



## SRI LANKA

### Human rights violations rise further in 2007

The situation of human rights, the rule of law and the independence of the judiciary deteriorated further during the year 2007. In the Asian Human Rights Commission's State of Human Rights Report of 2005 and 2006 many questions regarding the human rights situation of Sri Lanka were raised. There were no improvements in any of the areas relating to human rights and the rule of law, in fact, even the discourse on human rights suffered a serious setback as the Sri Lankan government refused to engage in any meaningful discourse about the improvement of the situation with the local human rights groups, international human rights groups, the Human Rights Council and with Louise Arbour, the High Commissioner for Human Rights who visited Sri Lanka in October this year.

#### 1.1 Comments by Louise Arbour, the High Commissioner for Human Rights

Perhaps the full text of her speech at the end of this visit is worth reproducing as an indication of the situation in the country:

I wish to thank His Excellency the President for inviting me to visit Sri Lanka and the Government of Sri Lanka for facilitating my program. I would like to thank Minister Samarasinghe and the many government officials, representatives of political parties, religious leaders, members of civil society and UN colleagues who have taken the time to share with me their perspectives. In particular, I would like to express my gratitude to the many individuals who approached me with testimonies of their own experience.

Yesterday I visited Jaffna. I am grateful to the military authorities for facilitating my visit and my particular thanks are due to the Bishop whose warm welcome and hospitality I very much appreciated.

I regret that time did not permit me to visit the Eastern Province. I also regret that I did not have the opportunity to visit Killinochchi, where I would have liked to convey directly to the LTTE my deep concern about their violations of human rights and humanitarian law, including the recruitment of children, forced recruitment and abduction of adults, and political killings. I am very concerned by the many reports I have also received of serious violations by the TMVP and other armed groups.

I was struck in my discussions by the fact that broader human rights issues affecting all communities on the island have largely been eclipsed by the immediate focus on issues related to the conflict. These include issues of discrimination and exclusion, gender inequalities, the low participation of women in public and political life, the rights of migrant workers and press freedom. These challenges will remain before and after any peace settlement, and they are deserving of greater and more focussed attention.



Sri Lanka has many of the elements needed for a strong national protection system. It has ratified most of the international human rights treaties. It has justiciable human rights guarantees in the Constitution. It has longstanding democratic and legal traditions. It has had a national human rights commission for more than a decade. Sri Lanka has an active media and benefits from a committed civil society.

However, in the context of the armed conflict and of the emergency measures taken against terrorism, the weakness of the rule of law and prevalence of impunity is alarming. There is a large number of reported killings, abductions and disappearances which remain unresolved. This is particularly worrying in a country that has had a long, traumatic experience of unresolved disappearances and no shortage of recommendations from past Commissions of Inquiry on how to safeguard against such violations. While the Government pointed to several initiatives it has taken to address these issues, there has yet to be an adequate and credible public accounting for the vast majority of these incidents. In the absence of more vigorous investigations, prosecutions and convictions, it is hard to see how this will come to an end.

While Sri Lanka has much of the necessary human rights institutional infrastructure, critical elements of protection have been undermined or compromised. The application of treaties in domestic law has been questioned by the Supreme Court in the Singarasa case. The Government's proposed legislation to address this problem, tabled this week in Parliament only partially addresses the issues and risks confusing further the status of different rights in national law.

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. Members of the Commission of Inquiry pointed out to me that some state officials had failed to appear in response to their requests. They also stressed that the absence of an effective witness assistance and protection system was a major constraint on their work. The Commission would, in my view, gain greater public confidence and support by conducting public hearings. In any event, 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.

The Human Rights Commission has in the past played an important role in this respect. However, the failure to resolve the controversy over the appointment of commissioners has created a crisis of confidence in the HRC both locally and internationally. The HRC's failure to systematically conduct public inquiries and issue timely public reports has



further undermined confidence in its efficacy and independence. Indeed, the Commission may lose its accreditation to the international body governing these institutions.

In my view the current human rights protection gap in Sri Lanka is not solely a question of capacity. While training and international expertise are needed in specific areas, and I understand would be welcomed by the Government, 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.

Many state that the LTTE is quick to manipulate information for propaganda gain. In my view this only accentuates the need for independent information gathering and public reporting on human rights issues.

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.

A final observation: It would be highly desirable for the government to consider an early ratification of the new International Convention for the Protection of All Persons from Enforced Disappearance. In light of the documented violations of international humanitarian law, Sri Lanka should seriously consider joining the 105 countries which have ratified the Rome Treaty creating the International Criminal Court.

## **1.2 United Nations Press Release – Special Rapporteur on Torture Concludes Visit to Sri Lanka**

The comments of Dr. Manfred Nowak, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment highlight the very urgent needs for the prevention of torture in Sri Lanka.

### **SPECIAL RAPPORTEUR ON TORTURE CONCLUDES VISIT TO SRI LANKA**

29 October 2007

The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, issued the following statement today:

"I was invited by the Government of Sri Lanka to undertake a visit to the country from 1 to 8 October 2007. The purpose of my visit was to assess the situation of torture and ill-treatment in



the country, and to strengthen a process of sustained cooperation with the Government to assist it in its efforts to improve the administration of justice.

I express my appreciation to the Government for the full cooperation it extended to me. I further express my gratitude to the United Nations Resident Coordinator and his team for the excellent assistance provided throughout the mission.

#### Meetings and places

I held meetings with Government officials, including the Secretary of Foreign Affairs, the Minister of Disaster Management and Human Rights, the Minister of Justice, the Chief Justice of the Supreme Court, the Attorney General, the Inspector General of Police, the Commissioner General of Prisons, the National Human Rights Commission, the Army's legal advisor on human rights, and the Secretary General for the Secretariat for Coordinating the Peace Process. During the mission I also met with a broad range of civil society organizations, lawyers, medical professionals, and representatives of international organizations and the diplomatic corps.

I wish to take the opportunity to thank the Inspector General of Police and the Commissioner General of Prisons for opening up the prisons and police detention facilities without restrictions, including the carrying out unannounced visits, and enabling me to conduct private interviews with detainees. In Colombo and vicinity, I visited Welikada Prison, Colombo Remand Prison, the New Magazine Prison (Female Ward), the Criminal Investigation Department (CID), the Terrorist Investigation Department (TID), Mt. Lavinia Police Station, Ratmalana Police Post, and Panandura South Police Station. In Galle, I visited the TID detention facility at Boossa. In Trincomalee and vicinity, I visited Trincomalee Prison, Trincomalee Police Headquarters (including CID), China Bay Police Station, Kantale Police Station, Polonnaruwa Police Station, and Polonnaruwa Prison. In and around Kandy, I visited Bogambara Prison, Katugastota Police Station, and Wategama Police Station.

#### Context and challenges in the promotion and protection of human rights

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

#### Scope of the visit

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



related to torture and ill-treatment, are in relation to the conflict and are alleged to be committed by both Government and non-State forces, including the LTTE and the TMVP-Karuna group.

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

### The practice of torture

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

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

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

### Accountability and prevention

In general, I note that Sri Lanka already has many of the elements in place necessary to both prevent torture and combat impunity, such as fundamental rights complaints before the Supreme Court in relation to Art 11 of the Constitution, indictments and prosecutions based on the 1994



Convention against Torture Act, bringing suspects before magistrates within the statutory 24 hour period, formal legal medical examinations by trained forensic experts (Judicial Medical Officers), and investigations and visits by the National Human Rights Commission (NHRC).

The commitment of the Government to prevent torture is also demonstrated by the establishment of mechanisms by the Inspector General of Police and the Attorney General's Office specifically to investigate allegations of torture (e.g. the Special Investigations Unit and the Prosecution of Torture Perpetrators Unit). Moreover, with respect to my mandate the Government regularly continues to provide clarifications and up-dates with regard to communications related to such violations.

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

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

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

#### Conditions of detention

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



Polonnaruwa and the Female Ward of the New Magazine Prison, the prison system as a whole is in need of structural reform.

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

#### Corporal punishment in prisons and the death penalty

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

#### Preliminary recommendations

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

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

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

Ensure separation of remand and convicted prisoners;

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

Reduce the period of police custody under the Emergency Regulations;

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

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



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

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

Establish centres for the rehabilitation of torture victims;

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

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

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

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

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

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

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

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

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

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





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

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

Mr. Nowak was appointed Special Rapporteur on 1 December 2004 by the United Nations Commission on Human Rights. As Special Rapporteur, he is independent from any government and serves in his individual capacity. The Commission first decided to appoint a special rapporteur to examine questions relevant to torture in 1985. The mandate, since assumed by the Human Rights Council, covers all countries, whether or not they have ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Mr. Nowak has previously served as member of the Working Group on Enforced and Involuntary Disappearances; the UN expert on missing persons in the former Yugoslavia; the UN expert on legal questions on enforced disappearances; and as a judge at the Human Rights Chamber for Bosnia and Herzegovina. He is Professor of Constitutional Law and Human Rights at the University of Vienna, and Director of the Ludwig Boltzmann Institute of Human Rights<sup>1</sup>.

### **1.3 No local or international investigations into human rights violations**

The Sri Lankan government resisted attempts by several government and human rights organisations to convince it of the need for an international human rights monitoring mission in order to break the deadlock that exists regarding investigations into human rights issues. The government's resistance was so vehement that it declared all such requests for international monitoring amounted to threats to the sovereignty of the nation and were ill-motivated. The words, invasion, intervention and a plot of the imperialists, were used to denigrate these requests. Besides, the situation of Iraq and Afghanistan was used as places where the UN should engage in human rights monitoring rather than Sri Lanka. Governments that showed a keen interest on promoting UN human rights monitoring mission were told that their own past human rights records did not qualify them to request human rights monitoring in Sri Lanka.

The United Kingdom was reminded that it was once a colonial power, Germany was reminded that it once had a fascist dictatorship and Switzerland was told that its neutrality in the Second World War did not qualify it to talk about human rights; the United States was reminded about

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<sup>1</sup> For further information on the mandate of the Special Rapporteur, please visit the website: <http://www.ohchr.org/english/issues/torture/rappporteur/index.htm>



its war in Iraq. And everyone was told that they were intentionally or otherwise engaged in assisting LTTE terrorism by pursuing this proposal for monitoring. The Sri Lankan government and its propaganda machinery carried out an extensive campaign internationally and locally to create a very bleak picture about the need for any UN human rights monitoring.

Meanwhile, all attempts to have local investigations were shut down. The Presidential Commission of Inquiry, which had been instituted to investigate into several well known cases did not make any progress and in fact, the public impression is that this commission is being used merely for creating an incorrect assumption of there being some investigations when, in fact, no such investigations are taking place. The IIGEP made three important public statements (see annexure) in which the limitations of the commission and particularly the role of the Attorney General's Department was severely criticised. No steps were taken to correct this situation despite of this criticism being repeated.

The Asian Human Rights Commission summed up the situation regarding the absence of both local and international investigations in a statement issued on October 20, 2007 entitled, SRI LANKA: Disappearances day, October 27 – denial of local or international investigations.

SRI LANKA: Disappearances day, October 27 – denial of local or international investigations<sup>2</sup>

On the 27th October the day for the disappeared will be commemorated by the Families of the Disappeared and Right to Life together with the Asian Human Rights Commission. The monument for the disappeared was established at Raddoluwa Seeduwa, near Negombo in the year 2000 as a symbol of the disappearances which have become a common phenomenon in Sri Lanka since the early 70s.

Disappearances have been occurring on a large scale in the south, north and the east of the country and during this year's commemoration family members of the disappeared will gather near the monument to pay respects to the dear ones who have been lost, perform religious ceremonies and also hold public gatherings to discuss issues of accountability relating to these disappearances. A number of organisations such as the Law Society and Trust, INFORM, CPD, the Civil Monitoring Commission, the Association for Disabled ex-Service Personnel, the Neelan Tiruchelvam Trust and the Meepura Newspaper have also officially joined in.

Perhaps on this occasion a number of salient features of disappearances in Sri Lanka need to be recaptured:

Disappearances are, for the most part, preceded by abductions – the structuring of disappearances is designed in such a way to as to deny liability. Those who conduct an abduction, which is the first step in a series of actions that lead to a disappearance, disguise themselves and also use vehicles which cannot be easily recognised. In this way the legal

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<sup>2</sup> For further information please see: <http://www.ahrchk.net/statements/mainfile.php/2007statements/1238/>



obligations relating to arrest are circumvented. Any arrest, according to law, has to be carried out by officers who can be identified and who are obliged to reveal their identities. Some instructions to law enforcement agencies have gone to the extent of requiring the arresting officers to give a receipt of arrest. They are also required to fax details of the arrest to the higher ranking police officers and the Human Rights Commission. The law enforcement officers are expected to travel in their official vehicles with are clearly identified. Only law enforcement officers authorised by their immediate superiors are allowed to carry out arrests. However, abductions are often done without following any form of written authorisation by superiors and often persons who are do not belong to the law enforcement agencies also carry out abductions with the direct or indirect approval of some officers of these agencies.

Abductions are not reported to courts – there are very strict regulations relating to the production of persons before court within the times stipulated by law. In the case of persons who are abducted with the ultimate purpose of making them disappear, no such reports are made to courts. This again demonstrates deliberate design in dealing with disappearances.

The places of detention are kept hidden – under normal law places where persons may be detained is clearly demarcated. To hold persons in a place other than an authorised centre of detention amounts to a criminal act. However, when persons are arrested for the purpose of making them disappear they can be kept in a place of the choice of the persons who engage in such activities. When law enforcement officers engage in such activities it implies that the higher authorities are authorizing them to do so. Thus, this also indicates a clearly designed activity that takes place with the approval of higher authorities.

No written records are kept – under normal law there are clear legal provisions requiring the police or military officers who make arrests to make detailed notes about the arrest, detention and interrogation. Higher authorities are expected to examine these records and to take appropriate steps on the basis of the information provided in these records, either to take legal action against the suspects or to release them. The higher authorities also bear responsibility to ensure proper medical attention is given to the suspects.

Killings in custody – every disappearance in which a law enforcement agency is involved directly or indirectly is a killing in custody. It is a violation of the law as well as the international law as provided for in the Geneva conventions. It is a murder with deliberate intention as the entire process is organised in a way to culminate in the killing of the arrested person while in the custody of a law enforcement agency. Once again, the higher authorities of the law enforcement agency, whether it be the police or the military, are responsible for each killing. They are complicit in designing the process of such killing and also the carrying out of the killing.

Illegal disposal of bodies – disappearances imply not only killings but also the secret and illegal disposal of bodies. Once again the whole process of illegal burials is part of the design of disappearances. Thus, in this process too, the higher authorities of the particular agency bear responsibility. To claim ignorance of such a well designed process at the very least amounts to culpable negligence.



There are also some disappearances which have been carried out either by terrorists or criminals. In these activities the law enforcement agencies do not bear direct responsibility for the act. However, they and the state bear responsibility for their failure to prevent such crimes and to take effective action to investigate, arrest and prosecute the offenders.

State responsibility – large scale disappearances, as they have been happening in Sri Lanka continuously since 1971, can only occur when there is political approval for such activities by the regime in power. Law enforcement agencies engage in such acts. Thus, it can be said that those involved in serious breaches of the law do so only when they have the assurance that those who hold power will ensure that no investigations or prosecutions will take place. This assurance has become the cornerstone of the relationship between the political regime and the police and military during this long period.

There is today an entrenched political and legal culture in which firm undertakings not to investigate or to prosecute disappearances and other gross abuses of human rights remain a foundation stone. It is an unwritten code that politicians will do all that is within their power to stop investigations into allegations of disappearances and other related matters. The operation of the criminal justice system takes place only outside the boundary of this agreement between those in power and the police and military.

