

*M. C. M. Iqbal*

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## **Disappearances and Reparations**

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## CONTENTS

<b>Forced Disappearances in Sri Lanka Constitute a Crime Against Humanity</b>	<b>1 – 15</b>
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*- Laura Black -*

<b>Reparations for Victims of Disappearances</b>	<b>16 – 19</b>
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*- M.C.M. Iqbal -*

<b>Disappearances of Persons and the Disappearance of a System</b>	<b>20 – 23</b>
--	----------------

*- Basil Fernando -*

<b>Access to Justice: From Disappearances to Accountability</b>	<b>24 – 32</b>
---	----------------

*- Rushika Patrick -*

<b>Book Review – AN EXCEPTIONAL COLLAPSE OF THE RULE OF LAW: TOLD THROUGH STORIES BY FAMILIES OF THE DISAPPEARED IN SRI LANKA</b>	<b>33 – 36</b>
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Law & Society Trust,  
3, Kynsey Terrace, Colombo 8  
Sri Lanka.  
Tel: 2691228, 2684845 Telefax: 2686843  
e-mail: [lst@eureka.lk](mailto:lst@eureka.lk)  
Website: <http://www.lawandsocietytrust.org>

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### *Editor's Note ... ..*

For decades, we have had the bizarre phenomenon of opposites competing with each other; on the one hand, the facade of a normal life and on the other, stories of the most extraordinary sadness related during by men and women during intense conflict. None of these stories are more poignant than the tales of the disappeared, told by victims both in the South and the North/East of Sri Lanka.

At the turn of the century, the government has yet to account to the families of the thousands who disappeared during 1988-'89, identified mass <sup>prisoners</sup> are yet to be fully investigated and arbitrary arrests, past acts of disappearances and torture <sup>by</sup> by the armed forces and the police are yet to be punished in all its severity.

The Review publishes four papers in this Issue in the hope of re-awakening discussion on the need to ensure accountability and justice for the victims and the families of the "disappeared" as well as the equally urgent need to make adequate reparation for their anguish.

The first writer makes out a convincing argument as to why the patterns of enforced disappearances, murder, and torture that occurred in Sri Lanka constitute a crime against humanity and why an international tribunal must be established to address these atrocities. She comes to this conclusion based on her finding that the legal system within the country is currently incapable of effectively prosecuting these crimes, pointing out that 'the collapse of the integrity of the system has made accurate investigation of perpetrators impossible.'

The succeeding two papers dwell on the crucial aspect of reparations and makes several practical suggestions to this effect. Particularly, the point is made that the breakdown in law and order that we experience now is, as a consequence of the history of large-scale disappearances, which became possible through the "loosening of all the hard knots that had hitherto kept criminal investigations tied to the rule of law and the elementary norms of human decency."

The third writer looks at the tentative findings of an ongoing study initiated by the Law and Society Trust in regard to reform of the existing law and practices in order to secure victims' rights and bring about accountability in regard to the perpetrators of the most barbaric of human rights violations.

The Review also publishes a book review of a recent publication in which the victims tell their tales of grief as emotionally as if the horrors that gripped their lives happened yesterday. It is time that the victims of this most cruel era in Sri Lankan history are ensured justice.

***Kishali Pinto-Jayawardena***







# Forced Disappearances in Sri Lanka Constitute a Crime Against Humanity

*Laura Black\**

## I. Introduction

This paper has two purposes. First, it argues that the enforced disappearances, murder, and torture that occurred in Sri Lanka constitute a crime against humanity. And second, it argues that an international tribunal must be established to address these atrocities because the legal system within the country is currently incapable of effectively prosecuting these crimes.

The actions that occurred in Sri Lanka clearly constitute crimes against humanity.

For an action to constitute a crime against humanity, several requirements must be met: it must be one of a limited number of crimes generally considered to warrant the label; it must be widespread or systematic in nature; and it must involve the government. The crimes against humanity enumerated in international instruments include murder, torture, enforced disappearance, extermination, arbitrary imprisonment, and persecution on political grounds.

Each of these crimes was committed in Sri Lanka as evidenced by the mass graves, torture chambers, illegal detention centers, testimony from the families of thousands of missing persons and the government's goal of removing political opposition during that period. Furthermore, these crimes were committed on a widespread scale. The Sri Lankan government has estimated that there were over 26,000 victims, while unofficial estimates put the number as high as 60,000. It is also clear that these crimes were part of a systematic attack planned at the highest levels of government and implemented through the police and army. There can be no doubt that a crime against humanity has occurred.

Despite the seriousness of the crimes and the enormous number of victims, these crimes against humanity have not been effectively addressed. The entire legal system was used in the campaign of disappearances, making internal prosecution impossible despite the efforts of the new government. The fact-finding commissions established by the government have uncovered information on appalling atrocities, but little action has been taken. Similarly, the interventions that UN agencies have made thus far have proven insufficient. More decisive action is required.

To address these crimes effectively, an international tribunal must be established. Both the seriousness and the number of offences warrant such an approach. Recently, the International War Crimes Tribunal in The Hague sentenced a former Bosnian Croat general to 45 years in prison for the deaths of 100 people. The deaths of 30,000 Sri Lankans are no less valuable. Only with greater international assistance, preferably in the form of establishing an international tribunal, can the perpetrators be brought to justice and a sense of law and order restored in Sri Lanka.

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\* the writer graduated, *cum laude*, from Harvard Law School and holds a B.A. in economics, *summa cum laude*, from Bucknell University.



It should be highlighted at the outset that these facts are not disputed by the government of Sri Lanka. Most of the disappearances occurred under a former government, and after a new government came to power, it established three fact-finding Commissions of Inquiry into the Voluntary Removal or Disappearance of Persons. This paper is limited to analysis of the Interim Reports and Final Reports of these Commissions.<sup>1</sup>

### **Forced disappearances in Sri Lanka constitute a crime against humanity**

The enforced disappearances in Sri Lanka present a uniquely abhorrent factual situation:

- **A large number of disappeared persons:** estimates range from 26,877 to 60,000 persons
- **A large number of child victims:** approximately 15% of victims were children below the age of 19
- **Involvement at the highest political levels:** the entirety of the legal enforcement mechanism was utilized
- **The methods utilized:** illegal detention and torture centers
- **The purpose of the enforced disappearances:** extrajudicial killing and elimination of evidence

The disappearance of tens of thousands of people in Sri Lanka was not a campaign by a hostile foreign enemy, nor was it part of a bloody civil war or revolution. It was a campaign by a democratically-elected government to remove opposition. The victims need not have even been involved with insurgents; attending a meeting or a speech, or even reading a book, was sufficient to be targeted for extra judicial killing. Many of the victims were outside the insurgency movement; some victims were simply members of legally recognized opposition parties. Many were just children.

The police and army came for the victims not only at night but at any time of the day.<sup>2</sup> Sometimes, the victims were abducted by men who came in unmarked cars and acted with impunity. Sometimes, the victims were arrested for questioning and subsequently disappeared in what may be called "involuntary removal." In the town of Trincomalee, residents were told to report to a stadium one morning after which the police then picked certain persons out of the crowd, blind-folded them, and transported to Plantain Point Army Camp. One victim who was released told of the torture; other victims were never heard from again, despite inquiries by their families.<sup>3</sup> As this example illustrates, the victims in Sri Lanka were not only abducted, but were normally murdered and often tortured as well. One of the Disappearances Commissions established Sri Lanka stated,

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<sup>1</sup> The information in this paper comes primarily from the following reports: The Final Report of the Commission of Inquiry into Involuntary Removal or Disappearance of Person in the Western, Southern and Sabaragamuwa Provinces (Sept. 1997) [hereinafter Final Report of Western]; Final Report of the Commission of Inquiry into the Voluntary Removal or Disappearance of Persons in the Northern & Eastern Provinces (Sept. 1997) [hereinafter Final Report of Northern]; and Interim Reports of the Commission of Inquiry into the Voluntary Removal or Disappearance of Persons in the Central, North Western, North Central and UVA Provinces (Sept. 1997) [hereinafter Interim Report of Central].

<sup>2</sup> Final Report on Western, Chpt. 3, figure 3.

<sup>3</sup> Final Report of Northern, pp. 16-19.



*"Disappearance is, in our finding, only a euphemism for a killing, a reality that the absence of recovery of the body should not be allowed to obscure."*<sup>4</sup>

In fact, death certificates were issued for persons where the Commission has been satisfied that they had been involuntarily removed, and compensation was paid to the victims' families.<sup>5</sup> Many of the bodies were recovered, however, in over a dozen mass graves.<sup>6</sup> There were also instances of mass executions. A well-known instance is the massacre at Mahawatte, Kandy, where at least 54 persons were killed in one night.

Many of the bodies showed signs of torture. In some cases, the government sought to have the fact of torture become common knowledge. Disfigured heads and bodies were displayed openly to serve as a warning to the public. Such atrocities became commonplace.<sup>7</sup> The existence of at least eight such torture chambers was discovered by a Commission investigating disappearances in four provinces.<sup>8</sup> At a torture chamber at St. Sylvester's College in Kandy, evidence showed that about 1,000 persons were detained in this camp and systematically tortured before being taken away and killed.<sup>9</sup>

Perhaps most disturbingly, 15% of victims were children below the age of 19.<sup>10</sup> The ruling party has a perception that the JVP targeted outstanding youth at the village level, and this perception was enough to cause the government to indiscriminately eliminate outstanding youth at the community level. The police and army would sometimes take young girls in place of fathers, and often children were abducted and killed along with their parents. Sometimes, the motives were personal, as in the abductions of young girls for sexual abuse, and the breakdown of the system allowed officials to act with impunity.<sup>11</sup> Any assertions by the government that their actions were compelled by an interest of self-defense and a need to maintain control against the insurgent Janatha Vimukthi Peramuna (JVP) appear ludicrous in the face of slaughter of children.<sup>12</sup>

These acts of violence were perpetrated on the authority of the government, and involved the entire legal enforcement machinery. Leading politicians, such as a Chief Minister of a Province and a

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<sup>4</sup> Final Report of Western, p. 27.

<sup>5</sup> Interim Report of Central, Interim Report--II, pp. 5-7.

<sup>6</sup> The Final Commission Report for the Western, Southern and Sabaragamuwa Provinces discusses the presence of twelve mass graves: the Hokandra Mass Grave; Essella School Mass Grave; Walpita Government Farm Mass Grave; Ambagahahenakanda Mass Grave; Bemmulla Mass Grave; Kottawekella, Yakkalamulla Mass Grave; Dickwella Mass Grave at Heendeliya; Diyadawakelle, Deniyaya Mass Grave; Wilpita Akuressa Mass Grave; Angkumbura Mass Grave; and Suriyakanda Mass Grave. Final Report of Western, p. 117. Two more mass graves have been discovered since the report was made: Chemmani Mass Grave and the Mamadala Mass Grave. "A Memorandum to the Working Group on Enforced or Involuntary Disappearances from Asian Legal Resource Centre, Hong Kong" (11 Feb. 1999), p. 17, fn. 13-14.

<sup>7</sup> Final Report of Western, p. 34.

