

LST REVIEW

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A QUESTION OF CONSCIENCE

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CONTENTS

LST Review Volume 19 Joint Issue 260 & 261 Jun. & Jul. 2009

Editor's Note i - iii

Twenty Years of Make-Believe – 1 - 65
Sri Lanka's Commissions of Inquiry

- A Report by Amnesty International -

Excerpts From - UTHR Special Report No.33 66 - 80
on the Third Anniversary of the ACF Massacre –
A Travestied Investigation, Erosion of the Rule of Law and
Indicators for the Future of Minorities in Lanka

- University Teachers for Human Rights (Jaffna) -

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The contents of this Double Issue containing as it does, the report of a recent Amnesty International publication on Commissions of Inquiry in Sri Lanka as well as extracts from the University Teachers for Human Rights (Jaffna) Special Report No 33 titled '*A Travestied Investigation, Erosion of the Rule of Law and Indicators for the Future of Minorities in Lanka*' may not be palatable to many.

However, the Review publishes these reports in the sincere belief that, as much as our collective conscience has been eroded by the unceasing brutal happenings of the past three decades under the watch of successive governments, this country cannot envisage a different future without—in the minimum—there being an acknowledgment of the wrongs that innocents have suffered, accompanied by reforms in law, practices and policies that guards to the best extent possible, against a recurrence of such grievous wrongs. In the current context, where it is too much to hope that there will be political will pushing effective investigation and prosecution of perpetrators, this is the best that one may hope for.

If however even this minimum is not realized, it does not take a particularly astute seer to portend that we will be faced with enduring mistrust that will erupt into open conflict once again in some way, even decades later, perchance between the majority and the minority or even between the majority itself. Thousands of Sinhalese innocents whose lives were destroyed during the turbulent eighties and early nineties as a result of the then government's extreme counter terror measures taken against the *Janatha Vimukthi Peramuna* are still waiting for justice, as much as their Tamil and Muslim counterparts caught up in the clash between the government and the Liberation Tigers of Tamil Eelam (LTTE).

The first report by *Amnesty International* published in this Issue, examines the context and functioning of the 2006 Commission of Inquiry Appointed to Investigate and Inquire into Serious Violations of Human Rights, which are alleged to have arisen in Sri Lanka since 1 August 2005. It calls for an end to politically motivated Commissions of Inquiry and outlines a series of recommendations that have been reiterated domestically by reformers and activists in the legal sphere for decades.

Particularly important among these recommendations are the reforms suggested to Sri Lanka's criminal justice system including its investigative and prosecutorial arms. The example of the pitiable fate that befell the 2006 Commission of Inquiry, not only during its functioning but also after its premature winding up, when its Report was not made public but purported excerpts were conveniently "leaked" in government websites and some selected newspapers, should serve as a lesson to those of us optimistic or naïve enough to believe that such exercises are actually well intentioned.

Dealing again with the same subject matter of the 2006 Commission of Inquiry, the *University Teachers for Human Rights (Jaffna)* Special Report No.33 from which extracts are published next in this Issue, also engages in a typically pungent critique of the Commission's functioning particularly in relation to its investigation of the inhumane killing of 17 aid workers of Action Contra la Faim (ACF), which was one of the cases investigated by the Commission.

Contested as these findings may be by some, the UTHR(J)'s following observation is pertinent in itself:

2
340
The State's unwillingness to face the truth in a number of cases that attracted international attention and the means it has adopted to stifle the truth, has been dehumanizing for both the majority community and the minorities. The developing power relations as exemplified at the Commission leave the minorities in the country hardly any breathing space. Had the Government treated these cases as means to adopt corrective measures and win over the minorities, the prospects for Lanka would be looking brighter today. The law and constitution may deem all citizens equal, but the rule of law is in abeyance, there is no right to life and no right to appeal against arbitrary detention.

Aptly, the UTHR(J) goes on to warn that, "What is the most urgent issue now is the restoration of the rule of law. Unless there is freedom of expression and open discussion, talking about a political settlement has no meaning. ..."

There is little doubt as to the validity of these observations. Undeniably, we need to see an end to a political culture that misuses cherished ideals of a liberal democratic polity, such as protection of human rights, independence of the judiciary, a democratic electoral system and the concept of the separation of powers, to strike at the heart of the public's understanding of the Rule of Law.

Responsibility to effect these changes must rest on the ordinary voters in this country rather than those of the elite among us, many of whom are aware of the exact manner in which accountability is deliberately subverted, whether through Commissions of Inquiry or otherwise, but choose to remain quiet due to manifold reasons, chief among them being the fact that the occurrence of extreme injustice does not touch them in any way. Until public agitation is evidenced on these matters as problems that go to the root of the ordinary man's or woman's denial of basic rights, whether Sinhala, Tamil, Muslim or other, we will not see a change in this way of thinking.

Ultimately though there will indeed be many who will find fault with the reasoning and summations of the two reports that the *LST Review* publishes in this Issue, the fundamental dysfunction of the Rule of Law in Sri Lanka today, which is evident for all to see, renders their objections of little account. This must remain the ultimate truth propelling the restoration of some measure of democratic functionality to our systems.

Kishali Pinto-Jayawardena

TWENTY YEARS OF MAKE-BELIEVE – SRI LANKA'S COMMISSIONS OF INQUIRY

A Report by Amnesty International

1. Introduction

Ponnuthurai Yogarajah lost two sons in 2006. His youngest son, Hemachandran, was one of five students shot and killed by Sri Lankan security forces on a beach in Trincomalee on 2 January 2006. His elder son, Kodeeswaran, was killed in August of the same year, one of 17 aid workers massacred in the town of Mutur. In March 2008 Ponnuthurai Yogarajah testified before a Presidential Commission of Inquiry mandated to investigate these and other “serious violations of human rights”. Using video conferencing, he gave his testimony from an undisclosed location outside Sri Lanka.¹ Ponnuthurai Yogarajah described the frightening search for his son the night he was killed, and of finding his body hours later. He spoke of official misconduct, threats from the police, and the pain of losing a child. His testimony, like that of other members of victims’ families, expressed doubt about the possibility of securing justice in Sri Lanka.

Ponnuthurai Yogarajah’s elder son, Kodeeswaran, received threatening phone calls at work after the death of his younger brother. “My son was working for Action against Hunger [ACF, Action contre la Faim, a humanitarian organization], and the STF [Special Task Force, an elite police unit] gave him many calls and he feared for his life and told me not to reveal anything in the courts, saying that they would shoot us”. Six months later, Kodeeswaran was dead.

Ponnuthurai Yogarajah was forced into exile after the death of two of his children.

In the country of my birth I couldn't give an independent statement because I was intimidated. My children were afraid that I would be killed and, therefore, I couldn't give a statement freely. I wanted to make the same statement that I made here, but my children did not permit me to, as they were afraid for my life.

– Ponnuthurai Yogarajah, March 2008

Two months later, in May 2008, the Sri Lankan government ordered an end to the use of video conferencing in the Commission’s hearings.²

¹ This was the first time in Sri Lanka’s history that this technology had been employed in a human rights inquiry. Video conferencing testimony was facilitated by the International Independent Group of Eminent Persons (IIGEP), an international group invited by the President of Sri Lanka to observe the Commission’s work.

² In mid-November media reports indicated that there may be renewed willingness on the part of the government to permit video conferencing: “Video conferencing facility allowed for Col”, *Daily Mirror*, 11 November 2008.

IMPUNITY

Impunity is the failure to bring perpetrators of human rights violations to justice. It denies the victims their right to justice and redress. It means that it is not possible to hold those responsible for violations to account—whether in criminal, civil, administrative or disciplinary proceedings—since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties. Nor is it possible to ensure that victims receive reparations.

Impunity arises from a failure by states to meet their obligations to investigate violations; to ensure that those suspected of criminal responsibility are prosecuted, tried and duly punished; to provide victims with effective remedies and to ensure that they receive reparation for the injuries suffered; to ensure the right to know the truth about violations; and to take other necessary steps to prevent their recurrence. The UN Special Rapporteur on torture has noted that “impunity continues to be the principal cause of the perpetuation and encouragement of human rights violations and, in particular, torture”. (UN Doc A/54/426, 1 October 1999, para 48)

(See also, Updated Set of Principles for the protection and promotion of human rights through action to combat impunity, UN Doc E/CN.4/2005/102/Add1, 8 February 2005).

The Commission of Inquiry before which Ponnuthurai Yogarajah testified in March 2008 was established to examine selected serious cases of human rights abuse that had not been effectively investigated by the police or prosecuted by the Attorney General’s Department. Such failures are not uncommon in Sri Lanka, nor are they accidental. Impunity has long been the rule in this country where violations of international human rights law and international humanitarian law are concerned, because successive governments wanted it that way. State agents have intervened directly in some cases to eliminate witnesses through bribes, threats, harassment, intimidation and violence, including murder, to discourage police investigations, and to mislead the public.³ Officials and other influential people have taken

³ See for example, the murder of Gerald Mervin Perera. Gerald Perera was arrested on 3 June 2002 in a case of mistaken identity, and tortured at the Wattala Police Station. He suffered renal failure as a result of his injuries but survived. The victim lodged a fundamental rights application before the Supreme Court of Sri Lanka, which, on 4 April 2003, found that torture, illegal arrest and illegal detention had been perpetrated by officers of the Wattala Police Station. On 23 September 2003 the Attorney General filed an indictment against seven police officers from the station, including the Officer in Charge (OIC), Sena Suraweera, under the CAT Act No 22 of 1994. The Attorney General later removed the name of the OIC from the list of the accused. On 21 November 2004, before Gerald Perera could give evidence, he was assassinated. On 2 April, 2008 the Negombo High Court acquitted the remaining six accused police officers on the basis of a lack of direct evidence of torture or eyewitness identification of the torturers (Case No HC326/03), despite the previous Supreme Court judgement, which named the officers responsible for Gerald Perera’s illegal arrest and detention, and which confirmed that the victim had been healthy when he entered the police station but was seriously injured when he was released. The Asian Human Rights Commission noted that, under the CAT Act, “once the arrest, detention, control and the time period within which injuries were caused within a police station is proved, the burden of proof of the innocence of the accused shifts to the accused. However, the trial court judge completely ignored this legal principle without any explanation to this case which is normally applied to other cases in Sri Lanka”. (The Asian

full advantage of significant flaws and inefficiencies in Sri Lanka's justice system to prevent prosecutions. Lack of consistent recognition by the courts of the principle of "command responsibility" has greatly exacerbated the problem by allowing those with the most influence and seniority to misuse their powers and take advantage of flaws in the existing system.

Sri Lanka's criminal justice system has critical shortcomings that obstruct justice for victims of human rights violations. It is subject to political pressure, lacks effective witness protection and is glacially slow. The system is so degraded that the vast majority of human rights violations over the past 20 years have never been investigated, let alone heard in court. Those that do make it to trial rarely conclude with a conviction; defendants are acquitted for want of evidence; witnesses refuse to testify; hearings are subject to repeated delays; even the prosecution has failed to appear in court in key human rights cases.⁴ This is not simply a problem of inadequate resources or institutional capacity (although these too are obstacles); it is a problem of political will.

The failure of the formal justice system to check grave violations of human rights has been a focus of domestic and international pressure on the Sri Lankan government for decades. That pressure has sometimes led the government to appoint ad hoc commissions of inquiry to look into particularly high profile cases. These have proved equally ineffective in combating impunity. The latest of these attempts is a Presidential Commission of Inquiry (CoI) into 16 cases of "serious violations of human rights". In more than half of these cases, violations are alleged to have been committed by Sri Lankan government forces in the context of its operations against the Liberation Tigers of Tamil Eelam (LTTE).⁵ Details of those cases, all dating from 2005 and 2006, and of the investigations into them, are provided below. They include assassinations of public figures, killings of aid workers and other civilians, and enforced disappearances. They are the tip of the iceberg.

Human Rights Commission dossier on the case of Gerald Mervin Perera. <http://material.ahrchk.net/srilanka/geraldpereraacquittal.pdf>.

⁴ For example, in 1995 the bodies of some 23 young Tamil men were found in Bolgoda, Alawwa and Diyawannawa lakes. Twenty-two members of the police Special Task Force (STF) were arrested in connection with the murders but were released on bail to resume work in early 1996. In March 1997, the case was struck from the roll call of the Colombo Chief Magistrate's Court because of the repeated absence of the Attorney General or his representative (see "Vasu Bombard AG on Bolgoda", *Sunday Times*, 27 April 1997, <http://sundaytimes.lk/970427/frontm.html#vasu>). The accused were eventually indicted in the High Court on charges of abduction, wrongful detention and murder. The case went to trial in June 2000 but continued to be subject to delays as key witnesses failed to appear. At least one of the accused is thought to have left the country: "Police Inspector S S P Madakumbura charged with killings at Bolgoda Lake, which occurred some years ago, has been placed on the Reserve List. He has failed to appear before the Colombo High Court No.2 for a long period and is believed [sic] to have left the country. How has the NPC considered him for a promotion and placed him on the Reserve List? The STF officer in question was reportedly residing abroad". "Police cry foul over promotions; National Police Commission says...", *The Island*, 14 July 2004, www.island.lk/2004/07/14/news20.html.

⁵ In several cases there are conflicting allegations. Government involvement had been alleged in 10 of the 16 cases, but there is some overlap. The LTTE has been accused of involvement in eight cases (in two of these, strong allegations have also been made against government forces). The involvement of the Karuna faction has been alleged in several cases, working separately or together with the Sri Lankan security forces. The Sri Lankan Navy has been accused of involvement in four cases. The Sri Lankan police, including the Special Task Force, have been accused in five cases.

Commissions of Inquiry have not worked as mechanisms of justice in Sri Lanka. Presidential Commissions have proved to be little more than tools to launch partisan attacks against opponents or to deflect criticism when the state has been faced with overwhelming evidence of its complicity in human rights violations. The best that can be expected of these Commissions of Inquiry, given their non-judicial nature, is that they will be a truth-telling exercise. In practice, although in some cases they have managed to secure limited monetary compensation for victims' families, they have caused delays in "normal" criminal investigations, potentially polluted evidence, and increased risks to victims and witnesses.

COMMAND RESPONSIBILITY

Command responsibility is a principle of international law that attaches criminal responsibility to superior officers who knew, or ought to have known, of the commission of war crimes, crimes against humanity and other violations of international law by persons under their command, and who failed to inquire into, prevent, or punish such acts. This responsibility is extended to non-military "superiors".

As a legal counterpart, persons who commit crimes under international law in compliance with manifestly unlawful orders cannot rely on this fact to claim lack of responsibility for the crimes.

(See, 1977 Additional Protocol I to the 1949 Geneva Conventions, Articles 28 and 33 of the Rome Statute of the International Criminal Court.)

With specific relevance to inquiries into certain violations of human rights, see Principle 19 of the UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (Economic and Social Council Resolution 1989/65, 24 May 1989):

"...an order from a superior officer or a public authority may not be invoked as a justification for extra-legal, arbitrary or summary executions. Superiors, officers or other public officials may be held responsible for acts committed by officials under their authority if they had a reasonable opportunity to prevent such acts. In no circumstances, including a state of war, siege or other public emergency, shall blanket immunity from prosecution be granted to any person allegedly involved in extra-legal, arbitrary or summary executions".

The Sri Lankan penal code also prohibits aiding, abetting, instigating, conspiring to commit criminal offences (Sections 102 and 113B) and concealing "a design to commit an offense". (Sections 111-113; Section 112 refers specifically to public officers.)

Penal Code (as amended), 1956, Volume 1, Chapter 19, Legislative Enactments of Sri Lanka (Consolidated).

THE DUTY TO PROTECT LIFE

The right to life is a key human right. This right, as provided in international human rights law and standards, including in treaties binding on Sri Lanka, must be respected and protected at all times. Article 6(1) of the International Covenant on Civil and Political Rights (ICCPR), to which Sri Lanka is a state party, provides that: “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life”.

Under Article 4 of this Covenant, this right cannot be restricted even “in time of public emergency which threatens the life of the nation”.

Under international humanitarian law, Article 3 common to the four Geneva Conventions of 1949, which binds all parties to non-international armed conflicts, including the one in Sri Lanka, provides that “[P]ersons taking no active part in the hostilities...shall in all circumstances be treated humanely,” including a prohibition, “at any time and in any place whatsoever” on “violence to life and person, in particular murder of all kinds...”. Such killings are also crimes under international law.⁶

The creation of another Presidential Commission of Inquiry will do nothing substantive to fulfil Sri Lanka’s international human rights obligations unless it results in increased access to justice and a reduction in human rights violations. If the present Col were operating in a political landscape that allowed it sufficient independence and technical expertise, it might serve as an important supplement to Sri Lanka’s criminal justice system. But in the present context of continued serious violations of human rights and tight political control of human rights and justice mechanisms, where the purse strings are held by the regime accused of abuse, the success of this Col (like that of its predecessors) is extremely unlikely. In the absence of real reform, Sri Lanka’s Cols are only window dressing. In the end, the successive failures of Cols to deliver justice may simply increase public cynicism and fuel the cycle of violence.

The failure of the Col as a justice strategy has been demonstrated most clearly by the findings of the International Independent Group of Eminent Persons (IIGEP), a group invited by the President of Sri Lanka to observe the Presidential Commission of Inquiry’s work, which concluded that the government of Sri Lanka was not willing to “investigate cases with vigour, where the conduct of its own forces has been called into question”. It also noted the state’s unwillingness to uncover “the systemic failures and obstructions to justice that rendered the original investigations ineffective”.⁷

⁶ See for instance, the Rome Statute of the International Criminal Court, adopted on 17 July 1998 (A/CONF.183/9), entered into force 1 July 2002, Article 8(2)(c)(i).

⁷ IIGEP Public Statement, 14 April 2008, REF: IIGEP-PS-006-2008.

THE DUTY TO INVESTIGATE UNLAWFUL DEATHS AND PROSECUTE PERPETRATORS

Under international law and standards, all reasonable allegations of unlawful killings must be investigated. This obligation reflects both the duty of states to ensure reparations to victims of human rights violations, including to disclosure of the truth, and their general duty to protect human rights, including by holding perpetrators of violations to account and taking steps to ensure that such violations are not repeated.

Under Article 2(3) of the ICCPR, states parties undertake, among other things, to ensure an “effective remedy” for persons whose Covenant rights have been violated. The Human Rights Committee, in its authoritative General Comment on Article 2, has referred to a “general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies” and added that “failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant”.⁸ The Committee also stated that where such investigations “reveal violations of certain Covenant rights, States Parties must ensure that those responsible are brought to justice. As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant”. It added that the obligations to investigate and prosecute “arise notably in respect of those violations recognized as criminal under either domestic or international law,” including “summary and arbitrary killing”.⁹

Similarly, Principle 9 of the Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions¹⁰ states that: “There shall be a thorough, prompt and impartial investigation of all suspected cases of extra-legal, arbitrary and summary executions, including cases where complaints by relatives or other reliable reports suggest unnatural death.... It shall include an adequate autopsy, collection and analysis of all physical and documentary evidence and statements from witnesses”. Principle 18 states that perpetrators should be brought to justice. Principle 20 calls for the families and dependents of victims of such executions to be entitled to fair and adequate compensation, within a reasonable period of time.

The IIGEP mission was invited by the President to observe the Col’s proceedings in order to ensure that they were conducted in a transparent manner and in accordance with international norms and standards. But almost from the start, the IIGEP’s efforts to support the Col in improving practices were met with hostility by the government. “The atmosphere of confrontation and disagreement towards the IIGEP” created by the government and also evident in the official correspondence of the Col, was, it concluded, “disquieting and

⁸ *Ibid.* para 18.

⁹ Recommended by UN Economic and Social Council Resolution 1989/65 of 24 May 1989.

¹⁰ IIGEP Public Statement, 14 April 2008, REF: IIGEP-PS-006-2008.

unpleasant”.¹¹ Moreover, the IIGEP was singularly unsuccessful in its efforts to help the Col improve procedures. In the end, it concluded that the Presidential Commission of Inquiry was not meeting international standards in five key areas, identifying: 1) Serious conflicts of interest [which] persist that compromised the independence of the Commission; 2) Lack of effective victim and witness protection; 3) Lack of transparency and timeliness in the proceedings; 4) Lack of full co-operation by state bodies; and 5) Lack of financial independence.

In April 2008, the IIGEP quit in protest; several commissioners also subsequently resigned and, in November, seven civil society groups that had received standing with the Col as independent observers submitted their resignations as well, noting with particular concern the intimidation and exposure of vulnerable witnesses, disappointment over the suspension of video testimony, and the unlikely prospect of prosecutions. The message was clear: the Sri Lankan government was unwilling to protect its citizens and uninterested in securing justice.

By February 2009, Sri Lankan government forces had gained substantial territory in their war against the Liberation Tigers of Tamil Eelam, and appeared poised to take control of remaining areas of the north. Both sides have been accused of violating the rights of civilians in the course of the conflict. As conventional fighting winds down (guerrilla attacks by the LTTE remain likely), the Sri Lankan government will be faced with the burden of accounting for decades of abuse, caring for a massive displaced and war-affected population, rebuilding critical infrastructure, and repairing damage done to civil society and the rule of law by years of reliance on draconian security legislation. The Sri Lanka authorities have little capacity to effectively investigate abuses against civilians committed by the LTTE; they are even less likely to effectively investigate and prosecute their own forces for violations of human rights and humanitarian law.

With this report, Amnesty International seeks to re-focus the debate within Sri Lanka and in the international community from one that is centred on the most recent atrocity, or the latest Commission of Inquiry, to one that is based on the need to prevent the continuation of violations and ensure real accountability for past abuses, with the support of systematic and sustained international human rights monitoring and technical assistance. Sri Lanka simply cannot go it alone.

Summary of Recommendations

For the full set of recommendations, see Recommendations page 55.

The conditions in Sri Lanka are undeniably challenging. The war with the LTTE has placed enormous demands on state resources. Official hostility towards critics, and antipathy expressed against international involvement in Sri Lanka, make useful collaboration with the international community on human rights issues that much more difficult. But given the

¹¹ Human Rights Committee, General Comment No.31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc CCPR/C/74/CRP.4/Rev.6, 21 April 2004, para 15.

profound domestic limitations on access to justice, and the grave reality of persistent human rights violations, we can see no other solution. The international community should use its significant influence to encourage the Sri Lankan authorities to investigate past violations of international human rights law and humanitarian law, prosecute suspected perpetrators in proceedings that meet international standards of fairness, ensure reparations for victims, and prevent future violations.

The international community is in a strong position to push for specific reforms that could change the trajectory of violence, and should consider establishing benchmarks to monitor Sri Lanka's progress in combating impunity.

Amnesty International calls on the Sri Lankan Government and the international community to work together to end the cycle of impunity in Sri Lanka by:

- initiating, implementing and supporting a national policy aimed at bringing perpetrators of human rights violations to justice.
- publicly acknowledging and forcefully denouncing wrongdoing by government forces;
- ensuring effective investigations, due process and swift prosecution of all perpetrators, including those enjoying political influence and high social status;
- establishing and supporting an adequately resourced, carefully instituted and technically well-supported witness protection system.

To accomplish the needed reforms and improvements, an independent field monitoring presence is required with strong powers to conduct investigations and assist the national institutions to deliver justice in relation to grave violations of human rights. To ensure independence, such a body must be empowered by an international mandate, not a presidential mandate.

This can be realized by:

- Requesting and supporting the Office of the UN High Commissioner for Human Rights (OHCHR) to establish a human rights field operation mandated to monitor abuses by all parties, protect civilians and perform capacity building in support of domestic institutions.

2. Commissions of Inquiry and Impunity

...the Commission of Inquiry is an ad hoc response to a series of particularly shocking incidents and should not be a substitute for effective action by relevant law enforcement agencies. Nor should it divert from the need for a forward looking, comprehensive and effective human rights protection system.