It is this agreement to ensure that investigations into these matters will be prevented that has created the obstacles to the local criminal investigation system to the extent that it has become dysfunctional. The officers of the Criminal Investigation Division (CID), who, being propelled by their professional obligations try to undertake investigations into this forbidden territory, put themselves at serious risk. The numbers of persons whose careers within the investigation field have suffered serious setbacks, either due to their lack of understanding of the rules of this forbidden area, or due to their defiance of these rules in the pursuit of the best traditions of their profession, are many. An entire psychology within the criminal investigation machinery in the country has become completely twisted due to these experiences. Today investigations into cases where state agencies are involved would be considered an act of great disloyalty to the police and the military.

The political reasons for objecting to any form of monitoring by the United Nations agencies are merely an extension of the rule that exists within the country that these matters should not be subjected to any investigations or prosecutions. However, it is also completely accurate to say that if the state has the will to pull away from this attitude it definitely has the capacity to conduct the investigations. It is common knowledge that in the past Sri Lanka has been able to develop the capacity of its investigating officers to successfully deal with very serious crimes. Investigations into former Prime Minister's Bandaranaike's assassination and investigations into the 1962 attempted coup to overthrow the government of the day are clear examples of the capacity of the Sri Lankan law enforcement agencies to deal with such matters. There are many officers who have now been scattered to various places due to punishment transfers or displacement from their professional roles for many mysterious reasons who, if they were allowed to do so would be able to bring many of the perpetrators of the disappearances of the recent decades to justice. But they all know the reality within their establishment now, which is



that there is a forbidden territory about criminal investigations into which they should enter only at their peril.

If a state has the will and the capacity to carry out investigations into gross violations of human rights such as forced disappearances there is no justification for the United Nations human rights agencies to request intervention in order to do such things. However, if the will or capacity is missing to ignore such issues it will be to dishonour the obligations of such agencies by those who hold authority within them. The obligations of the UN agencies to deal with the human rights violations in Sri Lanka arise, not from the incapacity of local agencies, but by the lack of will of the state to deal with these violations.

What the propaganda industry for the Sri Lankan government says against the UN High Commissioner's request for negotiations for assistance on this matter is that Sri Lanka has the capacity to deal with such investigations. However, what has been shown by the non-investigations is that the state is deliberately obstructing them, which clearly indicates that the state does not have the will to do so.

Under these circumstances it is legitimate to ask as to the reasons why the political authorities in Sri Lanka have created such a forbidden area relating to criminal investigations. A close study would suggest that this is because the military, which has been used by various regimes for their own purposes, have acquired 'rights' to obstruct any attempt at such investigations. Serious investigations into disappearances are perceived by the political authorities as a possible cause for an enormous rift between them and the military. The political system, which was built since the time the new constitution was made in 1978, cannot survive if serious investigations into police and military conduct take place.

The rough treatment Ms. Louise Arbour, the High Commissioner for Human Rights received in the country, as well as the huge misinformation campaign carried out by the propaganda industry of the government, can only be explained within this understanding that exists between the political leaders of the state and the police and the military. It is in this area that much more research and study is needed if the present obstacles to the protection and promotion of human rights within Sri Lanka are to be successfully countered.

Local people when affected by gross human rights abuses try to make complaints to local police authorities. The Criminal Procedure Code of Sri Lanka has laid down the detailed procedure for the recording of complaints, their investigation and the prosecution of criminal cases. When local people resort to the provisions in the local law regarding forced disappearances and similar types of human rights abuses, mostly done by the police or the military, they discover the hidden agenda that has developed over the last decade not to investigate or to prosecute these matters as explained above. After having exhausted all attempts to find legal redress, when they realise that locally, nothing will happen, they begin to seek help from human rights organisations and others to take these matters to the United Nations human rights agencies. When this happens, the same state that denies them the investigations locally, declares that international agencies need not interfere as there are local legal mechanisms to deal with these matters. Thus the citizen facing



these problems has nowhere to turn to. They are deprived of access to local as well as international systems to find a solution to the tremendous wrongs they have faced.

The placing of citizens in this helpless situation without a remedy, locally or internationally is thereafter portrayed as a matter of sovereignty. If the United Nations human rights agencies question the state about complaints of violations by the citizens, they are told not to interfere with the sovereignty of the state. The propaganda industry goes into full swing claiming that these complaints can be dealt with locally. However, those involved in the propaganda industry know full well that nothing, in fact, will be done.

The propaganda industry therefore naturally treats national and international human rights organisations with resentment for exposing and publicizing the narratives about the violations of human rights faced by the local citizens because that makes their job of falsification all the more difficult. They want to silence the human rights organisations and in fact all critics who merely record and publish what the citizens are complaining about. Thus, silencing of human rights organisations is only an extension of the silencing of citizens.

The propaganda industry therefore is not only engaged in spreading misinformation, they are an essential part of the machinery of repression. One arm of the state commits disappearances and abuses of human rights while the political leadership, the other arm, assures and guarantees the police and military that their actions relating to disappearances and other matters will not be investigated. The propaganda industry, the third arm, then takes all efforts to make it appear that either the reports of such abuses are exaggerations or that tough measures are taken locally to deal with such abuses. While those who cause disappearances use physical violence, politicians use political power to authorise such violence and to prevent investigations, the propaganda industry use their pens to silence citizens and anyone who extends their support to the victimized citizens.

This year's commemoration of the disappearances should be a day of reflection for anyone who cares for a decent way of life to prevail within Sri Lanka and about the actual reality of repression within the country. It is only when larger numbers of people see through the actual situation that they have been pushed into that they will find means to free themselves from these chains. Even master craftsmen of the propaganda industry will be able to do very little once the citizens begin to see through the means by which they have been not only denied their rights, but also humiliated when they try to find solutions to the problems they face.

#### **1.4 A year of disappointments**

At the beginning of the year the human rights groups linked to the AHRC issued the 'wish list' given below. However, none of these wishes have been fulfilled by the government of Sri Lanka. The government's performance in 2007 has been a complete disappointment and this neglect has ended in disastrous results to individuals, groups and the society at large. During this year Sri Lanka was once again ranked as a failed state, it also went up in the corruption index and the index on violations of freedom of expression.



### New Year Wish List 2007

1. That fundamental rights guaranteed in the Constitution be fully honoured; the right against illegal arrest (Article 13.1), the right against illegal detention (article 13.2), the right against torture (Article 11) to be fully respected and implemented, that steps are taken to ensure the right to personal security; that extrajudicial killings and abductions and disappearances be brought to an end by special and firm measures. That the freedom of expression and publication and the rights of the media are fully respected, protected and fulfilled.

2. That all crimes and abuses of human rights will be promptly and competently investigated according to the procedures required by law and the independence and the security of the investigators be guaranteed.

Court delays create social instability  
கூடுதல் தாமதம் சமூக அமைதிக்கு அச்சுறுத்தல்  
நீதிமன்ற தாமதம் சமூக அமைதிக்கு அச்சுறுத்தல்



நீதிமன்ற தாமதத்தை நிறுத்து  
End Court Delays

3. That the Attorney General's Department will be provided with all the necessary human and other resources to ensure speedy prosecution of all cases with particular emphasis on cases relating to human rights abuses.

4. That the right to fair trial be ensured by ending the delays in courts, the absence of witness protection, the reinstatement of the hearing of a trial from beginning to end without undue postponements, resolving of

problems relating to resource limitations in courts and bringing about the necessary legal amendments to overcome obstructions for the implementation of fair trial.

5. That the problems of the displaced persons will receive national attention and speedy measures to ensure respect for their dignity under human rights and humanitarian law.
6. That the rights of children be ensured with adequate measures to implement the relevant laws and the improvement of those laws.
7. That practical measures are taken to end discrimination against women in relation to education, employment and participation in social, cultural and political life.
8. That measures are taken speedily to realise equality to all minorities and that practical steps are taken to ensure the easy use of languages that will guarantee fairness to all.
9. That the constitutional crisis over the independent institutions created under the 17th Amendment is brought to an end with the appointment of an independent Constitutional Council and that measures are taken to restore the rule of law through practical measures to improve all the institutions.
10. That practical measures are taken to bring about a law in order to make the views of the United Nations Human Rights Committee implementable within the legal framework of Sri Lanka.
11. That the state accede to the Convention for the Prevention of Forced Disappearances and the Optional Protocol to the Convention against Torture (CAT)

## 2. Human rights violations



Any sensible discussion on the human rights situation in Sri Lanka needs to be divided into three parts on the basis of territorial authority exercised by the Sri Lanka government in separate areas. We will refer to these three areas as the government controlled areas – south, government controlled areas in the east and the north and the LTTE controlled areas in the north.

## **2.1 Human rights in the government controlled areas of the south**

**2.1.1. Torture:** the AHRC has continued to observe the human rights violations at the police stations in the government controlled areas of the south. In the past the AHRC has made several reports on this issue. The year 2007 did not see any improvement of the situation regarding the elimination of torture; in fact, the situation regarding the state investigation mechanisms into allegations of torture significantly deteriorated.

The Urgent Appeals desk of the AHRC received 47 cases of allegations of torture. This is a very small fraction as the source from which the AHRC obtains its information is still limited to some areas in the country. However, analysis of the narratives of these cases provides an insight not only into the reasons for which people are being tortured but also how widespread the practice is.

The reasons for torture revealed in these narratives are as follows:

- i. A police officer acting at the instigation of a friend to harass a victim.
- ii. Assaults without giving any reasons – probably with a view to fish for some information.
- iii. To intimidate a complainant who is pursuing a case against some police officers in court.
- iv. Trying to fish for information about a murder.
- v. To force a confession about a robbery that the victim has not been involved in – probably in order to create a substitute accused for a case that the police are unable to resolve.
- vi. Assaults as the point of abduction which has resulted in a disappearance – perhaps with the view to subdue the suspect and to take him/her away as soon as possible.
- vii. Shooting to death for failure to follow road instructions.
- viii. Assault while asking questions as to where the illicit liquor is hidden.
- ix. To chase fishermen out of a fishing area, allegedly for security reasons.
- x. To obtain a confession that the suspect stole jewelry – it has been commonly reported that persons are randomly arrested in some areas, particularly if they are young males as part of an attempt to stop snatching of chains and other jewelry.
- xi. Assault of a mentally retarded man demanding from him stolen goods – random assaults on persons with the hope that some discovery of theft or other crimes can be made has been a common cause of assaults in our previous narratives.
- xii. Assault by three policemen without any explanation – probably on mistaken identity.
- xiii. On allegations of stealing a gold chain.
- xiv. For parking a three-wheeler near the car of a senior police officer.
- xv. Three officers assaulting a person to falsely implicate him in a petty crime.
- xvi. A driver assaulted for non-payment of a bribe.





- xvii. Assaulted in front of a complainant who has made a complaint about the loss of TV cassettes – in earlier years also, there have been cases where persons were assaulted in front of complainants which seemed to be for the purpose of impressing upon the complainant that the police officers concerned are in fact trying to solve the crime. Why the persons are assaulted in front of the complainant may be due to close links between the police officer and the complainant or due to bribery.
- xviii. On questioning about theft.
- xix. For preventing a complaint being made to the police on a traffic accident – under the influence of the person who is alleged to have caused the accident in order to prevent further proceedings.
- xx. On suspicion of theft to fish for information.
- xxi. Assaulted by military personnel on mistaken identity.
- xxii. In order to obtain a confession about possession of five bullets – it is often reported that the police produce from their possession bombs, bullets and other weapons when they want to implicate some persons in crimes which are non-bailable. In these cases the police use confessions as evidence to create the impression that it is a genuine case.
- xxiii. Assaulted with reason and not even filing a case thereafter – perhaps the motive was to fish for some information which might accidentally be revealed due to wanting to escape the assault.
- xxiv. Assault due to some land dispute in which the police take the side of one party – under Sri Lankan law the police have no authority to deal with civil matters such as land disputes. However, there are many allegations of such interference quite often.
- xxv. Assaults by four police officers without given reason.
- xxvi. Requesting for illicit liquor (kasippu). When persons are suspected of the sale of illicit liquor they are forced to provide samples of it so that the police can, from time to time, file cases against them. There has been several instances reported in the past where persons who have given up such trade are forced to provide samples with a view to file further cases on such persons. The police either do not believe that they have given up the trade or they are desperately in need of some cases for the sake of their records.
- xxvii. A member of a local government office (Pradesiya Saba) who in the course of his official duties questioned a Sub Inspector of Police about allegations that the office was engaged in the illicit liquor business, the local government representative was severely beaten.
- xxviii. When questioning on an inquiry into murder about which the suspect alleged that he has no connection.
- xxix. For refusal to implicate a person that the police wanted to implicate in the sale of illicit liquor.
- xxx. A man assaulted by a drunken policeman.
- xxxi. A man assaulted at the instigation of a complainant.
- xxxii. Assaulted because of a land dispute in which the police have taken the side of one party.
- xxxiii. Assaulted for refusal to a request to give a bribe.



- xxxiv. For possession of a gold chain in his pocket – at random searches when a person is found with something that the police think suspicious they often resort of assault in order to obtain a confession that the property is stolen.
- xxxv. A man severely assaulted as the police intervened to settle a family dispute.

## Injuries

According to the narratives given in these cases the injuries to persons in most instances have been extremely serious warranting hospitalization. Beatings with hands, boots and poles are frequent in all these narratives.

In some cases the suspects have been taken to hospital by the police themselves, perhaps after the intervention of superior officers. However, there are also several instances in which the police merely take a person to a Judicial Medical Officer or District Medical Officer and get some papers signed without the doctor properly examining the victim or prescribing treatment. However, a marked feature in the cases recorded this year is that in several instances the victims have told the doctors about their assaults. In the past the victims used to be more afraid in making complaints fearing that they may be assaulted even more after returning from the medical examination. This year also, there were several cases of such assaults due to making such allegation to the doctor. In one instance the person was assaulted in front of the doctor himself.



Result of injuries received when the police went to the victim's house to inquire into a domestic ..

## Inquiries

In all these 47 cases complaints were made by the victims themselves as well as human rights organisations on their behalf. Human rights organisations have made complaints to the Inspector General of Police, the Attorney General's Department and the Human Rights Commission of Sri Lanka. In some instances complaints are also made to the National Police Commission. However, the Asian Human Rights Commission is not aware of any serious investigations into any of these allegations leading to prosecutions under the CAT Act, Act No. 22 of 1994. In previous years there had been more investigations by the Special Inquiry Unit (SIU) of the Criminal Investigation Division (CID) however, the Asian Human Rights Commission is not aware of any inquiries into allegations of torture in cases reported in 2007.

As for the Human Rights Commission it has lost its credibility even further this year as a competent body capable of investigation into these allegations.

The police higher authorities have begun to appeal to the public to understand the situation of their police officers and not to demoralize them by public criticism. The claim is that due to



terrorism and the increase of organised crime the duties of the police have become more difficult and that they are unable to observe the niceties of proper policing under the present circumstances. The failure on the part of the higher police authorities to enforce discipline with the force and the failure on the part of the political authority to ensure accountability within the force remains the reasons for the constant practice of torture as well as other forms of lapses in discipline. The year 2007 saw a further degeneration in this regard.

The National Police Commission ceased to exist as an independent body after the provisions of the 17th Amendment to the constitution for the purposes of the appointment of the commissioners to the NPC. This remains one of the more important reasons for the state of this public institution which due to politicisation and a long period of degeneration is today, unable to provide even the basic services required.

**2.1.2. Extrajudicial killings at police stations** - Quite regularly reports appear in the press of persons in police custody, having tried to attack the police with grenades or other weapons, being shot dead. The Gampaha police are reported to have killed two persons who, while in a police cell, tried to escape. These two persons were arrested regarding an attempted bank robbery according to the police. The police had recorded statements from both the suspects and had allegedly taken them to find some objects when they tried to attack the police, who then shot them dead.

The Modara police shot dead a suspect who was alleged to have killed a young mother living in the area. He too was arrested and it is alleged that while he was taken to identify a wooden pole used in the killing he tried to attack the police and was then shot dead. The suspect was a deserter from the Sri Lankan army who had served as a lance corporal.

