified the *Convention for the Protection of All Persons from Enforced Disappearance* (CED) in 2016, and adopted domestic legislation implementing it in March 2018, entitled the *International Convention for the Protection of All Persons from Enforced Disappearance Act No.5 of 2018*. As per Article 12(1) of the CED, states should protect the right of citizens to report enforced disappearance and *The Bournemouth Protocol* suggests that this right can extend to a right to safely report the discovery of mass graves. Moreover, Article 15 stipulates that states have the duty to search for, locate and release disappeared persons and, in the event of death, to exhume and identify them and return their remains. Given the large number of enforced disappearances in Sri Lanka, the discovery of a mass grave triggers, first and foremost, the duty to exhume and identify the bodies.

International humanitarian law also requires the search for the dead: Article 15 of the *Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* stipulates two distinct obligations: to search for the dead and to prevent their being despoiled (as specified in the 2016 Commentary on the *Geneva Convention (I)*).

When the civilian population discovers a mass grave site, they should be granted the protection to safely report it as per Article 17(2)) of the *Additional Protocol I*. Furthermore, Article 34 on the *Remains of the Deceased* enjoins that places of burial should be protected, including the need to “take all possible measures to prevent the dead from being despoiled”. To maintain the integrity of the evidence obtained from a site, it is crucial that a mass grave is not tampered with by third parties, including first responders. Therefore, the first step of managing mass graves sites after its discovery should be to ensure its safe reporting to local authorities and the physical protection of the site itself before an investigation officially opens.

The difficulties of implementing these international frameworks may be found at several levels. First, although several scholars and lawyers call for the application of international humanitarian law in the post-conflict period, there is no binding rule forcing states to do so. Secondly, in international human rights law, Sri Lanka ratified the *International Convention for the Protection of All Persons from Enforced Disappearance* (CED) only in 2016 and passed implementing domestic legislation in 2018. In the last four years, between this bill being passed and the

writing of this report, there have been several key events: the re-electing of a government that was not prone to implementing transitional justice mechanisms (in 2019), the pandemic (starting in 2020), and protest movements (in 2022) which concluded in the ousting of the president in the summer of 2022. A third obstacle is thus likely to be the lack of resources available in civil society to bring claims against government officials concerning the protection of mass grave sites using international legal instruments. These difficulties also apply to the subsequent phases of mass grave management.

B. Investigation

Once a mass grave site has been discovered and reported, both domestic and international frameworks indicate that an investigation must be opened. It is unclear when these frameworks allow for an investigation to be closed when no results have been obtained after reasonable efforts to find and analyse evidence. Nonetheless, an investigation should include at least three phases: the planning, the forensic investigation and the identification efforts. Each of these steps has been carefully elaborated in *The Bournemouth Protocol* and this report suggests following its recommendations. We focus primarily on the regulatory framework which can be used to hold specific authorities accountable for the opening and carrying out of an investigation.

Domestic framework

Several legislative tools overlap in regulating who has the responsibility to conduct a mass grave investigation in Sri Lanka. The most relevant instruments are the *Code of Criminal Procedure* and the *OMP Act*.

When a mass grave has been reported to either the nearest Magistrate or the local inquirer, the *Code of Criminal Procedure* states that inquests of death should be carried out by an inquirer. As per Section 370(1), inquirers receiving information that a person has been found dead are required to proceed immediately to the site of discovery and write a report on the apparent cause of death. This report is to be sent to the local Magistrate, who, if holding any suspicion that a crime has been committed, is required to carry out an inquiry (Section 370(4)). Magistrates are further required to inquire into all cases where a person has been found dead without it being known how they came to pass and record the evidence (Section

9(iii)). They are also required to hold a post-mortem examination of the dead body (Article 373). For the purpose of the latter, the Magistrate may exhume the body (Article 373 (2)).

Furthermore, the *Evidence Ordinance No. 14 of 1895* can be used to request the identification of the person and their age. Section 38A, introduced in 1999, states, “Where a court is required to form an opinion as to the age of a person, a statement in a certificate purporting to be issued by a Medical Practitioner as to the probable age of such person is relevant.” This could be used to narrow the identity of the remains found. However, there remains a lack of specificity in the law about the duty to identify human remains found, the storage of evidence, and the necessity to have a clear chain of custody. Indeed, investigative teams should have a centralised and uniform procedure for the handling of human remains, from the start of exhumation to the identification and up to the final decision of what is to be done with the remains. In its 2020 Annual Report, the OMP requested the government’s judicial services to issue guidance for Magistrate Courts to guarantee that investigations are “exercised in a uniform and consistent manner to ensure that the chain of custody is preserved and multidisciplinary approaches to investigations are adopted” (OMP 2020, 14). It is unclear whether this guidance has been issued, and if it has been implemented.

According to the *Code of Criminal Procedure*, when a mass grave site is reported, the Magistrate Court opening the investigation can implement the necessary steps that are part of an investigation, including summoning witnesses or evidence and carrying out comprehensive forensic inquiries where necessary.

These provisions of the *Code of Criminal Procedure* should be read in conjunction with Section 12 of the *OMP Act*, which authorises the OMP to apply to the appropriate Magistrate’s Court for an order granting the OMP necessary permission to carry out an excavation and/or to carry out exhumation in suspected grave sites. This section further enables the OMP to “act as an observer at such excavation or exhumation, and at other proceedings.” Section 12(e) of the *OMP Act* allows it to request any assistance necessary from agencies or officers for the achieving of its mandate. This also grants that the OMP can ask for forensic help, for the appointment of archaeologists and anthropologists, and for funding of international experts to come to Sri Lanka if needed.