– Louise Arbour, UN High Commissioner for Human Rights, at the conclusion of her visit to Sri Lanka, October 2008

Legal Context and History

The Presidential Commission of Inquiry Act No.17 of 1948 was intended to provide the President with a mechanism for initiating inquiries into the administration of public departments, offices or agencies, or allegations of misconduct by a member of the public service.¹² It was not intended as a mechanism for investigating grave human rights violations. But the Act is broadly worded, containing a general clause on public safety and welfare, and provisions that grant broad executive powers. It has thus served as a useful tool for successive Sri Lankan Presidents who were under pressure to address human rights issues but were determined to maintain ultimate control over the proceedings and outcome of inquiries.

Under the Act, the President is authorized to set the terms of reference for Commissions of Inquiry and to appoint members, add new members at his or her discretion, revoke the warrant establishing a Commission at any time, and to appoint and give directions to the Commission's secretary without consulting the Commission or its Chair. The Act does not require Commission reports or recommendations to be made public; whether the inquiry (or any part of the inquiry) is to be made public is subject to presidential discretion.

The Act has been used in a human rights context since President J.R. Jayawardene appointed retired Supreme Court Judge, Justice M.C. Sansoni, to examine the causes and events surrounding ethnic violence in August 1977. But instead of improving the situation, the government enacted new legislation to shield errant government forces from prosecution. The CoI's proceedings were reportedly hampered by political interference.¹³ The report put most of the blame for violence on the Tamil political leadership, and discounted significant witness testimony that implicated the state (although it reported the allegations). M.C. Sansoni did acknowledge police failures to protect civilians and to prevent violence, and identified a few police officers who had instigated or participated in violence against Tamils. The Sansoni report recommended that Tamil victims be compensated for damages. Perpetrators identified in the report were not prosecuted. Instead, in 1982, Parliament passed the Indemnity Act, No 20 of 1982, which prevented legal action of any kind against any representative or employee of the government for any act, "legal or otherwise, done or purported to be done with a view to restoring law and order during the period 1 August 1977

¹² See, Section 2(1) Commissions of Inquiry Act No.17 of 1948. See also, Kishali Pinto-Jayawardena, "Focus on Rights: Assessing Sri Lanka's presidential commission of inquiry", *The Sunday Times*, 14 January 2007, <http://sundaytimes.lk/070114/Columns/focus.html>.

¹³ See, Kishali Pinto-Jayawardena, "Focus on Rights: Further Reflections on commission inquiries and rights violations – Part Three, *The Sunday Times*, 17 February 2008, <http://sundaytimes.lk/080217/Columns/focus.html>, quoting Hoole, Rajan (2001) "The Citizenship Acts and the Birth of the Federal Party", in *Sri Lanka: The Arrogance of Power: Myths, Decadence and Murder*, University Teachers for Human Rights (Jaffna), Wasala Publications, Colombo, p37: "Former Chief Justice Miliiani Claude Sansoni was a man fighting a battle with himself. During the later stages of the Commission hearings, he remarked to a confidant gravely 'I have never before headed a political commission'. In judging Sansoni's Report, we must go beyond the individual and take in to consideration the milieu in which he was working. In a context where the politics of the nation is wayward and the executive both too powerful and thoroughly unscrupulous, to expect a good commission report on a matter involving high stakes, is to expect too much from individuals".

to 31 August 1977, if done in good faith..". This Act was further amended in December 1988 to extend the relevant period of indemnity to 16 December 1988.¹⁴

From the outbreak of anti-Tamil rioting in July 1983, which led to full-scale armed conflict between the state and the LTTE, increasing numbers of people were victims of gross human rights violations in Sri Lanka. By the late 1980s, enforced disappearances and extrajudicial executions had reached vast proportions. These violations occurred in the context of two major conflicts in the country: the government's war with the LTTE in the north and east of the country, and a second confrontation between government forces and the *Janatha Vimukthi Peramuna* (People's Liberation Front, JVP), a southern-based Sinhalese party that sought to overthrow the government. In October 1990 in the context of the Sri Lanka Aid Consortium meeting in France, Sri Lanka faced a potential withdrawal of donor funds unless the human rights situation in the country improved. The state began engaging with its international critics.¹⁵

Amnesty International welcomed the change, which held out the promise of a more collaborative approach to improving human rights in Sri Lanka, but the government never showed real seriousness. This new style of diplomacy emphasized form over function. Sri Lanka was able to postpone donor sanction by stringing critics along from one presidential order to the next, creating Commissions of Inquiry and temporary agencies, none of which delivered legal accountability for grave violations or real reform of systems. In the meantime, Sri Lanka's human rights record remained among the worst in the world.

By 1991, the UN Working Group on Enforced or Involuntary Disappearances had received almost 15,000 reports of enforced disappearances and had transmitted 4,932 cases to the government of Sri Lanka.¹⁶ President Ranasinghe Premadasa created Sri Lanka's first Commission of Inquiry into "involuntary removals of persons" in January 1991. Its mandate was extremely limited, dealing only with new enforced disappearances that occurred after the establishment of the CoI (the vast majority of Sri Lanka's tens of thousands of reported enforced disappearances from the period occurred between 1988 and 1990). Since 1991 there have been nine Commissions of Inquiry to investigate enforced disappearances and a number of other human rights-related inquiries.¹⁷ While most, if not all, of these Commissions of

¹⁴ Indemnity (Amendment) Act, No.60 1988.

¹⁵ Up until 1991 the response of the Sri Lankan government to human rights criticism had been to deny allegations of abuse and to block international human rights organizations from investigating allegations by denying them access to the country. Amnesty International was denied permission to visit Sri Lanka from 1982 until 1997. In 1986 Amnesty International launched its first campaign on enforced disappearances in Sri Lanka. In late 1991, in this new climate of engagement, Amnesty I made 32 recommendations for human rights safeguards, 30 of which were accepted by the government. The two that the government rejected both concerned impunity: the government refused to permit a Presidential Commission of Inquiry into Involuntary Removals to investigate "disappearances" which occurred before 11 January 1991, and refused to repeal the Indemnity (Amendment) Act, claiming it was no longer in force.

¹⁶ Amnesty International, *Sri Lanka: Implementations of the Recommendations of the UN Working Group on Enforced or Involuntary Disappearances following their visits to Sri Lanka in 1991 and 1992* (Index: ASA 37/04/98).

¹⁷ Three Commissions of Inquiry into Involuntary Removals of Persons established by President Ranasinghe Premadasa (1991, 1992 and 1993); Commission of Inquiry into Involuntary Removals

Inquiry identified alleged perpetrators, very few prosecutions for human rights violations have resulted.

In 1994, Amnesty International issued a report titled, *Sri Lanka: When will justice be done?*, documenting the government's investigations into 18 well-known cases of extrajudicial executions and enforced disappearances dating back to 1983. These involved more than 750 individual victims, from a lawyer tortured to death in police custody, to the mass "disappearance" of 159 people from a camp for displaced persons in eastern Sri Lanka. As a rising opposition parliamentarian with the Sri Lanka Freedom Party (SLFP), Sri Lanka's current President, Mahinda Rajapaksa campaigned internationally on cases of enforced disappearance like these, urging the international community, and in particular Sri Lanka's donors, to put pressure on the Sri Lankan government to end the violations.¹⁸ Of the cases documented in Amnesty International's report, only two resulted in convictions, and both were of subordinate officers on lesser charges than murder: the death of a lawyer due to police torture in 1989, and the enforced disappearance of 25 Embilipitiya schoolchildren after their arrest by the army in 1989 and 1990.¹⁹

Although hundreds of other police officers and military personnel have been indicted since 1994 for human rights violations (mainly for torture, abduction or wrongful confinement), there have been only a small number of convictions.²⁰ To Amnesty International's

of Persons established by President D.B. Wijetunga (1993); three Zonal Commissions of Inquiry into Involuntary Removals and Disappearances (1994) established by President Chandrika Bandaranaike Kumaratunge; All Island Commission of Inquiry into Involuntary Removals and Disappearances of Certain Persons (1998); Commission of Inquiry into the Establishment and Maintenance of Places of Unlawful Detention and Torture at the Batalanda Housing Scheme (1995); Commission of Inquiry into the incidents that took place at Bindunuwewa Rehabilitation Centre on 25 October 2000 (2001); and the Presidential Truth Commission on Ethnic Violence (1981-1984) (2001).

¹⁸ In 1990, Mahinda Rajapaksa was arrested at Colombo Airport trying to bring documentation on cases of enforced disappearance to the UN in Geneva.

¹⁹ The police officers linked to the murder of lawyer Wijedasa Liyanarachchi were convicted of conspiracy and wrongful confinement but received suspended sentences in 1991. The case was raised again by the Batalanda Commission in 1995, which found it likely that the victims had been tortured to death in the secret detention facility under investigation, but no further action was taken. In the Embilipitiya case, those convicted received 10-year sentences for conspiracy, abduction with the intent to commit murder, and wrongful confinement. In both cases a superior officer ultimately escaped punishment. In the Embilipitiya case, after appeal, the convictions of four soldiers and a high-school principal were upheld in early 2002. But the highest-ranking officer, Brigadier Liyanage, commander of the Sevana Army camp where the children were detained prior to being killed was acquitted due to lack of evidence of his direct involvement in the abductions. "In a highly critiqued finding, Brigadier Liyanage's blameworthiness was found to be 'neither more nor less than that which was attributable to all those in the chain of command.'" (SC Application No.506/99, SCM 25.11.99 per ARB Amerasinghe J), (Kishali Pinto-Jayawardena, "Focus on Rights: Imperative revisions to the criminal law to ensure accountability", *The Sunday Times*, 20 May 2007).

²⁰ In March 2008, Foreign Minister Rohitha Bogollagama issued the Sri Lankan Government's response to the US Department of State Country Reports on Human Rights Practices 2007. He noted that: "a) Over 150 indictments have been served against approximately 600 members of the security forces and the Sri Lanka Police as a result of their involvement in serious human rights violations prior to 2004. The alleged offences committed by them include abduction and disappearance, and illegal detention and murder; b) Since 2004, a total of 42 indictments against 90 persons have been forwarded to the High Courts by the Attorney General's Department as a result

knowledge, there have been only three convictions under the Convention Against Torture and other Inhuman and Degrading Punishment Act (The CAT Act). Up to 2007 there had been fewer than 30 convictions for abduction or wrongful confinement (the charges normally associated with enforced disappearances). There is only one case where security forces were convicted for murder: the well publicized 1998 rape and murder of Krishanthi Kumaraswamy.²¹

In 1994, Amnesty International concluded that justice had not yet been done. Some of the investigations seemed to have been set up in order to stem public outcry rather than with the intention of bringing those responsible to justice, and have produced no known results. And the vast majority of cases of extrajudicial executions and “disappearances” in Sri Lanka had never been subject to investigation.

Fourteen years later, Amnesty International’s conclusion remains the same; if anything it is strengthened by the persistence of new violations of human rights and the continuing absence of political will to prevent or stop such violations, investigate them properly, prosecute those suspected of criminal offences or ensure reparations for victims, in accordance with Sri Lanka’s obligations under international human rights law and international humanitarian law.

The case of the brutal killing of the 17 ACF [Action contre la Faim – Action Against Hunger] workers in Muttur is just another in the long list of cases where the Sri Lanka State has been manipulating evidence to exculpate the security forces personnel from blame. The case of the Bindunuwewa Massacre (2000), the cases of the bodies exhumed at Chemmani (1998), the case of the 20-odd bodies of abducted Tamils that were found in the Bolgoda Lake (1995) and other places are examples of some such earlier cases.

– M.C.M. Iqbal, a former consultant for the National Human Rights Commission of Sri Lanka and later National Liaison Officer of the International Independent Group of Eminent Persons

The war dragged on throughout the 1990s with little improvement in the human rights situation and no real progress in combating impunity. A ceasefire between the LTTE and the Sri Lankan government, which started in February 2002, brought relief to civilians and reduced conflict related human rights violations, but other violations, such as torture in police

of investigations into allegations of torture. In addition, 31 cases have been sent to the police to initiate action in the Magistrate’s Court”. (Response of the Government of Sri Lanka to the US State Department Country Reports on Human Rights Practices, 2007, 31 March 2008, www.lankamission.org/content/view/64/). “However in so far as convictions handed down in terms of the CAT Act are specifically concerned, there have been only three in more than 14 years since the CAT Act came into force”. (*Sri Lanka; The Right Not to Be Tortured: A critical analysis of judicial response* by Kishali Pinto-Jayawardena and Lisa Kois, Law & Society Trust, June 2008). “In the 10 years from 1998 to 2007, 27 police, military personnel, and civil administrative staff were convicted for abductions and wrongful confinement”. Human Rights Watch quoting a three-page document with statistics given to Human Rights Watch by Palitha Kohona, Permanent Secretary to the Sri Lanka Ministry of Foreign Affairs during a meeting in Washington DC in October 2007. “Recurring Nightmare; State Responsibility for ‘Disappearances’ and Abductions in Sri Lanka”, Human Rights Watch, 5 March 2008, www.hrw.org/en/node/62398/section/9#_ftn273.

²¹ Amnesty International, Urgent Action for Krishanthi Kumaraswamy (ASA 222/96) which went out on 20 September 1996.

custody continued to occur, the LTTE's attacks on Tamil opponents increased, and outstanding cases made little progress.²² In 2005, as the ceasefire unravelled, Sri Lanka once again experienced a sharp increase in serious human rights violations. But effective investigations and prosecutions of these new incidents were not forthcoming. Sri Lanka's national Human Rights Commission was ineffectual, crippled by its loss of political independence and unconstitutional status; and there were increasingly vigorous calls from domestic and international organizations for an international human rights monitoring presence in Sri Lanka.

Buying Time Once Again – Enter the Commission of Inquiry

On 4 September 2006 President Mahinda Rajapaksa announced that the government would invite an international independent commission to probe abductions, enforced disappearances and extrajudicial executions in all areas of the country. Amnesty International welcomed the government of Sri Lanka's commitment to address past human rights violations as well as the envisioned international role, which Amnesty International has long recommended. But on 6 September 2006 the President instead announced that he would invite an International Independent Group of Eminent Persons (IIGEP) to act as observers of the activities of a local Commission, which would investigate these violations. On 2 November 2006, the President created "The Commission of Inquiry Appointed to Investigate and Inquire into Serious Violations of Human Rights which are alleged to have arisen in Sri Lanka since 1 August 2005". The IIGEP was fully formed three months later, in February 2007.

²² Although the Sri Lankan courts have failed to recognize the doctrine of command responsibility of criminal law decisions, in fundamental rights cases judges have "affirmed the vicarious liability of superior officers of the police, army and other services who fail to prevent violations of human rights by their subordinates". "Focus on Rights: Imperative revisions to the criminal law to ensure accountability", by Kishali Pinto-Jayawardena, *The Sunday Times*, 20 May 2007, <http://sundaytimes.lk/070520/Columns/focus.html>.

But the courts' decisions are disturbingly inconsistent, as a June 2008 study by the Law & Society Trust (LST) points out. The Supreme Court has sometimes ruled that fundamental rights judgements that implicate police officers in torture should not prevent their promotion. LST provides as an example: *Keerthi Nuwan Jayantha Wedasinghe and Indika Hapugoda v. Ranjith Abeysuriya and others*, SC(FR) No.392/2004, SCM 20.02.2006, Law & Society Trust, Sri Lanka: the right not to be tortured; a critical analysis of the judicial response, by Kishali Pinto-Jayawardena and Lisa Kois, June 2008.

Explanation: "This case concerned a Police Inspector Indika Hapugoda who was found by the Supreme Court in a Fundamental Rights decision to have tortured a woman who had made a complaint against a local businessman in a land dispute. The woman was arrested, detained and tortured by police officers of the Nittambuwa police station on the instigation of the businessman who had links to the police. She lodged a fundamental rights application and the Supreme Court under Justice Mark Fernando found that the police officers had indeed subjected her to torture. But later, Chief Justice Sarath Silva, considering an application by two police officers challenging their non-promotion by the National Police Commission, ruled that the previous judicial finding should have no impact on the promotion. The Chief Justice's decision was apparently based on the fact that one of the police officers involved had been implicated based on his position of responsibility as OIC [Officer in Charge], and that therefore his promotion ought not to be affected. But the police inspector Indika Hapugoda actually committed acts of torture (see *Cader v. Mallawa Kumara and others*.)

"The Court's finding that liability (even if vicarious) should have no impact on the promotion scheme of police officers offends the very essence of the sui generis jurisdiction that the Court is vested with, in terms of fundamental rights violations and results in negation of the Court's own authority.", Kishali Pinto-Jayawardena.

The sleight of hand performed by the Government in putting this Commission (aided as it is supposed to be by a team of international observers) as the primary focus and thus shifting attention away from the due functioning of the “normal” rights protection monitors such as the National Human Rights Commission, is unbelievable. Such unreservedly clever manipulation would have been exposed to justifiable public ire in any other country in South Asia than in Sri Lanka.

– Kishali Pinto-Jayawardena, “Focus on Rights”, The Sunday Times, 7 January 2007

Although many in Sri Lanka were ready to welcome any initiative that promised to combat impunity and slow the rapid decline in human rights conditions in the country (especially one with an international component), the plan fell far short of the UN monitoring mission some had hoped for. The move was seen by some as a way for the government to “buy time” and undermine the systems of accountability.²³

In November 2006, responding to President Rajapaksa’s revised position, Amnesty International called upon him to:

- add independent, impartial and competent international experts to the proposed CoI;
- ensure that the CoI’s work is developed in consultation with a representative profile of civil society, including NGOs;
- ensure that the CoI will assess the information collected in light of relevant provisions of international human rights law and international humanitarian law, as well as relevant Sri Lankan laws;
- ensure the safeguarding of the CoI’s independence, access to all relevant persons and information, accessibility to the public, protection of witnesses, and full discretion as to its mode of operation and publication of interim and other reports;

²³ See, for example, Dr P. Saravanamuttu, “The sham of independence without human rights protection,” which ran in The Morning Leader on 7 February 2007: “The government’s objective of buying time against international censure on its woeful record of human rights protection succeeded with the announcement of the Presidential Commission and the Independent International Group of Eminent Persons (IIGEP) which is scheduled to meet on 12 February. The announcement and establishment of the Commission, scepticism about the efficacy of Commissions in Sri Lanka based on past experience notwithstanding, and the appointment of the IIGEP, was surely intended to demonstrate the government’s commitment and seriousness thereof to human rights protection. Clearly this has not filtered through the chain of command, control and communication raising questions of as to whether it was ever intended to. The announcement and establishment of the hybrid arrangement of the Commission and the IIGEP has not in any way constituted a deterrent to further human rights abuse by officers of the state.

“Abuses mount. They occur on a daily basis. Were the case of the TRO [Tamils Rehabilitation Organization] abductees and Pastor Gnanaseelan to name just two amongst a host of others, to be added to the list of cases to be investigated by the Commission, the Commission could sit indefinitely. Accordingly, the government can claim that the strengthening of human rights protection must wait upon the findings of the Commission and the IIGEP. In the meantime the culture of impunity, already institutionalised will be consolidated”. www.cpalanka.org/Newspaper_Articles/Leader_7_Feb_2007.pdf.

- ensure that the CoI's recommendations are carefully considered with a view to their full implementation.

Amnesty International added that unless the CoI is established and allowed to function under these standards, it believed that the CoI will not be able to function as an investigative body that would address violations of international law in a meaningful way, as required by international standards.²⁴

Amnesty International regrets that its call, and similar ones by international and national NGOs and individuals were unheeded, and that the CoI indeed failed to comply with international standards in conducting its investigations, as set out below.

Analysis of the Work of the Commission of Inquiry

Fifteen cases for "investigation and inquiry" were listed in the Schedule to the Warrant of November 2006 appointing the Commission of Inquiry; a 16th case, the assassination of MP Nadaraja Raviraj, was added later, reportedly by the President himself. The Presidential Warrant authorized the CoI to conduct "independent and comprehensive investigations" and to "examin[e] the adequacy and propriety of the investigations already conducted pertaining to such incidents amounting to serious violations of human rights". A major shortcoming of the CoI's performance to date has been that, while it has focused on conducting its own confidential investigations and public inquiries, its inquiries have not focused on the failures of the investigations by the police and Attorney General's department investigations into the same cases. As illustrated by a discussion of key cases below, a detailed critique of the performance of these two institutions is urgently needed, as they have consistently failed to bring to justice perpetrators of criminal offences associated with gross violations of human rights.

The Commission of Inquiry's mandate included a schedule listing the following cases:²⁵

1. The Assassination of the Foreign Minister of Sri Lanka, Hon. Lakshman Kadirgamar PC.
2. The killing of 17 aid workers of the international NGO, Action contre la Faim, in early August 2006.
3. The alleged execution of Muslim villagers in Mutur in early August 2006 and the execution at Welikanda of 14 persons from Mutur who were being transported in ambulances.
4. The assassination of Joseph Pararajasingham MP on 25 December 2005.

²⁴ Amnesty International, *Sri Lanka: Observations on a Proposed Commission of Inquiry and International Independent Group of Eminent Persons*, (Index: ASA 37/030/2006), 17 November 2006, pp2-3.

²⁵ For the CoI's Terms of Reference, to which this list is attached as a schedule, see the Commission's website: Presidential Commission of Inquiry to Investigate and Inquire into Serious Violations of Human Rights, www.pchrv.gov.lk/full_mandate.html.

5. The killing of five youths in Trincomalee on or about 2 January 2006.
6. The assassination of the Deputy Director General of the Sri Lanka Peace Secretariat Ketheesh Loganathan on 12 August 2006.
7. Death of 51 people in Naddalamottankulam (Senchola) in August 2006.
8. Disappearance of Rev. Nihal Jim Brown of Philip Neri's Church at Allaipidi on 28 August 2006.
9. Killing of five fishermen and another person at Pesalai beach and at the Pesalai Church on 17 June 2006.
10. Killing of 13 people in Kayts police area on 13 May 2006.
11. Killing of 10 Muslim villagers at Radella in Pottuvil police area on 17 September 2006.
12. Killing of 68 people at Kebithigollewa on 15 June 2006.
13. Incident relating to the finding of five headless bodies in Avissawella on 29 April 2006.
14. Killing of 13 people at Welikanda on 29 May 2005.
15. Killing of 98 security forces personnel in Digampathana, Sigiriya, on 16 October 2006.

Added to the schedule later:

16. Assassination of Nadaraja Raviraj MP on 10 November 2006.

It is important to note that the Col's mandate does not allow it to monitor ongoing human rights violations but does provide some flexibility to add cases, as was done after the assassination of Nadaraja Raviraj.

Slow Progress and Prioritization of Cases

The Commission of Inquiry was slow to start up, particularly given the seriousness of the cases they were mandated to investigate. It took six months for the Col to settle administrative matters, hire staff and initiate investigations. For the first year, all the Commission of Inquiry's investigations were conducted in camera, which meant that victims' relatives and members of the public were excluded from the hearings. The Commission finally commenced a public inquiry in one of its cases on 5 January 2008.

The Col made a distinction between "investigations" and "inquiries". "Investigations" refer to in camera hearings held under Clause 8 of the Commission's mandate. "Inquiries" refer to sessions that are open to the public. The Col argued that the in camera investigative sessions were necessary because the original investigations had been so poor that they had to repeat them in order to determine whether a witness' testimony was useful and should be included in

a public hearing. The IIGEP was critical of this arrangement, saying that it was both an inefficient use of time and did not meet international standards of transparency. International standards require that families of victims in extrajudicial executions have the right to be informed of and have access to any hearing, to have access to all information relevant to the investigation, and are entitled to present other evidence.²⁶

As of January 2009, more than two years, and two mandate extensions later,²⁷ only four of the 16 cases had received any public hearings and the Commission had managed to conclude only one investigation (the inquiry into the killing of five youths in Trincomalee in January 2006). Inquiries into the killing of 17 aid workers of the French NGO Action contre la Faim in Mutur (ACF, Case No.2) continued in January. In September 2008, the Commission initiated inquiries into the killing of 68 people at Kebithigollewa on 15 June 2006 (Case No.12) and the killing of 98 security force personnel in Digampathana on 16 October 2006 (Case No.15).