A further case was reported of a suspect who had been killed after arrest when trying to escape from the custody of the Weligama police. Yet another person who was taken after arrest by Waduwa police to find a weapon jumped from the boat in which he was traveling in Bolgoda Lake, allegedly committing suicide. All these cases were reported to have happened during this month (October 2007) and in police stations quite close to the capital, Colombo.

One of the cases that received wide publicity was the killing of the two alleged suspects of the Delgoda family massacre. The officer in charge of the Megahawatte police submitting a report to the Magistrate's Court of Gampaha gave the following description of the incident:

“On the basis of a statement made by Amaradasa, to the effect that the weapons were hidden at No. 277A, Kaduboda, Delgoda, when the police went to find the weapons a bomb, hidden in that place was taken [by the two suspects] to kill the police officers. On the orders of Sub Inspector Nishanka, PC27273 Wijeratna and PC 34334 Gunwardena shot with their T56 [light] sub-machine guns bearing number 28030808 and 29041767. After the shooting as the two suspects had been wounded they were taken to hospital where they died.” The two suspects were shot in the chest and the head.



Subsequent to the incident several villagers contacted human rights organisations and gave different versions of the death of these two persons. While some villagers claim that one of the suspects was beaten to death at the police station and the other was shot dead in some remote place, both bodies were then brought and dumped at the alleged place of the incident. These villagers also stated that they suspect other persons having been involved in the family massacre who are still at large.

In all these cases the magistrates accepted the versions given by the police and entered verdicts of justifiable homicide. The magistrates decided the correctness of the versions given by the police before the cases had been brought to trial at a High Court and before all the evidence was examined.

Such deaths which have become quite a common occurrence indicate that the police higher authorities approve of such practices. The fact that the government or the parliament has not taken any visible or effective action to question this practice also suggests that there is direct or indirect political approval of such killings. The former Inspector General of Police (IGP) quite publicly approved this practice and the present IGP has spoken of stopping crime by 'hook or by crook'. Neither was taken to task by the government or parliament. In some countries such as Bangladesh and India where shootings by the police has come to the notice of the judiciary, the Supreme Court as well as other courts has made numerous attempts to evolve means to intervene and has rigorously tested the police when such incidents are reported. In Sri Lanka there have been no such attempts and this practice goes on unchallenged.

The practice of killing after arrest is not new in Sri Lanka. In 1971, in the repression unleashed on an insurgency, thousands of persons were arrested and killed. In the period between 1986 and 1990 at least 30,000 people disappeared meaning that they were abducted and killed while in police or military custody. In the north and the east this practice has gone on from the late 70's until now with, it can safely be said, the tacit approval of the police and military establishments and no serious inquiries take place.

It appears that now if a person is killed by way of torture at a police station this is also portrayed as a case where the person had tried to attack the officers and therefore the police took the necessary measures to protect themselves. In this way even the possibility that there was in the for investigations into custodial deaths have become even more difficult as these are presented as deaths that occurred outside police stations and particularly in scenes of investigations into crime.

The present practice of accepted self defense by the police as the reason for a killing by the magistrates in several courts makes it even more difficult to identify the place of death as well as the circumstances surrounding it.



The Asian Human Rights Commission wrote an open letter to the Judicial Service Commission regarding the habit of magistrates pronouncing justifiable homicide regarding the killing of persons in police custody.<sup>3</sup>

### 2.1.3. Disappearances – the scourge of Sri Lanka

During the relevant period disappearances took place in all parts of the country.

In January 2007 the then Foreign Affairs Minister Mangala Samaraweera said publicly that a person is abducted every five hours in Sri Lanka.<sup>4</sup> He also added that “kidnappings, abductions and killings have become common incidents and that no matter who did it, as a government we were responsible for it”. Subsequently, he left his post and the government merely dismissed his claims as being ‘politically motivated’.

Regardless of any political underpinning to his statement, the irrefutable fact is that abductions, disappearances and extra judicial killings have become the living reality experienced by thousands of Sri Lankans during the past few years. Since mid 2006 when fighting intensified between government military forces, various paramilitary groups and the Liberation Tigers of Tamil Eelam (LTTE), thousands of civilians have been abducted. Many have subsequently disappeared and the mutilated bodies of others have been discovered throughout the country— but specifically in the Northern and Eastern Districts of Sri Lanka as well as within the main city of Colombo and its Suburbs.<sup>5</sup> In Jaffna alone, according to the Jaffna Human Rights Commission at least 835 civilians were kidnapped between December 2005 and May 2007 and about 600 are still missing.<sup>6</sup>

Among the victims are media personnel, members of the clergy, parliamentarians, businessmen, humanitarian workers and academics including the Vice Chancellor of the Eastern University. Few have been released allegedly after paying large sums of money or after being severely warned by their captors not to pursue their professional activities. Even foreign nationals have not been spared and according to a startling revelation by the Australian Television programme, “*Dateline*” 18 Australian citizens, formerly Sri Lankans, have also been abducted whilst visiting the country. Apparently, victims’ families continue to remain tightlipped about what happened, due to intense fear regarding the fate of loved ones (those who have not been released) or reprisals against family members still in Sri Lanka, if they spoke out. Majority of the victims however, are the ordinary men, women and even children, of Sri Lanka.

Media reports refer to the dreaded white van without number plates—already ingrained in people’s psyche as a symbol of the terror era (*beeshana yugaya*) of 1987 to 1991, during which period between 30,000 (official) and 60,000 (unofficial estimates) disappeared—has made its

<sup>3</sup> For further information please see: <http://www.ahrchk.net/statements/mainfile.php/2007statements/1036/>

<sup>4</sup> Reported in the Sunday Leader, January 28, 2007.

<sup>5</sup> HRW Report titled “Return to War” September 2007.

<sup>6</sup> REPORTERS WITHOUT BORDERS press release, August 24, 2007



reappearance in Colombo as well as in the North and East. One Jaffna family's encounter with the ominous white van is as follows:<sup>7</sup>

On September 11, 2006 about 12:15 am the family was awakened by barking dogs. About fifteen men broke down the front door and entered their home. The men were heavily armed and wore black trousers and black shirts. The family thought they were thieves, and pleaded with them to take all their possessions but leave them unharmed. The gunmen had a powerful torch with them. The family had only two kerosene lamps.

Suddenly the men pulled a member of the family—a 30-year-old Suresh—by his shirt. The family cried that he was innocent and also had a family of his own. But the men pointed their guns at them and threatened: 'if you shout, you will be 'wiped out''. They questioned Suresh asking him his name, age and occupation. According to the family, the intruders spoke in irregular and unfamiliar Tamil but fluent Sinhala.

His mother hugged him strongly; she asked them not to take her son. She was pulling her son back while the men dragged him forward by his shirt. Eventually she was hit on the head with a weapon and she fell down bleeding. He was also hit on his chest and he fell down. Then they dragged him by his leg for about 50 metres and forced him inside a vehicle. Ever since, Suresh has not been seen or heard of, though his family has complained to the police and other authorities.

The men had come on two motorbikes and the ominous white van. They came during a government imposed night curfew in the Jaffna Peninsula.

Parliament reintroduced the Emergency Regulations in August 2005. Since mid 2006, these draconian laws have facilitated the arbitrary arrest and detention of hundreds of people—mainly young Tamil men suspected of being LTTE members or supporters. But increasingly others have also met with the same fate. The number detained under Emergency Regulations, including those reported as disappeared, is not clear. The Emergency Regulations introduced in December 2006 called the Prevention and Prohibition of Terrorism and Specified Terrorist Activities even allow for the criminalization of a range of peaceful activities that are protected under Sri Lankan and international law. Some of the regulations could be used to justify a crackdown on the media and civil society organizations, including those working on human rights, inter-ethnic relations, or peace-building. Apparently, the authorities could even use the wide immunity clause to exempt from prosecution members of the security forces deemed to be acting in "good faith."<sup>8</sup>

The government seems to have turned a deaf ear. Either it is unwilling or incapable of

<sup>7</sup> AHRC Statement AS-213-2006 issued on September 13, 2006; also reported in the Daily Mirror of September 16, 2006.

<sup>8</sup> HRW Report titled "Return to War" September 2007.



dealing with this colossal tragedy facing its people. Despite numerous complaints lodged, letter written and meetings attended with the representatives of the people, little action was initiated to prevent the incidents or apprehend the culprits. In the face of obvious lethargy on the part of state authorities including the law enforcement agencies, in September 2006 several prominent personalities of varying communities and political ideologies joined together to establish the Civil Monitoring Committee (CMC) as a voice on behalf the voiceless victims' and their family members. And despite one of its members being gunned down in the heart of Colombo two months later, the Committee has nonetheless been monitoring incidents of killings, abductions and disappearances around the country and making complaints to the authorities on behalf of the grieving families. They have protested on their behalf for the return of those still missing as well as urging government and law enforcement authorities to take action to apprehend those responsible. The CMC has also conducted their own investigations and identified some of those involved in the abductions and thereafter induced the police to apprehend the culprits. Later it was alleged that there were plans to release the group leader and claim he had escaped police custody. The very fact that it was a civil society monitoring group that had to investigate and uncover information relating to the identity of the abductors itself is a severe indictment on the government, the AHRC later said in an issued statement.

In June 2007, the Sri Lankan police arrested 16 people, including four policemen and a member of the air force, in connection with the abductions and disappearances occurring in and around Colombo, after their identities were revealed in Parliament. While disappearances and abductions showed a temporary lull in Colombo, in the rest of the country, families continued to report abductions or relatives by unknown persons and disappearance. The National Human Rights Commission in Jaffna had reported that, in the first three weeks of August 2007 alone, 21 cases of enforced disappearances and 13 cases of unlawful killings took place. On September 3, the ICRC reported that in the previous three weeks, it had documented 34 such abductions countrywide. Currently, dozens of people are seeking protection at the Jaffna Human Rights Commission offices, not only against the threats of the LTTE but also the Sri Lanka forces.

On August 23, 2007, the CMC together with two other prominent local civil society groups, Law & Society Trust (LST) and the Free Media Movement (FMM) published a Report on some of their findings.<sup>9</sup> The document which would be updated hereafter on a regular basis was presented to the authorities including the President, Human Rights Commission and the Presidential Commission of Inquiry appointed to probe 16 cases of human rights violations (CoI) and the IIGEP headed by Justice Bhagwati. Its compilers warned that this was by no means an exhaustive study but was only the tip of the iceberg.

According to this report, 547 persons were reported killed and 396 persons disappeared during January to June, 2007. The largest proportion of people killed in the first six months of 2007 was Tamil – 70.7% across the island, as compared with 9.1% Sinhalese and 5.9% Muslims. The gravity of this situation becomes even more pronounced they said, when considering that the

<sup>9</sup> Reported in the Daily Mirror, August 30, 2007



Tamil people make up only 16% of the total population. Men were killed in much larger numbers than women – 89.9% vs. 9.7% while by district, Jaffna was worst affected by killings (23.2%), followed by Batticaloa and Vavuniya (21.5% and 21.3 respectively).

Data on humanitarian workers and religious leaders killed reflects the overall trends in killings, with Tamils disproportionately affected as compared with Muslim and Sinhalese. Killings of this category of persons were highest in Trincomalee, during the period January 1, 2006 to August 21, 2007. However, it is notable that religious leaders of three of the four main faiths have been killed since last year—viz. Father Jim Brown (August 2006), Selliah Parameshwaran Kurukkal (February 2007), Handungamuwe Nandarathna Thero (March 2007) and most recently Father Nicholaspillai Packiyaranjith, (September 2007).

As with killings, according to the report, Tamils suffered disproportionately from abductions – 64.6%, compared with 3% Sinhalese and 3% Muslims. Men represented nearly 98% of all missing persons. By district, Jaffna was again worst affected by disappearances (49.5%). However Colombo was next worst affected, at 17.7%, underlining the concern expressed by many local NGOs at the situation with respect to this particular violation. Nearly 19% of persons abducted were taken from their homes. The vast majority of these were in Jaffna, however there were a few abductions from home in other parts of the country. Where times were specified, these were for persons who disappeared in Jaffna, which has been under curfew since before January 2007. Roughly 5% of all persons abducted were persons abducted from home during curfew in Jaffna – in an area allegedly under government control.

Two days after the report was published Mahanama Tilakaratne, former high court judge and Chairman of the Commission appointed by the President to investigate killings, disappearances, abductions and unidentified dead bodies (the ‘one-man’ commission) was quoted in the media as claiming that 1,425 out of the 1,992 people thought to have disappeared since September 2006 to June 2007 had returned.<sup>10</sup> He seemed as if he was echoing the sentiments of the government who proclaimed that 90% of those gone missing have returned home while others had gone abroad.<sup>11</sup>

Mr. Tilakaratne has never elaborated, as to whether he interviewed any or all of those he claims to have returned. Nor has he ascertain whether (a) in fact they had been abducted; and if so the identities of or information regarding the culprits, (b) any payment of ransom had been made, or (c) the returnees had been coerced into divulging sensitive information or participate in crimes, thus posing a security threat to the state. He was also silent as to whether he called for investigations into the incidents to ascertain whether any person had falsely reported an abduction or disappearance. If so, legal action should have been taken against those found to be making frivolous complaints and misleading law enforcement authorities, the commission as well as the public.

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<sup>10</sup> Daily Mirror, September 1, 2007

<sup>11</sup> In an interview with *Al Jazeera* President Mahinda Rajapaksa alleged that "Many of those people who are said to have been abducted are in England, Germany, gone abroad. They have made complaints that they were abducted, but when they return they don't say." Teymoor Nabili, "Peace Through War in Sri Lanka," May 31, 2007.





Mano Ganesan, Convener of the CMC addressing the UN Human Rights High Commissioner, Louise Arbour, at the UN office in Colombo on October 11, 2007 challenged the government to prove and publish details of abductees the government claimed to have ‘returned home’ as well as those who are supposed to have gone abroad and numbers of their passports issued by the Controller of Immigration and Emigration. He went on to say that though the list of institutions, committees and commissions to investigate human rights abuses in Sri Lanka are very long none of them had produced tangible results. Investigations were conducted in a half-hearted manner and the culture of impunity was obvious, promoting the continuation of abductions, disappearances and extra judicial killings.

Currently there exist several entities appointed or designated by the government to conduct hearings and inquire into reported case or human rights abuses. They are: (1) the Human Rights Commission of Sri Lanka (2) Ministry of Human Rights (3) Ministerial Advisory Committee of prominent persons (4) Mahanama Tilakaratne Commission (5) Special Presidential Commission on 16 selected incidents (CoI), (6) The International Independent Group of Eminent Persons (IIGEP) to observe the proceedings of the CoI and (7) the Ministerial Committee on Disappearances. However the progress made by most of these entities is not known while abductions and disappearances continue almost unabated.

For instance, The Presidential Commission of Inquiry (CoI) though established early this year has not made much progress in relation to the 16 cases members had been mandated to investigate while new atrocities occur. Its proceedings are not conducted are not open to the public. Despite their mandate ending in November 2007 they have not completed its first inquiry—that of the massacre of 17 aid workers of Action Against Hunger (ACF) in Mutur, Eastern Sri Lanka. Earlier, concerns raised by the IIGEP regarding the non-conformity with international norms, snail-paced nature of the proceedings and more specifically the conflict of interest of the role of the Attorney General’s Department because investigators “may find that they are investigating themselves”, are yet to be addressed.<sup>12</sup> Strong criticism was made by the Attorney General—prompting the IIGEP chairman, Justice Bhagwati to almost tender his resignation—seemed the only response of the state.

The Presidential Commission of Inquiry is also not a deterrent for current and on-going human rights abuses as the commission is only advisory. It can only recommend to the government the steps to take, including by the Attorney General, but there is no legal obligation for the President to act on their recommendations or make them public. On October 13, 2007, in a press statement at the conclusion of her visit to Sri Lanka, the High Commissioner for Human Rights Louise Arbour said that while the public will have greater confidence in the CoI if it conducted itself publicly, she nonetheless acknowledged that the CoI was 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.