<sup>8</sup> "Torture chambers" existed at the following locations: St. Sylvester's College at Kandy; YMCA at Welimada; Community Centre (Praja Salawa) at Moneragala; Sudampaya at Anamaduwa; Hali Ela Motors at Badulla; Beragala Army Camp, Haputale; Paddy Marketing Board Stores at Walapane; and St. Ritas Camp, Nuwara Eliya. Interim Report of Central, Interim Report--VII, p. 20.

<sup>9</sup> Interim Report of Central, Interim Report--II, p.5 (internal citation omitted).

<sup>10</sup> Final Report of Western, Chpt. 3, Table 4.

<sup>11</sup> Final Report of Western, p. 122.

<sup>12</sup> In light of a statistic that 14% of the disappearances involved children below the age of 15, one Commission member asked, "Can the war theory, which maintains that the police and military acted in self-defence, stand in the face of these naked statistics?" Interim Report of Central, Interim Report, p. 15.



Cabinet member of the government, have been named as playing a part in removals.<sup>13</sup> Two senior officials, one from the police and one from the army, have testified under oath of the role played by politicians of the governing party in preparing "lists" of names for executions.<sup>14</sup> A Commission established by the government stated that it was of the opinion that the disappearances/killings of these persons have been with the knowledge and tacit approval of the Government in power at that time.<sup>15</sup>

The widespread government involvement can be seen in the impunity with which the police acted, and the existence of multiple illegal detention and torture centers. The abductions often occurred during the day with men taking victims away in unmarked cars. Mourning families filed missing person reports and made personal pleas at the homes of government officials for information on their loved ones, all to no avail. One father stated,

*"I went to the police 76 times, but we were driven away like dogs."*<sup>16</sup>

Cases of disappearances were dismissed without criminal investigation.<sup>17</sup> Although not as common as in the late 1980s, disappearances continue today. And despite government commissions appointed to study the disappearances, most of the perpetrators have not been put to justice. The international community must act on this crime against humanity.

### **The actions of the government constitute crimes against humanity**

#### Comparison to other crimes against humanity

Other recently condemned violations of human rights pale in comparison to the widespread nature of the atrocities in Sri Lanka:

- The International War Crimes Tribunal in The Hague recently sentenced Former Bosnian Croat general Tihomir Blaskic to 45 years in prison for his key role in an incident where more than 100 people were killed.<sup>18</sup>
- The Düsseldorf High Court last year sentenced former leader of a paramilitary Serb group Nikola Jorgic to life imprisonment. He had been convicted in 1997 of eleven counts of genocide and 30 counts of murder.<sup>19</sup>
- The British House of Lords recently ruled that Former Chilean dictator General Augusto Pinochet could be extradited for the crime of torture. The total number of dead or

<sup>13</sup> Interim Report of Central, Interim Report--IV, p. 11.

<sup>14</sup> Final Report on Western, p 37.

<sup>15</sup> Interim Report of Central, Interim Report--II, p. 7.

<sup>16</sup> Final Report of Western, p 155.

<sup>17</sup> Interim Report of Central, Interim Report--II, p. 4, pt. F ("When persons went to the Police Station to complain about the removals they were usually driven away and their complaints were not recorded.") and g ("complaints of abductions in most cases had been entered in the Minor Offenses Information Book of the Police Station").

<sup>18</sup> Blaskic was charged with trying to ethnically cleanse central Bosnia of Muslims. He was found guilty of all but one of 20 counts of crimes against humanity, war crimes and grave breaches of the 1949 Geneva Convention. "Hague tribunal sentences Bosnian general," and "General guilty of Bosnia war crimes," BBC News, available at [news2.thls.bbc.co.uk/hi/english/world/europe/newsid%5F665000/665158.stm](http://news2.thls.bbc.co.uk/hi/english/world/europe/newsid%5F665000/665158.stm).

<sup>19</sup> The Pinochet Precedent: How Victims Can Pursue Human Rights Criminals Abroad," Human Rights Watch (March 2000), available at [www.hrw.org/campaigns/chile98/brochfn1.htm](http://www.hrw.org/campaigns/chile98/brochfn1.htm).



disappeared was 3197, but Pinochet benefited from immunity as head of state for almost all of the crimes committed under his regime.<sup>20</sup>

Despite the much larger number of victims in Sri Lanka than in any of these incidents, the disappearances there have not attracted the same amount of international attention and outrage. This is especially inexplicable when seen in light of the similarities with the case of General Pinochet. Both situations involved large-scale disappearances, torture, and murder at the hands of government officials. However, whereas there were about 3000 victims of the Pinochet regime, there have been over 30,000 in Sri Lanka. Although he has yet to stand trial due to his physical condition, the case of General Pinochet of Chile has aroused a level of international attention that the case of disappearances in Sri Lanka has lacked. The enforced disappearance of approximately 30,000 must be treated and addressed as the crime against humanity that it actually is.

#### Legal basis for crimes against humanity

The disappearance, and attendant torture and murder, of tens of thousands of people in Sri Lanka constitutes a crime against humanity. Both common sense and international precedent dictate this result. As discussed in further detail below, the crimes against humanity which occurred in Sri Lanka include

- Murder;
- Torture;
- Enforced disappearance of persons;
- Extermination;
- Imprisonment or severe deprivation of physical liberty in violation of fundamental rules of law (arbitrary imprisonment); and
- Persecution on political, racial, religious or ethnic grounds.

The occurrence of one of these crimes, however, does not automatically make it a crime against humanity. For any of these actions to be considered a crime against humanity, two basic elements must be shown:

- Widespread or systematic nature and
- Government involvement.

For example, the Rome Statute of the International Criminal Court defines “crime against humanity” as one of a number of specified acts “when committed as part of a widespread or systematic attack against any civilian population, with knowledge of the attack.”<sup>21</sup> Similarly, the Draft Code of Crimes Against the Peace and Security of Mankind defines “crime against humanity” as one of a number of

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<sup>20</sup> According to an official report by the civilian government that succeeded Pinochet, 3,197 people were killed or disappeared under his rule after he seized power in 1973 in a bloody coup against elected Marxist president Salvador Allende, available at [www.cnn.com/2000/WORLD/europe/03/02/pinochet.05/index.html](http://www.cnn.com/2000/WORLD/europe/03/02/pinochet.05/index.html) and House of Lords, *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet*, *Regina v. Evans and Another and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* (On Appeal from a Divisional Court of the Queen's Bench Division) (24 March 1998), available at [www.parliament.the-stationery-office.co.uk/pa/ld/ldhome.htm](http://www.parliament.the-stationery-office.co.uk/pa/ld/ldhome.htm).

<sup>21</sup> Rome Statute of the International Criminal Court [as corrected by the procès-verbaux of 10 November 1998 and 12 July 1999], Part 2, Art. 7(1). “Attack against any civilian population” “means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population pursuant to or in furtherance of a State or organization policy to commit such attack.” *Id.* At Part 2(2)(a).



specified acts “when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group.”<sup>22</sup>

A somewhat more restrictive definition can be found in the Resolution Concerning the Establishment and Statute of the International Criminal Tribunal for Rwanda, which defines “crime against humanity” as one of a number of crimes “when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.”<sup>23</sup>

The activity in Sri Lanka clearly meets the standards, whether broadly or narrowly defined. The disappearances were certainly widespread in scale, as they involved tens of thousands of people, and were systematic as well. A report produced by one of the commissions established in Sri Lanka states that –

*“The common features of the narration by thousands of humble petitioners in respect of thousands of abductions and disappearances bore powerful witness to the fact that what we were looking at was an orchestrated phenomenon and not a series [of] isolated instances explicable in terms of ‘excesses’ by individual transgressors.”<sup>24</sup>*

As discussed in the background facts above, the disappearances were clearly orchestrated by the government against civilians. And, although some perpetrators took advantage of the lawless situation to commit crimes for personal reasons, the original motivation was political and most transgressions had this motivation, as required by the Statute for Rwanda.

To be considered a crime against humanity, a crime must be sufficiently serious in degree and be enumerated in the relevant convention. Reiterating the list above, the crimes against humanity that are relevant to the situation in Sri Lanka include murder; torture; enforced disappearance of persons; extermination; imprisonment or severe deprivation of physical liberty in violation of fundamental rules of law (arbitrary imprisonment); and persecution on political grounds. Any of these crimes individually could constitute a crime against humanity. The occurrence of several of these crimes compounds the urgency with which the Sri Lankan situation must be addressed.

#### The crime of murder

Murder is one of the original crimes against humanity, dating from the Nuremberg Charter.<sup>25</sup> The Principles of the Nuremberg Tribunal provides that certain crimes are punishable as crimes under international law as crimes against humanity:

Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such

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<sup>22</sup> Draft Code of Crimes Against the Peace and Security of Mankind, International Law Commission Report, 1996, Chpt. II, Art. 18.

<sup>23</sup> Resolution 955 Concerning the Establishment and Statute of the International Criminal Tribunal for Rwanda, S/RES/955 (1994), 8 November 1994 (Adopted by the Security Council at its 3453<sup>rd</sup> meeting, on 8 November 1994), Art. 3.

<sup>24</sup> Final Report of Western, p. 32.

<sup>25</sup> Charter of the International Military Tribunal at Nuremberg (1945), Art. 6(c).



persecutions are carried on in execution of or in connection with any crime against peace or any war crimes.”<sup>26</sup>

Initially associated with crimes committed during times of war, crimes against humanity have now become autonomous crimes.<sup>27</sup> The Statute of the International Criminal Court,<sup>28</sup> the Statute on Rwanda,<sup>29</sup> and the Draft Code of Crimes Against the Peace and Security of Mankind<sup>30</sup> all list murder as a crime in its own right, dissociated with crimes against peace and war crimes. There is no doubt that crime of widespread and systematic murder was committed in Sri Lanka, as evidenced by the mass graves and the discovery of thousands of bodies.

Not only have crimes against humanity become independent crimes, the types of actions that constitute crimes against humanity have expanded since Nuremberg. Acknowledging this expansion, the Commentary accompanying the International Law Commission Report concerning the Draft Code of Crimes Against the Peace and Security of Mankind states:

*The definition of crimes against humanity combined in article 18 is drawn from the Nürnberg Charter as interpreted and applied by the Nürnberg Tribunal, taking into account subsequent developments in international law since Nürnberg.*<sup>31</sup>

Crimes such as torture and enforced disappearance, discussed in depth below, have also become crimes against humanity.<sup>32</sup>

#### The crime of torture

Torture is one of the most established crimes against humanity and is defined as a crime against humanity in the Statute on Rwanda<sup>33</sup>, the Draft Code of Crimes Against Peace<sup>34</sup>, and the Statute of the International Criminal Court.<sup>35</sup> The Statute provides this definition of “torture”:

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<sup>26</sup> *Principles of the Nuremberg Tribunal, 1950*, No. 82 Principles of Law Recognized in the Charter of the Nuremberg Tribunal in the Judgment of the Tribunal. Adopted by the International Law Commission of the United Nations, 1950, Principle VI (c).