Concerning identification, the OMP is mandated to clarify the circumstances in which such persons went missing, their fate (Section 2), and to “collate data related to missing persons (...) and centralise all available data within the database established under this Act” (Art 10(1)(e)). Taken together, these articles indicate that it is part of the OMP’s mandate to identify if human remains found in a mass grave could belong to a listed missing person. Section 13 (1)(k) (iii) also mentions that the OMP is authorised to make recommendations to the relevant authorities relating to the handling of unidentifiable and identifiable remains.

As previously mentioned, there seems to be a gap in the law concerning the coordinating mechanisms between the OMP and other relevant institutions, such as the local Magistrate’s Office. In the planning phase of an investigation, channels of communication, coordinating mechanisms, and the respective roles of the Magistrate and the OMP should be clarified for these acts to be procedurally coherent and easily enforceable. However, even without the *OMP Act*, Sri Lankan laws contain provisions dictating the investigation of a mass grave.

Other rights that are enshrined in the Sri Lankan Constitution could be used to help ensure the State conducts a full investigation. For example, the right to life and to be free from torture and the right to liberty and security of the person (article 11 of the Constitution): as a guarantor of these rights, the State would have the obligation to investigate breaches of these rights. The right to a fair trial and to judicial guarantees (Article 13.2) should also ensure effective investigation.

International framework

The most significant law having a bearing on the discovery of mass graves might be the States’ duty to search and investigate in the *International Convention for the Protection of All Persons from Enforced Disappearance* (CED). It is a duty of means and not of results (Klinkner 2020), meaning that states are obliged to initiate a serious investigation and mobilise reasonable means in the search for truth, but they are not obliged to establish positive results of these investigations if the latter remain inconclusive. The CED has further provisions relevant to mass grave investigation:

- Guiding Principle 7: until the fate and/or whereabouts of the disappeared have been established the search is a continuing obligation
- Article 12(2): “so long as there are reasonable grounds to believe an enforced disappearance has occurred, the authorities are required to investigate”.
- Article 12(4): “member states ought to take the necessary measures to prevent and sanction acts that hinder the conduct of an investigation.” This investigation needs to be independent, adequate, and capable of determining facts and identifying those responsible.¹⁴
- Article 24(2): “Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party shall take appropriate measures in this regard.”
- Article 24(3) “Each State Party shall take all appropriate measures to search for, locate and release disappeared persons and, in the event of death, to locate, respect and return their remains.”

C. Prosecution

Domestic framework

When an investigation yields extensive information on the event that caused the mass grave to be created, a prosecution should follow. This is regulated by the *Code of Criminal Procedure* Article 9, which states that every Magistrate’s Court shall have the “power and authority and is hereby required to hear, try, determine, and dispose of in a summary way all suits or prosecutions for offences committed wholly or in part within its local jurisdiction, which offences by this Code or any other law in force are made cognizable by a Magistrate’s Court or a District Court”. However, there are no details in the *Code of Criminal Procedure* on what kind of sentence would be suitable for the crime of creating a mass grave as a separate charge from the murder of the victims.

Even if legal proceedings are not conducted to establish the perpetrators, the evidentiary value of the samples has to be carefully guarded as the contamination or destruction of such evidence could lead to the inability to ascertain with accuracy

¹⁴ As determined by the case *Kukhalashvili and others v Georgia*, Judgment, ECtHR Application Nos 8938/07 and 41891/07 (2 April 2020) para 129)

whether such samples belong to a missing person and whether this person was subject to torture or other crimes before their death.

Another legislative gap is that there is no specific law governing forensic analysis. There was a *Policy and Legal Framework Pertaining to the Proposed Law on Inquests into Deaths* proposed in 2017 (*The Colombo Post* 2017), but there is no publicly available information on the implementation of this framework. If it has been implemented, it could help address challenges affecting the work of the OMP.

International framework

While scholars Caroline Fournet and Nicole Siller argue that “indecent disposal of corpses” may amount to an international crime in itself (Fournet and Siller 2015), current international law sanctions the actions that led to a mass grave rather than the creation of the grave itself. Torture and enforced disappearances are prohibited by treaty, and state parties are required to enact domestic legislation to provide effective penalties where abuses occur. This is established and reiterated with precision in the *Geneva Convention (I)* Article 49; *Geneva Convention (II)* Article 50; *Geneva Convention (III)* Article 129; *Geneva Convention (IV)* Article 146; *United Nations Convention against Torture* Articles 2 and 4; CED Article 6; and ICCPR Article 6 in relation to genocide. The Geneva Conventions further require state parties to actively search for alleged perpetrators to bring them to trial (GC (I) Article 49; GC (II) Article 50; GC (III) Article 129; GC (IV) Article 146).

The *CED-Guiding Principles* specify that “the search for the disappeared person and the criminal investigation of the persons responsible for the disappearance should be mutually reinforcing” (Principle 13(1)). In the case of Sri Lanka, the involvement of some members of government in events that are potentially linked to mass graves has impeded prosecutions and public accountability. Since the subjects of international law are usually states, this conflict of interest has certainly played a major role in preventing claims from being brought up. Especially in the context of a civil war within one nation state, it is difficult to imagine a state bringing a claim against itself in front of the International Court of Justice. While other states could theoretically bring such a claim against Sri Lanka, there have not been enough incentives to do so.

D. Rights of the families

In this section we cover what laws regulate the handling of human remains and the contact with families during and after the investigation.