<sup>12</sup>

See annex.....



Ms. Arbour was of the view that “in the context of the armed conflict and of the emergency measures taken against terrorism, the weakness of the rule of law and prevalence of impunity is alarming. There are a large number of reported killings, abductions and disappearances which remain unresolved. This is particularly worrying in a country that has had a long, traumatic experience of unresolved disappearances and no shortage of recommendations from past Commissions of Inquiry on how to safeguard against such violations. While the Government pointed to several initiatives it has taken to address these issues, there has yet to be an adequate and credible public accounting for the vast majority of these incidents. In the absence of more vigorous investigations, prosecutions and convictions, it is hard to see how this will come to an end.

Finally the High Commissioner for Human Rights suggested that it would be highly desirable if the government were to ratify the new International Convention for the Protection of All Persons from Enforced Disappearance as well as join the 105 countries which have ratified the Rome Treaty creating the International Criminal Court.

#### **2.1.4. Denial of fair trial**

Denial of fair trial remains a frequent experience of persons complaining of crimes as well as of the accused due to the following reasons:

- i. Extrajudicial killings and forced disappearances (as mentioned above). Both extrajudicial killings and forced disappearances are forms of summary punishment. This summary punishment is meted out by the police, military or other agents carry out such punishment. Under the Sri Lankan Constitution the right to punish persons is given only to the judiciary subject to due process and appeals. However, this is very much deviated from.
- ii. By failure to investigate. In cases of serious violations of rights such as massacres, and political killings, the absence of adequate investigation has become the common practice. This is also extended to many instances of serious crime. One of the reasons for extrajudicial killings or alleged criminals is to give the impression that the alleged criminals have been punished and therefore no further inquiries are needed.
- iii. Delays in adjudication. Delays in adjudication in Sri Lanka often amount to denial of justice. Delays take place for many reasons such as delays in investigations and also delays in trials. Delay provides the opportunity for witness intimidation or provides various incentives to witnesses not to come to court or to change their original version of the evidence. Often the complainants themselves are intimidated or lose interest due to the hazards faced over a long period of time. Observers have attributed also the reasons of private interests of lawyers to postpone cases as being done without resistance from the presiding judges. Judges sit in courts, in many instances, only for a short time during the day and the non-utilisation of available court time is also a factor in delays. The net result of delay is the people’s loss of respect for the courts



and the lowering of their expectations of justice. The result of all this is the poor performance in prosecutions the success rate of which is only four percent.

### **Absence of witness protection**

Despite of many promises no adequate witness protection law or programme has been introduced to Sri Lanka. The Asian Human Rights Commission has repeatedly called for the enactment of such a law but at the same time has also pointed out that the absence of such a law is deliberate. Given the extent of human rights abuses by the police and military as well as the extent of the corruption by the politicians and other officers, any encouragement given to witnesses to come forward will create serious problems to those in authority. Therefore the government follows a deliberate policy of not implementing an adequate and effective witness protection programme in Sri Lanka. The result is that the criminal trials suffer greatly due to the absence of witnesses. This on the one hand contributes to failure in prosecution and on the other hand encourages lynching by civilians or summary executions by the police and the military.

#### **2.1.5. Lawlessness**

In every aspect of society lawlessness has become a marked feature and there were some glaring instances in which this became sharply manifest.

#### **The Delgoda family massacre**

On May 26, 2007 five persons belonging to the same family were chopped to death in their own home. According to reports the alleged cause of the multiple murders was a land dispute which had gone on for some time.

The following day, according to reports, a group of people arrived from outside the neighbourhood in a bus and burned three houses. The same day two suspects were arrested by the police and within a few hours they had been shot dead and their deaths were announced through electronic media to the whole nation. Within 24 hours of that event the magistrate of the area pronounced that the two deaths amounted to justifiable homicide in self defence.

Within the two weeks around this event there have been several murders of families in various parts of the country. In fact extra ordinary forms of crimes are taking place reflecting an extremely abnormal situation.<sup>13</sup>

The killing of the two suspects frightened the villagers and prevented them from coming forward to let the authorities know about what they knew about the incident. Some families related to the alleged suspects have been chased away from the village and the police have told them not to return, stating that they (the police) are unable to provide them with protection.

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<sup>13</sup> Further information may be found at: <http://www.ahrchk.net/pub/mainfile.php/delgoda/>



Several villagers have contacted human rights organisations and have expressed their skepticism about the police inquiries into this matter. According to some written statements given by these villagers the actual culprits in this massacre are still at large and there are serious allegations that one prominent politician is also connected with this murder. However, the villagers feel that they will not receive protection if they were to make statements to the police on this issue. Human rights organisations have written to the Inspector General of Police to cause an independent inquiry through the Criminal Investigation Division into this massacre but so far there is no indication that any measures have been taken to ensure a credible investigation.

There were many similar family massacres in several places. In all these instances some small disputes have been the alleged reason for the killing of whole families. What is revealed through these incidents is the absence of trust in the police by the residents of various areas and even the erosion of trust among neighbours due to the bewildering absence of the rule of law.

### **Lynching**

Mr. I.G. Pushpakumara was beaten to death by a mob who believed that he was trying to escape after committing the theft of a mobile phone. The post mortem inquiry revealed that he suffered serious head injuries and injuries at the base of the skull and lower jaw by attacks with blunt instruments. There were severe injuries also to the chest and the back.

There were many incidents reported throughout the year about mobs dealing with alleged thieves or errant drivers who had caused injuries to the public. In all these instances people have taken the law into their own hands and the reason often stated is that resort to the police will be of little use.

### **Allegations of corruption and absence of investigations**

Throughout the year there were constant reports of massive levels of corruption and also questions arising from the report of the Committee on Public Enterprises (COPE) which alleged corruption involving billions of rupees. However, no powerful person was brought to court under the country's law on bribery and corruption. Several petty officers meanwhile were charged in courts and some even sentences for long years of imprisonment. The belief that no serious inquiries will take place into such corruption is quite widespread and this results in discouragement and demoralization of the citizens. The general disbelief in the rule of law is very much a result of the absence of any trust that any significant action will be taken to deal with widespread corruption. The country's law and the intuitional framework within the Commission on Bribery and Corruption is inadequate to deal with this situation. The adoption of an effective corruption control legislation followed by implementation will contribute not only the illumination of corruption but also to the improvement of law and order. On this issue the AHRC commented on May 22, 2007 about the epidemic lawlessness in Sri Lanka.<sup>14</sup> The AHRC

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<sup>14</sup> For further information please see: <http://www.ahrchk.net/statements/mainfile.php/2007statements/1027/>



also commented on the lack of proper direction from the police hierarchy on dealing with the issue of absence of discipline within the police which contributes to the countries lawlessness.<sup>15</sup>

## **2.2. Human rights violations in government controlled areas of the east and some part of the north**

Some parts of the country earlier controlled by the LTTE was brought under the control of the Sri Lankan government by the military and also there are areas in the north, some of which are still controlled by the LTTE and others which are under the authority of the government.

Some features common to both areas is that the pressure of the armed conflict is severely felt in these areas and the control of the areas is virtually under the military. There has been constant allegations of abductions, disappearances, constant searches and displacement of persons (regarding displacement please see xxxx).

A marked feature of the east in particular is that there are many paramilitary groups operating in these areas and they maintain their own armed groups. As there is collaboration between these groups and the military against the LTTE the enforcement of the rule of law on these groups remains a difficult task. The disarming of these groups has been declared as an aim of the government. However, this disarming has proved difficult due to the cooperation between the armed forces and these groups with regard to the issue of the LTTE.

There has also been allegations of the recruitment of child soldiers by one group, generally known as the Kuruna Faction.

The civilians constantly complain of harassment from these armed groups as well as from the military. The maintenance of the rule of law and the functioning of the mechanisms of the rule of law is yet to be achieved.

Louise Arbour make her concerns know about the human rights situation in the eastern province:

I am very concerned by the many reports I have also received of serious violations by the TMVP and other armed groups.

## **2.3. The territory controlled by the LTTE is entirely a military zone and all movements to and from this area is completely controlled.**

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<sup>15</sup> For further information please see: <http://www.ahrchk.net/statements/mainfile.php/2007statements/1035/>



The security considerations of preventing attacks from outside remain the paramount consideration affecting all areas of life within this territory.

Although the LTTE claims to have policing and courts these are pure ad hoc arrangement and are not based on any principles of the rule of law. The area remains a territory outside the framework of the rule of law.

The LTTE has been blamed by various UN agencies, the government as well as human rights organisations for the recruitment of child soldiers. The human rights concerns were expressed by Louise Arbour during her visit:

.....I also regret that I did not have the opportunity to visit Killinochchi, where I would have liked to convey directly to the LTTE my deep concern about their violations of human rights and humanitarian law, including the recruitment of children, forced recruitment and abduction of adults, and political killings. (See 1.1).

### **3. Displaced Persons**

## **4 Serious concerns affecting the Sri Lankan judiciary**

### **Introduction**

Sri Lanka's legal system was originally a combination of the Roman-Dutch Law and English Law. The present system of judicial administration and organization is based on the current Constitution, introduced in 1978. The judiciary comprises the Supreme Court, Court of Appeal, Provincial High Courts, District Courts, Magistrates' Courts and Primary Courts.

The Supreme Court is the country's highest court, headed by the Chief Justice and comprising between six and ten judges. The Supreme Court's major jurisdictions include constitutional, final appellate and fundamental rights jurisdictions.

### **Politicisation of the Office of Chief Justice**

On September 16, 1999, then-Attorney General Sarath Silva was appointed Chief Justice by President Kumaratunga. There were serious substantive questions with regard to this appointment and two motions alleging misconduct and seeking to remove his name from the roll of Attorneys-at-Law were pending against him at that time. The Supreme Court had, in fact, appointed two inquiry committees to look into the allegations.



National and international experts expressed concerns about the appointment; among them Dato Param Coomaraswamy - the Special Rapporteur on Independence of the Judiciary - who advised the government not to proceed with the appointment pending the conclusion of the misconduct inquiries. This advice was disregarded by President Kumaratunge, with whom the Attorney General had close personal contact. Between October and November 1999, three petitions were filed challenging the appointment of the Chief Justice, which were also later dismissed by a bench of the Court that had been handpicked by the Chief Justice.

Two impeachment motions filed against the Chief Justice, alleging specific instances of abuse of power while in office respectively in 2001 and 2003, were rendered nugatory by President Kumaratunge having prorogued and then dissolved Parliament.

### **Arbitrary Conduct by Chief Justice Sarath Silva**

#### *Authoritarian powers in listing of cases and determination of Benches*

The Supreme Court sits in Benches of three judges for the hearing of cases. The Chief Justice who approves the Bench list and nominates judges for Benches consisting of three judges or appoints a fuller bench (a bench of more than three judges) for special matters warranting a Divisional Bench. This power has been increasingly arbitrarily exercised by the Chief Justice. For example, with regard to the rights petitions challenging the Chief Justice's appointment, he appointed a Divisional Bench of seven judges, in ascending order of seniority, excluding the four senior-most judges. The petitions were dismissed by this Divisional Bench, which relied on the concept of constitutional immunity afforded to presidential appointments in order to refuse relief.

The senior-most judge of the time, Justice M.D.H. Fernando, who had been bypassed as a result of the appointment of Sarath Silva as Chief Justice, was excluded in almost all important constitutional cases. This led to his premature retirement in early-2004, two and half years early. A letter written to the Prime Minister by 45 leading civil society organizations called for the appointment of a Parliamentary Select Committee to examine the circumstances that led to the resignation of Justice Fernando, but no action was taken either by the Executive or the Legislature concerning this issue.

#### *Arbitrary control of the Judicial Service Commission*

The Judicial Service Commission (JSC), headed by the Chief Justice, generally consists of two other senior-most judges of the Supreme Court. Since Sarath Silva became Chief Justice in 1999, he has exercised powers of virtually unilateral decision-making along with two other junior judges of the Supreme Court, despite the fact that the Court had senior judges including Justices M.D.H. Fernando and Dr. A.R.B. Amarasinghe serving on the Bench at that time, and despite judicial tradition that decrees that senior rather than junior judges should form a part of the JSC.

Under the Constitution, the JSC exercises the powers of appointment, promotion, dismissal and disciplinary control of judges of the lower courts. However, there are no disclosed criteria. The



International Bar Association Report 2001, entitled “Sri Lanka: Failing to Protect the Rule of Law and the Independence of the Judiciary” gives examples of instances where original court judges were arbitrarily disciplined and even dismissed by the JSC headed by the Chief Justice. The IBA Report concluded that “the perception of a lack of independence of the judiciary was in danger of becoming widespread with extremely harmful effects on the rule of law in the country.”

In his April 2003 report to the UN Commission on Human Rights, Param Coomaraswamy, then-United Nations Special Rapporteur on the Independence of the Judiciary wrote,

*The Special Rapporteur continues to be concerned over the allegations of misconduct on the part of the Chief Justice Sarath Silva, the latest being the proceedings filed against him and the Judicial Service Commission in the Supreme Court by two district judges (which is set for hearing on 27 February 2003). E/CN.4/2003/65/Add.1 25, February 2003.*

In January 2006, two senior judges from the JSC resigned from the Commission over, what was widely known as conflicts of opinion with the Chief Justice. Dr. Shirani Bandaranayake and T B Weerasooriya, had indicated that they had resigned their positions on the Commission ‘in accordance with their conscience.’ No public explanation has yet been given for the reason for these resignations.

#### *Undermining the Fundamental Rights Jurisdiction of the Supreme Court*

In recent years, the flood of fundamental rights applications that had previously been filed before the Supreme Court, resulting in a rich body of jurisprudence enhancing rights of citizens even during times of emergency, has progressively decreased. The isolated ‘rights friendly’ judgments that are now delivered, award small amounts of compensation, and in many cases settlements are evidenced by judicial coercion of lawyers and/or petitioners.

#### *Arbitrary Use of Contempt Powers and Refusal of Sri Lanka’s Supreme Court to adhere to International Treaty Obligations*

Contempt of court has become an increasingly powerful weapon used by the Court and in particular by the Chief Justice to stifle justifiable criticism. On February 6, 2003, a lay litigant, Anthony Michael Fernando, who made the Chief Justice a party in a fundamental rights case, was sentenced to one year hard labour by a bench comprising the Chief Justice and two other judges for raising his voice in court and filing applications. The United Nations Human Rights Committee, in considering a communication submitted by Mr Fernando under the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), concluded that Mr. Fernando’s right to a fair trial under article 9(1) had been violated, (Sri Lanka, Case No 189/2003, Adoption of Views on 31, March, 2005). The Optional Protocol to the ICCPR enables the Committee to receive and consider individual communications from any individual that is subject to Sri Lanka’s jurisdiction.

The Government of Sri Lanka (GOSL) stated however that, at the time that Sri Lanka decided to





become a Party to the Optional Protocol, it was not envisaged that the competence of the Human Rights Committee would extend to a consideration, review or comment of any judgment given by a competent Court in Sri Lanka, in particular on findings of fact and on sentences imposed by such a Court upon a full consideration of evidence placed before it, and regretted that it was unable to give effect to the views of the Committee under Article 2, Paragraph 3 (a) of the ICCPR.

Other such Communications include: Sarma v Sri Lanka No 950/2000, Adoption of Views on 31 July 2003; Jayawardene v Sri Lanka, Case No 916/2000 Adoption of Views on 26 July 2002; Ivan v Sri Lanka, Case No 909/2000, Adoption of Views on 26 August 2004; Sinharasa v Sri Lanka, Case No. 1033/2004 Adoption of Views on 23 August 2004 and Rajapakse v Sri Lanka Case No 1250/2004, Adoption of Views on 26 July 2006. However, there has been no implementation of any of these Views by the Sri Lankan Government.