<sup>27</sup> International Law Commission Report, 1996, Draft Code of Crimes Against the Peace and Security of Mankind, Chpt. II, Commentary, Pt. 6 (citing, *inter alia*, *Prosecutor v. Dusko Tadic*, Decision of the Appeals Chamber on the Defence Motion for Interlocutory Appeal on Jurisdiction, p. 73 (“It is by now a settled rule of customary law that crimes against humanity do not require a connection to international armed conflict.”); and Pinochet, House of Lords, opinion of Lord Browne-Wilkinson, (citing *Oppenheim’s International Law* (Jennings and Watts edition), vol. 1, 996; note 6 to Article 18 of the *I.L.C. Draft Code of Crimes Against Peace; Prosecutor v. Furundzija*, Tribunal for Former Yugoslavia, Case No. 17-95-17/1-T), opinion of Lord Slynn, and opinion of Lord Millet.

<sup>28</sup> Part 2 (1)(a).

<sup>29</sup> Art. 3(a).

<sup>30</sup> Art. 18(a).

<sup>31</sup> International Law Commission Report, 1996, Chpt. II, Draft Code of Crimes Against the Peace and Security of Mankind.

<sup>32</sup> A recent article by Human Rights Watch also notes this expansion in the notion of crimes with universal jurisdiction. “The Pinochet Precedent: How Victims Can Pursue Human Rights Criminals Abroad,” March 2000, Human Rights Watch, available at <http://www.hrw.org/> (“Since the end of World War II, the list of crimes giving rise to universal jurisdiction has grown to include many atrocities committed within national borders, such as genocide, torture, ‘apartheid’ and other ‘crimes against humanity.’”).

<sup>33</sup> Art. 3(f).

<sup>34</sup> Art. 18(b).

<sup>35</sup> Art. 7 (1)(f).



*"Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.*<sup>36</sup>

The evidence that torture was committed is plentiful: eyewitness testimony from persons who were released after detention; the discovery of torture centers; and physical evidence on the bodies exhumed from mass graves as well as those on display as public warnings plainly showing the signs of severe physical pain and suffering. This pain and suffering did not arise from lawful sanctions. The disappeared persons were held illegally, and in any event, the physical abuse evident on the bodies is beyond what could be legally inflicted upon a prisoner. It is clear that the crime of torture was committed.

The crime of torture has recently received much attention due to the high profile accusations against General Augusto Pinochet of Chile and the recent case before the British House of Lords seeking his extradition to Spain. The House of Lords discussed the seriousness of the crime of torture. Lord Browne-Wilkinson quoted as follows from a case before the Tribunal for the Former Yugoslavia:

*"Because of the importance of the values it protects, [the prohibition of torture] has evolved into a peremptory norm or jus cogens, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules."*<sup>37</sup>

Quoting an American court, Lord Browne-Wilkinson continued

*International law provides that offenses jus cogens may be punished by any state because the offenders are "common enemies of all mankind and all nations have an equal interest in their apprehension and prosecution."*<sup>38</sup>

The international community must take action to redress the crimes of torture in Sri Lanka.

Although the international crime of torture existed at a pre-eminent level even before enactment of the Convention, the Torture Convention provided an international system to prevent the torturer from escaping punishment.<sup>39</sup> The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment defines torture in much the same way as the definition in the Draft Code discussed above.<sup>40</sup> It also provides that –

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<sup>36</sup> Art. 7 (2)(e).

<sup>37</sup> Pinochet, House of Lords, opinion of Lord Browne-Wilkinson (page numbers not available) (citing *Furundzija, Prosecutor v. Furundzija*, Tribunal for Former Yugoslavia, Case No. 17-95-17/1-T, para. 153).

<sup>38</sup> *Id.* (citing *Demjanjuk v. Petrovsky*, 776 F. 2d 571 (1985)).

<sup>39</sup> *Id.*

<sup>40</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading treatment or Punishment, adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 Dec. 1984 (entered into force 26 June 1987), Part I, Art. 1.



*"[n]o exceptional circumstances whatsoever, whether a state of war or a threat or war, international political instability or any other public emergency, may be invoked as a justification of torture."*<sup>41</sup>

Insofar as the phenomenon of disappearances is concerned during this time, the government of Sri Lanka had clearly violated the Convention Against Torture and no excuse is available for their actions.

International treaties as well as the Pinochet case clearly support the finding that torture was committed in Sri Lanka and that this pattern of torture constitutes a crime against humanity. The British House of Lords found that the atrocities committed under Pinochet, if proven true, would constitute crimes against humanity and violations of the Torture Convention, and a different determination by the international community concerning the disappearances in Sri Lanka would be completely unfounded.

#### The crime of enforced disappearance

Enforced disappearance, which form the basis of the charges against the Sri Lankan officials, is also a crime against humanity and is defined as such in several international instruments. These include the Resolution on Rwanda,<sup>42</sup> the Statute of the International Criminal Court,<sup>43</sup> and the Draft Code of Crimes Against the Peace and Security of Mankind.<sup>44</sup> The Statute Of the International Criminal Court provides a definition, which is rather standard, for "enforced disappearance":

*[T]he arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or political organization, followed by a refusal to acknowledge the deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.*<sup>45</sup>

The disappearances in Sri Lanka clearly meet these conditions. The victims were either abducted and detained, or arrested for questioning and then detained. Authorization and support came from several levels of the government. Families inquired about missing persons, but the police and government officials normally refused to acknowledge the abductions and always withheld information on their circumstances. The victims were also removed from the protection of law for prolonged periods of time, usually forever, in fact. The situation in Sri Lanka clearly meets the definition.

<sup>41</sup> *Id.* at Part I, Art. 2(2).

<sup>42</sup> Resolution concerning the establishment and statute of the International Criminal Tribunal for Rwanda, S/RES/955(1994), 8 November 1994 (Adopted by the Security Council at its 3453<sup>rd</sup> meeting, in November 1994).

<sup>43</sup> Rome Statute of the International Criminal Court [as corrected by the procès-verbaux of 10 November 1998 and 12 July 1999], Part 2, Art. 7 (1)(i).

<sup>44</sup> Draft Code of Crimes Against the Peace and Security of Mankind, Art. 18. The Commentary noted that "[a]lthough this type of criminal conduct is a relatively recent phenomenon, the present Code proposes its inclusion as a crime against humanity because of its extreme cruelty and gravity." International Law Commission Report, 1996, Chpt. II, Art. 18, Commentary, pt. 15.

<sup>45</sup> *Id.* at Art. (7)(2)(i).



The Inter-American Convention on Forced Disappearance of Persons of the Organization of American States also provides support for treating disappearance as a crime against humanity. The Convention “[r]eaffirm[s] that the systematic practice of the forced disappearance of persons constitutes a crime against humanity” and “[c]onsider[s] that the forced disappearance of persons is an affront to the conscience of the Hemisphere and a grave and abominable offense against the inherent dignity of the human being.”<sup>46</sup> This “reaffirmation” shows that treating disappearances as a crime against humanity is not a novel approach. The Convention defines forced disappearance in much the same way as the Statute of the International Criminal Court.<sup>47</sup>

Even before the instruments discussed above specifically labeled disappearances as a crime against humanity, there was support for such a notion. Although the Nuremberg Charter did not expressly enumerate enforced disappearances as a crime against humanity, the Tribunal convicted Wilhelm Keitel of this crime, invented by Adolph Hitler.<sup>48</sup> And the UN Declaration on the Protection of All Persons from Enforced Disappearances, written before the instruments discussed above, states that the “systematic practice of [enforced disappearance] is of the nature of a crime against humanity.”<sup>49</sup>

The crime of enforced disappearance has always been a crime of severe magnitude, and is now firmly established as a crime against humanity. The facts surrounding the situation in Sri Lanka show that this crime was committed and must be treated as a crime against humanity.

#### Other crimes

Related to the crime of murder, yet a crime in its own right, is that of extermination. In addition to appearing in the Nuremberg Charter, extermination is also enumerated as crime against humanity in the Statute on Rwanda<sup>50</sup> and the Draft Code of Crimes Against the Peace and Security of Mankind.<sup>51</sup> The commentary in the International law Commission Report accompanying the Draft explains that extermination, by its nature, is directed against a group of individuals. It states –

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<sup>46</sup> Inter-American Convention on Forced Disappearance of Persons (entered into force March 29, 1991), Preamble, on deposit with OAS General Secretariat, available at <<<http://www.cidh.org/basic.htm>>> (visited on 3/9/2000).

<sup>47</sup> The Convention provides:

For the purposes of this Convention, forced disappearance is considered to be the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees.

Id. at Art. II.

<sup>48</sup> Amnesty International- Report- EUR 45/01/99, “United Kingdom: The Pinochet Case--Universal Jurisdiction and the Absence of Immunity for Crimes Against Humanity (January 1999), p. 7 (citing Judgment of the International Military Tribunal for the Trial of German Major War Criminals (with the dissenting opinion of the Soviet Member)- Nuremberg 30<sup>th</sup> September and 1<sup>st</sup> October 1946, Cmd. 6964, Misc. No. 12 (London: H.M.S.O. 1946), pp. 48-49)) available at [www.amnesty.org/ailib/aipub/1999/EUR/44500199.htm](http://www.amnesty.org/ailib/aipub/1999/EUR/44500199.htm).

<sup>49</sup> UN Declaration on the Protection of All Persons from Enforced Disappearances, G.A. res. 47/133, 47 U.N.GAOR Supp. (No. 49) at 207, U.N. Doc. A/47/49 (1992) (adopted 18 Dec. 1992), Preamble, para. 4.

<sup>50</sup> Art. 3(b).

<sup>51</sup> Art 18(a).



*In addition, the act used to carry out the offense of extermination involves an element of mass destruction which is not required for murder. In this regard, extermination is closely related to the crimes of genocide in that both crimes are directed against a large number of victims. However, the crime of extermination would apply to situations that differ from those covered by the crime of genocide. Extermination covers situations in which a group of individuals who do not share any common characteristics are killed. It also applies to situations in which some members of a group are killed while others are spared.<sup>52</sup>*

Large groups of people were rounded up and killed in Sri Lanka. Although perhaps not fully aware of the legal definition, government officials specifically discussed their goal of exterminating JVP

*"...You cannot do these things under the normal law. It takes a lot of time. By the time my good friends who are lawyers take time to solve these things the match will be over... We have finished the first eleven and the second eleven. Now we are tackling the under fourteen fellows."<sup>53</sup>*

The crime of arbitrary imprisonment was also committed in Sri Lanka. After being abducted, the victims were normally kept in illegal detention centers in violation of all legal rights for varying lengths of time before their execution. The Statute on the International Criminal Court also includes "[i]mprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law";<sup>54</sup> the Statute on Rwanda includes imprisonment in the context of widespread or systematic attack against civilian population on national, political, ethnic, racial or religious grounds;<sup>55</sup> and the Draft Code of Crimes against the Peace and Security of Mankind lists "arbitrary imprisonment" as a crime against humanity.<sup>56</sup> The situation in Sri Lanka satisfies all three instruments.