From the cases selected for public hearing, it appears that the Commission of Inquiry attempted to strike a political and ethnic balance by addressing abuses mainly against Tamil civilians in the cases of Mutur and Trincomalee, and mainly against Sinhalese civilians and military personnel in the cases of the Kebithigollewa and Digampathana bus bombings. Given the government's interest in political and military "stabilization" of the east in the lead-up to Provincial Council elections in May 2008, and particularly its strategic interest in Trincomalee, it is perhaps not surprising that the first two cases addressed publicly were from that region. But they were also extremely grave incidents that attracted, and deserved, a great deal of public attention, and there is compelling evidence of state responsibility in both.

For more than a year, the Commission of Inquiry focused its closed-door investigations on the Trincomalee case and ACF killings, and then began looking at the killing of Muslim workers in Pottuvil and the deaths of Tamil schoolgirls in the air force raid on Sencholai—all cases where the state was alleged to have had a role. The Kebithigollewa and Digampathana bombings—which were the suspected work of the LTTE—were added as cases for public inquiry much later, after the departure of the IIGEP, and after legal counsel, known for their communally partisan activism, began appearing for the STF and the army.²⁸

On 27 January 2008, at a press conference in Brussels, Belgium, Sri Lankan Foreign Minister Rohitha Bogollagama blamed the CoI's slow progress on its lack of access to conflict areas, but claimed that the CoI was now on track. "Most of the cases are now nearing completion", he said. "And in one of the cases, where there were 17 aid workers associated with the French [International NGO], the ACF ... soon we expect a report to come out of that".²⁹ Several knowledgeable observers following the proceedings noted private fears that, with the

²⁶ UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, recommended by Economic and Social Council Resolution 1989/65 of 24 May 1989, para 16.

²⁷ The Commission's most recent one-year mandate expired on 4 November 2008. The President granted a six-month extension up to May 2009.

²⁸ S.L. Gunasekera has appeared for the STF; Gomin Dayasiri for the army.

²⁹ "Sri Lanka denies abuses, says probes nearly complete", 28 January 2009, Reuters India <http://in.reuters.com/article/southAsiaNews/idINIndia-37688420090127>.

IIGEP gone, along with civil society participants and some of the Commission of Inquiry's most active, experienced members, the CoI might rush through the rest of its cases and submit a weak or inconclusive report.

Case Details

The Killing of Five Youths in Trincomalee on 2 January 2006

On 2 January 2006, five Tamil students were killed and two were seriously injured by the Sri Lankan security forces in Trincomalee. At about 7PM, a group of students from Sri Koneswara Hindu College and St Joseph's College in Trincomalee had gathered for a chat near the seafront, when a grenade was thrown at them from a passing auto rickshaw. The students ran, but at least three of them were injured in the explosion. A short while later a group of 10 to 15 officers in uniform believed to be police from the elite Special Task Force (STF) arrived. They put the injured students into their jeep and beat them with rifle butts, and then pushed them out onto the road. According to a witness, the security forces personnel then shot dead five students.³⁰ All five were around the age of 20: Gajendran Shanmugarajah, Rohan Lohitharaja, Sivanantha Thangathurai, Hemachandran Yogaraja and Ragihar Manoharan. Two other youths survived with injuries: Pararajasingam Kokularaj and Yoganathan Poongulalon. The dead and injured were loaded into jeeps and transported to the hospital. Although the security forces initially claimed the five had been killed when the grenade (which they alleged the students had been carrying) exploded, a postmortem later revealed that the five students had died from gunshot wounds. Three of them had been shot in the head.³¹

Navy personnel present at the scene closed checkpoints after the grenade blast, preventing worried parents from reaching the scene. The main streetlight at the scene was switched off, making it difficult to see and, according to witness testimony, bystanders were made to kneel or lie down at gunpoint. It was the end of the holidays at a popular meeting spot, and many civilians were trapped at the beachfront at the time of the incident. These civilians were all potential witnesses, had there been sufficient guarantees of safety and adequate investigation of the incident to secure useful testimony. Unfortunately, the initial investigation was deeply flawed and all known witnesses faced grave threats. The CoI could have made an important contribution by focusing more attention on the shortcomings of the original investigations and improving the protection of witnesses.

Threats to Dr Kasipillai Manoharan and His Family

³⁰ Amnesty International, "Dr Kasippillai Manoharan, medical doctor", UA 114/06, (Index: ASA 37/013/2006), 3 May 2006.

³¹ "The Trincomalee Judicial Medical Officer [JMO] Dr Gamini Gunatunga conducted the postmortem and ruled that all five dead victims had died due to gunshot injuries. Three had died of head injuries while the other two had succumbed to abdomen and chest injuries. The JMO however observed that some of the victims had injuries other than gunshot wounds too. But the fatal ones were from gunshots." D.B.S. Jeyaraj, "Terrible truth of the Trincomalee tragedy", Tamil Week, 15 January 2006, www.tamilweek.com/Trincomalee_tragedy_0115.html. See also Amnesty International, UA 114/06 (Index: 37/013/2006) 3 May 2006.

Family members of the victims report that after the incident they were pressurized to keep silent, and most complied, out of fear. Dr Kasipillai Manoharan, father of Ragihar Manoharan, was an exception. An inquest was held at the Trincomalee Magistrates Court on 10 January 2006 at which Dr Manoharan gave evidence. That night, the family heard shouting outside, and their house was pelted with stones. Dr Manoharan also received a number of anonymous phone calls on that and several subsequent nights, from a man speaking Sinhalese interspersed with a few words in Tamil, who told him that he and his family would be killed because he had given evidence at the inquest.

Dr Manoharan was one of several witnesses who gave evidence to the Magistrates Court the following week. A Sinhalese police officer who attended court reportedly called the witnesses “*kotiyas*” (tigers) meaning members of the LTTE. A few days after the court hearings, a man came to the family home on a motorbike, wearing a helmet, so that his face could not be seen, and asked to see Dr Manoharan. When Dr Manoharan’s wife—who is also a doctor—offered to give medical help, the motorbike rider insisted on seeing Dr Manoharan and when he realized this was not possible, he went away.

Dr Manoharan suspended his medical practice and his children stopped attending school. Dr Manoharan notified the Sri Lanka Monitoring Mission (sent by Norway, Denmark, Finland, Iceland and Sweden to monitor the ceasefire between the government and the LTTE), the International Committee of the Red Cross (ICRC), the UN High Commissioner for Refugees (UNHCR), and the National Human Rights Commission, of the threats to kill him and his family.

In June 2006, in the lead-up to a Magistrates Court hearing into the killings, the threats intensified. By this time, Dr Manoharan was the only witness willing to testify for the prosecution, and the threats appeared to be an attempt to force him to withdraw from the case. According to Dr Manoharan and his family, on 12 June his son, Sharhar, was stopped by two police officers in Trincomalee while on his way to sit his A-Level geography exam. The police officers asked for Sharhar’s identity card. When they ascertained that he was Dr Manoharan’s son, they remarked, “Your father is flashing the whole matter at the international. That is not good for your family. You are going for the exam, you go now, and we will see you later”. This threat apparently referred to the publicity generated by campaigning by Amnesty International and other organizations on behalf of the family. Following the police officers’ comments, Sharhar was so concerned for his safety that he left without completing his test paper and returned home.³²

On 21 June, Dr Manoharan was travelling in an auto rickshaw in Trincomalee, when he was stopped at a police checkpoint. The police officers on duty asked for his identity card and, on seeing who he was, reportedly told him, “Your son is dead”. They allegedly kept Dr Manoharan waiting by the side of the road for half an hour for no apparent reason while other vehicles passed by unchecked. When Dr Manoharan told the policeman that he would

³² Amnesty International, *Sri Lanka: Further information on fear for safety* (Index: ASA 37/019/2006) 28 June 2006.

inform the town's Senior Superintendent of Police or the Inspector General of Police, who is the head of police in Sri Lanka, about his detention on the road, one of the policemen reportedly said, "You are supporting the LTTE and our high officers are supporting you, so how can we do our duty?" Soon afterwards, Dr Manoharan was allowed to proceed on his way.

Dr Manoharan's fear for the safety of his family eventually convinced him to seek safety outside the country. He provided testimony to the CoI via video conferencing from an undisclosed location. In his testimony he described the events above and offers that he said were made by the Minister of Human Rights and Disaster Management, Mahinda Samarasinghe, of a house in Colombo and school admission for Manoharan's surviving children, in return for his silence.

Testimony of Ponnuthurai Yogarajah

In February 2008, Ponnuthurai Yogarajah told his story to Rajan Hoole, of University Teachers for Human Rights, Jaffna (UTHR(J)). Ponnuthurai Yogarajah and his family lived near the beach where his son Hemachandran was killed. He and his wife heard the grenade explode that evening and he went to investigate. When he reached the main road he was stopped by men in military style uniforms, who struck him, forcing him to the ground.

One man pointed the gun at us and shouted aloud in Sinhalese, "Okkama Kotti, vedi thiyanda ona" (All are Tigers, [and] must be shot). Some of the women there began screaming ... I fell down and lay with my chest down. I saw 20 to 25 persons there in that condition. There was a Navy checkpoint there at the guest house corner. Naval personnel are usually there. ... a powerful light that was by the side of the road was switched off... A few minutes after the light went off, I heard several boys shouting, "Aiyo Amma" [Oh God, Mother"]. Their screams lasted about five minutes. Then I heard gunshots. Yes, I marked that they were not shots fired upwards, but had the distinct pound of shots fired at the ground. I realized that a tragedy had taken place. I must have heard 20 to 30 gunshots. About 10 minutes later we were asked to get up and go back the way we came. There were also Navy men there in blue uniform. They did nothing to us. It was persons in khaki who ordered us to sit, hit us and asked us to go. They could be the police or the STF. Those who were made to lie on the road included women. I was the last to come there. I did not see them hitting anyone except for the fact that they punched me on my back...

– Ponnuthurai Yogarajah's testimony concerning his sons in the five students and ACF tragedies, February 2008, UTHR Special Report No.30

Yogarajah went home. He was worried about his son, so he told his wife he was going to the hospital to look for him.

There was that heavy prompting within me that something had happened to our son Hemachandran and that one of the voices I heard was his. It must then have been about 7.50pm. I got on to my bicycle and took an interior route. I saw naval personnel here and there on my way to the hospital and

passed three or four of their checkpoints. They neither stopped me nor asked me anything. At the time I went, there were no military personnel at the hospital entrance. I saw some doctors standing looking at the entrance. I asked some of the kanganies (supervisors) if there had been an incident, to which they replied they heard there had been one, and that is why they are on alert. It was past 8pm when a jeep arrived. It stopped at the entrance to the hospital building. I went near and peeped inside. I saw two bodies and nothing else at the back. Two policemen were seated in front. I climbed into the jeep from a side. I turned the bloodstained faces to see if either was my son. My son was not there. The kanganies came with stretchers when the vehicles with the victims arrived. I too helped to carry the bodies. Two jeeps arrived 10 minutes later. The first brought three bodies and the second, two. I got into the first as before. I could not recognize the faces, but my son was not there. In the third, I saw one, which from the features and the dress I recognised as my son. I began screaming. Upon unloading the bodies the jeeps speeded away.

Inside the hospital, all seven bodies were laid out in a row. Two or three doctors came in. One doctor who spoke in Tamil noticed the twitching of the jaws in two of the bodies and ordered them to be taken to the clinic and the rest to the mortuary. My son was among those destined for the mortuary. I became fully conscious of the loss of my son. I stayed in the hospital for about an hour. Once my son's body was taken to the mortuary, I sat outside for a short time and cried. I then went home.

- Ponnuthurai Yogarajah's testimony concerning his sons in the five students and ACF tragedies, February 2008, UTHR Special Report No.30

Ponnuthurai Yogarajah told the Commission of Inquiry in March 2008 that police officers in Trincomalee had tried to force him and the other parents of the boys who had been killed to sign false statements saying that their sons had been members of the LTTE.

[W]hile the post mortem was being held, policemen threatened me and asked me to sign a document stating that my son belonged to the LTTE. They said that they would not release my son's body unless I signed this document. I also came to know that there was pressure on the other parents to sign a similar document. There were officers from the Harbour Police and other important police officers from the area present at the hospital at that time... How could I accept such a thing? My son had just completed his A-Level exams and was awaiting entry to the university. I am confident that my son had no connections with the LTTE whatsoever. I vehemently refused to sign the false declaration and, after arguing for about one hour, the hospital police were given instructions to release the body.

- Testimony of Ponnuthurai Yogarajah to the Commission of Inquiry, 17 March 2008³³

Ponnuthurai Yogarajah said that he learned from a police officer that the STF, under the command of a police officer he identified by name, were responsible for the death of his son.

³³ "Crying for justice!", *Daily Mirror*, 22 March 2008; and , "Witness accuses police of intimidation", *Daily Mirror*, 18 March 2008.

About two weeks after my son was killed, Dr Manoharan sent someone to tell us that the magisterial inquiry was taking place. I was never informed of this by the court... When I was at the court there was a Tamil police officer there. I cannot remember his name but he was more than 45 years old and he was not attached to the Harbour Police but to another station. This policeman seemed angry about what had happened to our sons. He indicated another policeman in the vicinity and he identified the other officer by name. He told Shanmugarajah [the father of another victim] and me that the STF was responsible for these killings. He said STF was acting under the command of that police officer.

– Testimony of Ponnuthurai Yogarajah to the Commission of Inquiry, 17 March 2008³⁴

On the 90th day after the incident, a memorial ceremony was held at the spot where they were killed. The families of the five deceased boys and a few relatives were present there. During the ceremony the same police officer drove past and returned with four or five other policemen. Then they came to the ceremony and stood in front of us. It could be for no other reason than to intimidate the families who were grieving the loss of the sons.

– Testimony of Ponnuthurai Yogarajah to the Commission of Inquiry, 17 March 2008³⁵

Amnesty International has concerns about the way in which the original police investigation was conducted. The actions of the police officer in charge show evidence of profound negligence or ineptitude, from his initial failure to assess injuries and notify emergency services, supervising officers or the hospital, to his failure to proceed immediately to the crime scene, secure physical evidence and obtain verbal accounts from potential witnesses, including members of the security forces present at the scene, or to check and obtain details of their firearms.

There were a number of inconsistencies in official statements regarding the incident, starting with the initial claim by the army commander for Trincomalee that the victims were LTTE members killed by their own grenades and accusing them of planning to attack the security forces.³⁶ Several of the statements taken later from security force personnel also blamed the LTTE, and were reportedly worded so similarly that their stories seemed rehearsed. None of the early statements mentioned gunshots or bullet injuries, nor did they acknowledge involvement by the security forces. But when news became public that the Judicial Medical Officer's autopsy report found that the victims had been shot at close range, pressure for an investigation mounted. On 4 January the Defence Ministry announced a "full scale" investigation into the killings.³⁷ But that momentum was shortlived.

On 8 January 2006 *The Sunday Times* columnist Iqbal Athas reported the involvement of the STF in the killing. His first column focused on the role of an advisor to the Defence Ministry, H.M.G.B. Kotakadeniya, suggesting that he acted alone in deploying the STF to Trincomalee

³⁴ "Witness accuses police of intimidation", *Daily Mirror*, 18 March 2008.

³⁵ *Ibid.*

³⁶ "Army denies killing Tamil youths", BBC News, 3 January 2006, http://news.bbc.co.uk/2/hi/south_asia/4578868.stm.

³⁷ "Sri Lanka orders probe into killing of students", *AFP*, 4 January 2006.

while the Defence Secretary was away in India. A week later, on 16 January 2006, in the same column H.M.G.B. Kotakadeniya admitted he had indeed ordered the STF to Trincomalee, but stressed that he had done it with permission from Defence Secretary Gotabhaya Rajapaksa, the President's brother:

I spoke to Defence Secretary Gotabhaya Rajapaksa and received his approval.... I accept I was responsible for this deployment. This was done much before Defence Secretary Gothabaya Rajapaksa accompanied President Mahinda Rajapaksa on his state visit to India. I have continued to receive complaints from Sinhala residents in the district. More than 40 of them have been killed. I felt there was a need to strengthen the police in Trincomalee to maintain law and order in view [of] the strategic importance of this city. ... The STF Commandant (D.I.G. Nimal Lewke) was at first reluctant to deploy on the grounds there were heavy demands on his men. I had to impress on him the urgency over this crucial matter...

– Retired Deputy Inspector General H.M.G.B. Kotakadeniya, advisor to the Ministry of Defence, quoted by Iqbal Athas, "Situation Report," *The Sunday Times*, 15 January 2006

The order to CID to arrest STF members suspected of involvement in the killings also reportedly came from the Defence Secretary. On 13 February the CID obtained detention orders under the Emergency Regulations, signed by the Ministry of Defence, to detain a Sub-Inspector attached to the Trincomalee police and 12 STF personnel for a month pending investigation.³⁸ The Attorney General later instructed the CID to release the STF suspects. No reason was given by the Attorney General's Office. But the decision to release the men came after the Government Analyst's Department "concluded... that none of the bullets found in the bodies of the victims had been fired by the guns issued to them".³⁹ The investigation appeared to end there.

On 13 March 2008, Dr Manoharan told the Commission that the Minister for Human Rights and Disaster Management, Mahinda Samarasinghe, telephoned him in April 2006 saying that the killing of his son and his friends "was a tragic incident. The forces thought the boys were LTTE".

The Killing of 17 Aid Workers from the International NGO, Action Contre la Faim, in August 2006

On 6 August 2006 the bodies of 15 aid workers with the French aid agency, Action Against Hunger (Action contre la Faim, ACF) were discovered lying face-down on the front lawn of ACF's Mutur office, with bullet wounds to the head and neck, indicating that they had been shot at close range, execution style. The bodies of two more staff members were found on 8 August in a car nearby. They may have been killed while trying to escape. In all, 17 ACF

³⁸ "Situation Report: Geneva: How far can the two sides go?" by Iqbal Athas, *The Sunday Times*, 19 February 2006, link from <http://sundaytimes.lk/060219/index.html>.

³⁹ "STF suspects in Trinco youth murder to be released," by D.B.S. Jeyaraj, *Tamil Week*, 4 May 2006, <http://tamilweek.com/newsfeatures/archives/311>.

staff members, four women and 13 men, were killed on 4 or 5 August 2006, shot by unidentified attackers, thought to be members of the security forces.

A number of international organizations voiced strong suspicions that the state security forces were involved in the ACF massacre. The government attributed the killings to the LTTE. Proving who killed the ACF staff hinged largely on establishing the time of death, since both the LTTE and the Sri Lankan security forces controlled the area for periods of time during the first week of August. Denied immediate access to the scene by the security forces, the Sri Lankan Monitoring Mission, the SLMM, ruled that the killings were a ceasefire violation by the government.⁴⁰ Peter Apps, the Reuters correspondent who arrived in Mutur on 6 August 2006, said that the security forces were clear in interviews with him that the LTTE had withdrawn the previous day, so he believed the security forces were in charge of the town when the massacre took place.

As I have recounted many times to those who ask, I landed in the town the next day with a media tour organised by the military, keen to show it was back in their hands despite the ongoing clashes in the suburbs. I did not know that the ACF team was missing, but I did push the local military commanders on the ground for details of civilian casualties. They never mentioned the massacre—but they were clear in saying that the rebels had withdrawn the previous day.

— Peter Apps, Reuters correspondent⁴¹

One very important piece of evidence was a series of photographs taken by staff of the Consortium of Humanitarian Agencies (CHA), the first outsiders to reach the scene after the murders, on 6 August. The state of decomposition of the bodies recorded in the photographs was said to support the theory that the killings could have taken place on 4 August or at the very latest the early morning of 5 of August. The University Teachers for Human Rights (Jaffna) (UTHR(J)), after months of painstaking research, finally concluded that the ACF staff members had been killed on the afternoon of 4 August, and accused three members of the security forces of perpetrating the killings: a Muslim Home Guard and two police constables, who were reportedly accompanied to the ACF office by commandos of the Navy's Special Forces.⁴² The government has maintained that the killings took place earlier, on the morning of 4 August, and that the LTTE was still in control of the area at the time. It cites the time of death estimated in the Judicial Medical Officer's (JMO) report.

The UTHR reports contained detailed information on military movements in the town at the time and indicate that there were witnesses present at that time who could have provided other evidence, had there been adequate interest in investigating the incident and sufficient guarantees of safety for witnesses.

⁴⁰ "Military 'killed Lanka aid staff'", *BBC Sinhala*, 30 August 2006, http://news.bbc.co.uk/1/hi/world/south_asia/5298470.stm.

⁴¹ Peter Apps, "Aid worker massacre remains unsolved", ReutersAlertNet, 3 August 2007, www.alertnet.org/db/blogs/36072/2007/07/3-161605-1.htm.

⁴² UTHR(J), "Unfinished business of the five students and ACF cases – a time to call the bluff", Special Report No.30, 1 April 2008.

Despite the fact that this was the biggest single attack on humanitarian workers ever to occur in Sri Lanka, and government security forces were in or near the Mutur area at relevant times, it appears that no arm of the security forces conducted an investigation into the ACF massacre at the time.

It is well documented that the police failed to secure the crime scene at the ACF compound, which in turn led to a failure to collect evidence systematically. “From the fifth morning the [ACF] premises were left unprotected allowing free tampering of evidence for several days”, UTHR(J) noted in Special Report No.27. Neither did the police remove the bodies, which meant that colleagues of the victims had to collect and transport the bodies back to Trincomalee themselves. UTHR(J) has compiled a series of reports on the ACF massacre and notes:

Before [colleagues of the victims] set off, an uncle of one of the women victims, Kohila, who was a doctor in the Mutur area, called at the ACF office and told some of the staff that he had received calls from Mutur saying that the authorities were planning to burn the bodies. At the bridge on the border of Seruvila and Mutur Divisions, the two policemen who accompanied the team stayed back, saying their orders from Trincomalee were not to enter the Mutur Division. The Army refused to let them proceed until they removed all their ACF gear and antennas and went as mere civilians reaching Mutur about 3pm. To the amazement of those who went, the police had made no attempt to protect the scene of crime and mark it off, although they had known about it for two days, from the fifth morning... The local politician who had first informed [the ACF colleagues] of the deaths called over and asked why they had not come earlier and that the authorities were planning to remove or dispose of the bodies.

– UTHR(J) Report No.25

The government went on to appoint a Judicial Medical Officer (JMO) from Anuradhapura to conduct the autopsies, overriding the initial order by the magistrate from Trincomalee for the JMO from Trincomalee to do the work. The Anuradhapura JMO, Dr Waidyaratne, did not initially conduct a full autopsy and did “no more than record the injuries and causes of death”.⁴³ According to a report by Dr Malcolm Dodd, a senior forensic pathologist sent by the Australian government to assist the Sri Lankan authorities in a re-examination of the case, all 17 bodies were originally examined by Dr Waidyaratne and a junior colleague in a period of five hours on 8 August 2006 “under less than optimal conditions”.⁴⁴

Political interference continued with the sudden removal of the Mutur magistrate the day before he was to deliver the inquest verdict. The Mutur magistrate ruled that the investigation of the case had been inadequate, and was planning to present his conclusions, but the transfer of the case effectively silenced him. This transfer from the Mutur Magistrate’s Court was reportedly carried out on instructions given by telephone from the Ministry of Justice

⁴³ UTHR(J) Special Report No.27, p24.

⁴⁴ “Independent forensic investigation of the Mutur massacre, Sri Lanka, August 2006”, Dr Malcolm J Dodd, Consultant Senior Forensic Pathologist, Victorian Institute of Forensic Medicine, Southbank, Victoria, Australia.

Secretary rather than by the Secretary of the Judicial Services Commission, which is standard practice.