In addition, a recent decision by the Supreme Court (SCM 15.09.2006, judgment of Chief Justice Sarath Silva) on a review petition filed with respect to the Sinharasa case, ruling that the presidential act of accession to the Optional Protocol to the ICCPR was an unconstitutional exercise of legislative power as well as an equally unconstitutional conferment of judicial power on the Committee, has proved to be extremely inimical to the domestic impact of the Committee's decisions.

### **Ignoring Constitutional Provisions Safeguarding the Independence of the Judiciary**

The 17th Amendment to the Constitution that was enacted in 2001, decreed that the President's nominees to the Court of Appeal and Supreme Court need to be ratified by the Constitutional Council (CC), a ten-member body comprising six members appointed by parliamentary consensus and four ex officio members.

Since March 2005, the CC has been defunct due to President Mahinda Rajapakse's refusal to fill the vacancies in the CC on the basis that the smaller parties have not yet nominated the body's one remaining member. Currently, there is litigation pending in the Court of Appeal challenging this inaction. However, the Court of Appeal has refused interim relief in one petition invoking the constitutional principle of immunity for acts of the President and the other petitions have been pending before the Court for well over a year. In early June 2006, the President appointed one new judge to the Supreme Court and two other judges to the Court of Appeal, on the recommendation of the Chief Justice, bypassing the CC.<sup>16</sup>

### **Allegations of corruption**

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<sup>16</sup> For further information please see: <http://www.ahrchk.net/statements/mainfile.php/2007statements/1043/>



Transparency International in their year 2006 report devoted a chapter of the issues of corruption affecting the Sri Lankan judiciary titled Corruption in Sri Lanka's judiciary<sup>17</sup>

## **5. Serious concerns affecting the Attorney General's Department**

On June 1st the International Independent Group of Eminent Persons (IIGEP) submitted its first Interim Report to the President of Sri Lanka. The report contained the observations and concerns of the IIGEP about the Presidential Commission of Inquiry to Investigate and Inquiry into Alleged Serious Violations of Human Rights (The Presidential Commission).

Among other things the IIGEP expressed concern about the role of the Attorney General's Department as legal counsel to the Commission.

“We are concerned about the role of the Attorney General's Department as legal counsel to the Commission. The Attorney General's Department is the Chief Legal Adviser to the Government of Sri Lanka. Members of the Attorney General's Department have been involved in the original investigations into those cases subject to further investigation by the Commission itself. As such, members of the Attorney General's Department may find that they are investigating themselves. Furthermore, it is possible that they be called as material witnesses before the Commission. We consider these to be serious conflicts of interest, which lack transparency and compromise national and international standards of independence and impartiality that are central to the credibility and public confidence of the Commission.”

This observation regarding the conflict of interests faced by the Attorney General in relation to the Presidential Commission should be an occasion to inquire into the much compromised situation of the Attorney General's Department as it stands today in terms of prosecution relating to abuse of human rights, as well as the prosecution of crime in general.

The Attorney General's Department is today functioning in the following areas (among others); it is the legal advisor to the government; it is the country's premier prosecuting agency regarding all serious crimes and it is also the legal advisor to the government with regard to the state's treaty obligations to the United Nations human rights agencies. Often the department becomes the chief spokesman on behalf of the state during official meetings of such agencies where its officers accompany the diplomats representing the government. As the government's legal advisor it also relates closely to senior staff of the government agencies, particularly officers of the police and armed forces; the role of the government's legal advisors has changed radically in recent decades to mean the legal advisor of a particular regime which often implies having to give legal advice and even prosecute cases which are very politically motivated.

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<sup>17</sup> For further information please see: [http://www.transparency.org/publications/gcr/download\\_gcr#7](http://www.transparency.org/publications/gcr/download_gcr#7) (page No. 275)



Before we comment on these roles it is fitting to note the change of public perception about this department which has taken place over the past few years. Today the public does not perceive the Attorney General's Department as an independent department. On issues of very great importance the department's independent role has been compromised for a long time now. The colossal crisis the country has faced has brought into question the role of the chief prosecutor. Large scale crimes such as the disappearances of tens of thousands of persons and gross forms of human rights abuse that were considered necessary by successive regimes have reduced the Department, at best, to that of a spectator. However, it was often even more compromised than that when extremely controversial emergency regulations were brought in, for example like the one in 1988 which gave authority to officers of the rank of ASP and above to order the burial of a body without any reference to a court; the Department has not been seen on record as opposing or objecting to it. It is not an exaggeration to say that the department now lacks a moral credibility which is an essential attribute of any organisation that has to play the function of the public prosecutor.

### **The role of the advisor to the government**

On the role of the advisor to the government the public have witnessed that on many occasions of great constitutional importance the opinion of the Attorney General's Department has been rejected by the government. One glaring example was on the issue of the appointments relating to the 17th Amendment. On this issue the position taken by the Attorney General was not honoured by the government and the appointments were made, ignoring the provisions of the Constitution itself. The basic position of the government seems to be that the role of the legal advisor is to conform to whatever devices the government arbitrarily decides to undertake. Under these circumstances playing the role of an independent legal advisor is not possible.

### **The role of the public prosecutor**

The role of the public prosecutor requires that the department is able to prosecute all cases on the basis of legal criterion. However, in recent decades this position has changed significantly. Political convenience has become an enormously important factor in prosecutions. In the case of over 30,000 disappearances in the south in the late eighties the role of the department was a negative one. Even regarding the limited number of cases which were recommended for prosecution by the Commissions of Enforced Disappearances there had been no successful prosecutions. There was a unit established within the Attorney General's Department under public pressure but that was just a show piece and not a genuine prosecuting branch.

Even on purely criminal cases regarding prosecution and bail matters there is widespread suspicion about various forms of influences that can enter into the decisions relating to such matters. A regime's pressure and the pressure of politicians are not the only ones. Various forms of societal links and other undue influences are also suspected as reasons for decisions not to prosecute, to delay prosecution, for files to go missing and many other similar allegations.

### **The role of advisor to officers of the state**



Perhaps this is area in which the department has been compromised most in the past. Several insurgencies in the south, north and the east have raised many allegations of extrajudicial killings, disappearances, torture and the like against officers of the state.

In the eighties in particular, there were many habeas corpus applications in which serious allegations were made against senior police and military officers. It was during this time that the department made the fatal mistake of assigning some state counsels to advise officers facing such charges on how to make false affidavits denying the allegations. It may have perhaps been the first time that officers facing serious allegations were helped in this manner by the department. Naturally, under such circumstances senior officers who receive such advice would have lost whatever fear they might have had regarding the high standards of integrity that the department should adhere to in dealing with all matters of law and discipline. When the prosecuting branch and officers facing serious criminal charges come to an understanding to help each other then the very existence of the department is threatened. Observers believe that it was this move, more than anything else that damaged the department. The fact that no open admission has been made about such bad practices and no serious apologies have been made on this score also helped to perpetuate a bad image, not only for outsiders but also for those who know the inside story.

### **A spokesman at UN human rights bodies**

Meetings of UN human rights agencies often becomes an occasion at which the Sri Lankan government takes a completely defensive position and attempts to deny all the allegations that are made by international agencies as well as local critics. UN sessions are not meant to be such an adversarial process. They are in fact meant to be a dialogue where the state can admit to its limitations, including even serious violations of human rights, and express resolve to overcome such problems. Such a frank approach requires a will on the part of the government to improve the human rights situation and also to take concrete steps regarding various types of violations.

As the government is firmly resolved not to do anything to improve the conditions within the country giving rise to such violations it engages in trying to refute such allegations and to give an image of extreme innocence about its human rights practices. It also tries to portray that the allegations are not well founded and even malicious. This unfortunately is the approach that the Sri Lankan government has adopted on many an occasion. Often formulating such responses of denial becomes the function of some officers of the Attorney General's Department. In recent years some of them have acquired quite an expertise on this issue. Reading some of the statements made to treaty bodies will be quite bemusing to any Sri Lankan who is familiar with the actual situation of the country. However, when a professional agency committed to the enforcement of the rule of law has to engage in such exercises of falsification it affects the very nature of the institution itself.

The contradiction that the department faces in this situation may be illustrated by an example. In recent years the department has filed over fifty cases against state officers regarding torture under the CAT Act (Act No. 22 of 1994). That is an illustration of how widespread police torture is in the country. However, when the department's officers made submissions before the Committee against Torture they tried to portray that there is no such serious problems regarding



torture in Sri Lanka. They even went on to deny some of the cases decided by the Supreme Court. A prosecutor's role calls for strict respect for facts, a propaganda officer's role on behalf of a government that is denying facts calls for callous disregard for the fact. When both these roles are done by officers of the same department then the department itself places itself in a dubious position.

### **Attorney General's Department as a confused institution**

All these many roles have turned the AG's department into a very confused institution. That is quite a natural result of having to play contradictory roles and also having to justify each of those roles. It is quite natural for the public to look at these many roles and to be confused. When this happens to the country's most important legal office the result is that the role of law becomes confused. In fact, the Attorney General's Department now contributes in a very significant way to create confusion about the law and its operation in Sri Lanka. We are aware that such an allegation is one of a very serious nature. However, observing what has happened to this department over the recent decades, it is not possible to avoid the observation that today this department itself is confused and is in turn creating a great deal of confusion locally and internationally about the role of the law and its operation in Sri Lanka.

### **Other factors adversely affecting the Attorney General's Department**

It would be unfair to put the entire blame of the degeneration of the Attorney General's Department on internal factors within the department. While it is starkly clear that several heads of the department since the late 70s have played pivotal roles to lower the standards of the department, it is not possible to separate such negative contributions from political and legal developments that have taken place in Sri Lanka in recent decades.

The cumulative effect of the many changes that have taken place in Sri Lanka since the 70s is that many of the basic concepts relating to law and its enforcement have now become very confused. Let us take a few examples: What is the place of the Constitution of Sri Lanka? Is it the paramount law of the country? The manner in which the 17th Amendment has been ignored and the presidential decrees contrary to constitutional provisions have been given effect to implies that the reference to the constitution as the paramount law has little meaning. The strange nature of the 1978 Constitution itself is that it prevents challenges to the constitutionality of actions as long as they are done by the executive president. The 1978 Constitution has also created confusion about the very nature of the constitution. Is it a liberal democratic constitution or not? The creation of the position of the executive president with absolute power and without checks and balances as available within the American or French constitutional systems has had the effect of diminishing the roles of the legislature as well as the judiciary. Any student of civics or constitutional law may wonder what this constitution is all about. Such confusion about the paramount law of the country affects all areas of the operation of the law.

There is also serious confusion about some aspects of the law that directly affects people. For example, what is the meaning of murder in the present context of Sri Lanka? Over 30,000 disappearances which the Commissions to Inquire into Enforced Disappearances has termed as



abductions followed by killing and disposal of bodies are not treated as murder. When arrested persons are killed by the police on one pretext or another, such as them trying to attack the police who in turn kill them in self defense, such actions are treated as justifiable homicide at the inquest stage, thus preventing any further inquiries into such murders. Here, the concept of defense in criminal cases is allowed to be taken and proved at the inquest stage itself. This is a complete alteration of the concept of a defense in a criminal trial as understood in the criminal law in the country in the previous decades.<sup>18</sup>

## 6. Media freedom in Sri Lanka. . . or the lack of it. . .

Resumption of hostilities between government forces and the LTTE has severely eroded media freedom in Sri Lanka.

Since August 2005 eleven media personnel have been killed; to date no serious investigations have been carried out and no one has been convicted for any of these killings<sup>19</sup>. This has affording total impunity to the culprits. According to *Reporters Without Borders (RSF)* investigations into the murder of journalist Tharmaratnam Sivaram, editor of the news website TamilNet and columnist of the Daily Mirror, abducted and killed in April, 2005, have been blocked by the authorities. Two suspects—members of a pro government Tamil militia—have rarely been troubled by the police even though they were identified by the investigators.<sup>20</sup>

Utterly terrorized and fearing for their lives, many journalists have stopped working and fled the country. In December 2006, photographer Anuruddha Lokuhapuarachchi of the Reuters news agency sought refuge in India after being threatened for highlighting the plight of Tamil residents in the east and north of Sri Lanka. A few days earlier, journalist Rohitha Bashana Abeywardene fled to Europe to escape death threats. Numerous others too have complained of being threatened:<sup>21</sup>

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<sup>18</sup> For further references on the Attorney General's Department please refer to articles in Human Rights Solidarity Vol.17 No. 4 (July 2007) Kafkaan Metamorphosis of the AG's role and Compromising Position of the Attorney General. [www.hrsolidarity.net](http://www.hrsolidarity.net)

<sup>19</sup> AHRC UA dated October 252007.

<sup>20</sup> Reporters Without Borders (RSF): Sri Lanka Annual Report 2007

<sup>21</sup> According to BBCSINHALA.com dated January 23, 2007 others who have received threats are Lasantha Wickramatunga Editor, Sunday Leader Newspaper; Victor Ivan Editor, Ravaya Newspaper; Sunanda Deshapriya Ravaya & FMM; Bandula Pathmakumara Swarnawahini; Sri Ranga MTV net work; Ruwan Fernandez Maubima and the Sunday Standard Newspapers; Sandaruwan Senadeera Lanka E news;



Sri Lankan journalists have not escaped being abducted either. In August 2006 Nadarajah Guruparan, news editor of a privately owned radio station Sooriyan was abducted and detained for one day by unknown persons who threatened him. In November, the Shakthi television editor complained of receiving death threats for giving ‘undue’ coverage to the assassination of a TNA parliamentarian.

**Jaffna:** According to ‘Reporters without Borders’ (RSF)<sup>22</sup> titled “*Jaffna’s media in the grip of terror*” the murders, threats, abductions and censorship in Jaffna Peninsula in northern Sri Lanka had made it one of the world’s most dangerous regions for the press. They face pressures from all sides of the conflict be it the LTTE, other para-military groups or the government security forces. With their reporting and writing, they are expected to please all of these groups and as this is impossible they invariably face the wrath of someone.

A fact-finding mission to Sri Lanka in June 2007 had revealed that the intensification of the conflict had led to the militarization of Jaffna which in turn has produced a deterioration in human rights. At least 7 media workers have been killed since May 2006; one journalist is missing and at least three media outlets have been physically attacked. Many journalists have fled the area or abandoned the profession. No serious investigation has been conducted into any of these incidents even though in some cases suspects have been identified.

Ever since the attack on the offices of the leading newspaper on May 2 journalists have worked in fear. Some newspapers have shut down while others have lost 90% of their staff. One editor had said they carry more national and international news than local reports because the staff was worried. “We all know that a life is worth more than a news story” he had said. Local media sometimes reports these incidents journalists confined to their offices in Jaffna are unable to investigate them or SF involvement. If he does, he risks a visit from the ‘unmarked white van’.

Coupled with the extremely difficult working conditions of workers, the Jaffna press was also hit by a shortage of newsprint between August 2006 and May 2007. In August 2006 the A9 highway between Colombo and Jaffna was closed and the Jaffna residents received food and other supplies via air and sea. At first the military refused to classify newsprint and ink as items needed in Jaffna. Some newspapers were forced to reduce their newspapers from 8 or 12 pages to 4; some had to use coloured paper. Some even converted to ‘wallpaper’ where a few copies were printed and pasted on walls of popular meeting places such as tea shops where people could read them. The ban however was lifted in May 2007 after international pressure.<sup>23</sup> Media personnel believe that as the consequence of this inaccessibility to Jaffna and other conflict-ridden areas is that the civil war in Sri Lanka is covered in an incomplete and biased way by many local and foreign media.

On May 1 2006, Sivanathan Sivaramya was arrested at World Press Freedom Day conference organised by the United Nations Educational, Scientific and Cultural Organization (UNESCO) as

<sup>22</sup> Press Release of Reporters Without Borders and International Media Support Dated 24 August 2007

<sup>23</sup> RSF Annual Report 2007



she was entering the Bandaranaike Memorial International Conference Hall. She was working for the Sri Lanka Broadcasting Cooperation (SLBC) as a part-time announcer and was arrested despite producing her official ID card. She was accused of attempting to kill a minister attending the function. After five days in police custody, she was released on bail as a result of local and international pressure. The police withdrew the case on 2 June 2006 as they found no evidence against her. After she was released she filed a human rights complaint at the Supreme Court. On July 16 2007 the Supreme Court held that her arrest was illegal and order the two policemen involved to pay Rs. 50,000 to Ms. Sivanathan as compensation.