Finally, because the government's intent was to remove political opposition, the crime of "persecution on political, racial, religious or ethnic grounds" was committed in Sri Lanka. This has been characterized as a crime against humanity in the Nuremberg Charter,<sup>57</sup> Nuremberg Principles,<sup>58</sup> Statute on Rwanda,<sup>59</sup> and the Draft Code of Crimes Against the Peace and Security of Mankind.<sup>60</sup> The Draft Code explains that –

*The inhumane act of persecution may take many forms with its common characteristic being the denial of the human rights and fundamental freedoms to which every individual is entitled without distinction as recognized in the Charter*

<sup>52</sup> International Law Commission Report, 1996, Chpt. II, Draft Code of Crimes Against the Peace and Security of Mankind, Commentary Pt. 8.

<sup>53</sup> Hansard, Sri Lanka, Volume 62 column 1249, proceedings of 25.01.90.

<sup>54</sup> Part 2, (1)(e).

<sup>55</sup> Art. 3 (e).

<sup>56</sup> Art 18(h).

<sup>57</sup> Nuremberg Charter, art. 6(c).

<sup>58</sup> Nuremberg Principles, Principle VI.

<sup>59</sup> Statute on Rwanda, art. 3,

<sup>60</sup> Draft Code of Crimes Against the Peace and Security of Mankind, art. 18(e). The Commentary to the Code also lists the Nuremberg Control Council Law No. 10, art. II, para. C, and the 1954 Draft Code, art. 2, para. 11, as providing that this crime constitutes a crime against humanity. International Law Commission Report, 1996, Chpt II, Draft Code of Crimes Against the Peace and Security of mankind, Art 18, Commentary, pt. 11.



*of the United Nations (Articles 1 and 55) and the International Covenant on Civil and Political rights (article 2).<sup>61</sup>*

The victims of disappearances in Sri Lanka were denied of every basic right, and were clearly persecuted. The crime of persecution provides yet another basis for calling the actions by the government in Sri Lanka a crime against humanity.

### **The actions of the government constitute gross violation of human rights**

The disappearances in Sri Lanka must surely be classified among the "gross violations of human rights" condemned by Secretary General Kofi Annan. During a 1999 Human Rights Commission meeting, he stated:

*No government has the right to hide behind national sovereignty in order to violate the human rights or fundamental freedoms of its peoples. Whether a person belongs to the minority or the majority, that person's human rights and fundamental freedoms are sacred.<sup>62</sup>*

Although the statement was made in the context of dealing with minorities, the meaning is clear. Governments and their officials will be held accountable for the atrocities they commit against their own people.

### **The situation of child victims must be addressed**

Although the actions in Sri Lanka obviously violate numerous other conventions relating to the rights of adults,<sup>63</sup> it is the violation of those conventions protecting the rights of children that is most disturbing. States are to extend particular care and assistance to children under international instruments such as the Convention on the Rights of the Child;<sup>64</sup> Declaration of the Rights of the Child;<sup>65</sup> Universal Declaration of Human Rights;<sup>66</sup> International Covenant on Civil and Political Rights;<sup>67</sup> and the International Covenant on Economic, Social and Cultural Rights.<sup>68</sup> In particular, children should not be punished or discriminated against based on status, activities, expressed opinions, or beliefs of family members.<sup>69</sup> Not only were children in Sri Lanka not given "particular care," they did not even receive the basic, minimum rights guaranteed to adults. Other provisions concerning children, such as those securing education and social security, have no chance of being attained in a climate where children's lives are at risk.

<sup>61</sup> *Id.*

<sup>62</sup> Press Release SG/SM/6949 HR/CN/898, "Secretary-General Calls for renewed Commitment in New Century to Protect Rights of Man, Woman, Child—Regardless of Ethnic, National Belonging" (7 April 1999).

<sup>63</sup> See, e.g., International Covenant on Civil and Political Rights, art. 10(1) ("All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."); and Body of Protection of all Persons under any Form of Detention or Imprisonment (adopted 9 December 1988), Principle 1 ("All persons under any form of detention or imprisonment shall be treated in a humane manner with respect for the inherent dignity of the human person.")

<sup>64</sup> Convention on the Rights of the Child, Preamble (2 September 1990).

<sup>65</sup> Declaration of the Rights of the Child, Preamble (entered into force 20 November 1959).

<sup>66</sup> Universal Declaration of Human Rights, art. 25(2) (entered into force 10 Dec. 1948).

<sup>67</sup> International Covenant on Civil and Political Rights, art. 23 and 24 (entered into force 3 January 1976).

<sup>68</sup> International Covenant on Economic, Social and Cultural Rights, art. 10 (entered into force 3 January 1976).

<sup>69</sup> Convention on the Rights of the Child, art. 2.



Article 37 of the Convention on the Rights of the Child is particularly applicable. It provides that --

- "No child shall be subject to torture or other cruel, inhuman or degrading treatment or punishment";<sup>70</sup>
- "No child shall be deprived of his or her liberty unlawfully or arbitrarily" and that the "arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time";<sup>71</sup>
- "Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age";<sup>72</sup> and
- "Every child deprived of liberty shall have the right to legal and other appropriate assistance."<sup>73</sup>

Every one of these rights was violated by the forced disappearances and murders in Sri Lanka. The enforced disappearance and extrajudicial killing of thousands of children requires action by the international community.

### **The situation in Sri Lanka requires action by the international community**

#### Need for criminal investigation

Though a number of commissions were established within Sri Lanka to address the issue of forced disappearances they have been to no avail. The three initial commissions, for example, made their recommendations, but no legislation has been considered for implementing the recommendations.<sup>74</sup> All these three commissions recommended a special prosecutor. However, this will be of little use because the two functions of investigation and prosecution are separate under Sri Lanka law and the system is currently incapable of properly performing these investigations. The collapse of the integrity of the system has made accurate investigation of perpetrators impossible.

During the height of the disappearances, police did not carry out investigations due to the complicity of many police and government officials. Although control of the government has changed hands, many lower level officials and police officers still retain their positions. During a discussion of police involvement, several people commented to one of the commissions that, being a good police officer invites trouble, and such officers become victims of unjust transfers and other forms of discrimination. Because people close to powerbrokers are appointed to various commissions, it becomes impossible to challenge an unfair transfer order. Even when officers have been transferred, the structural damage to the system has thwarted the search for the truth. One commentator pointed out that "People [the police officers] were transferred out, but the institution remained the same.

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<sup>70</sup> Art. 37(a).

<sup>71</sup> Art. 37(b).

<sup>72</sup> Art. 37(c).

<sup>73</sup> Art. 37(d).

<sup>74</sup> Interim Report of Central, Interim Report--VII, p. 18 ("There appears to be very little progress in implementing the recommendations of the Commission especially with regard to the action to be taken against persons against whom credible material indicative of such persons being responsible for the removals and/or disappearances, have been made available to the Commission.")



Policemen did not know how to investigate.”<sup>75</sup> The system had broken down to such an extent that the country is no longer able to investigate even normal crimes, let alone crimes so serious as the disappearances.

The Sri Lankan justice system, as it exists now, is unable to handle adequately the criminal investigation and to foster a sense of justice among the population. One of the Commission reports states –

*Most of the complainants do not seem to be interested in receiving compensation as much as seeing those responsible being punished. Some of such persons continue to be serving in the very same areas [...] some in higher positions than before. The anguish and anxiety of the complainants, who keep asking us what happened after the inquiry, is understandable as no action appears to have been taken against the persons whom they have mentioned as responsible at the inquiries before this Commission.*<sup>76</sup>

The result of the government’s use of the entire legal enforcement machinery in its campaign of mass disappearances is the creation of a subverted system of justice, which cannot recover without outside assistance.

### **Conclusion; the role of the international community**

Action by the international community is needed at several levels. Despite the lapse of time, the United Nations Working Group on Enforced and Involuntary Disappearances can conclude that the disappearances are crimes against humanity and take action on this basis. In the past, the recommendations of the Commission concerning Sri Lanka have largely been ignored. The United Nations Working Group agreed in a 1999 recommendation to take up the issue of a criminal investigation, but little progress has been made. To resolve the crimes committed in Sri Lanka, the UN Commission must take a stronger and more active position; namely advocating establishing a tribunal.

The United Nations High Commissioner for Human Rights can also play a part in redressing these crimes by first seeking a mandate from the United Nations Human Rights Commission and the Security Council to proceed on the matter of disappearances in Sri Lanka on the basis that a crime against humanity has taken place. The Secretary General likewise can appeal to the Security Council for a tribunal to be established, both on the basis of the situation in Sri Lanka being a crime against humanity and a gross violation of human rights.

To establish a Tribunal, the United Nations can either obtain the consent of the Sri Lankan or get a resolution from the Security Council. The Sri Lankan government has demonstrated its commitment to try these crimes, and should be amenable to allowing the United Nations to take control. The government has the desire to rectify the situation--it has made a commitment to both the United

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<sup>75</sup> see article by Sasanka Perera in Human Rights SOLIDARITY, Asian Human Rights Commission, April 1999, vol 9 no 4.

<sup>76</sup> Interim Report of Central, Interim Report--VII, p. 18.



Nations and to the Sri Lankan people to bring the perpetrators to justice-but it needs assistance in restoring order within its legal system.

At this point, two alternatives are available: abandoning these cases without remedies or trying the cases under international law by a Tribunal established by the United Nations. When one considers the seriousness of the crime, however, only one alternative is viable. The victims of the disappearances were robbed of their most basic rights, were tortured, were murdered, and were even robbed of a proper burial. Their families have suffered the psychological trauma of not knowing what happened to their loved ones, and continue to suffer as long as the perpetrators go unpunished. The only solution is to establish an international tribunal and restore the system of justice in Sri Lanka.



## Reparations for Victims of Disappearances

*M.C.M. Iqbal\**

Disappearances of persons both in the Northern and Southern parts of Sri Lanka during the past two decades have left behind an indelible mark on the history of this country.

Though the circumstances under which these disappearances occurred, the scale of such incidents and the ethnic identity of the victims is not the same in all parts of the country, the effects of these incidents on the victims, or rather the families of the disappeared, are ironically almost the same. It is now an acknowledged fact that the families of those who had been involuntarily removed in the mid 1990s were enticed by some politicians who took advantage of their plight to win their votes. These politicians made them believe that they were concerned about what had happened to the disappeared persons and promised that they would hound the perpetrators who committed such acts with impunity and put an end to such occurrences in the future. They also promised appropriate reparations to the families of the victims. Many of the victims believed these promises and voted for a change of government at the elections in 1994. Subsequently, the party that came to power at that time, appointed three Presidential Commissions of Inquiry to look into the disappearances that occurred since January, 1988. But none of these three Commissions had access to the North, which was not under the control of the then government.

In 1998, another Commission of Inquiry was appointed with island- wide jurisdiction to inquire into complaints left un-addressed by the Zonal Commissions. The mandate of this Commission precluded it from inquiring into new complaints. Consequently about six hundred disappearances that occurred in the Jaffna region during and after 1996 could not be inquired into by the Presidential Commission appointed in 1998 even though the list of those who had disappeared during this time, was made available to it. To stem the mounting criticism against the then government for not inquiring into disappearances that had occurred during its own regime, a Board of Investigation consisting of Defence Ministry Officials was appointed in 1999 to inquire into these incidents. Understandably, (given the composition of the Board), the inquiries conducted by this Board were alleged to be biased by activists and civil society organisations working for the families of the disappeared. It is not surprising that the report of this Board was never published.