As a result of replacing the Mutur magistrate with a magistrate from Anuradhapura and moving the case to the Anuradhapura Court, the language of the court and recording was Sinhalese. This posed additional difficulties for the victims' families, whose language is Tamil. Families also faced additional burdens as it was further for them to travel to Anuradhapura. In September 2006, the case was transferred again, this time to Kantale, which is closer to Trincomalee and Mutur, and thus eased access for witnesses. Transferring cases is not an infrequent practice in Sri Lanka, and it contributes substantially to the problem of impunity. Many important human rights cases have been transferred out of the north and east. In fact, members of the security forces accused of human rights violations in the north and east routinely petition the court to transfer their cases to Sinhala-speaking areas purportedly for reasons of safety. These transfers make it more difficult, more expensive, and more dangerous for witnesses, victims and their family members to reach the courts, increasing the likelihood that they will fail to appear and that their cases will be dismissed for lack of evidence.⁴⁵

Victims' families were reportedly pressured to disallow the exhumation of bodies for re-autopsy, but in the end, 11 bodies were re-examined in October 2006 by Judicial Medical Officer Dr Waidyaratne and his team, with the assistance of Dr Dodd as an observer. The

⁴⁵ In December 2000, nine civilians were reported missing in Mirusuvil near Jaffna. The victims were internally displaced people (IDPs) who had obtained permission from the Sri Lankan Army to visit their vacant homes and check on their property. On 24 December 2000, one of the missing men, Ponnuthurai Maheshwaran, escaped from army custody with severe injuries from torture. Based on his evidence, a mass grave was discovered and the bodies of eight people were found, including a five-year-old child whose body showed signs of torture. The exhumation took place on 25 December 2000; the case was taken up at the Chavakachcheri Magistrate's Court and 14 army personnel were taken into custody; five were indicted. The case was first transferred to Anuradhapura, and then to Colombo where it stalled. In May 2005 the Colombo High Court Trial-at-Bar established a new three-member bench to inquire into the case; delays continued. (Amnesty International Report 2001, available at: www.unhcr.org/refworld/docid/3b1de37b13.html [accessed 17 March 2009]; Asian Centre for Human Rights, SAARC Human Rights Report 2006: Sri Lanka, www.achrweb.org/reports/saarc2006/srilanka.htm).

Ida Carmelita was a former member of the LTTE who had surrendered to the police about a month before she was gang-raped and killed by five soldiers at Pallimunai, Mannar district on 12 July 1999. She had been shot through her vagina. In his report, the District Medical Officer in Mannar documented evidence of rape and sexual violence, including bites on her breasts and lips. Two of the suspects had been recognized by a neighbour and another by the brother of the victim. A corporal and a soldier were identified at an identification parade by witnesses and taken into custody. The case was transferred to the Chief Magistrate's Court in Colombo in June 2000 on the advice of CID to the Attorney General. Progress in the case stalled after key witnesses were threatened and subsequently fled to India. Suspects were released on bail. Amnesty International, *Sri Lanka: Rape in Custody*, 28 January 2002 (ASA 37/001/2002).

In August 1992, 35 civilians were massacred in the village of Mailanthanai in the Batticaloa district. Twenty-one Sri Lankan Army soldiers were accused in this case, which was initially heard in the Batticaloa courts (the number of accused was eventually reduced to 18). It was transferred to the Sinhala majority town of Pollonaruwa and then to Colombo. Witnesses in the case were IDPs who had been living in camps in Valaichenai for many years; for the impoverished witnesses travel to and from Colombo was both difficult and costly. In 2002 soldiers accused in the case were acquitted; in 2003, representatives of the victims requested that the Attorney General appeal the acquittal. The Attorney General did not grant the appeal.

reexaminations found that all 11 victims died of gunshot injuries and that six of the bodies contained “well preserved and minimally deformed” 7.62mm projectiles. The team also reported recovering a single 5.56mm projectile (suggesting a second weapon type) from the skull of one of the victims.⁴⁶

Dr Dodd’s report recommended detailed ballistic analysis to determine how many weapons had been discharged. Observers have expressed concern that critical evidence was compromised when police took control of the recovered bullets from the JMO and submitted evidence to the Government Analyst’s Department for examination, without an Australian ballistics expert present, as ordered by the Magistrate and stipulated in a cooperation agreement between the Sri Lankan government and the Australian government. “Unfortunately, the chain of custody of the bullets was broken, with sleuths from the CID taking over the bullets from the Anuradhapura Judicial Medical Officer Dr Waidyaratne, before they were handed over to the Government Analyst for ballistic tests”.⁴⁷

The security forces continued to obstruct the Commission’s investigations, refusing to provide information on grounds of national security. Public hearings were disrupted by the theatrics of private counsel who, both in the context of the hearings and in numerous public statements, attacked witnesses, members of the Commission, ACF and the IIGEP in highly inflammatory and political terms.⁴⁸ The proceedings were also hampered by serious problems with spoken and written translations of witness testimony, including material provided to the Commission by the CID. Below is one example that was described in an article in the *Daily Mirror* on 25 April 2008:

Critical Evidence Lost in Translation?

CoI proceedings were disturbed by discrepancies in translations of statements given by the witness to the CID in 2006, giving information about the witness’s last visit to the ACF office on August 4, 2006, and the combatants he saw in Mutur on that day.

The issue of erroneous translations arose when Deputy Solicitor-General Yasantha Kodagoda, leading the evidence on behalf of the CoI, started questioning the witness on the basis of details provided in a statement

⁴⁶ This finding was contradicted by the Government Analysis Department, which concluded that all were 7.62mm bullets. Contacted later, Dr Dodd revised his opinion, saying he was not a ballistics expert and that it could have been the core of a 7.62mm bullet.

⁴⁷ “Killing of 17 ACF aid workers, Rigor mortis sets into investigations: CID subverts chain of custody by ‘hijacking’ incriminating bullets from exhumed bodies”, *The Nation on Sunday*, 26 August 2007.

⁴⁸ Attorney at Law Gomin Dayasiri appeared on behalf of the Sri Lanka Army in the CoI proceedings. Gomin Dayasiri is an active member of the Board of Management of Protect Sri Lanka, a self-described “Think Tank to promote a common understanding among all Sri Lankans on the role of foreign intervention and its threat to Peace, Human Rights in its proper perspective, Development and National Unity as well as to safeguard the sovereignty, prevent secession and preserve the territorial integrity of Sri Lanka”. www.protectsrilanka.org/About-us.html.

recorded by the CID on October 4, 2006. The witness said that he had met the ACF personnel on the August 4 at about 8:30AM. Confusion arose as to [sic] whether this fact had been omitted from his original statement.

It was also discovered that certain facts had been omitted from the Sinhala and English translations, in the section where the witness said, "We went on our motorbike towards the hospital and on the way we saw some LTTE cadres with guns at the post office junction and the temple junction.... We went towards the Mutur jetty. We could hear gun shots so we turned back in fear. When we went towards the ACF we saw some people near the ACF office and Manivannan [the Additional Divisional Secretary] addressed them and told them not to be there like idiots and to go towards the church immediately. I saw the army on the jetty side and LTTE on the town side."

"Each time we try to establish a point about certain times [when an event occurred] it seems that it reads differently in different translations, which makes it very difficult," Commissioner Manouri Muttettuwegama said.

"I'm reading from the certified translation given to me," Mr Kodagoda said in frustration.

The witness was requested to stand outside for 10 minutes while the Commission tried to resolve the issue of discrepancies between translations. Then the validity of any of the translations of the four statements recorded by the witness was queried. Then it was brought to light that Counsel for the Commission had not been furnished with a copy of the relevant testimonials of the witness in 2006.

The level of frustration that led to the premature adjournment of the Commission hearing was seen when Commissioner Muttettuwegama was heard to complain to CoI Chairman Nissanka Udalgama saying, "this is a real nuisance".

Finally the Commission decided to provide "new certified translations" done by translators of the Commission, since the "certified translations of the statements provided by the CID had proved to be erroneous".

-- Daily Mirror, 25 April 2008

In July 2008 ACF left Sri Lanka, saying that they had lost confidence in the government investigations into the killing of their 17 local staff. Representatives returned briefly in November to testify before the Commission.

In October 2008, Commission Chairman Nissanka Udalgama said the CoI would soon submit to the President their interim report on the Trincomalee killings and the ACF case (described above), and would include recommendations, including on compensation to the next of kin of the Mutur and Trincomalee victims. They were invited to apply to the

Commission for compensation by submitting an affidavit establishing the identity of the applicant and his or her relationship to the victim.⁴⁹

The Killing of 68 People at Kebithigollewa on 15 June 2006

On the morning of 15 June 2006, a Claymore mine exploded on a civilian bus that was carrying more than 150 people near Kebithigollewa, a predominately Sinhalese town between Vavuniya and Horawapathana in Sri Lanka's North Central Province. Sixty-eight civilians were killed, many from the same families, including at least 12 children; more than 70 people were injured. Many of the passengers were from the village of Yakawewa; dozens of family members travelling to the funeral of a young man from the village, a former home guard who had settled near Vavuniya. The government accused the LTTE of perpetrating the attack. According to the Sri Lankan military, the bus was blown up using a pair of land mines detonated by remote control.⁵⁰ The Ministry of Resettlement announced that it would provide Rs50,000 (US\$500) compensation to victims of the blasts.⁵¹

Speaking to *The Island* newspaper from the Kebithigollewa hospital in June 2006, a survivor, N. Dissanayake, said that the passengers were headed for his nephew's funeral in Vavuniya, among them men, women, children, Buddhist monks and about 15 home guards. "I was standing on the foot board of the overcrowded bus when there were two huge explosions. The bus was thrown a distance of about 25 to 30 metres. That is all I remember", he added.⁵²

The attack caused hundreds of residents from nearby villages to flee the area, which was in a contested region between LTTE and military control. There have been other violent incidents near Kebithigollewa, and families in these "border villages", as they have been called, have been displaced repeatedly over the course of the conflict.⁵³ Many lost breadwinners in the June 2006 attack, and had ongoing medical problems as a result of their injuries. The village of Yakawewa lost 54 people in the attack. Out of 128 families in the village, 45 families (most of whom lost one or more family members) were reportedly still living in a camp for the displaced in Kebithigollewa a year after the attack, even though government assistance to the displaced there had ceased. Those who remained cited both security and economic

⁴⁹ Patachara scenario at Kebutigollawa hearing", *Daily Mirror*, 4 October 2008 www.dailymirror.lk/DM_BLOG/Sections/frmNewsDetailView.aspx?ARTID=28235.

⁵⁰ "Massacre and mayhem, Tigers – spawned motto", *Sunday Observer*, 10 February 2008, www.sundayobserver.lk/2008/02/10/fea04.asp.

⁵¹ "Amidst funerals villagers flee fearing Tiger terror", Cyril Basnayake, *The Island*, 17 June 2006, www.island.lk/2006/06/17/news1.html.

⁵² "Twin blasts kills 61 civilians in CTB bus" *The Island*, 16 June 2008, www.island.lk/2006/06/16/news2.html.

⁵³ There was a second bus bombing in Abhimanapura, a village in Kebithigollewa, in 2007 that killed 16 people; in early January 2008 three soldiers were killed when an army vehicle was bombed in the Thalgaswewa area of Kebithigollewa; on 24 January 2008, 16 unidentified bodies were found in two shallow graves in Hijrapura on the Horowpathana-Kebithigollewa road. According to police, the victims were all men between the ages of 25 and 40 and they had their hands tied behind their backs and were blindfolded. They all had gunshot injuries.

reasons for staying, as well as an emotional reluctance to return to the place where they lost so many family members.⁵⁴

While many villagers from Yakawewa remain at the Boralukanda camp for security reasons, there is one person who stays at the camp simply because his house in the village brings back sad memories from the past. Priyantha, a home guard, stays at the camp to avoid being haunted by the tormenting memories of that terrible day. Priyantha became a well-known face overnight due to the moving photograph of him clinging on to his dead son that appeared in every newspaper following the June 15, 2006 Kebethigollewa tragedy. A lone man, Priyantha, is still trying to pick up the pieces and move on after he lost 23 family members in the disaster, including his wife and only son who was two years old at the time. This father's grief is still written all over his face. He too would have perished along with his family members if he had not decided to travel on his bicycle to Kebethigollewa that day.

*"How can I return home? How can I live there alone?" he asks.
– The Sunday Leader⁵⁵*

On 9 December 2008 the Chair of the CoI, retired Supreme Court Judge Nissanka Udalagama, reported that the CoI had concluded its inquiry in the Kebithigollewa case. During public hearings of the CoI that began in October, the CoI heard evidence from survivors of the blast, including B. Pathmawathie, aged 48, who lost her husband, two of her four sons, close relatives and friends in the attack. She too has decided to stay in Kebithigollewa with her injured son rather than return to her village. Going back would be too painful, she told the CoI.⁵⁶

The Killing of 98 Security Forces Personnel in Digampathana, Sigiriya on 16 October 2006

On 16 October 2006, 102 Sri Lankan naval personnel were killed and 116 others, including civilians, were injured when their convoy of buses was rammed by a suicide bomber driving a truck loaded with explosives. At the time of the incident the buses were parked at the Digampathana Transit Camp, on the Trincomalee-Habarana road. Some 300 sailors were at the site at the time of the attack, some going home on leave, others returning to duty.⁵⁷ The Sri Lankan government accused the LTTE of carrying out the attack. The CoI's investigation into the Digampathana attack was initiated on 20 October 2008, but the testimony given by the first two witnesses was not open to the media.⁵⁸

⁵⁴ "A tragedy of the survivors", Rohan Abeywardena, www.sundaytimes.lk/070624/News/nws23.html.

⁵⁵ "Forgotten Kebithigollewa", *The Sunday Leader*, 17 June 2008, www.thesundayleader.lk/20070617/issues-1.htm.

⁵⁶ "Patachara scenario at Kebithigollewa hearing" *Daily Mirror*, 4 October 2008, www.dailymirror.lk/DM_BLOG/Sections/frmNewsDetailView.aspx?ARTID=28235.

⁵⁷ Personnel killed and injured at Digampathana, Sri Lanka Navy website, www.navy.lk/index.php?id=297.

⁵⁸ "CoI commences probe into Digampathana bomb blast", *Daily Mirror*, 21 October 2008, www.dailymirror.lk/DM_BLOG/Sections/frmNewsDetailView.aspx?ARTID=29740.

The Killing of 51 Persons in Naddalamottankulam (Sencholai) in August 2006

As noted above, for the first year, all the Commission's investigations were heard in camera; some cases in which investigations were initiated have never received a public hearing. Less therefore can be said about these cases. But despite there being no public hearing, the Col's investigation into the airstrike on Sencholai is one that warrants further discussion. On 14 August 2006 the Sri Lankan Air Force bombed Sencholai, a compound of buildings in Mullaitivu District. The airstrike killed more than 50 high-school students who were assembled there, and injured 150 others. The LTTE and the Sri Lankan government exchanged accusations about the nature of the facility (which had formerly served as an orphanage) and the training being provided to its inmates. The LTTE said the girls were receiving "leadership" or first aid training; the government maintained that they were LTTE recruits.

The Col proceedings were closed and confidential but many details of the case had already been widely publicized in Sri Lanka both in print and on television. Three young injured survivors of the Sencholai bombing were compelled to give televised statements to the state media while in police custody. They were later re-interviewed by the Col in closed hearings. Shirani Goonetilleke, Director/Legal of the government's Secretariat for Coordinating the Peace Process (SCOPP), who serves as an advisor to the Commission's Victims and Witness Protection Unit, reportedly escorted these highly at-risk witnesses to and from these sessions, and was present when they testified.⁵⁹

In November SCOPP chose to pre-empt the Col's investigation and release its version of the incident. On 10 November 2008 in a report entitled, "Humanitarian Services to the North" the Peace Secretariat wrote:

In over 350 air strikes since current hostilities began, two years ago, there have been allegations of fewer than 50 civilian deaths. This excludes 61 victims of what turned out to be forced LTTE conscription of young girls. The Air Force targeted what it was informed was a training centre, and the photographs of girls in military fatigues, with weapons, made clear its information was accurate. The initial LTTE claim that this was an orphanage was changed when it was revealed that the orphanage situated there had been moved to Kilinochchi some years previously. The claim that this was a First Aid Training Centre was belied not only by its situation miles away from the homes of the conscripted girls, not only by the pictures of how they had been forced to dress and act, but also by the testimony of a couple who were rescued and were kept safe in Government custody, after a third died mysteriously while in a hospital in the North.

— SCOPP report, 10 November 2008⁶⁰

Upon release from Kandy hospital only a few days after surgery, one of the victims was sent back to Vavuniya hospital, where she died under circumstances that have never been

⁵⁹ Confidential correspondence.

⁶⁰ "Humanitarian Services to the North", SCOPP Report, 10 November 2008, www.peaceinsrilanka.org/peace2005/Insidepage/SCOPPDaily_Report/SCOPP_report101108.asp.

adequately explained.⁶¹ Another victim was reportedly told she could go home, but when she was released from Kandy hospital, she was taken to a police station in Kandy, where she was once again detained and made to provide a statement. She was compelled to repeat her story to reporters. Her interview was televised, along with others featuring testimony from victims and from the mother of a victim, profoundly increasing their vulnerability, particularly their risk of reprisals by the LTTE. Interview footage remains available on the Sri Lankan Defence Ministry website.⁶² As has happened before in high profile cases of this type, their full names were published, and nothing was done to obscure their faces. The victim in question was then transferred to state custody in Colombo.

The “safe” government custody referred to by the Peace Secretariat included detention and interrogation by the Kandy police and the authorities in Colombo. The injured witnesses were not charged with any offence. They were A-Level students, reportedly abducted outside their school and brought to Sencholaï by the LTTE against their will. They had only been in LTTE custody for a few days when the bombing occurred. Amnesty International understands that they were not dressed in military fatigues or armed, although their trainers were. They are reported to have received First Aid training and to have been shown how to dismantle and reassemble a weapon—suggesting that the LTTE did indeed intend military training of some sort. (Many people in LTTE-controlled areas have been subjected to compulsory military training; not all become active cadres.) The training was apparently cut short by the Air Force attack. The victims were young (18, 19 and 20, according to press reports), and exploited and endangered by the LTTE. They continued to be exploited and endangered by the state.

The Killing of 10 Muslim Villagers at Raddella, Pottuvil Police Area on 17 September 2006

On the morning of 18 September the bodies of 10 young men were found hacked to death at Rattakulam, an old reservoir in Raddella, Pottuvil, about 9km from Pottuvil town in Ampara District, bordering the Lahugala National Park. The murdered victims were all Muslims aged 18-25. An older man, Meera Mohideen, survived with injuries and was hospitalized. The men had been working for a local contractor repairing the reservoir’s sluice gate at the request of the Pottuvil Divisional Secretariat. When the workers and colleagues sent to retrieve them failed to return home on the evening of 17 September, villagers reportedly appealed to the STF at Shastraveli, about four miles away, to organize a search party. When the STF refused to help, they went looking for the missing men themselves. That night they found empty liquor bottles near the work site; the next morning the villagers found the victims’ bodies bound and blindfolded, with deep cuts to their throats and necks. They were lying in the same

⁶¹ Walter Jayawardhana, “Mystery surrounds the death of Sencholaï victim Dayalini; judge asks why she was transferred back to Vavuniya from Kandy”, *Asian Tribune*, 1 October 2006, www.asiantribune.com/index.php?q=node/2236. An appeal from October 2006 from the North East Secretariat on Human Rights (NESOHR) attributed her death to medical negligence in Kandy: “Inhuman politics with a human tragedy – An appeal for international intervention”, www.nesohr.org/inception-sept2007/human-rights-reports/Sensolai.pdf.

⁶² Stories appeared on Rupavahini, the Sri Lankan National Television and ITN (Independent Television Network), a public company under state jurisdiction. Footage remains available on the Sri Lankan Defence Ministry website.

area where they had found arrack bottles the previous evening.⁶³ They also rescued the sole survivor, Meera Mohideen, who was seriously injured, with similar cuts to his neck. He was hospitalized.

Both the LTTE and local Muslim leaders accused the STF of the killings, citing previous conflicts between the STF and the community. Sri Lankan officials accused the LTTE, and said that Meera Mohideen had told police the attackers were LTTE. In Meera Mohideen's case, his daughter complained that even she had been prevented from seeing him for weeks. He was initially sent to Kalmunai hospital, but, according to the Sri Lankan Defence Ministry, was "redirected to the Base Hospital Ampara, due to security formalities".⁶⁴ He was later transferred to Colombo Hospital.

Meera Mohideen, the injured man, was sent by ambulance with written instructions from District Medical Officer, Pottuvil, to have him admitted to hospital in Kalmunai. Kalmunai has Ashraff Memorial Hospital and the older base hospital in the Tamil division, both of which were well equipped after the 2004 tsunami. The ambulance had gone past the STF check point in Karaitivu and was in Maliyakkadu on the outskirts of Kalmunai, when the Police there stopped the ambulance and ordered the patient taken to Amparai [Ampara] Hospital

... the story was leaked to the Press on the 19th itself that Meera Mohideen had told the special police investigation team, whose formation the Government had announced, that the LTTE had carried out the killings, having come armed with "guns, sickles, knives and axes". The SLMM [Sri Lankan Monitoring Mission] tried to see the survivor but was turned away by the Police. A Muslim rights group contacted the family of the victim, who said that the victim was in too poor a state to make a statement to the Police team and was practically devoid of speech. He could only grunt incoherently. This was also the Police's rationale for turning away the SLMM and members of the family. It was on the 22nd that the SLMM was allowed to see him. Meanwhile government spokesmen, including Muslim minister Fowzie, blamed the LTTE for the killings.

– UTHR(J) Special Report No.23⁶⁵

On 27 September Meera Mohideen was featured in a televised interview from his hospital bed at Ampara General Hospital, telling Minister A.L.M. Athaullah that the attackers had been Tamil speakers and that he thought they were LTTE.⁶⁶ The footage, which appeared on the Sri Lankan Defence Ministry website, continues to be featured on a pro-government internet

⁶³ *The Choice between Anarchy and International Law with Monitoring*, UTHR(J) Special Report No.23, 7 November 2006, www.uthr.org/SpecialReports/spreport23.htm#_Toc174529736.

⁶⁴ "'Pottuvil massacre' heinous crime by the LTTE", Ministry of Defence website, 7 November 2006, www.defence.lk/new.asp?fname=20060919_01.

⁶⁵ *The Choice between Anarchy and International Law with Monitoring*, UTHR(J) Special Report No.23, 7 November 2006, www.uthr.org/SpecialReports/spreport23.htm#_Toc174529736.

⁶⁶ "STF OIC files FR petition against former IGP and Rauff Hakeem", Susitha R. Fernando, *Daily Mirror*, 19 October 2006.

site.⁶⁷ At this point his family had still not been allowed to see him. According to UTHR(J), when a family member asked him about the interview later, he did not remember giving it.

On 4 October or in the days following, Meera Mohideen was moved to a paying ward in Colombo Hospital for unknown reasons despite the Medical Superintendent in Amparai saying that he would be discharged in a few days and was fast recovering. According to sources close to his family, Mohideen became insistent that he wanted to go home and the doctors found it difficult to keep him in Colombo. His son-in-law was summoned from Pottuvil, who pacified Mohideen and persuaded him to stay longer... The problem in Colombo Hospital appeared to be that the Amparai Police had put him there and the Hospital was waiting for the Police to initiate his discharge.

– UTHR(J) Special Report No.23⁶⁸

Eventually, Meera Mohideen was released and allowed to rejoin his family.

There are troubling similarities between the treatment of survivor Meera Mohideen and the young victims of the Sencholai bombing. In both cases the victims were hospitalized for longer periods than appear to have been medically required, as a security measure or in the interests of information control. They were kept incommunicado but were compelled to provide televised statements for the media under police guard from their hospital beds. In neither case was any effort made by interviewers to disguise their identities.