On November 22, 2006, Munusamy Parameshwari a reporter for the Sinhala newspaper *Mawbima* was arrested by the Terrorist Investigation Division (TID) accusing her of “helping the LTTE and a suspected suicide bomber. She was held in custody for four months without any charge being brought against her. Finally she was released on March 23 after a fundamental rights case was filed in the Supreme Court. Parameshwari was apparently targeted because of her writings on human rights violations, including enforced disappearances.

On February 27, 2007, the Terrorist Investigation Division arrested the spokesperson and financial director of Standard Newspapers Ltd., which publishes *Mawbima* and the English-language weekly *Sunday Standard*. Under the Emergency Regulations they detained him for over two months without charge. On March 13, 2007, the government froze the company’s assets, forcing *Mawbima* and *Sunday Standard* to stop publication. On May 30, the police arrested the owner of the company under the Terrorist Financing Act on suspicion of providing material and financial assistance to the LTTE.

Iqbal Athas is a veteran journalist who is associate editor and defence correspondent for the *Sunday Times* newspaper and also frequent contributor to *CNN* and *Janes Defence Weekly*. On August 14 2007 Athas wrote a detailed investigative report in his regular Sunday Times column about the Ukrainian government's own inquiry into the arms deal. The headline read: "MiGs loaded with millions in mega frauds; The Sunday Times investigation reveals shocking double-deals and wheeler-dealings; While Lanka remains hush-hush, Ukraine Govt. orders full probe." After publication of that article, he complained that his security—assigned to him since 1998—was suddenly withdrawn. He has also been harassed and followed by unknown people since then, and that he now fears for his life and for the safety of his family. He continues to receive threats including from the government. The most recent being on September 30 2007 after he reported among other things, on the resistance that government troops are meeting, their casualties and some of their successes. The Ministry of Defense carried a lengthy attack on its website against him and also accused him of ‘promoting terrorism’.

In September 2007 state controlled television station Sri Lanka Rupavahini Corporation (SLRC) sent four journalists on compulsory leave after they submitted a letter saying their professional rights had been disrespected and damaged. SLRC claimed they were distributing leaflets pertaining to the letter during working hours, but the FMM says the leaflets were distributed outside the SLRC premises before working hours. Also in September, CID officials questioned Indika sakalasooriya from The Nation Sunday newspaper asking him to reveal his sources and





contacts pertaining to a story. He rightly refused citing his professional rights under the code of journalistic ethics.<sup>24</sup>

On October 12, 2007 journalist were forced to leave the scene where people had gathered outside the UN office in Jaffna to meet Louise Arbour. Reportedly security official had grabbed one journalist's camera and deleted all photos of the incident. Again on October 17 security forces prevented photojournalists from photographing a military truck transporting munitions that had met with an accident and overturned in a suburb of Colombo. The camera was grabbed and the film expose.

According to reports, over the past year the President has held regular breakfast meetings with media editors. Sometimes he admonishes editors for their "unpatriotic" writing. But his brother the defence secretary being more direct, telephoned the editor of the *Daily Mirror*, Champika Liyanaarachchi in April 2007 and warned her that he would "exterminate" a journalist who had written on human rights issues in the country's east.

That is what media professionals have to deal with, to do their jobs in Sri Lanka.

## **7. The Human Rights Commission of Sri Lanka (HRCSL)**

7.1. The following comment was made by Louise Arbour:

The Human Rights Commission has in the past played an important role in this respect. However, the failure to resolve the controversy over the appointment of commissioners has created a crisis of confidence in the HRC both locally and internationally. The HRC's failure to systematically conduct public inquiries and issue timely public reports has further undermined confidence in its efficacy and independence. Indeed, the Commission may lose its accreditation to the international body governing these institutions.

During 2007 the HRC itself took several measures with the view to virtually abdicate some of its important responsibilities. By an internal circular bearing No. 7 dated 20/6/2007 addressed to all directors, regional coordinators, legal officers and investigating officers, the secretary of the HRCSL laid down a prescriptive period for the receiving of complaints of three months from the date of the incident. This short circular reads as follows:

Period of prescription of receiving petitions

<sup>24</sup>

International Federation of Journalist press release dated 21.9.2007



The Board at its meeting held on 18.6.2007, decided that the period of receiving petitions should be restricted to 3 (three) months from the date of incident of violation of Human Rights.

You are kindly requested to give publicity to this decision among the members of public and also abide by the above decision. The petitions already accepted should be inquired into irrespective of the date of incident.

Any exceptional matters should be referred to the Commission for decision.

The AHRC made the following comment on this circular:

One human rights activist commented, 'If the HRCSL receives fewer complaints, then it can create an impression around the world that the human rights situation in the country has become better.' International human rights groups place much reliance on the statistics given out by the HRCSL in trying to gauge the situation of human rights in the country.

The implication of this circular is that complaints regarding torture, extrajudicial killings, forced disappearances, gross violations of the rights of children and women, complaints relating to discrimination and violations of the provisions for equality before law, are all prescribed unless the complaints are made within three months.

The HRCSL is a statutory body created for the purpose of the protection and promotion of human rights and is expected to work within the framework of the Paris Principles relating to national institutions. However, the HRCSL in recent times has not in any way conformed to these principles, either about its independence, or on the implementation of international norms and standards relating to the observance of human rights by the state.

A national human rights commission is expected to monitor human rights violations and to make recommendations to all government bodies on the steps that need to be taken in order to better facilitate respect for human rights. This is a function that the HRCSL has failed to carry out, regardless of the extremely difficult circumstances relating to human rights faced by people throughout the country. Instead of monitoring human rights it is in fact, by its most inefficient methods of work, discouraging complainants who wish to pursue their rights. The advantage of such inaction goes to the perpetrators of the violations.

There is no basis for setting prescriptions against acts of torture, extrajudicial killings and forced disappearances. These are heinous crimes and gross violations of human rights. The Board of the HRCSL has acted in violation of the basic norms and standards for the protection of human rights in imposing a period of three months as a period of limitation for the acceptance of complaints by the Commission.



Given the situation of the extreme alarm that prevails in the country today there is likely to be many persons who may not dare to make complaints immediately out of fear for their lives. The government had admitted the absence of witness protection in the country and its adverse consequences on all witnesses. Under such circumstances it is natural for people to wait for more secure conditions before they make a complaint. Individual complainants may want to ensure for themselves a place of safety before they make complaints relating to serious violations of rights. Also, particularly, people living in rural areas and more distant parts of the country, will find it difficult to keep to such a deadline. In conflict areas the situation can be even worse. How is it possible for refugees and other displaced persons who suffer the worst forms of human rights abuses to keep to such a deadline?<sup>25</sup>

7.2. The Human Rights Commission also withdrew some services such as visits to police stations and the twenty-four hour hotline which the previous commissioners started in order to enable complaints to be received by the commission speedily. The reason given was lack of funds. Provision of funds for the HRC is the duty of the state. However, the political reason for withdrawal of these functions is to convey the message to the general public not to have high hopes of human rights protection through the commission. The creation of low expectations with regard to human rights is a policy adopted to discourage complaints being made. This particular feature of the discouraging of complaints has spread into all areas, not only to the HRC. It can be said that this is part of the state policy. The purposes of this policy are two-fold. One is to prevent local or international human rights groups and even UN agencies from having information on human rights violations and also to encourage a culture of impunity. As the HRC statistics have been widely used in the past as a indicator about disappearances, torture and the like there is a clear attempt to discourage the making of complaints so that statistics provided by the commission will appear more favourable to the government.

7.3 A blackout on information is reported to have been imposed by the HRC on its sub-offices and particularly on the office in Jaffna. The following report which appeared on October 21, 2007 in LAKBIMAnEWS reveals the gag order on human rights abuses imposed by the HRC:

Ranga Jayasuriya

The Sri Lanka Human Rights Commission has imposed a blackout on information regarding abductions and disappearance, LAKBIMAnEWS learns. Specific instructions have been sent from the HRC Head Office in Colombo to its Jaffna office, last week, ordering it to refrain from releasing information on human rights violations to the Media and other public interest groups.

The latest communication was part of the gag campaign and was ordered by the government.

<sup>25</sup> For further information please see: <http://www.ahrchk.net/statements/mainfile.php/2007statements/1121/>



The HRC branch in Jaffna has been ordered to direct callers seeking information to the HRC Head Office in Colombo. The HRC in Colombo, however, maintains an unofficial blackout on the details of human rights violations, especially regarding abductions and disappearances.

Several requests to the HRC by LAKBIMAnEWS to seek information on complaints on abductions and disappearances were turned down.

LAKBIMAnEWS contacted the Director of Investigations and Inquiries of the Human Rights Commission, Ms. Samanthi Wijemanna for statistics on abductions and disappearance in the Jaffna peninsula. She replied that she was not in a position to provide information and that a written request should be made to the Human Rights Commission. The request will be taken up at a board meeting which would decide as to whether the request should be granted or not, we were told. However, inside sources said that the Jaffna HRC branch gives a daily update to the HRC headquarters on the developments related to the human rights situation in the peninsula. Several HRC officials told LAKBIMAnEWS that the latest position by the HRC came into effect following instructions given by the government.

"The government is worried that these statistics could be used to discredit it," one officer said.

Several officials reasoned that they had to comply with the instructions issued by the government, though they are not in the best interest of human rights in the country.

#### 7.4

Furthermore, in a article published in the Daily Mirror on October 26, 2007 the following comments were made on the performance of the HRCSL

Activists, academics denounce HRCSL track record as failure

Thirty three community and city based activist organizations comprising a network of activists and academics have called upon the International Coordinating Committee (ICC) of National Institutions for the Promotion and Protection of Human Rights in Geneva, not to lend credibility and legitimacy to the Human Rights Commission of Sri Lanka (HRCSL).

They say the Sri Lankan HRC has become an institution that has failed to live up to its mandate and has been unwilling and unable to respond to the severe human rights crisis facing the country.

The organizations include Suriya Women's Development Centre, Batticaloa, Law & Society Trust, Colombo, Movement for Defense of Democratic Rights (MDDR),



Colombo, Kurunegela Citizens Committee, Kurunegela, Mannar Women for Human Rights and Democracy, Mannar Mothers and Daughters of Lanka, Colombo, National Fisheries Solidarity Movement, Negombo, Centre for Policy Alternatives (CPA), Colombo, Centre for Human Rights and Development (CHRD), Colombo Association of Family Members of the Disappeared (AFMD), Colombo, Centre for Society and Religion (CSR), Colombo, Centre for Women and Development, Jaffna, INFORM Human Rights Documentation Centre, Colombo, Institute of Human Rights (IHR), Colombo and the International Centre for Ethnic Studies (ICES), Colombo

The letter has been submitted prior to the ICC's review of the re-accreditation of the HRCSL this week. The United Nations Office of the High Commissioner for Human Rights (OHCHR) functions as the ICC Secretariat and a Sub-Committee of the ICC is scheduled to examine the re-accreditation this week.

In a recent visit to Sri Lanka, United Nations High Commissioner Louise Arbour pointed to the fact that the failure to resolve the controversy over the appointment of commissioners has created a crisis of confidence in the HRC both locally and internationally. She warned that the HRC's failure to systematically conduct public inquiries and issue timely public reports has further undermined confidence in its efficacy and independence and stated that the Commission may lose its accreditation to the international body governing these institutions.

Reflecting these concerns, the letter written by these organizations to the ICC observes that Sri Lanka has witnessed a steady erosion of the independence and effectiveness in many of its democratic institutions including the police, public service, Parliament, Attorney General's Department, Judiciary and most recently, the HRCSL.

They point out that none of the members of the HRCSL appointed by the President, (disregarding the pre-condition of approval by the Constitutional Council); have a human rights background and the criteria for selection have not been known. This process violates the general observation of the Sub-Committee on accreditation which emphasizes that the selection of members to an NHRI should be through a transparent and inclusive process.

## **8. The impact of the denial of rights on citizens**

We reproduce below stories of the struggles of five persons to seek redress for human rights abuses in Sri Lanka and the hazards they faced over the years. These cases are a demonstration of the general collapse of the entire system of justice within the country and the nightmares people are forced to face due to this situation.<sup>26</sup>

<sup>26</sup> These stories were based on the work that the AHRC and its partner organisations have done to assist victims of human rights abuses to seek justice. On the basis of materials collected by the AHRC over several years these stories were written by Patrick Lawrence, a journalist.



### **8.1. The Case of Amitha Priyanthi.**

When you meet Amitha Priyanthi, it is difficult at first to tell if you are in the presence of hope or bitterness. A woman of exceptional dignity and determination, Amitha's bearing—formal, measured, precise—betrays little of her inner life. This is by design, one senses. Amitha conveys the presence of powerful emotions precisely by withholding all emotion from view. Her assertions and explanations of things—events of the past, plans for the future—always reflect years of careful consideration. But this same feeling as she has pursued the cause of justice in the name of her late brother, and what she feels as she looks to the future, are not made available. One does not know, equally, whether to feel hope or bitterness oneself as Amitha tells her story. Only at the end, when Amitha brings events up to the present and explains the way forward, does the recognition come: Hope and bitterness are not separable in Sri Lanka. The pursuit of justice in Sri Lanka brings both, even in victory.

There are many deserters from the Sri Lankan army—a consequence of the long, senseless war in the North and East between government troops and the Liberation Tigers. And it is with an act of desertion that Amitha's story begins.

Her younger brother, Lasantha, was a soldier. He seems not to have held a strong view about the war, although he opposed it and did not wish to fight in it. Stronger were his feelings about his wife and newborn baby. In the spring of 2000, while serving in the north, near Jaffna, Lasantha was refused leave to see his family. Instead he was given a few days to travel to his village, then ordered to return to his unit. Lasantha went home but never returned.

“He was granted a short holiday,” Amitha said when we discussed these events. “He had no intent to go back.”

On June 12, 2000, the police arrested Lasantha in Payagala, the village south of Colombo where he lived. Eight days later he died in a hospital, still under remand, of injuries sustained while he was in police custody. The cause of death was acute renal failure: Lasantha's kidneys had been irreparably damaged when the police beat him with a wooden pole.

Seven years later, Amitha was still fighting for justice in the case of her brother. There had been victories and defeats. She had gone from police station to police station, from court to court, from one session of the Sri Lankan Medical Council to the next. And there would be more to come.

In August 2003, a case she had pursued in the Supreme Court on behalf of her widowed sister-in-law ended successfully. It created a precedent regarding the rights of the next of kin to seek redress through an application to the Supreme Court based on the fundamental rights clause in the Sri Lankan constitution. The court held that the police were responsible for torturing her brother and granted compensation to the widow and child from their marriage.



Amitha also won a case in magistrate's court when a doctor testified that her brother's death was homicide—death by assault. Criminal charges—culpable homicide—were then filed against one police officer. But complications accumulated in this case. The non-summary inquiry into the homicide case took six years—until March of 2006. The case had gone to the high court, but by the summer of 2007 the Attorney General had yet to file an indictment. In the course of these delays, the officer charged absconded—disappeared, as Lasantha had done when he went on unauthorized leave.

In a district court, Amitha followed another strategy. She filed a civil claim against three police officers, the Inspector General of Police, the Attorney General and the Commissioner of Prisons. She also filed a further civil action against the Judicial Medical Officer (JMO), the Attorney General and the Administrative Secretary to the Ministry of Justice, whom she claimed were complicit in her brother's murder. A civil case such as this involves prolonged litigation; anything from 5 upto 20 years.