Subsequently some of the victims of these disappearances in the Jaffna region complained to the Human Rights Commission and sought the assistance of this Commission to find out what happened to those who had disappeared during 1996. The Commission received 341 <sup>complaints</sup> of disappearances by December 2002. This included complaints in respect of 35 Muslims from Jaffna who had gone missing during the period of their exodus from Jaffna in 1990.

Availing itself of the provisions of section 11(b) of the Human Rights Commission Act No: 21 of 1996, the Human Rights Commission appointed a Committee consisting of persons of eminence under the chairmanship of Dr. Devanesan Nesiiah in December 2002, to inquire into and report on the

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\* The writer is a Consultant at the Human Rights Commission and was Secretary to several Commissions of Inquiry into Disappearances of Persons.



disappearances of the 341 persons referred to. This Committee was, *inter alia*, requested to recommend relief measures to needy victims. The report of this Committee was released in October, 2003 stating that the Committee had found clear evidence of 281 of the 341 disappeared persons having been taken by the army. The Report stated that there is no evidence as to what happened to them thereafter and no information could be gathered as to whether they were still alive. The Committee also recommended several relief measures in respect of the families of these victims. Similarly the 1994 Presidential Commissions of Inquiry into Disappearances too had reported that there is *credible material indicative* of the responsibility of several members of the police and security forces in respect of many of the disappearances that occurred in other parts of the country. These Commissions also made extensive recommendations on the kind of reparations that need to be provided to the victims' families.

Though several years had passed since the Presidential Commission made these recommendations and one year has passed since the Committee on Disappearances in Jaffna made their suggestions in regard to appropriate reparations that ought to be provided to the families of the disappeared, we have not seen the substantive realisation of these recommendations/suggestions in any way.

This short discussion paper<sup>1</sup> highlights the need for speedy implementation of the relief recommended to the victims. Many of them are in dire circumstances and do not have anyone to sponsor their cause effectively. Providing meaningful reparations could help in the healing of the wounds left behind by the regrettable incidents of the past. This is especially so as the victims from the North had a hearing regarding the traumas that they suffered through as recently as last year. Such a move would also be invaluable in bringing about a more suitable environment for a genuine re-commencement of the peace negotiations between the LTTE and the government.

In this regard, the most important and immediate recommendation for reparations is the need to re-enact the Registration of Deaths (Temporary Provisions) Act which had lapsed in 2001. This Act needs to be enacted with the necessary amendments. Its provisions enabled many victims of disappeared persons who held certificates of confirmation of disappearance from a Presidential Commission of Inquiry to obtain death certificates in respect of such person on a presumption of death. The absence of such a facility at present has led to manifold suffering on the part of many of the families of disappeared persons, (whose disappearances had been confirmed subsequently), as they have been unable to obtain the benefits of any of the relief measures already available, even though they hold certificates of confirmation issued by Presidential Commissions or the Human Rights Commission. An amendment to the Act should enable holders of confirmations of disappearance issued by the Human Rights Commission to enjoy the same privilege as those who complained to the Presidential Commissions and obtained the necessary documentation.

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<sup>1</sup> Dr. Radhika Coomaraswamy, Chairperson of the Human Rights Commission, ~~recently~~ presided over a discussion recently regarding the implementation of the recommendations for relief to these victims of disappearances. Representatives of several Ministries and other officials concerned with the implementation of these recommendations, attended. Mr. M.D.W Ariyawansa, Additional Secretary to the President also attended this meeting along with Mrs. Manouri Muttetuwegama and Mr. H.G. Dharmadasa who were members of the last Presidential Commission of Inquiry into Disappearances, Dr. Devanesan Nesiiah and Mrs. Jezima Ismail who were members of the Committee on Disappearances of the Human Rights Commission, along with the author, who was the then Secretary to these Commissions of Inquiry and the Committee referred to. The recommendations detailed in this paper arise out of the discussions at this meeting.



Besides, the following matters discussed at this meeting also need to be attended to by the authorities concerned. These concern the difficulties encountered by members of families of disappeared public officers, teachers, employees in semi government institutions such as co-operatives to get the salaries of disappeared and other benefits, the problems faced by internally displaced persons when making their applications for relief in respect of the disappeared IDPs as they have to do so through the office of the Divisional Secretary of the area where they usually resided, the non-payment of compensation by REPPIA due to non- allocation of funds by the Treasury, the grant of scholarships to children of disappeared persons and the need to provide vocational training to members of the families of disappeared persons.

Other problems that could be identified are the inability of the heirs of disappeared persons to claim life insurance benefits from Insurance Companies as the policy is treated to have lapsed for non-payment of the premium after the disappearances of the person so insured, the problems of families of disappeared persons not being able to continue to cultivate on LDO permit in regard to lands of the disappeared persons, the plight of elderly parents of disappeared persons who were dependents of such persons who are now in dire circumstances and the need to provide a means of livelihood to widows of disappeared persons.

The respective Ministries, particularly the Ministry of Rehabilitation, the Ministry of Social Services, the Ministry of Vocational Training, Ministry of Education, Ministry of Finance and other officials such as the Registrar-General must take whatever steps possible to provide assistance to the victims of disappeared persons on the basis of the recommendations made. Representatives from these Ministries should have regular meetings to monitor the implementation of the recommendations if these ministry officers are genuinely concerned ~~are~~ about the welfare of the victims.

One cannot be heard to say that the lack of funds is the reason for the non-implementation of the recommendations made. The Presidential Commission had taken this fact into consideration and had recommended the establishment of a special fund for this purpose, soliciting donations from State and non- State institutions both local and foreign, and philanthropic institutions both within the country and abroad. But so far, no such attempt has been made to establish such a fund. It is time that serious consideration is given to this recommendation.

Many of the families of the victims other than those in the North and many parts of the East, have received the monetary payments stipulated in a Public Administration Circular issued in 1987. The amounts payable under this circular in respect of an ordinary person who disappeared varies from Rs.15,000 to Rs.50,000 while to a politician it is Rs.500,000. The disparity in this regard makes clear, the substantial injustice caused to an ordinary citizen whose family unit has been torn apart and who has had to suffer tremendous agonies due to forces beyond his control. To add insult to injury, many in the North and the East are yet to get even this pittance.

However, these monetary payments which are paltry in nature, are not going to help to settle the pain of mind that the victims still endure. Other recommendations made by the commissions and bodies appointed to look into disappearances ought to be implemented, particularly in regard to counseling and providing a means of livelihood to those who lost their breadwinner. These measures could help to ease the burden of the victims and help them to forget the past. It is only then there can be some measure of peace in the country where development activities could take place on an even pace.



The country is now passing through a phase of reconciliation. It is important to deal with every issue that could fetter the peace process. Implementing the recommendations in regard to reparations recommended to victims of disappearances is one such issue. Though most of the incidents concerned had occurred more than ten years ago and the number of first generation victims has dwindled, their children and even their grandchildren bear the consequences of what happened and display deep hurt and bitterness. In some cases, trauma had been handed down from generation to generation. The subsequent generation tends to absorb and retain the pain and grief consciously or unconsciously. The children of these generations could carry traces of their traumatic experiences for the rest of their lives. It is for this reason that the implementation of the relief measures is important to minimize even to a small extent, the sufferings of the victims. It is hoped that those in authority will play their part effectively in bringing about such relief measures <sup>as</sup> a matter of absolute priority.



# Disappearances of Persons and the Disappearance of a System

*Basil Fernando\**

## Introduction – the Consequences of Our History

The *Final Report of The Commission of Inquiry into Involuntary Removal or Disappearance of Persons in the Western, Southern and Sabaragamuwa Provinces*<sup>1</sup> (hereafter the *Commission Report*) among its recommendations, mentions the need for a training programme in investigations for all police officers (pp. 80, 174). Besides this, the *Commission Report* recommends that Police-Lay Visitors Panels be instituted for each police area and Citizens Advisory Bureaus be established at each district level (pp. 80, 174). Obviously these are measures recommended to reverse the consequences of the disturbances caused to the law enforcement machinery by processes that made large-scale disappearances possible in Sri Lanka.

During this period of involuntary removals, the law enforcement mechanism was subject to significant deterioration. As a result, extra-judicial killings became not merely phenomena relating to insurgency investigations but subtly entered into the arena of criminal investigations as a whole. In many parts of the country, we now have complaints of so-called self-defence killings, shooting of fleeing suspects and the like. Complaints about the lack or inadequate investigation of serious crimes have become common. It is also no exaggeration to state that bribery in criminal cases has reached epidemic levels.

The breakdown in law and order that we experience now is as a consequence of the history of large-scale disappearances, which became possible through the loosening of all the hard knots that had hitherto kept criminal investigations tied to the rule of law and the elementary norms of human decency. Emergency regulations implemented at that time removed many limitations from the powers of law enforcement officers. As a result, Sri Lanka lost the human resources necessary for law enforcement: i.e., a group of law-abiding law enforcement officers committed to observing an extremely high degree of caution in their work, while also being highly skilful in the detection, prevention, and investigation of crimes. In the past, although Sri Lanka had experienced its limits in developing such a professional group of law enforcement officers, the country's achievements in this area were considerable. However, these hard-earned habits of professional behaviour were consistently undermined in order to encourage law enforcement officers to engage in illegal arrests and detention, torture and killings.

Normally, the control of the behaviour of law enforcement officers is achieved through various forms of supervision in which government departments deal with law enforcement and ultimate supervision rests with the courts. Emergency regulations in force at that time of mass scale disappearances were designed to remove such controls. One such control removed was the judicial supervision of post-mortem inquiries; this then allowed the disposal of bodies without post-mortem inquiries. What

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\* Executive Director, Asian Human Rights Commission, Hong Kong.

<sup>1</sup> *Final Report of the Commission of Inquiry into Involuntary Removal or Disappearance of Persons in the Western, Southern and Sabaragamuwa Provinces*. (Department of Government Printing, Sri Lanka, September 1997).



logically followed were executions without judicial inquiries. Law enforcement officers thus were given the 'freedom' to deal with 'crime' in any way they liked. Thus, these emergency regulations removed the most fundamental checks necessary to maintain a proper law enforcement mechanism.

Although the removal of controls was devastatingly simple, effective re-imposition of these controls has not been an easy task. Inevitably, to re-introduce controls to the same officers who have now become used to operating without such fetters is extremely difficult. In an analogous situation, one can observe that the behaviour patterns of a good watchdog that had earlier been prevented from tasting blood can never be the same after it has tasted blood. In a country that does not make human resource training a priority and neglects to provide attractive conditions for law enforcement officers, the re-creation of an orderly law enforcement system will remain a formidable task. Nevertheless, the delay in achieving this task poses a continuing threat to the society.