Domestic framework

The *OMP Act* acknowledges that relatives of missing persons are entitled to know the circumstances in which these persons went missing, their fate and whereabouts. One of the key mandates of the OMP is to ensure that the rights and interests of families of missing persons are protected. Families have often campaigned to be informed of the progress of investigations and to be able to observe the exhumation work. The February 2022 decision of the Vavuniya High Court to allow family members to observe the Mannar mass grave excavation sets an important precedent in this regard. It recognises the agency of the families that are at times the main actors pushing for the investigation of a site. The OMP's mandate includes ensuring "avenues of redress" for relatives of missing persons and could thus encompass the protection of such participation if it is requested by family members of the victims.

The following articles of the *OMP Act* are also relevant and, together, can be interpreted as dictating the safe return of human remains to families:

- Preamble: "relatives of missing persons are entitled to know the circumstances in which such persons went missing, and the fate and whereabouts of such missing persons."
- Section 2(d): "The OMP shall indicate avenue of redress to which such missing persons or their relatives may have recourse."
- Section 13(1)(a)(ii): "upon the conclusion of an investigation, where the OMP concludes that the person to whom a complaint relates is a missing person or is deceased it shall issue a report to the relative of such missing person, to such effect, in order to enable the Registrar General to issue a Certificate of Absence or a Certificate of Death as the case may be."

- Section 13(1)(d): “at the conclusion of an investigation the OMP shall [...]
 - “(i) where the missing person is deceased or his whereabouts are unknown, inform the relatives of the missing person and other complainant as the case may be, of the circumstances in which such person went missing and his fate;
 - “(ii) where the missing person’s whereabouts are known [...], inform the relatives of the missing person of the circumstances in which such person went missing.”

Furthermore, the right of the family members of missing persons to know the fate of their loved ones can be construed within the right to know, broadly conceptualised within the right to information that was recognised under the *Right to Information Act No. 12 of 2016* and Article 14A(1) of the 1978 Constitution of Sri Lanka. The *Right to Information Act* also contains a special provision for urgent requests, whereby, if a citizen is enquiring about a situation concerning the life and liberty of a person, they should get a response within 48 hours.

According to the *Special Provisions of the Registration of Deaths Act*, families of missing persons can choose to obtain a Certificate of Absence or a Certificate of Death or neither. Currently, because the bodies of victims of mass graves have not been identified, most families have not benefitted from these laws on the safe return of human remains. Of the few bodies that were identified (such as two of the 15 bodies found at the Chemmani mass grave), it is not publicly known if the families were able to receive the remains and conduct a proper burial. It is also important to note that, before the establishment of the OMP, some families had been pressured into applying for a Certificate of Death for their missing loved ones through the Presidential Inquiries and Commissions on the Disappeared, to quash their protests for answers (Brito Fernando 2022).

International framework

Concerning the return of human remains, Article 24(3) of the CED reiterates the obligation to allocate the necessary resources for excavation of burial sites, including the collection, storage and identification of human remains. In addition, there is an obligation to return human remains of the disappeared to surviving family members and to provide documentary information on the deceased person,

including issuing a death certificate. Article 15 requires states to offer cooperation and assistance to one another in search and repatriation efforts.

In *Customary International Humanitarian Law*, Rule 114 states that, “Parties to the conflict must endeavour to facilitate the return of the remains of the deceased upon request of the party to which they belong or upon the request of their next of kin. They must return their personal effects to them.” However, there is no official mechanism to ensure these obligations are respected.

E. Commemoration

The details of the commemoration of a site should be decided in a joint process with the relevant communities. There are no regulations mandating the commemoration of mass grave sites, either at the domestic or international level. However, the right of families to rebury the bodies of their loved ones can be construed within the protection of private and family life. In its urgent recommendation for memorialisation in 2018, the OMP suggested that, after excavations, mass graves should be preserved as memorial spaces (OMP Interim Report 2018, 17). Furthermore, the OMP has the mandate to “create public support to fulfil the needs of relatives of missing” and make recommendations about commemorations, reparations, non-recurrence, and legal reform (OMP Annual Report 2020). Creating public support encompasses inclusive memorialisation, education, and awareness raising.

Internationally, the United Nations’ *Joinet-Orentlicher Principles to Combat Impunity* requires that states preserve the collective memory of events (Principle 3). As previously mentioned, Rule 115 of *Customary International Humanitarian Law* on the disposal of the dead also indicates graves must be respected and properly maintained – this can be construed within a larger commemorative goal.

With specific reference to commemoration, several authors and activists interviewed for this report have stressed the importance of the following guidelines:

- Engage with the local community before an excavation, to ensure their security and support for the investigation, and include them to participate in the investigation if desired. This is especially important in the north and east, where an investigation by government security forces might create

a feeling of insecurity (Kabir 2022). This also entails thinking critically about how an excavation will impact the communities and their struggles (Kodikara 2022).

- In commemorating mass grave sites, three dimensions should be balanced: the spiritual aspect of the sites should be respected, the legal importance (as a potential scene of a crime), and the political importance (as a representation of something that should not happen again). The sites should also stay accessible to the general public (Ruki Fernando 2022).
- If there are memorial monuments built to commemorate the graves, the sites should also offer activities for the community. Monuments or plaques are important and fulfil at least two purposes: they are a common gravesite for families to mourn and can act as a reminder to actively prevent similar atrocities from recurring. However, there are already many monuments in Sri Lanka that sometimes only serve to reinforce one narrative over another. Mass grave sites should therefore become sites of active and inclusive commemoration (Brito Fernando 2022). Making space and providing resources for community-initiated commemorative practices could be a useful first step.