On July 26, 2007, Amitha had another breakthrough. This occurred when the Sri Lanka Medical Council ruled on the case of the doctor charged with examining Lasantha while he was in police custody. The council had been deliberating this case since October of 2001—nearly six years. It finally found the examining doctor guilty of eight offenses and suspended him from practice for three years.

Doctors of this kind are known as Judicial Medical Officers, and in this capacity they have quite specific responsibilities. This doctor's offenses as a J.M.O. in Lasantha's case are telling in themselves: They were mostly matters of omission. He had not asked Lasantha for his consent before examining him. He did not ask Lasantha the names of the police officers who assaulted him. He failed to give Lasantha a comprehensive examination—neglecting even to take his blood pressure. He failed to record any diagnosis nor to recommend hospital admission. In all, the doctor appears to have spent fifteen to twenty minutes with Lasantha. But we do not know, for that is by the doctor's account, and he made no record of his procedures.

One of the doctor's offenses involved what he did, not what he failed to do. He examined Lasantha in the presence of the police officers in the station where he had been tortured.

The facts of Lasantha's case, and of Amitha's long search for justice, are matters of record now. And Amitha, as she pursues the cases still pending, will add more to these facts and records. What do we see when we look closely at them? What do the records tell us about the matter of justice in Sri Lanka?

There is, first, the question of time. And related to this is the question of care and carelessness as they exist side by side in Sri Lanka.

Lasantha was dead within eight days of his arrest in the spring of 2000. Whether or not a court would have found him guilty of an offense we will never know, because he never got that far. Guilty or not, he was deprived of justice. And we now know that the examining physician spent



all of fifteen to twenty minutes (and quite possibly less) examining the patient. As the medical council concluded, a proper examination would very likely have saved Lasantha's life.

These facts stand against the seven years it has (so far) taken Amitha to bring justice to the case of her brother.

The medical council's ruling in the summer of 2007 is the most recent to be issued in Lasantha's case. When we read it, we cannot but be struck at the meticulous care taken in the council's deliberations over a period of several years, during which all efforts were made to provide the examining physician an opportunity to defend his conduct.

All Sri Lankans are due the amount of time that is required, however much, in the delivery of justice. All Sri Lankans deserve the attention to procedure the medical council brought to the case of the J.M.O. who examined Lasantha. But when this time and attention are placed next to the swiftness of Lasantha's torture and death and the carelessness with which the doctor handled his case, a paradox emerges: When time and attention to procedure are given to some and withheld from others, they stand as a perversity.

We must also recognize in the records the presence of what many civil society activists concerned with the judicial system term "the network." The network consists of judges, lawyers, police, and doctors who work in concert—not for the proper administration of justice, but for the benefit of one another. A judge will collude with the attorney who is supposed to represent a defendant. Or he will collude with the police. Or the lawyer for the defendant will collude with the police. Or (as in this case) a doctor will collude with the police in his official capacity as a J.M.O.

Note the doctor's evident attitude in Lasantha's case. The examination was cursory by any reasonable measure. The physician examined Lasantha in the presence of the police. He failed to recommend hospitalization because (as his counsel testified) he assumed the police would continue to hold him. These attitudes, these assumptions, this kind of conduct—all are prevalent in the Sri Lankan system. It is how the network functions. The presence of the network is the reason many of Amitha's friends and acquaintances advised her not to embark on her search for justice in the first place.

But here we come to a question that is everywhere evident in the record even if it is nowhere stated. This concerns the power of the powerless. We must not overstate the present position. Abuses—police abuses, medical abuses, and judicial abuses—are thought by many to be increasing in Sri Lanka, not declining. Amitha is in many respects something other than typical. Many cases such as hers do not end in justice. But Amitha brought sufficient courage and determination—a certain hardness, we can say—to her search for justice. And she proved that the powerless can assume power over their lives and circumstances.

There is another way to put this: If Sri Lanka is to cure itself of its ills, Amitha represents the future, while the guilty in the death of her brother represent the past. Or still another way: In





Amitha, a person of complex emotions but someone who is also in control of them, we find a certain kind of hope. It is the possibility of hope without bitterness.

## **8.2. The Case of Anthony Fernando.**

The picture of Anthony Michael Fernando most commonly circulated shows a young, smiling man looking slightly down into the camera. So perhaps, one surmises, he is tall. He wears a sport shirt, open at the neck, and his hair is neatly trimmed. In the background are what appear to be Gothic windows: He is standing, perhaps, in front of a church facility, or a community center.

One searches this small snapshot in vain for some suggestion of the extraordinary fate that befell Tony Fernando, as he is known, when he entered the space of the Sri Lankan justice system. But there is none. So, in the end, it is the ordinariness of this man that bears interpretation. In Tony Fernando we find the tragic ordinariness of extraordinary injustice in Sri Lanka—its reach into everyday lives.

Tony Fernando's story extends back many years now, for justice delayed is a considerable part of it. In 1997 he was employed as the Christian Emphasis Secretary of the Young Men's Christian Association in central Colombo. One day he fell and suffered injuries—a regrettable but common enough experience. Little that happened afterward was common, however—at least not by any reasonable standard. Tony Fernando fell at the Y.M.C.A., one might say, and did not stop falling until he landed in exile in Canada, where he now lives.

After his injury at the Y.M.C.A., Fernando filed a claim for workman's compensation. When the matter came before the Deputy Commissioner for Workmen's Compensation, an amount of offered which Fernando found unacceptable and his claim for compensation for a work-related injury was thereafter dismissed.

Legal motions followed—Fernando filed four of them. The first two alleged that the deputy commissioner's ruling violated his constitutional rights.

Time passed. In November of 2002 the Supreme Court considered the two motions jointly and dismissed them. Two months later Fernando filed a third motion relating to a legal point: He alleged that that the consolidation of the first two claims and their joint dismissal effectively denied him a fair trial. This motion was dismissed almost immediately. Fernando's fourth and most fateful motion followed in February of 2003. In it Fernando objected that the chief justice, Sarath Silva, and the two other judges who considered his third motion had no right to do so: They were the same judges who had dismissed the first two motions. This point would later receive the support of numerous legal experts, including the U. N.'s Special Rapporteur on the independence of judges and lawyers, Param Cumaraswamy.

But it is at this point that the substance of the case, one way or the other, is lost—or changes fundamentally in nature. From this point forward the question ceases to be Fernando's compensation claim and becomes the nature of justice (or injustice, more properly) in Sri Lanka.



“I am not going into the merits of the case,” Cumaraswamy would say later. “The question here is whether it is proper for the chief justice, after having been made a party to a case, to sit on the panel and adjudicate on the matter.”

We mentioned that the fourth motion was fateful, and indeed it was. With it, a fall while on duty at the Y. M. C. A. became, perversely enough, an international *cause célèbre*.

Fernando filed his final motion on February 5<sup>th</sup>. The following day the motion was heard, and during the proceedings Chief Justice Silva, a man of wide and controversial repute, considered that Fernando spoke too loudly in addressing the court. Silva issued a summary judgment: Fernando was sentenced to a year’s “rigorous imprisonment”—that is, hard labour—for contempt of court. He began serving his sentence that day.

Tony Fernando faced abuse almost as soon as he entered prison. He developed an asthma condition that went untreated. He was forced to sleep on the floor with his legs chained, which worsened his medical condition. On being transferred from a prison hospital back to his cell, he was repeatedly assaulted, which resulted in spinal injuries. In less than a week he was unable to get out of bed.

A month after his incarceration, Fernando filed a case alleging violation of his fundamental rights according to the Sri Lankan constitution. He also appealed Silva’s contempt ruling. The rights case, at writing, is still pending; the appeal on the contempt charge was dismissed in July of 2003, four months after it was filed.

Tony Fernando was released from prison eight-months into his sentence, in October 2003. While in prison custody, he filed three legal complaints: one with the U. N. Human Rights Committee regarding the contempt charges and the torture that followed; one (noted above) with the Supreme Court alleging torture while he was imprisoned, and one a criminal case against two prison guards allegedly responsible for his torture. At the time of writing the fundamental rights case before the Supreme Court is still pending and the criminal charges against the two prison guards has not been pursued by the state and the United Nations Human Rights Committee has made its decision, holding that Sri Lanka as the state party has violated Tony Fernando’s human rights by illegal detention, despite of the court decision to imprison him and requesting the government to pay compensation for the violations of his rights. The government has refused to pay the compensation on the basis that since the imprisonment was a result of a judgment of a domestic court it is not in a position to take any action on the matter.

Events unfolded swiftly at this point. In December of 2003 he received anonymous death threats by telephone, during which time he was told to withdraw all three cases. A month later the U. N. Human Rights Committee appealed to the Sri Lankan government for Fernando’s protection. (None was forthcoming.) A month later there was an attempt on Fernando’s life, when an unidentified man attacked him on a Colombo street and covered his mouth with a handkerchief containing a substance that proved nearly lethal.



On 30<sup>th</sup> August 2004, Tony Fernando appealed for asylum in Hong Kong. He left Sri Lanka on the 16<sup>th</sup> June 2004, and seven months later settled in Surrey, Canada where he now resides. His wife and children joined him in Surrey on the 16<sup>th</sup> December 2004. He still awaits two judgments.

There is a striking pettiness in the Tony Fernando case. Why did the Supreme Court act to turn such a minor matter into a case with international implications in the first place? A pettiness and a lack of all reasonable proportion. Sri Lanka, unlike India and numerous other jurisdictions, has no law covering contempt of court procedures. Judges can rule as they see fit and sentence defendants accordingly. It was in this circumstance that Tony Fernando received a year's hard labour (and then all the mistreatment that went with it) for the alleged offense of raising his voice in court. Again, the question is, "Why?"

Some fundamental features of Sri Lanka's critically dysfunctional judicial system are evident in the Fernando case. To understand them is to answer the above-noted questions. To understand them is also to recognize the fundamental problem of hierarchical consciousness in Sri Lanka and how it is manifest through a judicial system that is nominally based on modern procedure.

The most prominent of these characteristics is an obsession with form within the system. One finds among attorneys and judges alike in Sri Lanka an almost pathological preoccupation with rules and procedure. Form, in this sense, is ordinarily essential for the delivery and administration of equal justice. In the Sri Lankan case, form as we mean it here performs a different function. Its purpose is to mask what amounts to a near anarchy of injustice in Sri Lankan courts. So long as form is observed, practically anything goes.

Tony Fernando's true offense was to insist that law and procedure be applied as they were originally intended. This amounted to an attack on another of the core features of the Sri Lankan system: its impulse to preserve the prerogatives of arbitrary power. So we arrive at the essential contradiction exposed in the Fernando case—that is, behind the curtain of rules that the judiciary so carefully maintains, there are no rules.

The question of arbitrary power is related to another involving distance. Distance between ruler and ruled is, in essence, a feature of pre-modern political systems. It is by way of distance that arbitrary power is maintained. And it was another of Tony Fernando's offenses that he denied the judiciary's right to a distance it considered customary.

What is finally brought to light in the Fernando case is the problem of impunity and the judiciary's underlying desire to preserve it. The true tragedy of Tony Fernando's journey through the courts—even before it has ended—is that there is nothing out of the ordinary in it.

### **8.3. The Case of Lalith Rajapakse.**



It is common, when making one's way among the many victims of official abuse and human rights violations in Sri Lanka, to find people who have been waiting for three, four, or five years for their cases to be decided. Injustice may arrive swiftly—without notice, within a few seconds, out of nowhere. Then the years go by as the victim seeks redress. It becomes, in the end, another form of victimization, another form of injustice, not unrelated to the matter of official impunity. One is made a victim of abuse, and then one is made a victim again in the course of seeking to rectify the wrong.

Lalith Rajapakse was nineteen on the night of April 18, 2002. He is, at this writing, twenty-four, physically impaired and psychologically traumatized and still awaiting justice in the events that ensued.

On the night in question, several police officers arrived at the door of a friend's house, wherein Lalith was sleeping. For no reason evident to him at the time he was awakened, arrested, and taken to the police station in Kandana, a town about 20 kilometers north of Colombo. The torture that was to become central to his case began immediately: Lalith was beaten even in the jeep into which he was bundled outside his friend's house.

The U. N. Human Rights Committee later detailed Lalith's treatment at the police station: "He was forced to lie on a bench and beaten with a pole; held under water for prolonged periods; beaten on the soles of his feet with blunt instruments; and books were placed on his head which were then hit with blunt instruments."

These kinds of torture are familiar to those who study police practices in Sri Lanka. The last is intended to inflict internal injuries without leaving external marks. In Lalith's case, his grandfather eventually came to the police station and found him, slumped and lifeless, in a cell. He lay unconscious in a hospital for fifteen days afterward and was unable to speak coherently for nearly a month. He remained in treatment for another month; thereafter, the psychological stress prevented him from work. For two years Lalith lived in hiding, and he and his family survived on charity.

Three charges were filed against Lalith, and the torture was intended to extract a confession validating them. But none held up. There were two allegations of theft, which collapsed nearly a year and a half after they were filed, when it turned out the supposed victims of robbery had never claimed Lalith had stolen anything from them. The third charge was for allegedly obstructing the police in the discharge of their duties. It was not quite three years before a magistrate court acquitted Lalith of this charge.

Lalith took action on his own part. In May of 2002, just out of the hospital, he filed a case in the Sri Lankan Supreme Court charging that his fundamental rights, as guaranteed under the constitution, had been violated. His grandfather was a party to the case. A few months later the Attorney General, in apparent response to pressure from the U. N. Human Rights Committee, ordered an inquiry into the events that had led Lalith and his family into the courts. This led to a case in the High Court.



But the delays and irregularities have been many. Chief among them has been the pressure applied to force Lalith to withdraw from the legal process.

Threats against Lalith and his family have been more or less constant. And there are other details—bizarre, petty details that reflect certain routines the police often follow. A month after Lalith filed his fundamental rights case, a local fish trader (and a longtime acquaintance of Lalith's grandfather) was asked by the Kandana police to poison the fish the grandfather next bought. The fishmonger was also asked to let the police know where the grandfather liked to drink, so that his liquor, too, might be poisoned.

A few months later came threats to Lalith's life. These arrived by way of anonymous figures claiming to speak for the Kandana police—a claim the police denied. All the while, the police officers alleged to have tortured Lalith were permitted to continue serving in their customary posts. It was not until December of 2004 that Sub Inspector S.I. Peiris in Kandana and two other officers were barred from service and transferred. Sub Inspector Peiris was also indicted under the Torture Act of Sri Lanka.

Lalith's efforts to pursue justice have been more successful than those of many other Sri Lankans. And it is because of this partial success that his case affords us a particular window into the judicial system, its workings, and the limits of international authority.

In May of 2005, the U. N. Human Rights Committee accepted Lalith's appeal, overruling the objections of the Sri Lankan government as to the admissibility of the case on the grounds that his human rights were violated. A little more than a year later, the committee ruled in Lalith's favour: "The delay in the disposal of the Supreme Court case and the criminal case amounted to an unreasonably prolonged delay," the committee noted in its decision.

This represented a significant victory for Lalith, for his family, and for those human- and legal-rights organizations that have supported Lalith since he first filed his cases. But at this writing, in September of 2007, neither the Supreme Court case nor the criminal case against Sub Inspector Peiris has been settled.

Justice delayed, as the age-old principle holds, is justice denied. Yet for many Sri Lankans, justice delayed is all there is in the best of outcomes: It is a rare case that is accepted at the U. N. or by any other international organization devoted to upholding the rule of law. Most of the time, the universe of the law ends at the national borders.

Lalith's cases thus underscore a very uncomfortable truth in the struggle for justice in Sri Lanka: Even when cases of abuse and human-rights violations are taken up at the international level, the impunity with which the Sri Lankan authorities have long acted can still prevail.

In September of 2006, with Lalith's cases still pending (along with many others), Chief Justice Sarath Silva sought to elevate this impunity to the level of legal principle. Once again, the thought appeared to be that anything was permissible so long as it had the appearance of proper procedure.