An even greater danger is that the very memory of a rational system of law enforcement may be lost in the process. Alleged criminals may be at the mercy of the law enforcement officers. Contract killings may take place with varying degrees of consent on the part of the law enforcement officers. Corruption may become the deciding factor in the treatment of persons who may have to seek recourse to law. Politicians may exploit the situation and politicians themselves may become compromised as a result.

Under these circumstances the *Commission Report's* recommendations for training programmes in investigation for police officers are quite welcome and even laudable. However, such measures are wholly inadequate to deal with the situation now prevalent in the law enforcement machinery in which the internal structures of proper supervision have collapsed. Any attempt at finding solutions must acknowledge this and address the basic structures of the law enforcement machinery.

### **The Social Philosophy on the Basis of which Disappearances were Encouraged: *The Need to Maintain Order, With or Without Law***

The situation of instability and insecurity prevailing in the country during the last three decades, and particularly during the last decade, has given rise to a 'consensus' that order has to be maintained with or without law. The underlying assumption in this way of thinking is that law itself could be an enemy of order. According to this way of thinking, certain provisions of law restrict the powers of law enforcement officers to deal with disorderly conduct by some persons or groups. The rationale was that these perceived restrictions need to be removed. Freed from such restrictions, the law enforcement officers may return order and stability to society.

This way of thinking is usually regarded as 'realistic'. The maintenance of order through legal means is considered unrealistic for the following among other reasons:

- Financially speaking the country cannot afford to have a well-functioning law enforcement machinery and must therefore be resigned to have a defective one;
- Too much insistence on law may discourage law enforcement officers from carrying out their functions even to the extent that they are doing;



- As corruption and abuse of power are facts of life in the country it may not be a wise policy to fight too hard against them;
- As the insistence on law may lead to conflict, it may be necessary to restrict such agencies that insist on observing of the rule of law as the judiciary.

These and similar considerations form the basis for encouraging killing by law enforcement officers under circumstances that are said to 'justify' such acts which circumstances differ in a basic sense from the rigid parameters within which the law allows such actions.

However, instead of bringing about order, these practices have confounded the situation a thousand fold. Ironically, the worsening of the situation has resulted in the reinforcing of this same philosophy, much like a creditor who gives further credit to a debtor in the hope of regaining his earlier loans.

### **The Recovery of the System**

After the Cultural Revolution the Chinese realised that their existence of their society had been threatened. The slogan "Rule of Law as against the Rule of Man" was developed at the time. Since then, for over twenty years, the Chinese have constantly struggled to rebuild a society based on the rule of law. Despite many setbacks and such cruel incidents such as the Tiananmen Square killings, they have made enormous gains. Even with regard to the Tiananmen Square killings, the killing of about four hundred persons evoked tremendous adverse protests, which the disappearances of tens of thousands of persons in Sri Lanka has hitherto failed to evoke. Impressive attempts to build a system based on law can be witnessed in that country, despite the difficulties in developing such a system in a vast land with over a billion people.

### **Conclusion**

Repudiating past practices which helped bring about the phenomenon of disappearances in Sri Lanka is a fundamental challenge to all persons who wish to help the country recover from its 'great fall.' It is only through social change that such a challenge could be met. Political thinkers, social critics, jurists, judges, journalists, those who deal with moral and ethical matters and organisations including NGOs are duty bound to help create a social fabric within which the society can develop..

The *Interim Report*<sup>2</sup> from the same Commission on Disappearances contains the following recommendation:

*"Finally, we recommend the creation of a 'Wall of Reconciliation wherein are inscribed the names of all who have disappeared or died in this tragic period of our country's history."*

<sup>2</sup> Interim Report of the Commission of Inquiry into Involuntary Removal or Disappearance of Persons in the Western, Southern and Sabaragamuwa Provinces. (Department of Government Printing, Sri Lanka, September 1997). It needs to be said that a Monument to the Disappeared was declared open on February 4, 2000 on the initiative of the Families of the Disappeared in the Western Province in Sri Lanka



*"Your Commissioners consider this recommendation to represent every important aspect of national reconciliation. This Memorial Wall which will contain names denoting all sections of the Sri Lankan people, will be a symbol of our essential unity to future generations, a place to which everyone in this country could come and pay respect to those lost to us (p.---)."*

This may be useful, as have been such similar monuments in Cambodia as the *Genocide Museum* (located in a school transformed into a Khmer Rouge interrogation centre) and the *Killing Fields*, the location where these prisoners were later taken to be executed and buried). Beyond providing an opportunity to pay respect to the dead and preserve their memory, such a wall can act as reminder of the enormous crisis we face as a society and of the need to develop civilised ways to emerge from this crisis.



# Access to Justice: From Disappearances to Accountability

*Rushika Patrick\**

## Introduction

The Law & Society Trust (LST) inaugurated a project, "Access to Justice: From Disappearances to Accountability", to address the legacy of "involuntary disappearances" throughout the island. The project was designed to make sure that issues of disappearances and accountability are made a central part of the peace process, to inform surviving families about how best to vindicate their rights to compensation, and to train grass-roots lawyers throughout the island in legal and organising strategies to challenge and prevent disappearances and related human rights violations.

Another objective of this project is to respond to these and related challenges posed by Sri Lanka's legacy of "disappearances" and other extra judicial killings, with a special focus on the patterns of impunity that have resulted from such human rights violations.<sup>1</sup>

There are two aspects to the project. One objective is to analyse the legal framework within which disappearances are prosecuted and to introduce a new offence governing disappearances which aspects are primarily discussed in this paper. The second objective is to conduct research and talk to victim families and those working with victim families at the grass root level to see how they access the justice system,<sup>2</sup> which objective is not the focus of the instant analysis.

This analysis looks at some of the preliminary findings emerging from this project and contains in addition many insights that came out of a June 2003 seminar sessions on "Preventing and Prosecuting Disappearances: Looking Back and Looking Forward."<sup>3</sup>

## Various remedies available to victims of disappearances under the criminal justice system

The remedies available for victims usually are,

- To file an application for violation of fundamental rights under the Constitution in the Supreme Court under Article 13 of the Constitution which primarily encapsulates the freedom from arbitrary arrest and detention.
- To initiate criminal proceedings via the police and the Attorney General.

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\* LL.B (Hons) (London). Law & Society Trust.

<sup>1</sup> The Access to Justice project is co-ordinated by Ramani Muttetuwegama and involves a core group of people on the drafting of appropriate legislation consisting of Mr. Sri Shivaya (criminal lawyer), Ms. Manouri Muttetuwegama (Former Chairman of the Presidential Commission on Disappearances), Mr. Sarath Jayamanna (Senior State Counsel), Mr. Harshana Nanayakara (State Counsel), Dr. Devanesan Nesiah (Chairman of the Committee of Inquiry on Disappearances), Mr. M.C.M. Iqbal (Former Secretary to the Presidential Commission on Disappearances), Mr. Suhada Gamalath (Former Deputy Solicitor General), Ms. Suriya Wickremasinghe (Lawyer), Ms. Nehama Jayawardena (Lawyer), Dr. Sasanka Perera (Sociologist), Ms Priyadarshini Dias (Lawyer), Mr. Kapila Vaidyaratne (Senior State Counsel), and Mr. Prasantha Lal deAlwis (Senior State Counsel).

<sup>2</sup> This research is conducted by Ms. Indika Bulankulama, Researcher, Law & Society Trust.

<sup>3</sup> The seminar sessions were organised by the Law and Society Trust in liaison with the Colombo based Women and Media Collective which was involved on a project on the International Criminal Court.



- To file an application for a writ of habeas corpus; Art 141 of the Constitution

*Application for Writs of habeas Corpus* is the most popular remedy used by victims at the time of the disappearance. After the 13<sup>th</sup> amendment the High Court can also grant writs of habeas corpus; Art 154 P of the Constitution.

However these remedies are not very effective as evidenced below

*Applications for violations of fundamental rights* is restricted to the rights enumerated in the Constitution (Articles 10 – 14). Although the right to life is not guaranteed by our Constitution, the Supreme Court has held in recent judgements that the right to life is implied in the Constitution.<sup>4</sup>

*Civil remedies* against individuals for compensation. The amount of compensation granted does not reflect the gravity of the offence. It is insufficient and does not compensate the victim adequately.

*Prosecutions under the criminal law* are restricted for a variety of reasons. Our prosecution rate is very low. The main reason for the low prosecution rate is that most disappearances are perpetrated by state authorities including law enforcement authorities. Hence the possibility of ensuring recording of statements and conducting independent investigations is minimal. However, even in the cases which have been investigated, we found that there were several deficiencies including the lack of training, evidentiary restrictions and the need to fit disappearances within the existing rubric of the penal law has hampered successful prosecutions.

## **The Offence of Disappearance**

Our findings enumerated the fact that we have to fit disappearances into existing offences, which do not reflect the nature of disappearances; Disappearances are currently tried under Section 355 Penal Code, but this is insufficient to deal with disappearances. This is because this section deals with abduction.

Other problems abound. It is the duty of the prosecution to establish the intention of the defendants. However, intention may not be present at each step of the crime. Hence gathering of evidence to prove intention can become a cumbersome task. As a result, the prosecution relies heavily on circumstantial evidence, which can get to be problematic when it comes to judicial evaluation of the evidence.

It is for this reason that it may be opportune to introduce a new offence of disappearances into the Penal Code by amending Chapter xvi of the Penal Code which deals with 'Offences Affecting the Human Body.' Using such a provision in regard to the prosecution of past disappearances may be urged on the basis that this is not retroactive punishment but rather, punishment of a continuous offence. The word 'custody' should not be included in the definition as 'custody' denotes authority, whilst unlawful groups commit disappearances.

<sup>4</sup> In *W.M.K. de Silva v. Chairman Ceylon Fertiliser Corporation* (1989) 2 SLR 393, it was said that Article 11 belong to the class of rights that protects life. In *Sriyani Silva v. Iddamalgoda, OIC Police Station, Payagala* SC(FR) 471/2000 it was said that by necessary implication, Article 13 means that a person has a right to life.



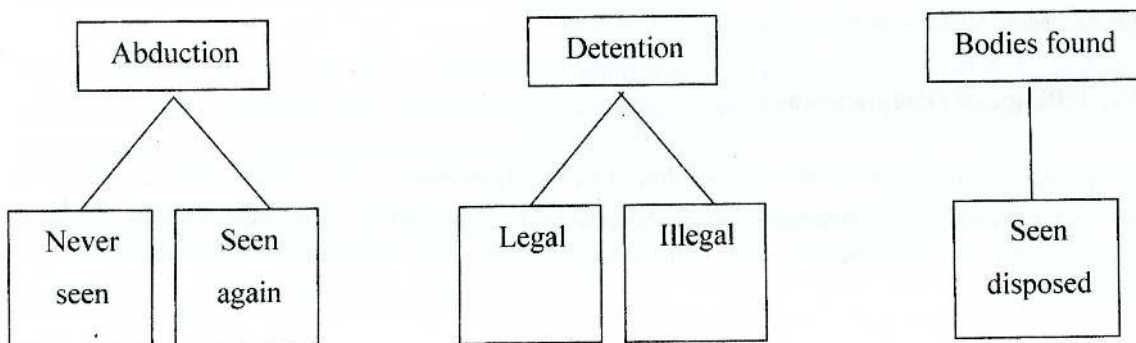
### *Proposed definition*

“Enforced or involuntary disappearance is an arrest, detention, abduction or taking away of a person against his/her will or otherwise deprivation of his or her liberty by anyone, followed by a refusal or omission to disclose the fate or whereabouts of the person concerned or a refusal to acknowledge the deprivation of their liberty which places such persons outside the protection of the law.