Though there are no specific laws concerning commemoration, other rights may be relevant and could be used to protect the families and communities in their commemoration of these sites. Some of these rights are:

- The right of freedom of religion and belief (Sri Lankan Constitution Article 10)
- The right of freedom of association and expression (Sri Lankan Constitution Article 14);
- The right to private life¹⁵

However, it is important to note that, parallel to commemoration, key socio-economic needs of communities should be considered. While memorialisation can help establish the groundwork for reconciliation, communities in the north and east suffer disproportionately from the effects of the war and from an ongoing militarisation of public life. Funds geared towards commemoration should be

¹⁵ The right to privacy has not been enshrined in the Sri Lankan Constitution, but is protected through constitutional interpretation and case law. For more information, see the Centre for Policy Alternatives, "Right to Privacy in Sri Lanka", September 2020 at 11-13.

sensitive to the primary needs of the local population. Author and activist Thyagi Ruwanpathirana has suggested that memorials can also serve a social utility that can address these issues. She gives the example of water-pumps in Nepal, built both as memorials and to address immediate needs of the community (Ruwanpathirana 2016, 5).

4. Discussion and Best Practices

The discovery of a mass grave and its subsequent exhumation constitute a collective moment for a society, whereby a number of difficult questions are asked in the public sphere. Historical inquiries into the circumstances that led to a mass grave often become a site of struggle for current political arguments. These sites gain a complex status as sacred places containing human remains and as potential legal evidence. It is crucial to reflect on what is at stake when exhuming a mass grave, in order to contextualise the process of excavation and the sites themselves in Sri Lankan history and politics.

Exhumations often give rise to new questions and conflicts and must navigate diverse needs and interests. For example, investigations of mass graves that are oriented towards prosecutions can sometimes clash with the needs of families to rebury their dead. Scholars Eric Stover and Rachel Shigekane have described how war crimes trials, by treating human remains as evidence, can overlook families' needs (Stover and Shigekane 2002). For example, in the case of a mass grave found in Kosovo after the Srebrenica massacre, prosecutors focussed not on the identity of the victims but rather on whether they were civilians and if the manner in which they were killed could indicate that a war crime had occurred because it showed that deaths were widespread and systemic (Stover and Shigekane 2002, 857). Moreover, it is often very difficult to identify bodies, given the lack of DNA databases in the country. When the victims are not carrying identifying papers or artefacts recognisable by their kin, the vast majority of bodies remains unidentified. This was the case in the Kibuye mass grave exhumation in Rwanda in 1995, where 17 bodies were identified from a total of 500 victims found (Stover and Shigekane 2002, 851). Only two of the victims identified had living relatives that could carry out a reburial process. These numbers point to the importance of not inflating expectations in the population with regard to identification and the return of remains to families.

Stover and Shigekane argue that families should have more than the 'right to know' the fate of their loved ones and that they should be able to participate in the exhumation process. It is most often the families that exert pressure on their government for mass graves to be excavated and bodies exhumed, but they can get side-lined once the investigation begins. Stover and Shigekane recount how, in the case of a mass grave excavation in Guatemala in the early 1990s, entire

villages would come to witness forensic scientists work on a site. These encounters were important for the families of the missing, as they offered a transparency that contrasted with years of being denied information about their loved ones from the military, the police and the courts. Observing the process at the excavation site could help some family members regain a sense of control and agency in the process of locating their disappeared relative (Stover and Shigekane 2002, 850). However, if the participation of the families is not well structured, it can also lead to the contamination of the evidence, like in the case of the exhumation at Sooriyakanda.

Indeed, to understand the conflicting interests at play, a multitude of voices must be heard. Mass grave sites involve a wide number of actors, including survivors, families of the victims, people living next to the site, activists, journalists, politicians, forensic scientists, governmental and non-governmental agencies and more. Perpetrators are also part of this community of actors. Writing on the memorialisation of mass violence events, scholars Elizabeth Anstett and Jean-Marc Dreyfus view victims and perpetrators as engaged in a long-term relationship and consider the violence that took place “not as an event but as a long, diachronic process, of which death and the treatment of the body are distinct but intrinsically linked steps” (Anstett and Dreyfus 2014, 7). The exhumation of a mass grave and the disturbing materiality of human remains can bring to light violent events that happened in the past, but can also re-trigger memories for the surrounding communities who live with the trauma of this violence. The excavation and exhumation of these sites are a delicate part of the process of community building in a post-conflict state. In the context of Sri Lanka, where the state-imposed narrative of the civil war actively attempts to erase other narratives of the past (Karunaratne 2021), these collective moments can open a door for a more inclusive and thus potentially more stable memorialisation process. However, for this to be possible, actors that guide these processes (such as the OMP and the Government) must still gain legitimacy among all communities, especially the Tamil and Muslim populations.

Given the competing demands from the State, the different affected communities, and international organisations, the following principles can be seen as starting points for a broader conversation within civil society and amongst families of the disappeared for the elaboration of a mass grave investigation. These principles are partly adapted from recommendations of *The Bournemouth Protocol*.