Victim and Witness Protection

Sri Lanka has no witness protection programme. The lack of effective protection for witnesses against intimidation has been a very serious obstacle to prosecution of human rights cases, and obstructs the work of the Commission of Inquiry by inhibiting witnesses and potential whistleblowers.⁶⁹ According to former Commissioners, the climate of fear infected Commission members as well. A bill to establish a rudimentary witness protection system in Sri Lanka has been stalled since June 2006. And although efforts to initiate an effective witness protection system are necessary and welcome, legal experts in Sri Lanka have noted significant flaws in the proposed legislation and the process by which it was drafted. Among the most troubling of these flaws were: its lack of an independent Protection Division (it relies instead on the Sri Lankan police force); its bans on foreign assistance for the purposes of witness protection; and the requirement that a public officer must be present where a witness is testifying.

The bill also exempts from criminal liability officials who leak information on protected persons “in good faith” or under orders [Sections 7(5) and 7(8)] and authorizes the Attorney-General to suspend any prosecutions, including on the basis of state interests [Sec 10(1)]; it establishes a National Authority for Protection of Victims of Crime and Witnesses where

⁶⁷ “Tamil Tigers Terrorist behind Pottuvil (Sri Lanka) Muslim massacre: Sole survivor, Srilanka lion”, 29 September 2006, www.youtube.com/watch?v=wrMThYTADKY.

⁶⁸ *The Choice between Anarchy and International Law with Monitoring*, UTHR(J) Special Report No.23, 7 November 2006.

⁶⁹ IIGEP Public Statement, 15 April 2008, www.iigep.org/prelease/estatement8.pdf.

officials hold a majority [Sec 12(1)]; and it provides for the mandatory presence of an official wherever a person is testifying [Sections 29(a) and 29(b)].⁷⁰

In addition, repeated delays in the legislative process suggest a lack of political will ineffectively addressing witness protection.

In the absence of an established system, in 2007 the Col created its own Victim and Witness Assistance and Protection (VWAP) Unit headed by Deputy Inspector General (DIG) Thangavelu of the Sri Lankan police. The mandate of the VWAP was adopted in February 2007 and on 8 May 2007 the Commission adopted the Scheme for the Providing of Assistance and Protection to Victims and Witnesses. DIG Thangavelu was not formally appointed until 19 June 2007. Following his appointment, a part-time deputy, three part-time advisers, and 13 full-time officers joined the VWAP Unit.⁷¹ The Unit, however, is not adequately resourced and lacks the autonomy, training and supervision necessary to fulfil its duties. According to former Commissioners, the IIGEP observers (as reflected in their final statement) and others familiar with the operations of the Commission, the VWAP Unit rarely functions, and does so in an ad hoc manner.⁷² According to former Col member Devanesan Nesiah: “The scope of witness protection the Commission has been able to extend to witnesses resident within Sri Lanka is very limited in respect of both degree and duration”.⁷³

Serious threats have been made against witnesses and reportedly against members of the VWAP Unit itself, although the latter have declined to admit this publicly.

All of the cases under inquiry by the Col are very sensitive, but this is particularly true of the ACF case. The execution-style killings themselves give every indication of being intentional and possibly pre-planned, and there are allegations of very high level government involvement in the case. The inquiry into the ACF case was initiated without any functioning witness protection programme in place and, unsurprisingly, “there are several who had information but were scared to talk about the massacre” a senior lawyer told Amnesty International. According to the UTHR(J), three witnesses to the ACF killings have already been killed and a fourth has gone missing.⁷⁴ Several family members of the ACF victims have had to flee the country for safety. There are also cases where witnesses have asked for protection after being summoned before the Commission of Inquiry, but protective mechanisms have not been put in place.⁷⁵

⁷⁰ See, *Objections to the Assistance and Protection to Victims of Crime and Witnesses Bill*, Law & Society Trust, 17 June 2008.

⁷¹ Mandate, Organizational Structure and the Rules of Procedure of the Victim and Witness Assistance and Protection Unit, adopted 27 February 2007.

⁷² Confidential communications.

⁷³ Devanesan Nesiah, resignation letter.

⁷⁴ “Report blames forces in Sri Lanka aid massacre”, 1 April 2008, Reuters, <http://uk.reuters.com/article/worldNews/idUKL3170510720080401?pageNumber=2&virtualBrandChannel=0>.

⁷⁵ A key witness in the ACF massacre filed an official complaint after threats were made following the provision of evidence. See, “Witness ‘threatened’ by officials”, *BBC Sinhala*, 5 May 2008, www.bbc.co.uk/sinhala/news/story/2008/05/080505_muttur_witness.shtml.

A witness appearing in a public hearing in the ACF case on 25 March 2008 told the Commission:

I get letters demanding that I give evidence in a certain way. I also get other letters vowing to wipe out my entire family if I reveal certain things while giving evidence. Although I have been facing these threats, senior Police officials did not acknowledge it saying that I haven't said anything to them. I would like to ask them to come again and ask me about it.

– *Daily Mirror*, 2 March 2008⁷⁶

He refused to give the names of other people in Mutur who may have been witnesses.

Even now, because I have come here, I am facing problems about staying in Sri Lanka. My entire family, and generations to come, will not be able to live in Mutur if I start divulging names.

– *Daily Mirror*, 2 March 2008⁷⁷

In April this witness requested “enhanced protection” after receiving another death threat the night before he was scheduled to testify.⁷⁸ Another witness summoned before the Col was reportedly instructed by the police in the offices of the Commission not to give his full testimony to the Col, and was threatened by them. In their closing memorandum to the Chair of the Commission, civil society organizations, which had been granted standing before the Commission, elaborated on threats to a witness that had occurred within the premises of the Commission of Inquiry proceedings themselves:

The most disconcerting of these incidents included a witness who was intimidated on two different occasions while appearing before the Commission in Case No.2 [The ACF case]. First, the witness was photographed without his permission and/or consent by the private counsel retained by the SLA [Sri Lankan Army] using a mobile phone camera. In the second instance, the witness described a threatening encounter during a Commission tea break by two individuals, unknown to him, who aggressively questioned him regarding his ongoing testimony at the Commission sessions. [Further] cause for alarm came from the Commission's own inquiry into the second incident, which revealed that the Commission's witness protection officers were present but failed to intervene to safeguard the witness. The two unknown individuals were in fact officers with the Commission Investigation Unit acting without orders or knowledge of their Investigation Unit supervisors.

– Civil Society letter to Chairman of the Commission of Inquiry to Investigate and Inquire into Alleged Serious Violations of Human Rights⁷⁹

⁷⁶ “ACF case: witness under threat”, *Daily Mirror*, 26 March 2008.

⁷⁷ *Ibid.*

⁷⁸ “ACF inquiry: Witness threatened the night before he testified”, *Daily Mirror*, 25 April 2008.

⁷⁹ Civil Society letter to Chairman of the Commission of Inquiry to Investigate and Inquire into Alleged Serious Violations of Human Rights, Re: Retirement from the Commission by Civil Society with Standing in Case No.2, 6 November 2008.

Not only do such incidents point to serious flaws in the Commission's procedures for safeguarding at-risk witnesses (for example by allowing lawyers, media and members of the public to mingle with witnesses at tea breaks), but these incidents, along with others that have been reported, jeopardize the ability of any witness to testify freely and openly before the Commission.

In its very first public statement, on 11 June 2007, the International Independent Group of Eminent Persons (IIGEP) stated:

We are concerned that there are no adequate victim and witness protection provisions under Sri Lankan law. We are of the view that witness protection is absolutely essential in order to investigate serious violations of human rights that are within the Commission's mandate. Appropriate legislation that accords with international norms and standards should be enacted and implemented as soon as possible to protect victims and witnesses. We regret that the Commission still has no functioning victim and witness protection mechanism. In the absence of appropriate legislation, an effective scheme or functioning protection unit, we fail to understand how the Commission could have invited the public...to come forward and give evidence.

– International Independent Group of Eminent Persons, Public Statement⁸⁰

The IIGEP repeated these concerns in subsequent public statements, including its concluding one.⁸¹

Before its exit, the IIGEP concluded that the Col's victims and witness protection programme:

... enjoys no statutory basis, it lacks fully trained staff, and it does not have sufficient funds to offer adequate assistance to those in need of protection from possible retaliation for appearing before the Commission. The Commission has not ensured the protection of victims and their families from intimidation and their representation by legal counsel. Moreover, there is no provision to extend the protection arrangements, such as they are, beyond the life of the Commission. It is hardly surprising that, under these conditions, victims and witnesses have not come forward to give evidence. Many vital witnesses have fled abroad, in fear of their lives. Similarly, there is no protection for government officers who are willing to become "whistle blowers" and to give evidence of official misconduct.

– International Independent Group of Eminent Persons, Public Statement⁸²

⁸⁰ International Independent Group of Eminent Persons, *Public Statement*, 11 June 2007, www.iigep.org/prelease/estatement.pdf, pp1-2.

⁸¹ International Independent Group of Eminent Persons, *Public Statement*, 15 April 2008, www.iigep.org/prelease/estatement8.pdf, pp8-10.

⁸² International Independent Group of Eminent Persons, *Public Statement*: "The Members of The IIGEP submit their concluding public statement on the work of the Commission of Inquiry and find a lack of political will to support a search for the truth", 15 April 2008, www.iigep.org/prelease/estatement8.pdf, p2.

The Commission has employed other practices that have put witnesses at risk and potentially pollute evidence, such as:

- Misrepresenting the Commission's capacity to provide protection both to witnesses and to the public through public announcements inviting witnesses to give evidence before the Commission, which implied (even before the VWAP Unit had been established) that the Commission had the capacity to protect them;⁸³
- Failing to conduct adequate threat assessments, including for families and survivors of victims;
- Employing a police officer from CID as a Commission investigator, despite the fact that the CID is a subject of the Commission's investigations and has been implicated in threatening CoI witnesses;
- Permitting staff of the Presidential Secretariat (SCOPP Director/Legal) access a witness in a case that implicated government forces (see above);
- Failing to intervene on behalf of affected witnesses to prevent repeated traumatization and intimidation of witnesses by aggressive questioning.

Witness protection was the motivating factor for applications by civil society organizations for standing before the Commission, after they observed what they later described as "disturbing and unjustified harassment of witnesses" by private counsel retained by the Sri Lankan Army (SLA) and Police Special Task Force (STF). The application for standing was also inspired by the Commission's shift to public hearings in early 2008, and its use of video conferencing to hear the testimony of at-risk witnesses outside the country.

Many observers have noted that private counsel for the army, Gomin Dayasiri, and counsel for the STF, S.L. Gunasekera, subjected witnesses to such rigorous questioning that they became visibly distressed. Such questioning is inappropriate in a non-judicial setting, and may inhibit witnesses from bringing forth evidence. As journalist Poornima Weerasekara described in a piece she wrote for the *Daily Mirror*:

P Yogarajah [the father of one of the young men killed in Trincomalee] was in visible distress holding his head while answering and making paper fans to channel out his frustration, when pelted with a barrage of questioning by the STF counsel in an attempt to attack his credibility. The witness who repeatedly stressed that he had only studied up to grade two was attacked for his lack of knowledge of certain court rulings pertaining to the Buddhist statue erected in Trincomalee.

– Daily Mirror, 22 March 2008⁸⁴

⁸³ "Inviting Representations: Notice to the Public, Presidential Commission of Inquiry to investigate and inquire into serious violations of human rights", www.pchrv.gov.lk/news/Inviting.html.

⁸⁴ "Crying For Justice", Poornima Weerasekara, *Daily Mirror*, 22 March 2008.

Finally, IIGEP Legal Advisor D. Urban intervened:

Though it is true that the counsel is able to attack the credibility of the witness, that attack must still be a fair attack ... There has to be a relevance to the questions. This witness has kindly agreed to do something that it is not a must to do. Therefore, he must be treated with respect and fairly and with compassion after having lost two children ... These proceedings are not a commercial for the government of Sri Lanka and whether a Buddhist statue is properly or lawfully erected in the centre of Trincomalee is irrelevant to these proceedings. Yet the counsel for the STF chose this irrelevancy to attack the credibility of Mr Yogarajah.

– *Daily Mirror*, 22 March 2008⁸⁵

An American lawyer observing at the proceedings described the atmosphere of threat in May 2008:

Since the entrance of civil society, the lawyers for the SLA [Sri Lankan Army] and the police Special Task Force (STF) have become more restrained in their open hostility towards witnesses whose testimony incriminates the state security forces, but apparently threatening tactics persist. It has been noticed that these state counsels routinely begin with questioning that essentially demonstrate[s] to the witnesses that everything about them is well known.

Such as by asking confirmation of the witnesses' occupation, home address, and the names and locations of family members and close relatives. On one occasion, counsel also employed elaborate theatrics. In front of the witness on the stand, a uniformed military intelligence officer delivered a video cassette sealed in plastic bag to the counsel's table. Counsel then waved the video cassette at the witness and generally stated that there was surveillance footage relevant to present investigation; therefore the witness should consider his testimony carefully as he might be recorded in the video.

The lawyers present from civil society challenged this as an implicit threat, but it also highlights the danger witnesses and their families face in their daily lives at home when beyond the attention of the CoI. Not surprisingly a number of the witnesses have informed the CoI they have been extorted not to testify. Unfortunately the CoI lacks any real capacity to provide protection besides asking the media not to publish information regarding the witnesses' identities. Vulnerable witnesses are thereby forced into a dreadful balance of sacrificing either justice or possibly their lives to secure the other.

– Adam Nord, The Advocacy Project⁸⁶

- Failing to treat witnesses in a humane and respectful manner.

Observers present in the public hearings described scenes where a witness was left weeping on the witness stand during a tea break while Commissioners retired to a private room.

⁸⁵ *Ibid.*

⁸⁶ *Witness Intimidation*, Adam Nord, www.advocacynet.org/blogs/index.php/2008/05/04/witness_intimidation?blog=104.

- Failing to ensure that witness testimony was correctly translated.

Proceedings were hampered during public hearings because both written and verbal translations were inaccurate or information was left out. On some occasions Commissioners themselves retranslated witness testimony.⁸⁷

- Permitting dual purpose investigations that blur the distinction between an independent Commission of Inquiry and a state investigation.

These could discourage victims and other potential witnesses from coming forward, and potentially mislead or violate the rights of some witnesses, particularly the right to protection against intimidation or violence and the right to due process of those who may be subject to prosecution at some point.

In September 2007 the CoI began using members of its Investigation Unit (police officers seconded to the Commission on a full-time basis) to retake statements (without a Commissioner present) from all witnesses who had already testified before the CoI, as well as from those who had not yet given statements. These were intended to serve two purposes: to provide additional or new information to the Commission of Inquiry and to gather evidence for potential criminal proceedings later (something which is outside the CoI's mandate). The initiative appears to have been an attempt to address the fact that evidence gathered by the CoI would otherwise not in itself be admissible in court. In essence the CoI's Investigation Unit members were expected to act simultaneously as independent investigators and as police officers working for the state.

The system has serious procedural flaws. Most importantly, it utterly compromises investigators' independence and thus increases the potential for intimidation of witnesses or reprisals against them, since police and other state forces are accused in many of these cases and there have already been a number of threats against witnesses.

While the objective of fact-finding requires commissions to exercise investigatory functions, commissions of inquiry are not appropriate mechanisms to, in effect, undertake police investigations, even when previous investigations appear to have been systematically flawed and ineffective. The IIGEP has been concerned that this is what the Commission thus far has endeavoured to do; to act as a substitute for the police in an effort to solve the crimes. The Commission does not have the expertise, financial or human

⁸⁷ "Lost in Translation? Difficulties in translation also seemed to have a bearing on the inquiry with the IIGEP Legal Advisor D Urban noting that 'some of the interpretation is inaccurate with the answers in fact being the opposite of what is being translated in English'. At one time one whole statement was omitted from the translation where witness Mr P Yogarajah emphasized thrice that 'if I had not come out of this country (Sri Lanka), I would not have been able to give evidence'. Commissioner Manouri Muttettuwegama also had to request the interpreters to tone down at one point because the interpretation took an aggressive tone. Meanwhile the retired Tamil language Parliamentary interpreter himself felt that he was caught between the 'devil and the deep blue sea', "Crying for Justice!" *Daily Mirror*, 22 March 2008.

resources, or time to undertake the comprehensive investigations into each of the 16 cases.

- International Independent Group of Eminent Persons, Public Statement⁸⁸

The Issue of Video Conferencing

The Commission's public inquiries and, in particular, its use of remote video conferencing to reach endangered witnesses, improved transparency and generated public and media interest in the proceedings. By the end of April 2008, the Commission had convened 20 public sessions in the Trincomalee Five Case, including six video conferences with at-risk witnesses living abroad, and seven public sessions in the ACF case.

Public interest in the Commission was raised especially by televised coverage of the emotionally charged and damning testimony of Dr Manoharan, the father of a victim in the Trincomalee case, who fled Sri Lanka with his surviving family members after the incident, as described above. Dr Manoharan's obvious emotional distress and the specificity of his allegations were featured on television news programmes in Sri Lanka. They attracted public attention to the incidents, and elicited new sympathy for the victims.

On 3 March 2008, in a statement at the High-Level Segment of the Session of the UN Human Rights Council, Mahinda Samarasinghe, Sri Lanka's Minister of Disaster Management and Human Rights, defended his government against charges that it was promoting impunity, using the Col proceedings and particularly its use of video conferencing as evidence:

Intensive investigations and inquiries by the Commission have achieved a fair degree of progress under the scrutiny of the International Independent Group of Eminent Persons. This very day sees the commencement of public inquiries before the Commission into the deplorable incident in which 17 young aid workers of Action Contre la Faim lost their lives. Investigations are nearing completion and we expect an outcome that upholds the principles of justice once the Commission completes its deliberations. The public inquiry into the killing of five youths in Trincomalee, commenced in January. Arrangements have been made to record video evidence of witnesses who are overseas. Investigations are underway into the massacre of 10 Muslim civilians in Pottuvil in the East and also other incidents within the Commission's mandate. Allegations of impunity, made by certain vested interests, against Government forces, are therefore, Mr President, premature and ill-conceived.

- Mahinda Samarasinghe, Minister of Disaster Management and Human Rights⁸⁹

But only two months later, the Presidential Secretariat ordered the suspension of witness testimony through video conferencing at public hearings of the Commission of Inquiry. The

⁸⁸ IIGEP, *Public Statement*, 14 April 2008, REF: IIGEP-PS-006- 2008.

⁸⁹ "Minister Mahinda Samarasinghe addresses High Level Segment of the 7th Session of the UN HRC", Ministry of Foreign Affairs, Sri Lanka, 5 March 2008. www.slmfa.gov.lk//index.php?option=com_content&task=view&id=1155&Itemid=1.

decision was a major blow to the functioning of the Col. In an interview given soon after he resigned as member of the Col, Devanesan Nesiah commented:

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

– Devanesan Nesiah, former member of the Col⁹⁰

The Presidential Directive to suspend the gathering of evidence through video conferencing from witnesses outside the country by the Col cited future witness protection laws, a key proposed provision of which was the prohibition against foreign funding. The Law & Society Trust interpreted this provision in the Witness Protection Bill as attempt to subvert the gains made by the Col and to prevent them from being used as a precedent in the future:

It appears that this provision was drafted with specific reference to the current Commission of Inquiry in an attempt to render its ground-breaking use of video conferencing in April 2008 illegal in retrospect and prevent further such use of video.

– Law & Society Trust⁹¹

The Col's video conferencing was funded and facilitated by foreign governments with the full knowledge of the Attorney General and Foreign Ministry. The second round was to have begun on 2 June 2008 and continued for two weeks, but it was stopped abruptly. The Presidential Secretariat refused to release funds for the use of video facilities at SLIDA (Sri Lankan Institute of Development Administration, a public sector training, management and research institution). The reason given by the Presidential Secretariat for refusing to disburse the funds was reportedly the uncertain status of the law relating to evidence received via video conferencing. The letter recommended that the Commission should wait for the Witness Protection Act to be passed to ensure the legality of Commission proceedings: "The timing of [the] letter of the Presidential Secretariat, read together with the provision in question, provides a valid basis for suspicion that the provision was drafted with the primary intention of preventing further video conferencing by this Commission".⁹²

When asked if the President or government were interfering with the proceedings of the Commission, Devanesan Nesiah told the interviewer that the "[i]tem-by-item control of expenditure by the Presidential Secretariat hindered progress. Allowing the first videoconferencing program was very helpful; disallowing the second was a disaster... The

⁹⁰ Devanesan Nesiah, quoted in an interview by Namini Wijedasa of Lakbima News, "Dr Nesiah: President wanted me to quit the commission", posted by FEDERALiDEA on 2 August, http://federalidea.com/fi/2008/08/dr_nesiah_president_wanted_me.html.

⁹¹ Law & Society Trust, "Position paper: Objections to the assistance and protection to victims of Crime and Witnesses Bill", 17 June 2008.

⁹² *Ibid.*

decision to disallow the video-conferencing was taken by the Presidential Secretariat without consulting the Commission. The effect was crippling”.⁹³

Video conferencing is an important tool for conducting investigations while ensuring witness protection. As has been noted by legal experts in Sri Lanka, there is no legal basis for a ban on its use in a Presidential Commission of Inquiry, which is not, after all part of the criminal justice system. “[U]nder current relevant law – the 1948 Commission of Inquiry Act, the Evidence Ordinance and the internal Rules of Procedure of the Commission itself – there is no bar to obtaining evidence via video conferencing. In fact, any issues relating to inadmissibility under the Evidence Ordinance are explicitly waived by Section 7(d) of the 1948 Act.”⁹⁴

The Bill’s requirement that a representative of the government must be physically present when a witness is testifying, whether in Sri Lanka or outside also defeats purpose of videotaping testimony to protect at-risk witnesses and will, if enacted, discourage the kind of extremely valuable testimony provided to the Col on the Trincomalee case.⁹⁵

While it is accepted that it must be possible to safeguard and ensure the credibility of witnesses who are not giving evidence in Court, the presence of a public officer where a witness within Sri Lanka seeks to give evidence (s29(a)) gravely undermines the safety of that witness where a State actor may have been involved in the offence in question. Section 29(b), relating to witnesses who have been forced to give evidence from outside Sri Lanka, is even more problematic, as it requires the presence of a “competent person” recommended by both the Attorney General and the Foreign Ministry in the location where a witness is testifying... [C]onsider the case of the families of the students killed in Trincomalee: where the witness has fled Sri Lanka due to a well founded fear of persecution by State actors and there is no sufficiency of protection in-country for that person due to the inability or unwillingness of the Government to ensure it – as in the case of these families who sought and were granted refugee status in the respective countries where they now live – there can be no argument made in favour of the presence of an official of the very Government from which they have fled.

– Law & Society Trust⁹⁶

Pressure on Commissioners

Political interference has continued to undermine the work of the Commission of Inquiry. The government has squandered the valuable expertise and frustrated the investigations of

⁹³ Devanesan Nesiiah, quoted in an interview by Namini Wijedasa of *Lakbima News*. “Dr Nesiiah: President wanted me to quit the commission”, posted by FEDERALiDEA on 2 August 2008, http://federalidea.com/fi/2008/08/dr_nesiiah_president_wanted_me.html.

⁹⁴ “Assistance to victims of Crime and Witnesses Bill”, Law & Society Trust, Position Paper, 17 June 2008.

⁹⁵ Witness Protection Bill, sections 29(a) and (b).

⁹⁶ “Objections to the assistance and protection to victims of Crime and Witnesses Bill”, Law & Society Trust, Position Paper, 17 June 2008.