One criticism can be levied against the words ‘Any person’ in the above proposed definition. The proposed legislation is intended to deal with political abductions, whether it is state or non-state actors. But the inclusion of the words ‘any person’ means that abductions committed for personal reasons can also be prosecuted under this law. However, the counter argument to this is that the decision of whether to prosecute or not will be in the hands of the Attorney General thus providing a bulwark against unfair prosecutions. Where abductions and disappearances are committed by the state apparatus but are motivated by personal intentions, the perpetrators should be prosecuted under this law.

### *Sentencing*

The types of sentences imposed will depend on the scenario. The following situations may be identified:



In this regard, sentencing could be graded into particular categories with a minimum sentence prescribed if the crime is committed by the state or by a political organisation. If the person is found alive, i.e. escaped, or if the perpetrators have released the person there will be no minimum sentence prescribed but the sentence imposed will be at the discretion of the judge. If the culmination was the death of the person, there will be an enhanced sentence, even if a murder charge cannot be proved against him.

It was proposed that the judge may at his discretion also impose a community service sentence. This is popularly known as community based correction. It was also proposed that the judge should take into account the psychological impact on the family.



## **Procedures of Investigation**

The already existing mechanisms of investigation should be revived. For example the Evidence Ordinance does not bar the usage of independent reports (such as reports by the Human Rights Commission) in investigations, but the police do not use them.

Some of the more specific problematic areas and possible solutions in this regard are listed below.

### ***Gathering Information***

The problem we are faced with today is that complaints have to be made to the perpetrators themselves. Most of the time it is the state authorities that commit these crimes, and it is to them that we have to go in order to file a complaint.

In order to overcome this problem, it was recommended that the following bodies should also be authorised to receive information:

- Human Rights Commission (HRC) and their regional offices.
- NGOs. The NGOs authorised to receive information should be designated by the minister.
- People nominated by registered political parties.
- An independent body to receive information. Because in the North for example if a complaint is made against the LTTE, those who record the information would not record it. Similarly during the JVP insurrection people could not go to the police or the army to make complaints. It is to avoid these problems that we propose the setting up of an independent body. By having multiple tracks through which people can go to make complaints, the possibility of suppressing information will be eliminated.

The following needs should be adhered to, in terms of gathering information, namely that the information received will not be made public and disciplinary action should be taken when it is recorded in the wrong book, for example recording disappearances in the minor offences book.

### ***Investigation***

Currently one fundamental problem that plagues the system is that it is only the police force that can conduct investigations, and most of the time the key perpetrators are the police force and the state authorities. Hence, there is a lack of will to conduct investigations. Also there is so much of corruption within the force that one cannot rely on police officers to record the complaints accurately or to conduct a thorough investigation.

The following recommendations could be useful in this regard

Information gathered by the above mentioned groups should be reported to the Magistrate immediately. The Magistrate will then go through all the complaints and order an investigation on cases which he believes to be genuine. He should order that the investigation commence by a particular day. The Magistrate will also specify a date on which the findings of the investigation should be reported.



The following bodies should be authorised to carry out investigations:

- Attorney General's (AG's) department
- HRC
- A representative from the ombudsman's department,
- A special police team under the leadership of the Inspector Police General (IGP)
- Special bodies appointed by the Minister

Once the findings of the information are reported, the magistrate should be empowered to conduct proceedings to determine whether there is sufficient evidence to establish a *prima facie* case on disappearance. Here, the magistrate will be performing a *quasi judicial* function (similar to his role in non summary proceedings). The duration of the proceedings should be two weeks. If a *prima facie* case has been established, a habeas corpus application will commence in the High Court (HC).

If on the evidence the magistrate decides that there is no case of involuntary disappearance, the applicant can appeal to the HC. The investigation report should be sent to the HC and the AG's department. Magistrates should have an 'alleged disappearance' list, which should be maintained until the allegedly disappeared have been found. A periodical report that will state matters that have been dealt with, those matters that have not been dealt with, and which have been continuously pushed back, will be sent by those gathering information to the magistrate.

### **Prosecutors**

Currently it is only the Department of the Attorney General that can prosecute. As there are a large number of cases to prosecute and only a limited number of State Counsels, there is a back log of cases. As a result, cases are filed many years after the crime, and by that time the victims and witnesses have lost interest in the matter and just want to forget everything in order to move on with their lives. Also by the time the case comes up the witnesses have been intimidated by the perpetrators and they are scared to come and give evidence.

An appointment of a special prosecutor is therefore necessary though obtaining the resources for establishing such an office might well pose problems. The other option is to have an independent prosecutor under the HRC.

### **The Doctrine of Command Responsibility**

The doctrine of command responsibility is where the superior is held criminally responsible for acts done by his subordinate. This concerns the problem of a superior who does nothing to prevent a subordinate from committing a violation of human rights when he had the ability to prevent the criminal conduct, or instigates/orders a subordinate to commit a crime. This does not however come under the categories of aiding, abetting and conspiracy.

This is a very important aspect, since in many instances the chain of command in committing disappearances seems to be an integral element of the impunity with which such acts were carried out.



In the few instances where there have been successful prosecutions, it is the subordinates that have been convicted. Most of the time the superiors are not even charged. This is due to the lack of political will. The superiors are protected by the system itself. Since the source of the problem is untouched, these crimes continue to occur.

Currently, Sri Lankan law does not recognise criminal liability based on command responsibility. As a result the superior bears no criminal responsibility and it is the actor that is held liable for the crime.<sup>5</sup> The Army Act No.17 of 1949, Navy Act No. 34 of 1950 and Air Force Act No. 41 of 1949 does not even mention command responsibility.

Since our law does not recognise this concept, the definition given under the ICC Statute is relevant. It is however necessary that the definition of command responsibility should cover non-state actors as well notwithstanding the fact that unlike in a government institution, where there is a clear hierarchy of authority, when it comes to non-state institutions it is difficult to identify clear hierarchy.

### ***Definition***

The definition for command responsibility is given in Art. 28 of the Statute of the International Criminal Court 1998. As can be gathered from this definition, it is not a strict liability offence. Neither is it a vicarious liability. This is based on the superior-subordinate relationship. The definition can be analysed as follows:

*Actus reus* (act): Where a superior having effective control fails to exercise the necessary or reasonable measures to avert or punish crimes by a subordinate, he shall be criminally liable for causing crimes.

*Mens rea*: Superior had knowledge or should have had knowledge that a crime is being committed, was committed or about to be committed.

The mental element can be further explained on the basis that knowledge can be either imputed or actual knowledge. Knowledge of the fact that you know or ought to know the crime will take place. Acquiescence or imputed knowledge can be inferred from circumstantial evidence.

### ***Means of introducing the concept of command responsibility to Sri Lanka***

One alternative would be to introduce amendments to all the relevant acts that include this concept. This would avoid the problem of separate legislation on command responsibility. When amendments to the law are introduced, it should be specifically provided that the amending law shall prevail over contrary provisions in any other statute.

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<sup>5</sup> *Wijesooriya v. The State* 77 NLR 25, where the soldier was held criminally responsible for killing a woman who was alleged to be a JVP insurrectionist. His defence was that he killed her on the orders of his superior. The court held that superior orders is not a defence



The doctrine of command responsibility not be limited to disappearance, and be extended to all crimes against humanity. If the crime has already been committed, the superior must take action to investigate and prosecute the perpetrators. If he fails to take action he should be held responsible.

### **Introducing the Concept of Whistle Blowing**

Free expression is guaranteed by Article 14 of our Constitution. This is a key means of holding government to account and of protecting citizens against abuses of their rights. There are no special provisions governing whistle blowing in Sri Lanka. There is no protection afforded to whistle blowers, nor are there provisions inducing people to come forward and 'blow the whistle' on their colleagues.

The purpose in trying to introduce this concept into our legal system is to encourage people to come forward and tell the relevant authorities as to who the perpetrators are. But there must also be provisions which afford protection to whistle blowers so that they may not be subject to intimidation. If such people are threatened they will not come forward in the future, and others who may want to come forward with the truth will also be discouraged.

Embedded in the concept of whistle blowing is also the concept of Truth Commissions and amnesty. The purposes of these are to promote the wrongdoers to come forward and confess their crimes in return for immunity from prosecution or a lesser sentence for the crime. Some examples of Truth Commissions are South Africa, Guatemala and Argentina. More thought needs to be given as to how this concept could be introduced into the every special context of forced disappearances.

### **Victims Rights**

Victims' Rights is a very important aspect of these discussions due to the common problem that in an adversarial system where the State is pitted against the accused, the victim is neglected. The State (the department of the Attorney General) concentrates all its resources on the investigation and trial, and while the interest of the general public is looked after by the state, nothing is done to protect the rights of the victim. They are merely apparatus in achieving the state's objectives: reduced to a witness like all other witnesses.

According to the current practice, the victim/witness is entitled to a copy of the first complaint only. They are not entitled to a copy of any other statements they make. It is emphasised at this point that this is not the law, but the practice. The effect of this practice is that the victim has to go through the trauma of encountering the experience again. The statement is not given to them because the court wants to see how much of this experience they remember. It is a 'test of memory'. If the evidence they lead in court is different to that of their initial statement, they are considered unreliable witnesses. This situation has to be remedied urgently.

Victims' rights can be divided into two categories:

1. Service rights
2. Procedural rights



There is more opposition to attempts to expand the range of procedural rights because it has a direct bearing on the rights of the accused as it might encroach on the rights of the accused. But service rights have no direct bearing on the accused rights. Procedural laws are those rules that prescribe the steps for having a right judicially enforced, as opposed to substantive laws that define the specific rights themselves.

### Service Rights

Information should be given to the victim at every stage which is at the investigation, court proceedings and the sentencing stage.

Excessive and unwanted cross-examination of the witnesses and victims should be curtailed. They should not be re-victimised.

### ***Safety and Protection***

The state should be accountable for the safety of the victims. There should also be an independent body or a person similar to an ombudsman who will look into the victim's safety from the time the complaint is made until the end of court proceedings. It must be ensured that the accused has no opportunity of coming back to the village and intimidating them. Safety measures should also be provided when they travel for the case. Victims should be given counselling to help them deal with the trauma and to move on with their lives.

### ***Protection to Child Witnesses***

A child of any age can be brought as a witness with a minimum age of eight years. The concept of video link could be used in this context where only the child, the child's parent/guardian, prosecutor, defence and the judge will be in the room. The child would not be able to see the courtroom and will be interviewed by a person who is experienced and skilled as it can be very traumatic for a child to relive the experience which can permanently damage the child's mental health if not handled properly. The proceedings in this room will be taped. This can be led as evidence in court proceedings.