- 1. Having a “do no harm” approach:** investigative teams should attempt, as much as possible, to be inclusive of all the communities involved and follow guidelines for interviewing traumatised individuals in human rights investigations (See Annex 4 for more guidelines).
- 2. Physical and emotional safety:** the site should be well secured. Furthermore, the surrounding community should be aware of the site and of its protection, to provide reassurance and to encourage their engagement with the investigation (Klinkner 7). The engagement of the surrounding community is necessary to help with the identification of victims, as their testimonies are at times the only evidence available concerning the events that led to a mass grave.
- 3. Centring the agency of the community:** families of the disappeared and of potential victims should be allowed to participate in the investigation process and observe the excavation of the site, if they wish to do so. If a community is not willing to investigate a mass grave, this wish should also be respected.
- 4. Independence and impartiality:** the team leading the investigation should ensure that their activities are not “susceptible to perceptions of political, religious or ethnic bias or control” (Klinkner 7). In the Sri Lankan context, where the government-controlled security forces have been responsible for violations of the rule of law, forensic investigative teams might be perceived as biased by certain communities. The teams should therefore be composed of a variety of people, including members of different communities and potentially external actors such as international experts, so as to gain legitimacy with these communities. Having human rights organisations and the Office on Missing Persons as observers during excavations is also important to ensure that the interests of the families of the disappeared are respected. This should be done despite the OMP’s dwindling resources since the change of government in 2019. It is also important to be mindful of the narrative that is created about a site, especially in a context where competing narratives exist. Without asserting one story over the other, it is important to secure evidentiary data, including local testimonies or physical evidence, to ensure that these sites and the complex events that created them are not forgotten.

5. **Confidentiality:** civilians participating in the investigation should be guaranteed confidentiality; it is essential that the determination of the scope of confidentiality be guided by two imperatives: (i) the safety of witnesses and (ii) victims' right to truth and justice.
6. **Transparency:** the public should be made aware of the results of the investigation. Bodies, once identified, should be returned to families.
7. **Communication:** clear and ongoing communication with the affected community at all stages is crucial. In both the investigation and commemoration of mass graves, it is important to be mindful of the vocabulary used around practices and its translations in all official languages.
8. **Realistic expectations:** the investigative team should not make unrealistic promises concerning what a mass grave excavation will achieve, to manage the expectations of the affected community.

5. Conclusion

As outlined in this report, the political and legal challenges to mass grave investigations in Sri Lanka remain high. In light of this, it might be necessary to critically assess the need for investigation and memorialisation of mass grave sites for a sustainable post-conflict reconciliation. Scholars like Eric Stover and Rachel Shigakane invite us to consider approaches that focus on the needs of the victims' families rather than on prosecutions. In his work *Digging for the Disappeared: Forensic Science after Atrocity*, Adam Rosenblatt also discusses the rise of 'family-centric' forensic work as a different approach to exhumations aimed at producing evidence for prosecutions. While the ongoing investigation in Mannar shows progress in the inclusion of families, the political barriers to the implementation of both domestic and international laws remain. Especially in an unfavourable political environment such as Sri Lanka, where several government officials have been accused of war crimes, it might not be realistic to expect working governmental officials to comply with investigations.

Of the seven investigations surveyed in this report, none led to the desired answers for families of the disappeared who believed their loved ones might have been victims of a mass burial. It is important to clearly delineate the different objectives of an investigation, which often aims at both truth-seeking and prosecution. The relationship between these two goals is complex and has been expressed in a number of different models in truth commissions around the world.¹⁶ In Guatemala, in an effort to encourage perpetrators to reveal the truth, it was decided that the testimonies given as part of the truth commission hearings could not be used as evidence in prosecutions (Hartnett 2016). In South Africa, the truth commission acted as a filter to reduce the number of possible criminal prosecutions by providing immunity to individuals who cooperated. In contrast, in Peru, the truth commission provided evidence to criminal prosecutors (Hartnett 2016).

Beyond the political challenge and the impunity of the Government, legal gaps are also an obstacle to mass grave investigation. The lack of clear regulation on the chain of custody for evidence has led to a lack of transparency about the location

¹⁶ Connor Hartnett's publication *The Relationship between Truth-Seeking and Prosecution* explores this complex theme in further details in a comparative manner, exploring different models of truth commissions in Rwanda, Columbia and more.

of the evidence collected from mass graves, how it was collected and preserved, and where it was sent for analysis. This has contributed to a lack of trust in governmental accounts. In the case of the Matale investigation in 2012, conflicting narratives about the mass grave emerged from different analyses of the evidence and from the possibility that the evidence sent to a laboratory in the United States had been tampered with.

Other legal gaps include the lack of clear coordinating mechanisms between the Office on Missing Persons and the police and judicial structures. The OMP's role overlaps with judicial structures as it has the power to appoint experts to work on a mass grave investigation. Yet, it is unclear how this role is integrated with local hierarchies of investigators. A third obstacle would be the legal gap in deciding when an investigation can be closed, which was the case with several mass grave investigations seen in section two. International jurisprudence on mass graves and enforced disappearances affirms that investigative efforts are an "obligation of means, not results" (Klinkner 2020, 5). This entails that the State has the responsibility to conduct an effective investigation and to take all "feasible measures" to locate the missing, identify victims and return the remains (CIHL Rule 117). Several mass grave investigations seen in section two stalled with inconclusive results. There remains a lack of clarity on when the measures taken by the State have fulfilled the obligation of an effective investigation.

While those obstacles remain, other avenues of action are possible for the memorialisation of these sites and the larger aims of reconciliation in the Sri Lankan context. Despite the lack of investigative results, commemorative practices can work towards these aims, while considering the generational impact that mass graves have on affected communities and on the public understanding of Sri Lankan history. Literary, visual and multimedia creations can also offer avenues for victims' families to process the reactions provoked by the discovery of a mass grave. They can render intelligible the disturbing reality of these sites.¹⁷ Artistic endeavours can elicit empathy from populations that feel detached from these sites or that are not supportive of reconciliation efforts. They can foster a climate of respect owed

17 An example is the documentary *Nostalgia for the Light* from Chilean director Patrizio Guzman, which explores the plight of women searching for the remains of their family members in the Atacama Desert.

to the victims and their families, where individual subjects are not subsumed in a larger group of victims of mass violence. Given the obstacles to more standard avenues for justice, fostering societal awareness of these issues is necessary and is part of advocating for families of the victims of mass graves. As more mass graves might still be discovered in the future, it is hoped that centralising historical and legal information on mass graves in Sri Lanka will lay the groundwork for further research and advocacy on this issue.