Commission members, many of whom have substantial experience working on previous commissions.⁹⁷

Commissioners have faced criticism and pressure from various government institutions. Lawyers representing the Sri Lankan Army and STF were particularly critical of the role of CoI member Dr Devanesan Nesiiah. As a senior civil servant and former Chair of the Committee on Disappearances tasked in 2002 with investigating enforced disappearances in Jaffna, they described his participation in the CoI as a conflict of interest. Dr Nesiiah had worked as a research consultant to the Centre for Policy Alternatives (CPA), a civil society organization with standing as an independent observer of the CoI. Dr Nesiiah disputed the accusations, but tendered his resignation in June 2008 as he did not receive any assurance from the President about his continued membership in the CoI.⁹⁸ By November, it was reported that at least two other Commissioners had resigned from their positions.⁹⁹

There were many difficulties impeding the Commission but progress was made, albeit slowly...The scope of witness protection that the Commission has been able to extend to witnesses resident within Sri Lanka is very limited in respect of both degree and duration. However, several key witnesses have gone overseas and the introduction of video conferencing opened the possibility of access to several of them. Accelerated progress was made and it appeared that the new momentum could be sustained. Since then, with the suspension of video conferencing and with the requirement imposed on the Commission to await the new legislation governing witness protection, those prospects have receded. In my view, some of the provisions in the draft legislation may deter several critically important witnesses from testifying. In consequence the Commission might not be in a position to arrive at a robust conclusion in any of the 16 cases assigned. That would be a disaster for the Commission, for the victims who seek justice, and for our national reputation – a fundamental indictment of our nation's ability to deliver truth and justice to the victims of serious violations of human rights ... It is especially regrettable that your letter follows a concerted media campaign against me spearheaded by the Counsel for the Army and the STF and by a section of the state owned media network. It is my opinion that the sustained attack directed against me and the projected video conferencing process has the ultimate objective of blocking effective video conferencing and thereby disrupting the work of the Commission...

– From the letter of resignation of Devanesan Nesiiah, 24 June 2008

⁹⁷ "Commission of Inquiry and the International Independent Group of Eminent Persons: Commentary on developments", CPA Policy Brief No.2, 2007, CPA, Colombo, www.cpalanka.org/research_papers/Policy_Brief_2_2007.pdf.

⁹⁸ Dr Devanesan Nesiiah denies that he is a member of the Board of Directors of the Centre for Policy Alternatives (CPA). In a letter to the Secretary to the President he said that he was only a Research Consultant to the CPA.

⁹⁹ Retirement from the Commission by Civil Society with Standing in Case No.2, 6 November 2008. Two new members, Mohammed Faizal Razin and Denzil Sarath Gunarathna, both lawyers, were appointed by President Rajapaksa to fill the vacancies created by the resignation of Commissioners Javed Yusuf and Manouri Muttettuwegama.

Lack of Co-operation from State Bodies

The work of the Commission of Inquiry has been frustrated by a lack of co-operation from state bodies, particularly with regard to the release of information and materials of relevance to the work of the CoI. The security forces, the Attorney General's Department, the Criminal Investigation Department, and the National Human Rights Commission, have all failed to provide evidence requested by the CoI and should be compelled to do so.

The IIGEP noted in its concluding statement that, during the course of its tenure: *There has been a refusal by State bodies to comply with the Commission's requests for information and documentation. Additionally, certain officers of the armed forces have refused to give information regarding the presence or absence of certain units at a particular time or in a particular place relevant to the cases so far examined by the Commission. National security has been cited as the basis of such refusal. The legal basis for claiming privilege with regard to information of this nature is not clear. No certificate to this effect has been tendered to the Commission, nor were reasons given why national security might be compromised. The Commission itself has not pursued the witnesses in this regard.*

– International Independent Group of Eminent Persons, Public Statement¹⁰⁰

Although the Commission is authorized to gather information, including through summonses, and to take action against individuals refusing or failing to produce evidence, to Amnesty International's knowledge, these powers have not been utilized.

The Attorney General

The Attorney General is the highest legal officer in Sri Lanka. The Attorney General's department reviews criminal investigations conducted into alleged offences, considers and initiates criminal proceedings against offenders, and prosecutes them in the courts. Indictments against persons accused of criminal offences are filed in the name of the Attorney General. The Attorney General provides legal advice to all arms of the Sri Lankan government, including the armed forces, police, and the President, who is also Commander in Chief, and (at present) Minister of Defence. The Attorney General represents the interests of the government in legal matters. The position is quasi-judicial in nature and statutorily defined. It is supposed to be an independent position but that independence has been increasingly compromised.

The 17th Amendment to the Constitution was supposed to protect the independence of the Attorney General's Office (and other key offices) by requiring that the appointment of the Attorney General be approved by a bipartisan Constitutional Council. But the Constitutional Council has been inoperative since its first term lapsed in 2005; since then the President has made direct appointments to critical positions. In December 2008, President's Counsel, Mohan Peiris (previously legal advisor to the Ministry of Defence), was sworn in as Sri

¹⁰⁰ IIGEP Public Statement, 14 April 2008, REF: IIGEP-PS-006- 2008.

Lanka's new Attorney General, following the retirement of former Attorney General, C.R. de Silva.

As noted by Sri Lankan legal expert Kishali Pinto-Jayawardena, since the Sansoni Commission (discussed above) there have been tensions between the Attorney General's Office and Presidential Commissions of Inquiry and these are increasing: "...the vulnerability of the office of the Attorney General to political pressure has increased exponentially. Is it proper for the Attorney General to be called upon to assist Commissions of Inquiry tasked with handling inquiries that are politically sensitive to the highest degree? Then again, is it proper that such assistance is required, particularly in the current context where the faults, (wilful or otherwise) of the prosecutorial process are as much to blame for the culture of impunity as faults in the investigative process?"¹⁰¹

The Role of the Attorney General in the Commission of Inquiry Proceedings

There is a conflict of interest. The Attorney General's department advised the police on the original investigations into cases that are now under consideration by the Commission of Inquiry. But one of the Commission's mandated functions is to examine the failure of the original investigations.

According to the IIGEP, which raised objections to the Attorney General's role in the CoI a number of times, documents transmitted to the Commission by the CID clearly showed that the Deputy Solicitor General (who serves as lead counsel on the Commission's Panel of Counsel and is subordinate to the Attorney General) advised the CID on the original investigation into the ACF Case.¹⁰² The Attorney General and members of the Attorney General's department are thus material witnesses to the failure of the original investigations.

But lawyers from the Attorney General's department are closely involved in framing the Commission's inquiries, collecting and preparing the evidence and leading the questioning of witnesses.

Members of the Commission's Panel of Counsel play a variety of conflicting roles:

- providing counsel to what should be an independent Commission of Inquiry;

¹⁰¹ Kishali Pinto-Jayawardena, "Focus on Rights: Further Reflections on Commission Inquiries and Rights Violations – Part Three" *The Sunday Times*, 17 February 2008, <http://sundaytimes.lk/080217/Columns/focus.html>.

¹⁰² The Attorney General's department consists of the Attorney General, the Solicitor General as his immediate subordinate and, under him, five Additional Solicitors General, 20 Deputy Solicitors General, 40 Senior State Counsels and 100 State Counsels, as well as two State Attorneys, five Senior Assistant State Attorneys and 10 Assistant State Attorneys. The CoI's Panel of Counsel from the Official Bar comprises: Palitha Fernando, Additional Solicitor General; Yasantha Kodagoda, Deputy Solicitor General; D.H. Jayakoddy, Senior State Counsel; and L. Karunanavake, State Counsel.

- serving as legal advisors to the government (including the President) on the work of the Commission;
- responding to public statements made by the IIGEP;
- attending to the regular criminal caseload of the Attorney General's department.

The Attorney General has also served as a government spokesperson on issues of human rights.

In March 2007, Deputy Solicitor General Yasantha Kodagoda and the Attorney General were part of the Sri Lankan government delegation to the Human Rights Council in Geneva. SCOPP Director/Legal Shirani Goonetilleke, who advises the Commission's Victim and Witness Assistance and Protection Unit, was also a member of the delegation. The purpose of this delegation, which also included the Minister of Disaster Management and Human Rights, was to defend the government's human rights record against an intended resolution.¹⁰³

On 27 June 2007, the Deputy Solicitor General represented the Attorney General at a government press conference relating to the ACF case. There he criticized the conclusions of the report of the International Commission of Jurists which alleged that the state had tampered with ballistics evidence in the case.

The impression of government complicity to shield the Attorney General's Office from scrutiny was intensified by the President's Clarification of November 2007, which exempted the Attorney General and his officers from Commission's investigations: "...the President did not require the Commission to in any way consider, scrutinize, monitor, investigate or inquire into the conduct of the Attorney General or any of his officers with regards to or in relation to any investigation already conducted into the relevant incidents". A further "clarification", dated 30 November 2007, advised that the President "does not see any basis in which officers of the Attorney General's Department could be subject to inquiry...".¹⁰⁴

In May 2008, the Attorney General and Deputy Solicitor General visited Geneva as part of the President's official delegation defending Sri Lanka's human rights record during its Universal Periodic Review by the UN Human Rights Council.

¹⁰³ "EU to move resolution on Lanka at Human Rights Council", *The Morning Leader*, 29 August 2007.

¹⁰⁴ International Independent Group of Eminent Persons, Public Statement, 19 December 2007, "IIGEP Reports no indication of implementation of its recommended corrective actions and lays down minimum conditions for the success of Presidential Commission of Inquiry's impending public inquiries", www.iigep.org/prelease/estatement5.pdf.

It is a situation that lawyer Kishali Pinto-Jayawardena described as being: "...well summed up by that pithy Sinhalese saying ... 'asking the mother of the thief to identify who the thief really is'" (*horage ammagen pena ahanawa wage*).¹⁰⁵

What any credible government would have done in the face of the strong criticisms made by the IIGEP is to have set up a high level inquiry about the Attorney General's Department itself. The decline within the department is so great that until such a high level and credible inquiry is made, and a decisive and comprehensive plan of action is adopted to correct this department, the present situation of playing a falsifier's role and developing shrewd techniques to defeat justice will be the unhappy task that the officers of this department will be fated to do.

The attorney general cannot be the chief of the prosecuting branch with the responsibility to fearlessly prosecute anyone, including police and military officers accused of human rights abuses, and at the same time be the government's spokesman denying that such abuses occur.

– Basil Fernando, Director Asian Human Rights Commission¹⁰⁶

Civil Society Responds

On 6 November 2008 civil society organizations that had participated in the Commission of Inquiry proceedings announced their withdrawal. The organizations included the Centre for Policy Alternatives, Home for Human Rights, INFORM, Law & Society Trust, Mothers and Daughters of Lanka, Rights Now – Collective for Democracy, and the Sri Lanka National Commission of Jurists. The groups participated through legal representation at every session of inquiry from 28 March 2008, when they were granted standing, until 4 November 2008. They also made a number of written submissions.¹⁰⁷

In a public statement, the organizations noted that they had jointly sought and obtained standing from the Commission to participate in the proceedings because they were "appalled with the repeated harassment of witnesses before the Commission by private counsels representing the Sri Lanka Army (SLA) and Police Special Task Force (STF)" and because they were hopeful that the Commission would make progress after it began using video conferencing to examine crucial witnesses who had fled to other countries for safety.

But this progress, they noted, was not forthcoming. Since its inception in November 2006, the Commission had managed to conclude only one out of the 16 grievous cases within its

¹⁰⁵ Kishali Pinto-Jayawardena, "Focus on Rights: Further reflections on commission inquiries and rights violations", *The Sunday Times Online*, 17 February 2008, <http://sundaytimes.lk/080217/Columns/focus.html>.

¹⁰⁶ "The compromising position of Sri Lanka's attorney general", Basil Fernando, UPI Asia, 15 June 2007, www.upiasia.com/Human_Rights/2007/06/15/commentary_the_compromising_position_of_sri_lankas_attorney_general/ 7701/Basil Fernando is director of the Asian Human Rights Commission based in Hong Kong. He is a Sri Lankan lawyer and was a senior UN human rights officer in Cambodia.

¹⁰⁷ Retirement from the Commission by Civil Society with Standing in Case No.2, 6 November 2008.

mandate, and there persist serious concerns regarding the Commission's transparency and independence, which detract considerably from its credibility, including the following:

- The President's arbitrary decision to prevent testimony through video conferencing has undermined the Commission's founding principle of independence. In the absence of a determination to examine all available evidence, the prospect for further progress has been effectively rendered meaningless.
- The Commission has failed to take any notable action to address the breakdown in witness protection, or respond constructively to our recommendation for improvements. This calls into question the ability of any witness to testify freely and openly before the Commission.
- The involvement of the Attorney General's Office as the Commission's counsel from the Official Bar raises fundamental questions of independence and impartiality, as the Attorney General's Office vocally defends the state against accusations of grave human rights violations, and had an instrumental role in the earlier investigations in Case No. 2 under inquiry by the Commission. These questions are heightened, since the President also sought to shield the Attorney General's Office from investigations and inquiries.
- The last week of August 2008 brought dramatic revelations on the profoundly flawed process of closed-door investigation sessions that occupied the Commission for its entire first year. During testimony by a Lieutenant of the Sri Lanka Navy it became evident that the witness had obtained a copy of Commission proceedings through inappropriate means and that the Commission desired to conceal such information from the civil society members and the general public.
- The President exercised undue influence in directing the resignation of a Commissioner. This was followed by three more resignations from among the eight appointed Commissioners. Most of these resignations have not been publicly announced or explained. This direct interference with the Commission and its vastly altered composition impacts negatively on its credibility and legitimacy.

The organizations pointed to the last minute, partial extension of the Commission's mandate as evidence of the President's ad hoc treatment of it, which threatens its independence and transparency. They concluded that any substantial progress by the Commission was unlikely in its final six months and reiterated their "profound concern for the safety and dignity of vulnerable witnesses".

3 The IIGEP – No Chance of Success

President Mahindra Rajapaksa established the IIGEP to deflect mounting pressure to have an Office of the UN High Commissioner of Human Rights monitoring presence in Sri Lanka. That dynamic alone, which was obvious to many members of civil society, should have been

an indication that the government was looking for an escape route rather than intending to seriously address current or past human rights violations. Pressure for international monitoring came from both local and international organizations, and was a reflection of growing disillusionment with Sri Lanka's domestic mechanisms and their persistent failure to check impunity.

Sri Lanka's Human Rights Commission (HRC), the seemingly logical choice for sustained domestic human rights monitoring, was never an efficient organization. But despite its turgid bureaucracy and tight budget, in the past the HRC had served as an important independent complaints mechanism, particularly in the case of its regional offices. But the HRC lost its constitutionally mandated independence in 2006 when the Constitutional Council, which was charged with appointing its membership, was allowed to lapse. The President then made direct appointments to the Commission, thus jeopardizing its independence, its international accreditation and its overall effectiveness.¹⁰⁸

A visit by the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, in late 2005 highlighted the escalating reports of violations and the problem of impunity, concerns that were repeated after visits in October 2007 by Manfred Nowak, UN Special Rapporteur on torture, and Louise Arbour, UN High Commissioner for Human Rights. All three visits inspired calls for international monitoring. In March 2006, Philip Alston wrote:

Many representatives of civil society pressed on me the need for international human rights monitoring. ...A range of candidates was identified as possible providers of a new human rights monitoring role. Foremost among these was the United Nations, which has both an established expertise in human rights monitoring and a lack of political involvement in the peace process. Other candidates were the Sri Lanka Donor Co-Chairs, some unspecified but non-Nordic country, and a "high-level panel" of human rights experts. There was a general consensus that, even were its resources greatly increased, the Sri Lanka Human Rights Commission would not be an appropriate body to investigate political killings countrywide. Few of my interlocutors felt that effective monitoring could be conducted without the

¹⁰⁸ The 17th Amendment to Sri Lanka's Constitution, passed in 2001, was an attempt to depoliticize some public appointments, including (among others) the members of the National Police Commission and the Human Rights Commission. Nominations would require approval by a Constitutional Council with representation from both ruling and opposition parties as well as non-political public figures. In 2006 the mandate of the Constitutional Council was allowed to lapse due to a disagreement between political parties over an appointment. President Rajapaksa chose to circumvent the Constitution and make his own direct appointments to important bodies. Several highly qualified and experienced former Commissioners refused appointments on Constitutional grounds. This was particularly devastating for the HRC and the National Police Commission (NPC), both of which have important human rights monitoring and protection duties. In the end, "[t]he appointees were predominately supporters and close personal friends of President Rajapakse" and had little standing in the human rights community. Kishali Pinto-Jayawardena, "Contempt of the Constitution: Disregard for the rule of law and its impact on the ethnic conflict in Sri Lanka" *Commonwealth Human Rights Initiative Newsletter*, Volume 13, No.2, New Delhi, Summer 2006.

participation of the LTTE.

- UN Special Rapporteur on extrajudicial, summary or arbitrary executions¹⁰⁹

In his report to the UN General Assembly, the UN Special Rapporteur on torture called explicitly on Sri Lanka to:

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

- Manfred Nowak, UN Special Rapporteur on torture¹¹⁰

The UN High Commissioner for Human Rights also noted calls for international support for human rights monitoring and protection. She acknowledged the government's obvious reluctance to avail itself of the UN's help, but still offered assistance:

Throughout my discussions, government representatives have insisted that national mechanisms are adequate for the protection of human rights, but require capacity building and further support from the international community. In contrast, people from across a broad political spectrum and from various communities have expressed to me a lack of confidence and trust in the ability of existing relevant institutions to adequately safeguard against the most serious human rights abuses...Some of the institutions themselves acknowledge their limitations in this respect.

In my view the current human rights protection gap in Sri Lanka is not solely a question of capacity. ... I am convinced that one of the major human rights shortcomings in Sri Lanka is rooted in the absence of reliable and authoritative information on the credible allegations of human rights abuses...OHCHR is willing to support the Government of Sri Lanka in this way. I am aware that there is a lively national debate about the need for international support in human rights protection. In light of the gravity of the reported ongoing abuses, and in particular of threats to life and security of the person, I believe that we should urgently resolve our ongoing discussions about the future of a productive relationship between OHCHR and the Government of Sri Lanka.

- Louise Arbour, UN High Commissioner for Human Rights¹¹¹

By appointing the IIGEP, President Rajapaksa acknowledged the need for an international role in investigating serious human rights abuses in Sri Lanka. As in the 1990s, the timing

¹⁰⁹ Extrajudicial, summary or arbitrary executions, Report of the Special Rapporteur, Philip Alston; Addendum: Mission to Sri Lanka (28 November-6 December 2005), UN Doc E/CN.4/2006/53/Add.5, 27 March 2006, paras 42, 44.

¹¹⁰ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak: Mission to Sri Lanka, UN Doc A/HRC/7/3/Add.6, 26 February 2008, para 94(y).

¹¹¹ Press statement by High Commissioner for Human Rights on conclusion of her visit to Sri Lanka, Colombo, 13 October 2007, www.unhcr.ch/hurricane/hurricane.nsf/view01/2C07EE5600DE5B19C12573750034C474?opendocument.

was important. Sri Lanka's donors were questioning their continued involvement in Sri Lanka in the context of renewed violence. This was particularly true as the funding invested in human rights training for armed forces and the police, initiatives to fund improvement in the courts system, and donor support for peace initiatives seemed to have done so little to improve the situation in the country. But the President was also heavily indebted to political forces in Sri Lanka that were opposed to international intervention of any sort. The IIGEP was a compromise.

Amnesty International believes that the persistent failure of police investigations into grave human rights violations is no accident, and does not reflect a lack of ability on the part of law enforcement. Foreign assistance has been used to train personnel and equip crime labs but has not noticeably improved the prosecution rate where the most serious human rights cases are concerned. Amnesty International is convinced that the Sri Lankan police have the capacity to conduct effective investigations when the political environment is conducive, and substantial foreign assistance has been devoted to enhancing this capacity.¹¹²

Amnesty International is concerned that the failure of the original investigations into the murder of the students in Trincomalee, the extrajudicial executions of the ACF workers in Mutur, and the killing of Muslim labourers in Pottuvil, combined with reports of violence and harassment against witnesses in these cases (including by the police), are indicative of a culture of impunity. The Sri Lankan authorities, rather than striving diligently to end this culture, are working to preserve it.

Strong legal response can be assured only through the swift and judicious prosecution of perpetrators and not through fact finding Commissions, assisted as they might be by international "eminent" personalities. These grandiloquent exercises often come to futile endings despite the tremendous amount of resources and energy that are devoted to their progress. And lest the accusation of unwarranted cynicism be leveled against me, I can only cite previous experience in my defence. For example, the 1994 Southern Zonal Disappearances Commission found the security forces responsible for 40 per cent - 75 per cent of the disappearances which occurred during the clash between the Janatha Vimukthi Peramuna (JVP) and the Government in the late eighties and early nineties. However, only nine convictions ensued according to research conducted in 2004.

¹¹² For example, the Swedish Government budgeted SKr30 million (approximately US\$3.7 million) for the period June 2005 - May 2008 for police reform in Sri Lanka intended to support "SLP capacity to plan and structure development; crime investigation including crime scene investigation; human rights; and integration including ethnic and gender balanced police force." The project trained 271 Scene of Crime Officers (SOCOs), and established 37 SOCO labs around the country, but beyond that the envisioned reforms were not realized. A review in July 2007 found no "concrete evidence for change brought about by the project with regard to human rights. The overshadowing concerns about national security make the chances for such change rather bleak, in light of the massive human rights violations in the country." Knud Olander, Camilla Orjuella, Rohan Edrisinha, Sida Evaluation 07/43, Review of Development Cooperation between Sri Lanka Police and Swedish National Police Board, p5, www.sida.se/shared/jsp/download.jsp?f=Utv0743_SIDA40261en.pdf&a=35261.

In the case of the most recent 2006 Commission, as in the case of others, (even with the best will in the world), good prosecutions may simply not be possible due to the rigidity of the current criminal law. The absence of a doctrine of command responsibility is just one facet of a system geared in favour of the perpetrator which is exemplified in its manifold aspects of a tortuous and delayed legal process, the absence of effective witness protection and a stubbornly hostile response to the actual victims.

– Kishali Pinto-Jayawardena¹¹³

Commissions of Inquiry have inherent limitations. They are ad hoc, short-term, and narrow in scope. In Sri Lanka, they can only be established by the executive and require no public consultation. The appointments, proceedings and findings are under the direct control of the President. For decades, Sri Lanka's leadership has relied on CoIs as an expedient window dressing exercise.

Overwhelmingly, recommendations [of Sri Lanka's ad hoc commissions] have not been implemented. This raises serious questions about political will. Does the political will exist to address grave violations of human rights? The answer, when one examines the recommendations and their non-implementation, is a resounding no. Again, the most telling example is the numerous commissions and mechanisms created to inquire into disappearances. Despite these mechanisms, and the hundreds of detailed and far reaching recommendations that have been made repeatedly to successive governments, disappearances have re-emerged as a persistent feature in the post-ceasefire political landscape. And yet, commissions continue to be appointed by successive rights-abusing governments and continue to be mostly supported by civil society (and prominent members of civil society who agree to sit on such commissions), as if commissions of inquiry represent a meaningful approach to accountability. The reality is that commissions of inquiry have served important, albeit in many cases limited, fact finding functions, but have simultaneously become habitual features in the enduring climate of impunity.

– Law & Society Trust¹¹⁴

4 Conclusions and Recommendations

Conclusions

Commissions of Inquiry are meant to play an investigative role and thus help in the search for truth and justice in cases of human rights violations. They should supplement a functioning justice system. In Sri Lanka, Commissions of Inquiry have not performed successfully, and the formal justice system is in tatters. Serious human rights violations (including torture, arbitrary arrest and detention, and violations of the right to life) continue to be committed, and perpetrators continue to be protected from prosecution by a government that is more concerned with pleasing its narrow political constituency than in protecting the citizens'

¹¹³ Kishali Pinto-Jayawardena, "Imperative revisions to the criminal law to ensure accountability," Focus on Rights, *The Sunday Times*, 20 May 2007.

¹¹⁴ Law & Society Trust, unpublished concept paper, Presidential Commission of Inquiry from an ongoing study by the Civil and Political Programme of LST, August 2007.

human rights and ensuring equal access to justice. There is less and less space for independent monitoring: the National Human Rights Commission is degraded; UN agencies have been obstructed; Sri Lankan human rights defenders have been threatened and killed; and the press has been stifled.

It is time for the international community to stop believing the charade that has been played for nearly 20 years. Sri Lanka is neither willing nor able to address impunity on its own. The international community should use its significant influence to encourage the Sri Lankan authorities to investigate past violations of international human rights and international humanitarian law, prosecute suspected perpetrators in proceedings which meet international standards of fairness, ensure reparations for victims and prevent future violations. The international community is in a strong position to push for specific reforms that could change Sri Lanka's violent trajectory, and should consider establishing benchmarks based on the recommendations below to monitor Sri Lanka's progress in combating impunity.