When the child is being interviewed all the relevant authorities can listen in from another room or from the court room itself. This would eliminate the necessity to interview the child over and over again and prevent the authorities from accusing one another of tampering with the interview.

### ***Short term plan***

- Need to strengthen the existing practice.
- Adopt as far as possible the proposals by the National Centre for Victims Rights.
- Need for sensitisation of the media and NGOs – victims are the foundation of the criminal law system. This has to be adequately addressed.
- Need to look into the mental trauma and suffering of the victim.

### Procedural Rights

In the adversarial system, priority is given to sentencing and punishing the offender, rather than rehabilitating the victim. In the inquisitorial system on the other hand the interest of the victim is



given priority. Victims are rehabilitated and compensated. We practice the adversarial system while incorporating certain components of the inquisitorial system. E.g. compensating the victim.

The issue to be considered is the manner in which the rights of accused are protected while also ensuring that victim's rights are also part of the system's concerns. The accused's rights also have to be looked after in as much as the requirements of fair trial are concerned. etc. In today's context the victim is not a party to the proceedings. It is the state. The victim is merely being used to achieve the state's objectives. The victim does not even know the status of the case, because he or she does have *locus standi*. Neither is the victim required to be in court when the judgement is delivered.

The victim is first victimised by the offender and is doubly penalised at the stage of the criminal justice system which is often referred to as the phenomenon of secondary victimisation which is aggravated by media victimisation.

In addition, given that the case is taken up only after a number of years, by that time the memory of the victim is faded with the consequent result that the defence capitalises on this memory failure to question the demeanour of the victim.

### ***Recommendations made regarding Procedural Rights***

*Introducing the victim impact statement.* This is where the victim makes a statement as to the impact the crime has had on his/her life. This statement should be considered at the time of sentencing. Other evidence should corroborate this.

*Introducing the victim opinion statement.* After the conviction, but before sentencing, the victim should be allowed to give an opinion on what the punishment should be. The danger here would be that the objectivity of sentencing might be lost and the process might become subjective. However, this problem could be overcome by stating the reasons for the type of punishment, for example, deterrence, incapacitation etc. The danger of the accused buying over the victim should also be guarded against.

### **Conclusion**

This brief paper looked at some of the findings emerging out of the ongoing study concerning the need to address issues of disappearances and accountability. However, changing the law *per se* would not be enough. We have to sensitise the judges, the lawyers, the media, and the public to the fact that disappearances is a horrendous crime which should not be taken lightly. Subordinate guidelines, circulars, and cabinet decisions should compliment the main legal provisions. It is important in this regard to emphasize that even if the disappeared person has a criminal record, compensation should not be denied to the family. Courts should take into account the expectations from the disappeared (who is often the bread winner of the family) by the family members.

Victims also need to be educated as to the various avenues available to them to obtain redress. Another problem encountered by the victims is that they have to travel a long distance spending a lot of time and money to collect their compensation. Steps should be taken to minimise the inconvenience suffered by the victims. These and several other measures that are detailed in this paper relating to victims' rights needs to be recognised in actual practice.



## **Book Review - AN EXCEPTIONAL COLLAPSE OF THE RULE OF LAW: TOLD THROUGH STORIES BY FAMILIES OF THE DISAPPEARED IN SRI LANKA**

**edited by Shyamalie Puvimanasinghe and published by the Hong Kong-based Asian Legal Resource Centre (ALRC), the Asian Human Rights Commission (AHRC) and Sri Lanka's Families of the Disappeared, October 2004**

Immeasurable anger explodes within me when I read this book. It is incredible that these horrors have actually occurred and even more incredible that the suffering of the victims have been allowed to recede into the dim recesses of this nation's memory, notwithstanding the many high level conferences and discussions that have been held in Sri Lanka's capital Colombo since the nineties, where the subject of the 'disappeared' has been the focus of learned analysis.

This book is unique because it brings out the stories of the victims in a manner that is unadulterated by abstract interpolations. For the storytellers, the grief is still raw fifteen years later and remains indelibly imprinted on the stories of the lives that they relate.

"Even if I get millions of rupees, I will not forget all these dreadful memories. Until today I do not permit anyone to light fireworks and organise parties at our residence as we are still mourning the loss of our child," says M. Maria Violet, whose son was forcibly taken away from home at gunpoint.

Violet's son was later killed. Her suffering is documented in this book along with the ordeals of parents, spouses and relatives who witnessed forced disappearance of their dear and near ones in twenty nine cases.

The victims included innocent students, workers and ordinary people of other professions. They were among some thirty thousand people forcibly disappeared between 1988 and 1992 when perpetrators, mainly the police and armed forces were given absolute impunity for their acts of violence and brutality. Nearly fifteen per cent of the victims were aged below nineteen years. People were abducted from homes, workplaces and on the streets, even openly and publicly. Many of them were murdered upon arrest or after interrogation and torture. The perpetrators, unleashed and sanctioned by an authoritarian rule and constitutional dysfunction, acted gruesomely and casually in the excuse of an armed conflict between the then government led by the United National Party, and the Janatha Vimukthi Peramuna (People's Liberation Front). In many cases, the victims were killed because of jealousy, personal feuds or elimination of political enemies or potential opponents in the reign of terror.

After all these years, the perpetrators are yet to be brought to justice amidst attempts to find legal redress to innumerable cases of the disappeared proving to be largely futile. In this 222-page book, families of the victims indicate their deep disillusionment with the notion of justice and a legal system, which permitted such atrocities to take place and which still has not bestirred itself on their behalf.



Sri Lanka's tragedy has, of course, other parallels around the world. When a committee of three internationally renowned jurists and human rights scholars appointed under the Oslo Accord to look into the Guatemalan conflict, handed over their report to the country's leaders in recent years, it was apt that their findings should be prefaced by an appeal from a survivor's testimony that;

*"Let the history we lived, be taught in the schools so that it is never forgotten, so that our children may know it".*

Fast on its way to being acknowledged as one of the most extensive recent analyses detailing the fragmentation of a country's morality and dignity, the report of the three member commission, (titled rather quixotically the Commission for Historical Clarification with the point being that it was not established to judge but rather to clarify the history of the civil war), makes compulsory reading for us. Indeed, there are many points of comparison and few of departure.

The report of the Commission documents an exceptionally moving account of three decades of agony. It expressed the hope that the violence and horrors described in the report should leave no room for despair and that,

*" .....(on the contrary), despite the shock that that the nation should suffer upon seeing itself reflected in the mirror of its past, it was to be hoped that the truth would lead to reconciliation....., the victims whose past had been degraded and manipulated will be dignified (while) the perpetrators, through the recognition of their immoral and criminal acts, will be able to recover the dignity of which they had deprived themselves."*

Its main purpose was to place on record Guatemala's bloody past, for though it is accepted that the country's armed confrontation, largely between its ruling elite and the ethnic Mayan people, had caused death and destruction, the gravity of the abuses suffered repeatedly by its people has yet to become part of the national consciousness.

Its mandate was to seek for answers to some bewildering questions. Why were innocent people compelled to live under the shadow of fear, death and disappearances for more than 34 years? Why were there daily threats in the lives of ordinary citizens having no connection with armed groups or paramilitary groups? Who can explain the extreme human rights abuses committed by both forces and specially by the State? Why did defenceless children suffer acts of savagery? Why did these acts of outrageous brutality, which showed no respect for the most basic rules of humanitarian law, religious ethics and cultural spirituality, take place? All questions, undoubtedly, of intense relevance to us.

The indictment that the Commission delivered on Guatemala's leaders, both state and non-state, is severe. The number of persons killed since the outbreak of the internal armed confrontation in 1962 were estimated to be over two hundred thousand with state forces and related paramilitary being responsible for ninety three percent of the deaths. Guerrilla forces were held accountable for only 3% of these atrocities while the remaining 4% concerned deaths where it has not been possible to determine responsibility. The victims included men, women and children of all social strata, working



professionals, church members, politicians, peasants, students and academics. In ethnic terms, the vast majority were Mayans.

The majority of human rights violations occurred with the knowledge or by order of the highest authorities of the state. The Commission dismissed the excuse that lower ranking army officers were acting with a wide margin of autonomy without orders from their superiors. It reminds, in overtones of general familiarity for us, that no high commander, officer of person in the midlevel command of the Army or state security forces were tried or convicted for human rights abuses in all those years. Those convictions that did, in fact, occur applied only to significantly lower ranking personnel whose trials were attended with monumental publicity. It is on this basis that the Commission, presupposing the reasoning of the UN Human Rights Committee in more recent times, takes the violations to be the result of an institutional policy, with impunity for those aberrant officers.

On the other hand, high level responsibility for abuses is not imposed on the state alone. Guerrilla high military commanders were held accountable for deliberate attacks on civilians. The role of the church in the Guatemalan conflict was also critiqued on the basis that the divisive policies it adopted lead to a further fragmentation of the national identity.

While the manner in which the Commission has pinpointed responsibility for past violations is important, the value of its report for us lies equally in what has been detailed as imperative measures for the process of national healing. Thus, it directs that, in the name of the State of Guatemala and with the primary aim of restoring dignity to the victims, the President of the Republic and the leaders of the political and military forces responsible for the violations assume responsibility for past violations and ask pardon for them.

It is unpardonable that two decades later, Sri Lanka has yet not complied with a similar duty in respect of the at least thirty thousand "disappeared" persons in this country. The reports of the three Disappearances Commissions appointed in 1994 suggested a number of welfare measures for the kith and kin of the disappeared. The report of the Commission on the Western, Southern and Sabaragamuwa Provinces in particular included a number of very practical relief measures relating to the emotional and economic rehabilitation of the spouses and children of those affected, payment of adequate compensation, the release of monies in frozen accounts and measures to minimise problems that relatives face when trying to reclaim land lost during that time.

The Commission suggested that a new tax similar to the defence levy be imposed to raise sufficient funds for the payment of compensation. In addition, it was recommended that a panel of lay visitors be established for each area and persons on this panel be given the authority to speak to detainees, check the conditions of detention and coordinate with national human rights groups. Such a step, it was suggested, would re-establish community based forces and procedures that the citizen can turn to when faced with misuse of state power.

For this same purpose, the setting up of a Citizens Advisory Bureau was recommended to help bereaved persons solve problems such as EPF dues, obtaining death certificates, the settlement of property matters and so on. The Commission further suggested that a Wall of Reconciliation be erected whereon would be inscribed the names of all those who died in that period in an



acknowledgement by the State that what had happened to these people was wrong, regardless of whichever government committed the abuses.

Very few of these welfare cum reconciliatory measures have been implemented. Payment of compensation to those affected has been halting and intermittent amidst complaints of insufficient funds and political bias. In the ultimate analysis, while we have had Disappearances Commission and even, in the most telling of ironies, a Truth and Reconciliation Commission which accomplished nothing except to further politicise the process of coming to terms with the past, the suffering of the victims still remains un-addressed. This is what manifests, in the deepest sense, our continuing collective and individual failure.

***Kishali Pinto-Jayawardena***



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