Annex 1: Alphabetical Table of Known Mass Grave Sites

Location	Date Reported	History of Discovery	Investigation	Number of bodies found	Suspected victims and causal event	Source
1 Ankumbura (Central Province)	1998	1994-1998 <i>Presidential Commission of Inquiry on Disappearances</i>	Disinterred on judicial order, but no public records of an official investigation	36	Police killings in 1989	Government of Sri Lanka 1998; Ilangamuwa 2014; Iqbal 2010; 1994 US Country Reports on Human Rights
2 Ambagahahenakanda (Sabaragamuwa Province)	1998	1994-1996 <i>Presidential Commission of Inquiry on Disappearances</i>				Government of Sri Lanka 1998; Ilangamuwa 2014
3 Batapola (Southern Province)	2004	Not applicable			Tsunami victims	Ilangamuwa 2014
4 Batticaloa (Eastern Province)	2014	Civilian claim led to a mass grave found in the Batticaloa District.			Potential link to the trial of 21 soldiers for killing 35 Tamil civilians in 1992 in the village of Mailanthani in Batticaloa district (1994 US country report)	Ilangamuwa 2014; Wijedasa 2019
5 Bermulla (Sabaragamuwa Province)	1998	1994-1998 <i>Presidential Commission of Inquiry on Disappearances</i>				Government of Sri Lanka 1998; Ilangamuwa 2014

6	Chemmani (Northern Province)	1998	See section 2 of the report.	1998-2006	15	Tamil civilians killed and buried by Sri Lankan army during military operations in the Jaffna peninsula in 1995-6	Ilangamuwa 2014; Iqbal 2010
7	Heendeliya, Dickwella (Southern Province)	1998	1994-1998 Presidential Commission of Inquiry on Disappearances				Government of Sri Lanka 1998; Ilangamuwa 2014
8	Diyadawakale, Deniv (Sabaragamuwa Province)	1998	1994-1998 Presidential Commission of Inquiry on Disappearances				Government of Sri Lanka 1998; Ilangamuwa 2014
9	Essella (Western Province)	1998	1994-1998 Presidential Commission of Inquiry on Disappearances	Disinterred, but no public records of an official investigation			Government of Sri Lanka 1998; Ilangamuwa 2014; Iqbal 2010
10	Hambantota (Southern Province)	2004	Not applicable			Tsunami victims	Ilangamuwa 2014
11	Hokandara (Western Province)	1998	1994-1998 Presidential Commission of Inquiry on Disappearances	Disinterred, but no public records of an official investigation			Government of Sri Lanka 1998; Ilangamuwa 2014; Iqbal 2010
12	Jaffna, Thuraiappah Stadium (Northern Province)	1999	See section 2 of the report.	1999	49	Tamil victims killed during the occupation of the Northern Province by the Indian Peace Keeping Force in 1987	Ilangamuwa 2014, US Country Report 2000.
13	Kaluwanchikudy (Eastern Province)	2014	See section 2 of the report.	Order to excavate given in 2014 but investigation has not started	Suspected to be around 100	Believed to contain Muslim victims of LTTE violence in the East	Karunaratne 2014

14	Kalmunai (Eastern Province)	2004	Not applicable				Tsunami victims	Ilangamuwa 2014
15	Kilinochchi (Northern Province)							Ilangamuwa 2014
16	Kirinda (Southern Province)	2004	Not applicable				Tsunami victims	Ilangamuwa 2014
17	Kuruduwattha-Galle (Southern Province)	2004	Not applicable				Tsunami victims	Ilangamuwa 2014
18	Mamadala, Ambalantota (Southern Province)	1998	1994-1998 Presidential Commission of Inquiry on Disappearances					Ilangamuwa 2014
19	Mankulam (Northern Province)	2020	Skeletal remains discovered by workers at a construction site of a hospital in Mankulam	2020				Sri Lanka Weekly 2020, available at https://www.srilankaweekly.co.uk/sri-lankan-police-investigating-mass-grave-northern-province/
20	Mannar (Northern Province)	2013	See section 2 of this report.	2013-2017	83			Ilangamuwa 2014
21	Mannar Town (Northern Province)	2018	See section 2 of this report.	2018- Ongoing				
22	Matale (Central Province)	2012	See section 2 of this report.	2012-2015	154		Sinhalese victims of state repression of the JVP uprising	Ilangamuwa 2014; Bala 2017
23	Mirusuvil (Northern Province)	2000	A civilian (Ponnuthurai Maheshwaran), after being in army custody, testified to the existence of a mass grave.	Exhumation took place in December 2000, case moved from Chavakachcheri Magistrate's Court to Colombo, case stalled after 2005.	8		Tamil civilians, including children, arrested by security forces in Mirusuvil, Jaffna.	Ilangamuwa 2014; Bopage 2017; BBC Sinhala, available at https://www.bbc.com/sinhala/news-story/2005/03/050306_mirusuvil