This report focuses on impunity in Sri Lanka and the role of Commissions of Inquiry (see Appendix), set up to investigate violations of international human rights law and international humanitarian law, in the absence of effective criminal investigations and prosecutions. Amnesty International emphasizes the importance of a functioning criminal justice system as essential to combating impunity, and stresses that Commissions of Inquiry are not replacements for good policing or respect for the rule of law. Bringing perpetrators to account, including high officials in positions of command responsibility, is the only way to break the cycle of impunity.

Recommendations

Amnesty International Calls on the Government of Sri Lanka to:

Demonstrate that it can bring an end to the cycle of impunity by:

- Establishing a national policy aimed at bringing perpetrators of human rights violations to justice, it should begin by publicly acknowledging wrongdoing by its forces and speaking out forcefully against human rights violations. It can translate words into actions by ensuring effective investigations, due process and swift prosecution of all perpetrators, including those enjoying political influence and high social status.
- Publicly declaring that all violations of human rights and international humanitarian law, irrespective of the identity of the perpetrator or the victim, will be investigated and that all those suspected of offences, irrespective of rank or political influence, will be prosecuted.

Take measures to learn from past failures and rectify them:

- The President should initiate a review of the criminal justice system that publicly acknowledges the system's failures and the inadequacy of ad hoc commissions as a substitute. This should be a genuine, fully supported, objective and impartial review with a clear and reasonable deadline. Many shortcomings of the justice system and potential remedies have already been identified by previous Commissions of Inquiry.

The review should specifically:

- Expose the flaws that have hindered proper police investigations, Commission of Inquiry investigations, prosecutions and punishment of persons suspected of international crimes.
- Examine and publish records of such investigations hitherto kept confidential, including the IIGEP reports to the President.
- Suggest ways to redress these flaws through legislative, administrative and practical measures, in accordance with international human rights law and standards;
- The review's report should be made public.
- The conclusions and recommendations of these Commissions of Inquiry should be made public and easily accessible, along with an official status report on implementation.
- The Commission of Inquiry is not an effective justice mechanism and does not take the place of criminal investigations and prosecutions but its findings, however limited, should contribute to greater accountability. The Commission of Inquiry's reports and those of the IIGEP should be made public, and the government should tell the Sri Lankan people exactly how it will proceed with these cases, and how long the justice process is expected to take. Delays of 10 and 20 years in the prosecution of crimes of this magnitude are unacceptable.

Ensure thorough and efficient criminal investigations:

- Expedite criminal investigations into the cases described in this report and all other cases of violations of international human rights and international humanitarian law, with full support to be given to the police, and take prompt action in accordance with the law against anyone who obstructs investigations.
- Sri Lanka lacks competent and credible mechanisms for investigating human rights violations. As part of its review, the government should explore the creation of such a mechanism (one suggestion is an Independent Prosecutor's Office) with a mandate to

conduct independent investigations in co-operation with the Human Rights Commission.

Ensure a strong, independent Human Rights Commission:

- For this collaboration to be effective, the Sri Lankan Human Rights Commission (HRC) needs to be supported and strengthened, and its independence must be restored. The HRC should be in a position to account for every human rights violation investigated as a crime.
- Restore the HRC's independence and impartiality, in particular through implementing the 17th Amendment to the Constitution and its schedule.
- Ensure that the HRC's work is fully supported financially so as to enable it to investigate human rights violations independently, thoroughly and efficiently.
- Establish a system to provide the relevant authorities with detailed information that they can use to aid them in investigations and prosecutions. Procedures must be established in law to consider the HRC's recommendations.
- Establish clearly defined rules for co-operation between the police, the Attorney General's Office and the HRC in addressing human rights violations, without compromising the latter's independence. These guidelines must be made available to the public so that the population can understand how complaints are investigated and prosecuted.
- The HRC must vet and supervise its staff at a local level to ensure their professionalism and adherence to human rights principles.

End impunity and ensure justice for victims:

- Ensure that all violations of human rights and international humanitarian law, irrespective of the identity of the perpetrator, are promptly, independently, impartially and thoroughly investigated.
- The Police Special Investigations Unit (SIU) should be strengthened and expanded by making it an investigating unit mandated to investigate complaints of gross abuses of human rights on a permanent basis. Members of the SIU should not be assigned to any task other than the investigation of human rights violations. Its resources should be expanded.
- Consider recommendations made by Sri Lankan legal experts that the work of the SIU should be supervised by officers of the Attorney General's department, especially

assigned for this purpose, and (to avoid further conflicts of interest) holding no other assignments.

- State agencies should investigate, prosecute and punish diligently under the applicable laws, police officers and armed forces personnel involved in human rights violations, in proceedings which meet international standards of fairness. This process can be aided by the National Police Commission (NPC), mandated to monitor grave misconduct and abuse by police officers and to ensure an effective Public Complaints Procedure, as mandated by Article 15G(2) of the 17th Amendment to the Constitution.
- Disciplinary control of police officers should not be delegated to the Inspector General of Police. The NPC should clearly articulate what types of misconduct or abuse of rights it will investigate and what penalties will result if complaints are proved to be true.
- As has been frequently recommended by Sri Lankan human rights defenders, the HRC and the NPC should strictly supervise and support the work of their area offices and staff. Lack of confidence at local levels undermines the effectiveness of these commissions. Conversely, efficient functioning of these agencies could greatly enhance the safe recording and investigation of public complaints.
- The absence of a witness protection system is one of the primary obstacles to prosecuting cases of gross violations of human rights and to preventing future violations. A witness protection system must be adequately resourced, carefully instituted and technically well supported.
- Amnesty International understands that there is now a legal precedent for the use of video testimony in Sri Lankan courts, and welcomes the initiative. Amendments to the Criminal Procedure Code should be considered that would expressly permit witnesses to give evidence by video link and to prohibit questioning about the location or new identity of the witness, or other sensitive information, and to legally and securely provide new identities for witnesses and their families.
- Ensure reparations to victims of human rights violations and violations of international humanitarian law, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition, in accordance with international standards.

Initiate changes in the law:

- Sri Lanka should pursue amendments to the Constitution to enshrine the right to life as a constitutional right, to include the crime of enforced disappearances in the penal law, and to reflect the international legal principle of command responsibility in the Criminal Procedure Code.

- Revise or repeal any emergency legislation which violates international law and standards and, in particular, provides for or encourages impunity for perpetrators of crimes under international law.

Ratify international treaties:

- Ratify the International Convention for the Protection of All Persons from Enforced Disappearance.
- Ratify the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
- Ratify the Rome Statute of the International Criminal Court.
- Establish procedures in law to consider modalities for implementing the views of the UN Human Rights Committee.

Amnesty International calls upon the international community to provide the leadership, resources and political will to call individuals to account that are currently missing in Sri Lanka:

Over the past decade it has progressively dismantled its most important justice mechanisms. The international community should use its significant influence to encourage the Sri Lankan authorities:

- To investigate past violations of international human rights and international humanitarian law, prosecute suspected perpetrators in proceedings which meet international standards of fairness, ensure reparations for victims and prevent future violations.
- To push for specific reforms that could change this trajectory, and consider establishing benchmarks based on the recommendations above to monitor Sri Lanka's progress in combating impunity.
- To accomplish the needed reforms and improvements, an independent field monitoring presence is required with strong powers to conduct investigations and assist the national institutions to deliver justice in relation to grave violations of human rights, including the need to set up a human rights monitoring system, to help with the post-conflict situation as well as with accountability.
- To ensure independence, such a body must be empowered by an international mandate, not a presidential mandate. To help with this transition to a more effective and accountable justice system, the government of Sri Lanka should request the Office of the UN High Commissioner for Human Rights (OHCHR) to establish a human rights field operation mandated to monitor abuses by all parties, protect civilians and perform capacity building in support of domestic institutions.

Appendix

Guiding Principles for Commissions of Inquiry into Violations of Human Rights and International Humanitarian Law¹¹⁵

1. Establishment: Competence, Independence and Impartiality

- Members of the commission of inquiry (the commission) should be chosen for their recognized impartiality and competence as individuals and be independent of any institution, agency or person that may be the subject of, or otherwise involved in, the inquiry;
- The commission should include members with proved expertise, knowledge and experience in the promotion and protection of human rights, including expertise of international human rights and humanitarian law;
- Civil society organizations, in particular non-governmental organizations involved in human rights, victims' groups, women's groups and other minority groups should fully participate in the selection and appointment process;
- Similar criteria to those ensuring the competence, impartiality and independence of the commissioners must be used for the appointment of professional administrative staff;
- For impartiality and independence to be ensured, the commission should also be guaranteed financial independence.

2. Mandate

A. Subject-Matter Mandate: Types of Violations to Be Investigated

- The commission should be mandated to fully investigate serious violations of international human rights and humanitarian law and related abuses (for example the torture of those forcibly disappeared);
- The commission should assess the information collected in light of relevant provisions of international human rights law and international humanitarian law, as well as relevant national law;
- The commission should investigate all serious violations, whether committed by government forces or by any armed group. The commission should also investigate the

¹¹⁵ For more detailed recommendations, see Amnesty International, *Sri Lanka: Establishing a commission of inquiry into serious violations of human rights law and international humanitarian law in Sri Lanka: Amnesty International's recommendations* (Index: ASA 37/031/2006), 14 September 2006, www.amnesty.org/en/library/info/ASA37/031/2006.

involvement of commanders and military and civilian superiors, including in planning, ordering or assisting in the perpetration of violations;

- The commission should have the mandate to make recommendations for future inquiry and investigation as necessary;
- The commission should include in its report a critical analysis of all factors which have led to or facilitated these violations of international human rights law and international humanitarian law, such as laws, institutional structures, policies and practices, and other factors.

B. Period of Operation

- The commission's mandate should indicate a time limit by which its operations should end and it should report its findings. The time limit must be a reasonable one, allowing both a thorough investigation and timely reporting;
- The commission should publish regular and frequent interim reports outlining progress made and obstacles encountered, including regarding issues such as victim and witness protection and recommended prosecutions.

3. *Powers*

A. Broad Investigatory Powers

- The commission should have the power to obtain all the information necessary to the inquiry. This would include the power to compel attendance and co-operation of witnesses, including state officials, while fully safeguarding their rights, as detailed below [Section 4 (B)] and to order the production of documents, including government and other records. The commission should also have the power to impose penalties for non-compliance with such orders;
- The government should ensure that all information that the commission considers to be relevant is provided to it, including archives, other records and testimony of government officials and members of armed groups.

B. Ensuring Accountability and the Prohibition of Amnesty Under International Law

- The commission should reaffirm the state's obligation under international law to combat impunity. This obligation includes investigating crimes under international law and, where there is sufficient evidence, prosecuting suspected perpetrators in trials that meet international standards of fairness, without the death penalty or other cruel, inhuman or degrading punishment;

- As required by international law, the commission should not recommend amnesties or similar measures of impunity with respect to crimes under international law.

4. *Operations and Procedures*

A. An Open and Public Inquiry

- As a matter of principle, all aspects of the work of a commission of inquiry should be made public. So far as possible, the media and public should be given access to the proceedings and to the evidence on which the commission bases its findings;
- The media and public may be excluded from all or part of the proceedings, the identities of victims and witnesses may be withheld, and material may be omitted from the commission's report at the request of individual victims or witnesses, or if the commission considers that such measures are necessary to protect them. Open or confidential hearings will be conducted, at the commission's discretion, in consideration of the security or other rights of victims, witnesses or suspected perpetrators.

B. A Victim-centered Approach

- All victims must be treated with humanity, provided with effective protection mechanisms and ensured effective support;
- Complainants, witnesses, those conducting the investigation and others involved in any way should be protected from violence, threats of violence and any other form of intimidation;
- The commission should be granted all the necessary human and material resources to devise and implement a victims' and witnesses' protection programme, covering all witnesses, victims and their families, staff and others associated with the investigation, as necessary;
- In determining which protection measures to take, the commission should take into account the views of the victims and witnesses on which measures they require and whether the protection measures are proportionate to the seriousness of the risk;
- A procedure should be established whereby a victim who is not satisfied with protection measures may apply to the commissioners to address the issue;
- The commission should be authorized to issue restraining orders, or to require the suspension from duty or reassignment of anyone who poses a threat to the victim or witness or to their family, as well as to order police protection, to ensure safeguarding the whereabouts of the victim or witness and their family from disclosure, and to ensure that they are provided with medical and psychological treatment and support.

C. A Fair Procedure

All witnesses, alleged perpetrators and other individuals involved should be guaranteed the following rights, among others, at all stages of the procedure before the commission:

- The right not to be discriminated against;
- The right to a fair and public hearing by a competent, independent and impartial body;
- The right not to be compelled to testify against themselves or to confess guilt;
- The right not to be subjected to torture or to any other cruel, inhuman or degrading treatment or punishment, including any form of coercion, duress or threat;
- The right to have the free assistance of an interpreter if they cannot understand or speak the language used;
- The right to be informed promptly and in detail of any allegations made against them;
- The right to defend themselves and where appropriate the right to have legal assistance;
- The right to be presumed innocent until proved guilty according to law;
- If adversely affected by a commission's decision, the right to seek judicial review;
- In the case of juveniles below 18 years of age, the procedure should take account of their age and the desirability of promoting their rehabilitation.

D. Collection of Evidence and Statement-taking

- The commission should pursue all available sources of information, formal and informal, local, national and international, recorded, written and oral, and seek the co-operation of the widest possible range of sectors of society, paying special attention to information and testimonies provided by victims and their families (both inside and outside the country), national and international human rights organizations and previous research projects;
- All interested parties should have an opportunity to submit evidence;
- The commission should consider written submissions from, or arrange special interviews with, witnesses who are unable to attend because they are abroad, because they are afraid of retaliations, or for other valid reasons. It should be flexible about the manner of questioning witnesses and adapt its method to the circumstances of the case and the individual interviewees, so as to gather an optimal amount of evidence;

- The commission should evaluate with caution all information received, especially if provided by any individuals or groups which might attempt to use the commission as an instrument for their own purposes.

E. Public Information and Education Campaign

- The commission should establish contact with representatives of non-governmental organizations, other relevant non-state institutions and the media, to publicize its work and obtain relevant information;
- The public should be notified of the establishment of the commission and the matters it will look into by all appropriate media. This notice should include an invitation to submit information and guidance for doing so;
- Live broadcasts of the commission's hearings should be considered, subject to evaluations regarding the protection of victims, witnesses and alleged perpetrators.

5. *Reporting, Reparation and Prosecution*

A. Final Report, Recommendations and Dissemination

- The commission's final report must provide details of all aspects of the commission's work, including investigations, hearings, findings and recommendations for prosecution. The final report should set out:
 - the commission's mandate and terms of reference;
 - its procedures and methods for evaluating evidence, as well as the law upon which it relied;
 - the background to the investigation, including relevant social, political and economic conditions and information on whether the commission received the necessary cooperation by the government and other public institutions;
 - its findings of fact and a list of documents and other evidence upon which such findings are based;
 - its conclusions based upon applicable law and findings of fact, including a critical analysis of laws, institutional structures, policies and practices, and other factors which allowed violations to take place;
 - a list of victims (except those whose identities are withheld for protection); and its recommendations.

- The report should be made public and easily accessible or available to the public;
- The commission of inquiry should have the power to make recommendations to the authorities with regard to:
 - reparations to victims and their families;
 - prosecutions of suspected perpetrators;
 - the enactment of specific legislative, institutional and other reforms that would prevent repetition of past violations;
 - any other necessary government actions to be taken in furtherance of its findings, such as promoting human rights education; organizing training for the police and security forces and continuing investigations or inquiries into particular matters.

B. Providing Full Reparation to the Victims and Their Families

- Throughout the inquiry, the commission should collect views from victims about what forms of reparation they require to rebuild their lives;
- The commission should recommend the full range of reparations required by international standards, namely restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition;
- Reparation should be proportional to the gravity of the violations and the harm suffered. It should be provided even if the perpetrator has not been identified;
- The commission should recommend a broad range of other reparations for victims according to their specific circumstances;
- Any recommendations made for reparation should never be portrayed or considered as a substitute for bringing those responsible to justice or preclude victims also seeking compensation through the courts.

C. Preserving Evidence For Future Prosecutions

- If a commission of inquiry obtains information indicating that identified individuals may have been responsible for committing, ordering, encouraging or permitting crimes under international law, that information should be passed to the relevant judicial or law enforcement bodies for investigation without delay, with a view to bringing those individuals to justice;

- The commission should recommend modalities of bringing to justice alleged perpetrators from all sides;
- The government should ensure that persons identified by the commission's investigation as having participated in such violations are investigated and brought to justice.

D. Archives

- The commission should establish at the outset the conditions that will govern access to its documents, including conditions aimed at preventing disclosure of confidential information while facilitating public access to their archives.

**EXCERPTS FROM UTHR SPECIAL REPORT NO.33 ON THE THIRD
ANNIVERSARY OF THE ACF MASSACRE – A TRAVESTIED
INVESTIGATION, EROSION OF THE RULE OF LAW AND INDICATORS
FOR THE FUTURE OF MINORITIES IN LANKA***

University Teachers for Human Rights (Jaffna)

Prefatory Note - This Special Report provides the UTHR's findings on the murder of the 17 staff members of ACF in Mutur and highlights the problems of the ensuing investigation. It is written in the aftermath of the closure of proceedings and reporting by the 2006 Presidential Commission of Inquiry (CoI). The Government's recent claim that the CoI has found the LTTE to be fully responsible for this crime and attempts by the CoI to debunk UTHR(J)'s findings in a previous report has prompted the organization to re-examine the issues concerned. This report is written despite the fact that the CoI's Official and final report to the President has not been made publicly available.

The UTHR (J)'s observations in this regard reveal the nature of the problem in succinct summary:

The course of the ACF inquiry traces growing state hostility to legal norms, arbitrariness in the use of police powers, and the politicisation of the Attorney General's office to the point of complicity in crime. Extrajudicial methods of dealing with inconvenient witnesses on occasion to the point of murder have become the norm as several witnesses in the ACF and Five Students cases (in Trincomalee) came to know.....

The case reveals the mindset behind the repression. The State consequently makes itself far more venal than what its ideology attributes to the minorities, as evident during rounds of communal violence. If the trend continues, in the end there will be no standards or laws the citizen and communities could appeal to.....

A proper inquiry, revealing the truth behind the ACF killings and the multitude of other human rights abuses is necessary to avoid the further entrenchment of ethnic politics. There is a need for an honest evaluation of the past that can provide a basis for a common future for all Lankans.¹

The **Introduction** notes that ACF and a related case mark an all important saga in the relentless growth of impunity in Sri Lanka.

The gruesome execution-style murders of 17 aid workers with the French organisation Action Contre la Faim in 2006; a criminal investigation that went nowhere; a half-hearted inquiry by

* Date of release: 4 August 2009. Reprinted with permission from UTHR (Jaffna).

¹ See at p.6 of the Special Report.

a Presidential commission of inquiry (which ceased ‘with a whimper’² in mid-2009); and the fear and intimidation faced by the families who sought justice, have dashed hopes of a return to peace and the rule of law.

Members of minority communities in state institutions and especially in the security forces feel too powerless and insecure to act according to their conscience. Friends and families of the victims and the local community have a clear awareness of the perpetrators of the crime, but the elites in Colombo continue to believe it within their power to suppress the truth using the brute power of the state. Any civil society attempts at raising concern are targeted and attacked as supporters of terrorists.

The government has exhibited an irrational obsession with hiding the truth in every incident where harm was done to civilians from the minorities by the armed forces. In many cases, the blame was not simply on one side—the LTTE was responsible for a great deal of violence against civilians—and if these cases were faced honestly they could have led to corrective measures. There is presently no such interest. In the ACF case as will be seen below, systematic intimidation of victim families was resorted to in attempts to obtain signed statements from them blaming the LTTE.’ [emphasis in the original]³

On 14 July 2009, the BBC in a similar vein as other news media, announced ‘Sri Lanka’s top human rights panel has cleared the army of killing 17 people working for a French charity in 2006’. As the basis for the exoneration CoI Chairman Justice Udalagama reiterated to the BBC, the position in the excerpts from the final report as given in *The Island*: “The evidence that was laid before us is that not a single witness stated before us that they saw the army around the place at the relevant time.... The entire town was taken over by the LTTE at the time. The LTTE said on their website (TamilNet) that they had taken over the town of Mutur”.

Justice Udalagama added, “There was other evidence like the presence of Muslim home guards. They had access to the weapons. And it could have been LTTE”.⁴

Citing the above, the UTHR (J) Special Report observes as follows:

The culprits were not identified, according to Chairman Udalagama’s BBC interview, because ‘he ran out of funds’. He also told the Daily Mirror (21 July 2009) that ‘the use of video conferencing was essential to hear evidence from the witnesses abroad but this practice was stopped by a Presidential directive’. [emphasis in the original]

² See at p.5 of the Special Report.

³ See at p.7 of the Special Report.

⁴ See at p.8 of the Special Report.

Yet the report seems to confirm the LTTE's culpability for these murders by relying on a report of the pro-LTTE website TamilNet, apparently the one on 5 August stating 'LTTE fighters returned to their positions Friday (4)', to hold the LTTE was in control of the place on Friday 4. The Chairman thus rejects the government spokesman's claim published in the government media on 4 August morning that its forces were in control of Mutur by the 4 morning. The CoI's claim, "The evidence does not disclose the presence of the commandos anywhere near the ACF office during the period, that is, on the morning afternoon or evening of the 4th", skates on thin ice. We cite below Peter Apps, who was told on 5 August by several Sri Lankan military commanders in Mutur that most LTTE fighters had withdrawn from the town by early Friday (4th) and about two dozen of them were sniping from the suburbs. Further by the 5th the Army had a post in Mutur hospital, very close to the ACF pointing to the area being well reconnoitred in advance. A police witness told the CoI that commandos were sighted in Al Hilal school nearby on the 3rd and 4th.

It was the difficulty in positing LTTE-control of the area throughout the 4th that impelled the CoI to advance the time of death to the early hours of 4th morning in accordance with the JMO's assessment; despite testimony from of Rev. Sornarajah who saw the ACF staff after 8.30AM and others at the Methodist Church 400 yards away that makes it clear the killings did not take place before.⁵

The UTHR (J)'s reflection in this context was that the CoI had investigated Trincomalee based ACF staff members' misjudgments in full but appears to have failed similarly to inquire into the inactions by the Army Major, Colonel and Senior Superintendent of Police.

One of the most shocking aspects of the Introduction to this Special Report is the summary of how families were intimidated all over again following the winding up of the CoI proceedings.

On Saturday 18 July this year, police in civil went to the homes of ACF families in Trincomalee and summoned them to Fort Frederick which functions as army HQ and the government's administrative centre. In that forbidding environment, they were confronted with a very lean, sickly looking, greying and slightly hunched man on the fairer side, flanked by two women in civil whom the families took to be from the police. There were several others in civil who struck the families as members a police intelligence unit. The latter took video shots of those brought there singly and in groups. The sickly looking man introduced himself as a private

⁵ See at pp.8 and 9 of the Special Report.

attorney from Colombo, who had come for their sakes, in order to get them more money from the ACF. He spoke in Sinhalese, which was translated into Tamil by one of the women next to him. The families thought the whole thing fishy, since if the man was a private attorney, he could have met them elsewhere, than at the seat of government in Trincomalee having the highest security. They were given two letters in English legalese to sign, one addressed to the Attorney General and the other to the President.

The one addressed to the President stated: "We are extremely grateful to Your Excellency for appointing a Commission of Inquiry and ensuring that justice prevailed. We agree with the findings of the Commission that the deaths were caused by the LTTE and the compensation as determined must be paid by the ACF for gross negligence to the heirs of deceased for a period of 10 years, based on the last salary.