24	Nikaweratiya (Northern Western Province)	1998	1994-1998 <i>Presidential Commission of Inquiry on Disappearances</i>		20	Suspected to be youths killed by police	Government of Sri Lanka 1998; Ilangamuwa 2014; US Country Report 1998
25	Pooneryn (Northern Province)	2014					Ilangamuwa 2014
26	Pudukuduirippu Mullaitivu (Northern Province)	2014	Sri Lankan family finds bodies in garden		9		Ilangamuwa 2014, Bangkok Post 2014
27	Sooriyakanda (Sabaragamuwa Province)	1994	See section 2 of this report.	Yes, 1994-1995	300	Sinhalese victims of state repression of the JVP uprising	Government of Sri Lanka 1998; Ilangamuwa 2014; Iqbal 2010
28	Tissamaharama (Southern Province)	2004				Tsunami victims	Ilangamuwa 2014
29	Walpita (Government Farm)	1998	1994-1998 <i>Presidential Commission of Inquiry on Disappearances</i>	Disinterred, but no public records of an official investigation			Government of Sri Lanka 1998; Ilangamuwa 2014; Iqbal 2010
30	Wavulkale (Sabaragamuwa Province)	1998	1994-1998 <i>Presidential Commission of Inquiry on Disappearances</i>	Disinterred, but no public records of an official investigation		Potentially linked to four police officers indicted in 1994 for the 1990 murders of 12 civilians in Wavulkale (1994 US country report)	Government of Sri Lanka 1998; Ilangamuwa 2014; Iqbal 2010, US Country Report 1994.
31	Wilpita, Akurassa (Southern Province)	1998	1994-1998 <i>Presidential Commission of Inquiry on Disappearances</i>				Government of Sri Lanka 1998; Ilangamuwa 2014; Iqbal 2010
32	Yakkalamulla (Southern Province)	1998	1994-1996 <i>Presidential Commission of Inquiry on Disappearances</i>				Government of Sri Lanka 1998; Ilangamuwa 2014; Iqbal 2010

Annex 2: International and Foreign Jurisprudence

The following cases about mass graves around the world could be used as examples for practices that could be implemented in Sri Lanka.

From the Inter-American Court of Human Rights

- *The Massacres of El Mozote and other Places v El Salvador*, Judgment on Merits, Reparations and Costs, Inter-American Court of Human Rights Series C No 252 (25 October 2012):
 - The investigation of gross human rights violation has to consider the broader context and complexities surrounding events (para 299), and states are under an obligation to provide documentary information on the deceased person (para 334).
- *Valle Jaramillo et al. v Colombia*, Judgment on Merits, Reparations and Costs, Inter-American Court of Human Rights Series C No 192 (27 November 2008):
 - An investigation should strive for “most complete historical truth possible, including the determination of patterns of collective action” (para 102).
- *Pueblo Bello Massacre Colombia*, Judgment on Merits, Reparations and Costs, Inter-American Court of Human Rights Series C No 140 (31 January 2006)
 - States should urge the public to share information to identify victims (para 272).
 - States must return identified human remains to their next of kin as soon as possible. The State must also cover the burial expenses, in agreement with the next of kin (para 273).
 - Victims have a right to adequate, effective and prompt reparation for harm suffered, including psychological care for the next of kin (para 274).
 - States have to investigate the facts of a case and, where relevant, identify, prosecute and sanction those responsible (para 265-269).
- *Velásquez Rodríguez v Honduras*, Judgment on Merits, Inter-American Court of Human Rights Series C No 4 (29 July 1988):

- The right to the truth requires an authoritative investigation into the individual human rights abuse as well as the socio-political context leading to the abuse(s); it entails an element of victim participation in the process and the promulgation of the investigative results to benefit society and the individual (para 177).
- *Mapiripán Massacre v Colombia*, Judgment on Merits, Reparations and Costs, Inter-American Court of Human Rights Series C No 134 (15 September 2005):
 - “During the investigative and judicial processes, the victims of human rights violations, or their next of kin, must have ample opportunity to participate and be heard, both regarding elucidation of the facts and punishment of those responsible, and in seeking fair compensation” (para 219).
- *‘Las Dos Erres’ Massacre v Guatemala*, Judgment on Preliminary Objections, Merits, Reparations and Costs, IACtHR Series C No 211 (24 November 2009):
 - For the remedial rights of victims, as a fair expectation of a democratic society and as a measure to enhance respect for the rule of law, the results of any investigation should be fully promulgated (...) the building of memorials to the deceased can form parts of guarantees of non-repetition efforts (para 256-264).

From the European Court of Human Rights

- *Aslakhanova and others v Russia*, Judgment, ECtHR Application Nos 2944/06 and 8300/07, 50184/07, 332/08, 42509/10 (18 December 2012):
 - States have to allocate the necessary resources for excavation of burial sites, including the collection, storage and identification of human remains (para 226).
- *Kukhalashvili and others v Georgia*, Judgment, ECtHR Application Nos. 8938/07 and 41891/07 (2 May 2020):
 - Following the deprivation of life, the duty to investigate includes “the identification and, if appropriate, punishment of those responsible” (para 129).

- *Sabanchiyeva and others v Russia*, Judgment, ECtHR Application No 38450/05 (6 June 2013):
 - Non-return of human remains and burial in unspecified locations would constitute a violation of the right to family and private life; an interference only permissible where it accords with the law, is in pursuit of a legitimate aim (such as public safety, prevention of disorder or rights and freedoms of others) and is necessary in a democratic society (paras 117-134).
- *Johannische Kirche & Peters v Germany*, Decision, ECtHR Application No 41754/98 (10 July 2001)
 - The manner of burying the dead can form an essential aspect of religious practice as protected under freedom of thought, conscience and religion provisions.