The one addressed to the Attorney General stated: "We thank your official counsel for the proper and impartial manner in which they presented evidence and the kindness with which they treated us when we came to give evidence. We greatly appreciate their services".⁶

A parent who was present told the UTHR(J), "I do not know English, but I gathered from others that the truth had been turned on its head and we were to give our assent. Some of us gave excuses trying to wriggle out of it. The Attorney was firm that we must sign. That is the situation now. If we do not sign, we must live on from day to day not knowing if we would have another night's sleep on our bed".⁷ On 25 July, police in civil came and summoned the families to Fort Frederick and in the same venue the letters were collected by the two women who were there earlier, although the attorney was not present.

"The matter of the letters evoked adverse publicity. The BBC reported the fact of duress against the unwillingness of the families. On 1st August the letters were returned by post by an unknown sender, stamped at Thampalakamam post office. The same day the families were called to a peace centre run by a priest. They were met by lawyers identifying themselves as from the Human Rights Commission in Colombo who spoke in English, which was translated. They expressed concern about the letters the victim families had been forced to sign. They asked them who was responsible for the killings. The people maintained as always their formal stance that the incident took place 18 miles away and they had no way of knowing. The visitors did not push the matter further".⁸

⁶ See at p.9 of the Special Report.

⁷ See at p.10 of the Special Report.

⁸ Ibid.

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Section 1 of the Special Report:

“Sometimes we forget, before there was ever a Commission, there was a case...”⁹

This Section summarises the history of the investigation into the murder prior to the CoI’s appointment, the political impetus for the appointment of the CoI and includes a brief reference to the intervention of the International Independent Group of Eminent Persons (IIGEP).

In 2007, the Judicial Service Commission, comprising the Chief Justice and two other Supreme Court Judges, (including the Chairman of the CoI) ordered the transfer of the inquiry on the eve of the inquest findings being delivered. The transfer was from the Mutur Magistrate, who was Tamil, to a Sinhalese magistrate. The new Magistrate then changed the order of the original Magistrate that the Medical Superintendent of Trincomalee Hospital, where the leading doctors are Tamil, do the post mortems. The JMO, Anuradhapura was empowered to do the post mortems.

The killing of 17 ACF workers in early August 2006, and its implications for humanitarian services, gave the question of impunity a new urgency. This led to the development of the CoI, assisted by the IIGEPs in late 2006 through discussions between the Government and the diplomatic community. Its task of investigating into 16 key violations commenced in 2007.

The IIGEP quit in April 2008 after a series of differences involving among others the Attorney General’s openly partisan role in the ACF inquiry. Even by this time the intimidation of witnesses by the Police was widely known in Trincomalee. Soon evidence by videoconferencing from witnesses who fled out of fear was stopped. Again the CoI surrendered to the President without arguing its case.¹⁰

The Special Report sets out to examine:

- Removal of an independent minded Tamil Commissioner due to pressure from Counsel for the Army;
- Attempts to provide or assert alibis for certain persons named in our report;
- Attempts to advance the time of the killings and demonstrate that the LTTE was in control of the area at that time;

⁹ *Ibid.*

¹⁰ See at p.11 of the Special Report.

- To post date by two days the Police's knowledge of the killings;
- To discredit the claim of commando involvement by denying that they ever went out with Muslim home guards,
- The flattering treatment of witnesses who supported the official line and the mistreatment or intimidation, inside and outside the commission premises, of witnesses and a commissioner who contradicted or refused to toe the official line.

Section 2 summarises the UTHR(J)'s previous findings (in Special Report No.30) with Additional Clarifications. The clarifications are based information from an eye witness and discussions with the IIGEP's team. They find that the only change with regard to the previous report is that the Commandos were not naval Special Forces as reported, but Army Commandos and Special Forces (see Section 11).

In Section 3, the various *alibis* provided to the CoI by persons named as being in Mutur or responsible for killings are examined and denounced as being false. The Section also highlights in detail the role played by members of the Attorney General's Department. It is observed that while State Counsel were meant to be Counsel for the CoI, they often acted in the interest of maintaining the fact that the state was not involved in the murders rather than leading witnesses on the facts of the situation Mutur during this period.

"The fairness of the Commission's inquiry was vitiated from the start by the AG's Dept. The Department directed the evidence, advancing police versions of when they got to know of the murders, even when they were patently absurd.

Deputy Solicitor General (DSG) Kodagoda who was in charge of directing the evidence and whose influence over the proceedings was so disproportionate, told the Commission very categorically on 2nd September 2008, "ASP Sarath Mulleriyawa who was supposed to have congratulated [the killers according to the UTHR (J) report] was not even in Mutur at the time".¹¹

Section 3.2 provides a detailed account of Home Guards Jehangir and Cader and their testimonies. It establishes that Home Guard Jehangir did accompany the commandoes into Mutur town on 4 August afternoon. This was confirmed to the CoI by Home Guard Cader whose evidence was taken over a considerable period by the CoI:

Muslim witness Cader was assailed by the DSG Kodagoda at the public hearing on an apparent inconsistency between his not requesting protection at the closed door hearing in September 2007 and requesting it in July 2008.

¹¹ See at p.15 of the Special Report.

The more pressing reason for the attack on Cader and denying him protection was that in September 2007 he denied seeing the commandos leaving the Police Station early morning on 4th August, but at the public hearing on 26th June 2008 he said he saw them leaving, and they went in the company of home guards.¹²

In Section 4, the available facts in regard to the time when the police knew of the killings are examined and it is concluded that the police claim in regard to finding about the bodies on 6 August cannot be maintained.

Section 5 deals with the crucial issue of the time of the killings—around 4.30 in the afternoon of 4 August. This is based on two eye witnesses interviewed by UTHR(J) who establish that the commandoes came to the ACF office just shortly before that. It is confirmed by witnesses who saw ACF staff members around 8.30 am on 4 August and by others who left town late morning and early afternoon who did not observe any shots being fired from the area.

Around 5.00 PM that day, testimony from within the Mutur Police indicates that four home guards, including Jehangir came back to the Police Station. One confessed to having come on a motorcycle. This corresponded with Witness-2's statement that he saw Jehangir and another home guard leave the scene of crime on a motorcycle taken from the ACF office.

Witness-1 who had first hand knowledge about the circumstances of the party that proceeded from the Police Station and what happened at the ACF office confirmed that Jehangir was one of them. It removed any confusion regarding the day on which Witness 2 observed the event. Being late afternoon, it could only be Friday 4th as the staff was definitely alive in the morning and by 5th morning their death was known to ACF and their families. Both witnesses confirmed the time as late afternoon, around 4.00 PM. This is our principal evidence that remains unshaken.

A draft report on the ACF case, which we call Draft-1, prepared by an assistant secretary to the Commission and the secretary to one of the commissioners, had a dilemma with the time of death because of Rev. Sornarajah's testimony that he met the ACF staff after 8.30AM on Friday 4th. This conflicted with the time of between 3rd night and 4th early morning given by the government pathologist Dr. D.L. Waidyaratna. The latter was more convenient for making a case that the killings took place when the LTTE was still in control.

When the Commission met on 2 September 2008, the Chairman said categorically that their mandate ended on 3 November 2008, and by early

¹² Police S.I. Saratchandra who altered his testimony conveniently on the same point about the commandos and home guards from the closed door to the public hearing was left unchallenged.

October 2008 four of the original eight commissioners had left or been thrown out.¹³ But the mandate was renewed with some additional commissioners appointed, and it appears that new witnesses were called specifically to address difficulties caused by testimonies before the old set of commissioners. One of those called was Dr. Waidyaratna".¹⁴

In Section 6, questions are raised on the post mortem findings by Dr Waidyaratne that apparently estimated the time of death as being the early hours of 4th morning. This is contrasted with the information received by a journalist and highlights that the CoI could have pursued this matter more exhaustively given the evidence on the time when the 17 people were last seen alive.

Section 7 is a summary of Rev. Sornarajah's Testimony that he met the ACF staff alive after 8:30 or perhaps 9:00AM on 4 August 2006, which questioned the official post mortem report. Rev. Sornarajah was harassed by members of the investigation unit of the Commission. Also, the Tamils who left Mutur on 4 August are convinced that the ACF workers were not killed while they were there—not before 11:00AM since gunfire from the ACF office would have been prominently heard at the Church and Al Hilal School.

Section 8, deals with the evidence by Home Guard Cader who places Home Guard Jehangir (one of those identified to be responsible for the murders) with the Commandoes on 4 August. Jehangir had claimed to the CoI that he had slept in the bunker from 2-5 August. However, several witnesses placed him outside the bunker on several occasions during this period.

Section 8.1, 8.2 and 8.3 provide considerable illustrations of how DSG Kodagoda and the Counsel for the Army attempted to discredit Cader's evidence during the open hearings of the CoI when he contradicted his statements to the closed hearings on seeing home guards Jehangir, Shiraj and Aniz leaving the Mutur police station along with Commandos early in the morning on 4 August 2006. However, the proceedings indicate that Cader remained consistent during the open hearings on his position.

In Section 8.3, the report details the strong possibility that Cader was in fact a eye witness to the killings. The section also details harassment of another police witness who also changed his testimony.

Section 8.4 continues to provide evidence of the involvement of the homeguards. They also report on tensions between the police and homeguards and that many weapons from the Mutur police station were missing after being distributed by the State to paramilitaries to combat the LTTE.

¹³ Dr. D. Nesiah was forced to resign in July 2008. Three other commissioners resigned during July to September 2008 citing mainly personal reasons. They were Javid Yusuf, K.C. Logeswaran and Mrs. Manouri Muttetuwegama.

¹⁴ See at p.19 of the Special Report.

In Section 10, we are reminded that although the Commission was appointed by the President, it was unable to obtain basic information from the Ministry of Defence. Also, although the Police investigation unit was to come back with a report on cell phone communications using phones owned by the victims, as the times of the latter calls around the time of death have a bearing on the inquiry, this was apparently not presented to the Commission.

Another issue of concern highlighted in this Section is the way the Commission and the DSG discounted evidence from a Tamil police officer attached to the Mutur police station at the time of the killings. This is contrasted with the Commission's apparently very definite conclusion despite hearing no uncontested evidence on this, that the LTTE was present in the town while there was no evidence of Army personnel being seen there.

Video conferencing was stopped, according to commission sources, as soon as the alarm was raised that important witnesses, including Shanmugarajah above, were to be presented. David Savage, a police officer with wide international experience, who served as the IIGEP's Adviser Investigations and Witness Protection, told us that when Shanmugarajah's appearance before the CoI through videoconferencing had been stalled, he had sent the CoI Shanmugarajah's testimony on CD along with the transcript. It appears that DSG Kodagoda's offhand dismissal had been the first and the last word on the matter as far as the CoI was concerned. The DSG was surely not naïve about how they were themselves complicit in arm twisting witnesses.¹⁵

The Section observes that the Commission (and the DSG who was Counsel for the CoI), failed to adequately test the validity of the claim by the Commander of the commando team that the Commandoes went out alone which claim was contradicted by several witnesses before the Commission. The Section also details the efforts made by ACF to get in touch with the Army regarding safety of their colleagues and the fact that the CoI did not try to establish these facts.

Section 11 clarifies a mistake in the previous report—that the Commandoes involved in the murder were probably not from the Navy but from the Army. The UTHR (J) do so by analyzing the evidence made available to the Commission itself.

Section 12 analyses the *alibis* from Police Constables Susantha and Nilantha and concludes that the CoI should have explored the *alibis* in more detail.

Section 13 covers the controversy around the bullet found in one of the victims, Romila. This was initially identified by Dr Malcolm Dodd, the Australian pathologist who assisted the government pathologists upon the invitation of the government as being a 5.56mm bullet. The Government was very sensitive to this because the Special Forces commandos who were in Mutur carried guns firing 5.56mm bullets. Since then, Dr Dodd changed his opinion to confirm that what was found was the *core of a 7.62mm bullet*. This conclusion is challenged

¹⁵ See at p.31 of the Special Report.

by accounts from witnesses who also saw the casings around the bodies initially. But the CoI could not interview the former ACF employee after video conferencing was halted by a Presidential order. The Commission could have taken steps to resolve the issue for itself rather than relying on government expert witnesses alone.

Section 14 provides extremely disturbing details in regard to the history of intimidation of witnesses and families of the murder victims. As described above, this continued even after the CoI handed its Report. In particular, the treatment meted out to Rev. Albert Sornarajah who was a witness before the CoI is detailed.

Section 15 details the efforts made by police and navy witnesses to explain inconvenient information (especially on dates and times of arrival of certain officers).

UTHR(J) points out that some of these areas obviously need greater investigation. The ACF staff members in Trincomalee certainly misjudged the situation in Mutur. Once the initial mistake was made and their co-workers were trapped in Mutur, ACF staff in Trincomalee did several things right. They undertook rescue missions. They contacted an Army Colonel on the 3rd and a Major on the 4th. They also contacted SSP Samarakoon. While the Commission investigated the ACF staff members' actions in detail, they did not inquire into the follow up taken by the military and the police after they had been requested to help save the 17 aid workers.

Section 16 details the purported conflict of interest on the part of one Commissioner, Dr. Nesiah, due to his connection with one of the NGOs that hired lawyers to represent the interests of the victims at the Commission. This question was initially raised by Counsel for the Army Mr. Gomin Dayasiri. Some members of the Commission also requested Dr. Nesiah to step down while others remained silent. While the matter was pending, Dr. Nesiah submitted his letter of resignation from the Commission to the President, stating "I find it incongruent that my 'prudence, ability and fidelity' can be selectively found lacking for some of the cases before the Commission, and not for others". The President had wanted Dr. Nesiah to step down from the ACF and Five Students cases, among the 16 cases being investigated by the CoI. One of the Commissioners who had played a more political role at the Commission, pushing strongly to limit the role of the IIGEP and requesting Dr. Nesiah to resign, also resigned after this.

The UTHR(J) goes on to state:

"We will not argue it here, but several commissioners held the view that a conflict of interest was a charge trumped up to get Dr. Nesiah out. As for conflicts of interest, Mr. Javid Yusuf was for a long time associated with the ruling SLFP. Mr. Douglas Premaratne, a former additional solicitor general, was closely associated with the extremist JHU, which is a party to the government. More importantly the Chairman had no less serious a conflict of interest. He was in the three-member Judicial Service Commission that removed improperly two magistrates in August 2006, who had shown a

determination to conduct investigations into the ACF case and the disappearance of Fr. Jim Brown. Both were cases under the CoI”¹⁶

Section 17 - A Question of Sources: The Real Issues

Given the relevance of observations made under this Section, we reproduce extracts verbatim from the UTHR(J):

“Some caustic remarks on our report were made at the Commission on 2 September 2008 by Deputy Solicitor General Kodagoda and by the Counsel for the Army Gomin Dayasiri. Kodagoda said that we seem to have copious amounts of information but no sources and Mr. Dayasiri said that they should also look at the defamation aspect of the UTHR reports. In an earlier presentation posted on defence.lk on 29 July 2008, Mr. Dayasiri accused us of dealing in testimonies of persons who are ‘unidentified, unknown, uncontactable and untraceable’ (http://www.defence.lk/new.asp?fname=20080728_05).

Mr. Dayasiri has missed the central evidence of our report. He has criticised our report citing selectively information used as indicators telling us what to seek. We also pointed out that the evidence from the bullet found in Romila has been mishandled, and evidence on the types of bullets given in the Addendum to the report came from a witness now abroad and in touch with the ACF. We stated all this confidently because evidence from different directions evolved into a coherent picture. In all fairness the Commission cannot ask us to reveal sources, when information coming to the Commission has been at the root of several of the witnesses being subject to threat and intimidation, as could be seen in the abominable treatment of Tamil witnesses cited above.

A human rights report stands or falls on its contents and the organisation's reputation for being faithful to the truth. There is in a situation such as prevailing in Lanka a need for human rights organisations to be intermediaries between vulnerable witnesses who could speak only at enormous peril and placing the truth in the public domain. It becomes needful because the system of justice has failed abysmally. Human rights reporting by its very nature cannot be infallible. The work needs to be carried further and the Commission had an opportunity of doing so.

The least one could have expected from the Commission is that it would take good evidence when it comes and use it critically. Videoconferencing initiated by the IIGEP provided such an opportunity. This was arbitrarily stopped by presidential directive, citing concerns like national sovereignty

¹⁶ See at p.53 of the Special Report.

and asking the Commission to wait for regulations which never came. Thus good evidence was shut out, discredited or distorted.

DSG Kodagoda who told the Commission at the outset that the Police came to know of the killings in the well-reconnoitred area two days after the event, referred dismissively to the testimony of a policeman, Shanmugarajah, now abroad, reasoning that he had earlier given a different story, due to what Kodagoda knew were instructions from his superiors. He was among those instrumental in the presidential directive stopping video conferencing at the end of May 2008 just when some key witnesses were to appear. The Commission accepted this interference without protest. With such trust in the state apparatus, the findings of the inquiry were preordained.

Saddled with an investigation unit whose job was to intimidate witnesses remaining in the country and squash evidence, what the victims got was torture and not relief. Some were terrified of going before the Commission. Interested persons are free to say anything about our report and manufacture alibis and misleading evidence reminiscent of honour among thieves.

The protection unit had been rendered ineffective while witnesses were being actively intimidated by the investigative unit and the plight of the witnesses above shows that anyone giving testimony against the security forces and remaining in Lanka would face a serious threat to sanity and security. Kokila's family was being harassed not for wanting to testify against the security forces but for their reluctance to endorse lies. On top of this facile arguments citing sovereignty and other abstruse principles were being cited to stop good witnesses who had fled abroad from testifying—that was the only way they could tell their experience and live. The integrity of anyone serving on the Commission under these conditions must be severely strained.

One early event virtually preordained what the Commission would come up with. A witness present at a meeting in the Defence Ministry between the time of the ACF killings and before the President appointed a commission of inquiry told us that DSG Kodagoda suggested to the Army Commander that the Army should inquire into the killings. The Commander immediately rejected it citing demoralisation of the troops. Kodagoda responded by stating his meaning as in effect having an inquiry for name's sake and closing the file in order to stave off international demands for a full inquiry. The DSG against constant expressions of concern was virtually made the director and script writer for the ACF inquiry and the result was a long and tortuous rendering of the simple recipe he gave the Army Commander in 2006.

This foregoing tells us a good deal about a state that has lost the capacity to respect the rule of law. The ACF and Five Students' cases became

emblematic because justice was promised, foreign observers were involved with considerable hope and expectation and the inquiries ended a damp squib or even a bizarre comedy. The CoI's earlier ACF draft, Draft-1, of September 2008, which we have cited, while aimed at covering up was professionally drafted. The language was rational. Those who drafted it clearly had problems with advancing the time of the killings. Its conclusion was the best they could hope to get away with, i.e. 'Both parties had the opportunity to kill the ACF workers'. From media reports it seems the final report is crafted in a language, which is more that of the Government's xenophobic and Sinhalese-centric support base that is eager to throw bricks all around. It is not the language of Justice Udalgama or Commissioner Mrs. Jezima Ismail.

The commission report meant to bring justice and healing only further reinforces the division in the country. The Commission itself, its ceremony in the BMICH and what it produced are less important than the drama behind it largely concealed from public view, to which the commissioners chose to be oblivious and which made a mockery of the Commission. That drama represents the attitude of the State to the minorities and how it would deal with them. What is reflected in the excerpts from the Commission report is that the Sinhalese are encouraged to turn a blind eye to what the minorities suffer under the jackboot of the State.¹⁷

Section 18 is titled 'The Cost of a Lawless State and Minorities'. Under sub-section 18.1, titled 'Degradation of the Rule of Law and the end of Constitutional Rule', it is observed that The State's unwillingness to face the truth in a number of cases that attracted international attention and the means it has adopted to stifle the truth, has been dehumanizing for both the majority community and the minorities. The developing power relations as exemplified at the Commission leave the minorities in the country hardly any breathing space. Had the Government treated these cases as a means to adopt corrective measures and win over the minorities, the prospects for Lanka would be looking brighter today. The law and constitution may deem all citizens equal, but the rule of law is in abeyance, there is no right to life and no right to appeal against arbitrary detention. The prisons are filling up not only with Tamils but also Sinhalese who are deemed traitors to state ideology.

In Section 18.2 titled 'Incompatibility of Justice with the Mores of the Regime' particular illustrative cases are reflected upon. One such instance is when Kayts Acting Magistrate Mrs. Srinithy Nandasekaran had, after the shelling of Allaipiddy in August 2006, gone there with three ambulances defying the Navy's threat to open fire and brought relief to the injured. A few days later, on 20 August 2006 the parish priest Fr. Jim Brown disappeared together with an elderly parishioner Wenceslas when they went to the church after signing a log book at the navy check point. Upon hearing about it two days later Mrs. Nandasekaran went to Allaipiddy with the police and ordered the police to take custody of the log book at the navy

¹⁷ See at pp.53-55 of the Special Report.

checkpoint. The Navy refused to give it. In the wake of this and also regarding her courageous stand in two child protection cases that were embarrassing to the LTTE, Mrs. Nandasekaran was selected the 2009 South Asian Regional Finalist for the US Secretary of State's Women of Courage Award. Stephen Suntheraraj who had worked as a child protection officer in Jaffna and earned the ire of the LTTE for assisting Mrs. Nandasekaran in a child abuse case by one of its senior advisors, was arrested in Colombo in February 2009, released on a court order on 9 May and abducted soon afterwards at a traffic light junction, after which he has disappeared.

The UTHR Special Report further points to the fact that the navy log book pertaining to Fr. Jim's case was never handed in. It was (along with this circumstantial evidence, an eyewitness account of armed men on two motorcycles following Fr. Jim to the church in that navy-controlled zone and the witnessed hostility of the local navy commander to Fr. Jim), a clear cut case for a commission of inquiry. Justice Udalgama, the Chairman of the Commission of Inquiry, told the *Daily Mirror* (16 June 2009), "We were unable to investigate the disappearance of Rev. Fr. Jim Brown as his body was not found..."¹⁸ The UTHR(J) observes in this context however that the least the Commission could have done is to demand the log book that Mrs. Nandasekaran was refused.¹⁹

The Special Report's concluding observations are of crucial importance in today's context:

"What is the most urgent issue now is the restoration of the rule of law. Unless there is freedom of expression and open discussion, talking about a political settlement has no meaning...."

In the present situation where benign political movement is unlikely, our energies are best directed towards the restoration of democratic norms and the rule of law. Emblematic cases like the ACF and Five Students cases serve as good starting points to focus on issues. Information about these cases is available from IIGEP archives, the Commission proceedings and reports like ours. The countries that sent eminent persons have an obligation to see these cases through and ensure that justice is done. They created expectations among victims and their families, and because of this attention a number of them have suffered enormously and have been harassed to this day as we have shown. When some of them badly needed asylum or relief, there was no IIGEP or ACF to help them.

Let it not be said that international humanitarian agencies are generous with sacrificing their local staff and doing so little to see that justice is done, without which humanitarian work becomes a nightmare. Others blamed the ACF in 2006, but several more had local staff working in the Vanni. The

¹⁸ See at p.58 of the Special Report.

¹⁹ Ibid.

ICRC itself lost three workers. They all have an obligation to support fully a proper inquiry into the ACF tragedy.

The next time Sri Lankan representatives come to the UN Human Rights Council calling themselves a human rights minister, an attorney general or deputy solicitor general, claiming to improve human rights for all the people of Lanka, it would be time to say the joke has gone too far...".²⁰

²⁰ See at pp.58-59 of the Special Report.

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The inaugural Law and Social Sciences Research Network (LASSnet) Conference held at the Jawaharlal Nehru University, New Delhi, from 8-11 January 2009 marked the coming of age of the law and social science research community in India. The conference was organised by the Centre for the Study of Law and Governance, JNU, with support from the Ford Foundation, New Delhi and the Max Planck Institute for Social Anthropology, Halle. The conference was held over four days where over a hundred papers were presented in 35 panels spread over seven sessions (see www.lassnet.org & lassnet.blogspot.com).

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