From the International Criminal Tribunal for the former Yugoslavia (ICTY)

- *Prosecutor v Mladić*, Judgment, IT-09-02-T-117281 (22 November 2017)
 - The right to bury family members is generally covered through the protection of private and family life.

In Domestic Legislation

Argentina

- *Argentine Law No. 14,321* of 11 May 1994: this Law creates the category of “forcibly disappeared” which is legally equivalent to a death for civil purposes, but the possibility of “reappearance” of the individual remains. This declaration also acknowledges State involvement in or responsibility for the individual’s death.

Bosnia and Herzegovina

- The 2003 Criminal Code of Bosnia and Herzegovina, Article 231a criminalises the failure to report a mass grave site with imprisonment (Bosnia and Herzegovina: Criminal Code (27 June 2003), Official Gazette of Bosnia and Herzegovina 37/03).

Iraq

- *Iraqi Law No. 13 of 2015, Affairs and Protection of Mass Graves Law*, amending Law No.5 of 2006, *Protection of Mass Graves*: this Law stipulates the procedure for the investigation of mass graves in Iraq. Citizens have a duty to report the discovery. The Ministry of Human Rights oversees the indexing and documenting of mass graves sites and takes possession of the location. A commission is created to supervise the exhumation process, which includes representatives of the prosecutor's department, the police and the court of appeal. An investigation aims to establish the fate of missing persons, identify prosecutions and collect evidence to prove their criminal responsibility (Lassée 2017).

Annex 3: Laws Cited

Domestic

- Constitution of Sri Lanka
- Cemeteries and Burial Grounds Ordinance No. 9 of 1899 as amended in 2005
- Office on Missing Persons (Establishment, Administration and Discharge of Functions) Act No. 14 of 2016
- The Code of Criminal Procedure Act No. 15 of 1979
- Registration of Deaths (Temporary Provisions) 1 (Amendment) Act No. 16 of 2016
- International Convention for the Protection of All Persons from Enforced Disappearance Act No. 5 of 2018
- Births and Deaths Registration Act No. 40 of 1975
- Evidence Ordinance No. 14 of 1895 as amended
- Right to Information Act No. 12 of 2016
- Human Rights Commission of Sri Lanka Act No. 21 of 1996

International Law

International Humanitarian Law:

- Geneva Conventions: GCI, GCII, GCIII, GCIV, *Additional Protocol 1* to the Geneva Conventions of 1977, Additional Commentary of 2016
- Customary International Humanitarian Law Rules (available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul)

International human rights law:

- The International Covenant on Civil and Political Rights (ICCPR), ratified by Sri Lanka in 1980
- The International Convention for the Protection of All Persons from Enforced Disappearance (CED), ratified by Sri Lanka in 2016

Annex 4: Further Relevant Guidelines

- Geneva Academy and International Committee of the Red Cross (ICRC) (2019), *Guidelines on Investigating Violations of International Humanitarian Law*
- United Nations Office of the High Commissioner for Human Rights (2016), *The Minnesota Protocol on the Investigation of Potentially Unlawful Death* (available at: www.ohchr.org/Documents/Publications/MinnesotaProtocol.pdf)
- Advancing Transfusion and Cellular Therapies Worldwide (2010), *Guidelines for Mass Fatality DNA Identification Operations* (available at: www.aabb.org/programs/disasterresponse/Documents/aabbdnamassfatalityguidelines.pdf)
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Since 1982, the International Centre for Ethnic Studies (ICES) has contributed to the world of ideas and has informed policy and practice through research, dialogue, the creative arts and other interventions. The ICES has been an important player in the areas of reconciliation, justice, gender and human rights and has been particularly influential in shaping policy and public imagination on issues of gender equality, ethnic diversity, religious coexistence, and constitutional reform in Sri Lanka. The institution's goal is to contribute towards relevant rigorous intellectual traditions that recognize our common humanity, promote diverse identities, and generate ideas that inform and guide policies and institutions in order to promote justice, equity and peaceful coexistence.

Rosa Luxemburg Stiftung

The Rosa Luxemburg Stiftung (RLS) is a German-based foundation working in South Asia as in other parts of the world on the subjects of critical social analysis and civic education. It promotes a sovereign, socialist, secular, and democratic social order, and aims to present alternative approaches to society and decision-makers. Research organizations, groups for self-emancipation, and social activists are supported in their initiatives to develop models which have the potential to deliver greater social and economic justice.

Mass Grave Sites in Sri Lanka: History and Legal Framework

Sophie Bisping

Between 1992 and 2022, at least 32 mass grave sites were uncovered in Sri Lanka. Of the few investigations conducted, none were successful in fully identifying victims, establishing stable narratives of events preceding each grave, or prosecuting responsible actors. Knowledge about the sites was scattered across multiple sources, making it difficult to gain a comprehensive understanding of this issue. This report consolidates the available information on each site. It clarifies the challenges to Sri Lankan investigations by providing historical context and synthesizing prior findings. It then situates this data within domestic and international legal frameworks regulating the discovery, investigation, and commemoration of mass graves. Accurate knowledge and legal contextualisation of the issue of mass graves are equally important to a sustainable post-conflict reconciliation in Sri Lanka. This report further discusses best practices in the management of mass grave sites in post-conflict societies based on theoretical perspectives and international precedents of transitional justice. As part of a larger project led by the International Centre for Ethnic Studies, it is hoped this will help lay the groundwork for a better public understanding of mass graves in Sri Lanka.

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