Chief Justice Silva's ruling came in the case of a man charged with conspiracy to overthrow the government—a case connected with the war between the government and the Liberation Tigers. The defendant, having been sentenced to ten years of “R. I.,” or rigorous imprisonment—that is, hard labour—successfully appealed to the U. N.'s Human Rights Committee. The committee ruled in the defendant's favour—a ruling Sri Lanka is legally committed to respecting. Silva, in an especially tortured instance of contorted legal reasoning, responded by invoking “the sovereignty of the People” to assert that Sri Lanka was, in fact, not bound to respect the U.N.'s rulings, despite being a signatory to the relevant covenants!

Among human-rights and legal-rights advocates and activists, the 2006 decision is considered a landmark in the all but complete corrosion of Sri Lankan justice.

#### **8.4. The Case of Palitha Tissa Kumara.**

Excess is a common feature of the Sri Lankan justice system. In one form or another one finds it in almost all the research one may conduct into the workings of the police, the lawyers, the judges, and the doctors. There is violence, there is abuse of a defendant's rights, there are threats and intimidation, there is false testimony, there are excessive sentences, there are unwarranted delays. Every so often we find a case that reminds us of the pathology underlying these forms of excess. At its root, the problem of injustice in Sri Lanka is a psychological problem. If we look at this carefully, there are suggestions that the contempt authority displays for ordinary citizens, are a form of self-contempt.

The case of Palitha Thissa Kumara is such a case. There is no other way to explain some of its grosser excesses but by way of a psychological analysis.

Some of the facts in Palitha's case will by now be familiar in our brief readings of other cases. The case begins on February 3<sup>rd</sup>, 2004.

Palitha was a craftsman from Matugama in the district of Kalutara. He was skilled in the arts of painting and stone carving. On the morning of February 3<sup>rd</sup>, six police officers arrived at his home and asked him to come to the station in Welipenna, a nearby town to paint the police emblem on the stationhouse in preparation for Sri Lanka's celebration of its day of independence. Palitha agreed. Any aspect of Palitha's encounter with the local police end at this point in his story.

Before the officers and Palitha reached the jeep in which they were to drive to the station, one officer turned and, out of nowhere, pistol-whipped Palitha to the point of causing an open wound on his chin. The police thereupon threw Palitha to the ground and assaulted him further before piling him into their vehicle.



On the way to the station the police stopped to arrest another man, known as Galathaga Don Shantha Kumar. Don Shantha would soon become a prominent figure in Palitha's case. He, too, was tortured; he, too, was accused of plotting robberies.

At the police station, an all too predictable round of torture began. According to Palitha's account, the police officer who had pistol-whipped Palitha beat him with a cricket pole on his neck, arms, head, spine, and knees. He then began demanding—again, out of nowhere—that Palitha surrender the bombs and weapons in his possession—bombs and weapons he had planned to use in the armed robberies he had been plotting. Don Shantha was there. The police officer made it known that the same would be coming to him.

The torture continued for approximately two hours, according to Palitha's later testimony, during which time Palitha repeatedly denied any knowledge of bombs, weapons, or robbery plots. The abuse stopped only when about eight other officers intervened, one of them taking the wicket from the violent officer's hands.

The assaulting officer then brought another detainee into the room. His name was Thummaya Hakuru Sarath, and he suffered from tuberculosis. The officer then issued what must stand as one of the most grotesque orders in the long, often-grotesque history of police abuse in Sri Lanka. Sarath was to expectorate into Palitha's mouth so as to infect him. More than a year later, when the matter was in dispute, Sarath gave a statement confirming that he had been forced to act in a manner deliberately intended to contaminate Lalith. It also emerged the Sarath, too, had been beaten—a victim himself.

Unable to stand, in and out of consciousness, Palitha remained in a jail cell for several days, during which more torture ensued. He was finally taken to hospital—or, rather, hospitals, for there were two, both of which refused to admit him (one refusing twice) despite injuries that were by this time evident.

Back at the jail cell, the assaulting officer produced a grenade. Palitha was forced to leave his thumbprint in wax, whereupon the print was transferred to the grenade. The officer had already forced Palitha to sign a confession of guilt without reading it to him.

It is now the 6<sup>th</sup> of February, three days after Palitha was taken from his home. He is taken back to one of the hospitals that had refused him admission. There “a man wearing a pair of shorts,” according to court documents, signed some papers. Palitha was then returned to the police station and later that day made a brief pass through a magistrate court before being admitted at a third hospital—a prison hospital in the town of Kalutara.

Palitha remained in prison until his release on bail in July 1, 2004, after 4 months and twenty five days in jail. But during that time, he had filed two cases. One was a fundamental rights case alleging that the police had violated his rights as guaranteed in the constitution. The other, filed by the Attorney General in High Court, charged Kaluwandhi Garwin Premalal Silva, a sub-Inspector and Palitha's principal assailant while in police custody, with causing torture by beating him with a pole and forcing a T.B. Patient to spit into his mouth.



Predictably enough, the threats against Palitha and his family began almost immediately. In mid-June he was offered five hundred thousand rupees, about five thousand American dollars, to withdraw his cases. In two separate incidents, he and his family received messages via third parties that his wife and child would be killed if he did not cooperate by dropping his complaints.

The court proceedings in Palitha's cases are excessive in their own right. The Supreme Court heard Palitha's fundamental rights case during several sessions in the course of 2005. The man in the shorts at the hospital, who had routinely signed police papers, turned out to be an assistant judicial medical officer, or A.J.M.O. His report on Palitha listed thirty-two separate injuries on all parts of the body, from scalp to feet. Among them were lacerations, multiple contusions, tinnitus in one ear, and a fractured anklebone. All but the fractures were judged "non-grievous." Yes, the doctor noted in his report, these injuries could have been sustained as the victim claimed they were.

The police presented an entirely different story. Palitha had been armed with a grenade when they arrived at his house, and it had been necessary to subdue him. The injuries sustained reflected the use of the minimum force required under the circumstances. There had been no torture; there had been no incident involving Sarath, the man with TB.

Palitha won a modest victory in his fundamental rights case. On February 17<sup>th</sup>, 2006, the Supreme Court ruled that, given the danger Palitha presented when he was arrested—meaning the grenade and the threat he would set it off—the violence at the time of his arrest was justified. The appearance in magistrate's court, although required by law within twenty-four hours of arrest, was lawful. However, the court accepted Palitha's account of torture at the police station and ruled that his constitutional rights had been violated. The judgment—excessive in its paucity, one might say—called for restitution in the amount of five thousand rupees from the police officer who assaulted Palitha—about fifty dollars—and twenty-five thousand rupees from the government as damages and compensation for costs.

Those supporting Palitha's case, despite its disproportionate award and the partial findings in the police officer's favor, counted the Supreme Court ruling an advance. But an unusual thing occurred some months later. On October of 2006 the High Court found in the police officer's favour. Sub-Inspector Silva was acquitted of all charges of torture—the judge ruling, in effect, that violence to the extent evident in Palitha's medical report was not excessive. The High Court judgment is, at this writing, on appeal.

We can but speculate, at this writing, as to Sub-Inspector Silva's motivations in his handling of Palitha's case. It may have been that a crime had been committed and he was desperate to find a perpetrator to demonstrate his efficiency. Such often occurs. But it is not clear in this case. What is clearer are aspects of the case that require no further evidence.

There is a pathology of disturbance in Palitha's case. The excess of violence—against three detainees, not only Palitha—is to be seen in numerous other instances. It is, indeed, not the worst case on record in this respect. The attempt to pass on a potentially lethal disease is another question. It indicates a depth of contempt that requires professional, clinical consideration.





The problem of injustice in Sri Lanka is, of course, a legal matter. There are also clear questions of a political and sociological nature. A case such as Palitha Tissa Kumara's, however, urges the prominent inclusion a psychological perspective. The problems associated with a dysfunctional police apparatus and a similarly impaired judicial system cannot be solved without reference to questions such as contempt and self-contempt, the self and the "other" in Sri Lanka, and the consciousness of hierarchy that infuses every human relationship with a dimension of "above" and "below." It is such complexities of consciousness that lead police officers to act as Sub-Inspector Silva did—and judges to defend him as they did in two separate courts.

### **8.5. The Case of Angaline Roshana.**

"The laws of the country are too weak." This observation was not made by one of Sri Lanka's uncounted victims of police abuse or official torture. Nor did a lawyer defending a victim in court articulate the thought. The remark belongs to a police officer who was, at the very moment he made it, in the act of torturing an ordinary citizen. Weak laws were the reason Angaline Roshana, who was twenty-five at the time, had to be assaulted in police custody and deprived of her legal rights. This was a police inspector's reasoning on December 4, 2000, when Angaline was in police custody in the suburban town of Narahenpita, in the hub of central Colombo (zone 8). The law had to be broken to keep the law.

As it happened, in Angaline's case the law did not prove to be too weak. She eventually won a fundamental rights case in the Supreme Court and, much later, a High Court judgment against the officers charged with assaulting her. Her story, then, ends with justice being served. But it is a rare story, an exception in Sri Lanka that regrettably proves the rule.

Angaline was at home on the evening of December 3, 2000, when at around 7:30pm, a group of men in civilian clothes arrived in a private vehicle and forced her to accompany them to the police station. No reason was given. When Angaline's family protested, questioning the identity of the men, one of them (a man who later turned out to be the Officer in Charge (OIC) of the Narahenpita Police Station) threatened to break their teeth, and forced Angaline into the vehicle before speeding away.

The police station was not their immediate destination. Instead, Angaline was taken to the home of an affluent local woman for whom she had previously worked as a washerwoman. The woman had complained to the police that some jewelry had been stolen and had accused Angaline of the crime. Among the missing items was a watch, which the woman said was worth half a million rupees—about five thousand American dollars.

The woman accusing Angaline was a lawyer and appeared to be familiar with the police officers—perhaps by way of her legal work. While the woman, her family, and the police officers drank and socialized, Angaline was forced to search for the watch over a period of four to five hours.



Having denied any knowledge of the theft, and having failed to find the missing property, Angaline was then taken to the police station shortly after midnight. There she was detained overnight, severely tortured, and forced to sign a confession. Throughout the course of her detention, the police officers frequently threatened to hang her up and beat her; these threats were usually made when the Angaline's former employer visited the police station.

Mr. Sanjeeva, a lawyer from the Human Rights Institute, and Dr. Nali Swaris visited Angeline while in detention, and demanded that Angaline's legal rights be observed and that she be produced before the court without further delay. OIC Shelton Saley supposedly laughed sarcastically, and remarked; *"the laws of the country are too weak. We are breaking the law to strengthen it."*

The act of taking a person into custody, without showing any police identification or wearing the police uniform, amounts to kidnapping. Moreover, Roshana was not informed about the reasons for her kidnapping or arrest. Furthermore, she was tortured to obtain a confession, and she is still being illegally detained.

Only on the following day, December 5<sup>th</sup>, did Angaline appear in the magistrate court. On the magistrate's orders, the Judicial Medical Officer (JMO) conducted an official medical examination of Angaline's injuries. The JMO's formal report identified seven contusions; the left shoulder, left upper arm (front and back), right shoulder, left and right buttocks, and upper left thigh. The report also indicates that Angaline's injuries were two-four days old, and caused with a blunt object consistent with the assault. His report is dated 7<sup>th</sup> December 2000.

At the trial Roshana herself, and several other persons gave evidence. The police officer also gave evidence, accepting the arrest but denying that any torture had taken place. The trial was protracted and lasted for a period of almost six years. The High Court judge held that the charges were proved beyond reasonable doubt.

Having received legal assistance from the Asian Human Rights Commission from the time of her arrest onward, Angaline took her case to two courts. The Supreme Court ruled in June of 2002 that Saley, the OIC accused of her torture had violated Angaline's fundamental rights by way of torture and illegal detention; compensation of 100,000 rupees was awarded.

In apparent retaliation, the police subsequently charged Angaline with theft in the magistrate's court—a case that was dismissed for lack of any evidence. In July of 2007, the court found OIC Saley and police Constable, Stanley Tissera, guilty of committing a gross human rights violation against Angaline. It is believed to be only the third such conviction under the UN Convention against Torture (CAT) Act of 1994, to which Sri Lanka is a state party. The act calls for a mandatory sentence of seven years' "rigorous imprisonment," or hard labour. Both officers were so sentenced; an additional year was added for each officer in lieu of fines in the amount of ten thousand rupees.

Angeline Roshana and those who supported her can count her long ordeal a victory. What is the truth at the core of this outcome?



Angaline triumphed, in effect, by subverting what must be recognized as the existing order. She did this by upholding the law, not by breaking it. So does her case lead us to the paradox at the heart of the Sri Lankan legal system—a paradox perfectly captured in the police inspector’s remark to Angalin’s family friend while she was in detention.

The paradox is very simply this: Those charged with enforcing the law in Sri Lanka are the very people who least respect it. Those who are supposed to uphold the law are the very people who often, and dangerously, break it. At the core of their reasoning is a distinction between law and order that is not valid.

The convictions Angaline won under the CAT Act are to be welcomed. But given the established record of the nation’s police and courts, three convictions under these laws over the period of thirteen years is simply not enough. The police inspector was wrong: Sri Lanka’s laws require strengthening, certainly, but as Angaline demonstrated, they are sufficient to deliver justice. It is their enforcement that is critically weak.

## **9. Recommendations**

### **General Comments**

Under the present circumstances it may seem even futile to make any recommendations to the government for adherence to international norms and standards on human rights as the government has clearly demonstrated that under the present circumstances, which in the view of the government, is one of dealing with “determined terrorism”, it is not possible to give priority for the respect for human rights, honour constitutional obligations to safeguard human rights or to comply with international human rights and humanitarian law. The government has clearly demonstrated that human rights are dispensable under these circumstances. The propaganda arm of the government vehemently criticised the United States, some countries of the European Union and also international and local human rights lobbies for acting in the interests of terrorists by trying to lobby for the protection and promotion of human rights in Sri Lanka.

In the course of the government’s attack against any scrutiny of its human rights record the government has repeatedly declared that human rights is a western imperialist enterprise. Despite of being an elected member of the Human Rights Council and despite of the government’s own pledges to the council the government’s critique of the very foundations of the human rights mechanism of the United Nations continue. One senior government official even went on to publically state that Sri Lanka has signed UN human rights conventions due to being bullied into doing so. The government did not disassociate itself from the comments of this senior officer.

Internally this same policy was followed by the discouragement of the police investigating mechanism from inquiring into human rights abuses. The Attorney General's Department collaborated with the alleged perpetrators of human rights by not presenting a fair and correct version of the events to the Presidential Commission of Inquiry and this issue was taken up



several times by the IIGEP. The judiciary still stood by the judgement in the Singarasa case and did not demonstrate any extraordinary interest in dealing with the human rights issues despite of serious violations being reported constantly.

Under these circumstances obtaining any positive action for the improvement on the part of the government will require considerable pressure both from the Sri Lankan people as well as the international community. Without a change of will on the part of the government the present impasse will continue and will even deteriorate. Local and international action needs to be adequate a change of will on the part of the government to force it to recognise its obligations to respects the human rights of its citizens under all circumstances.

### **Some specific recommendations:**

#### ***International Obligations***

**5.1.1.** To comply with the obligations under the optional protocol to the ICCPR the government must promptly enact legislation to enable the views of the Human Rights Committee to become implementable in Sri Lanka. In the light of the Singarassa case enactment of such legislation should be treated as a matter of urgency. Without the enactment of such legislation the citizens of Sri Lanka will be deprived of the rights they have gained to complain to the Human Rights Committee on violations of the ICCPR, particularly in the light of the Supreme Court judgement relating to the decision of the Human Rights Committee on this case.

The introduction of the Bill to Give Effect to the International Covenant on Civil and Political introduced to the Sri Lankan parliament recently does not adequately address any of the issues raised by the Supreme Court judgement on the Singarasa case, as Louise Arbour mentioned, “the government’s proposed legislation to address this problem, tabled this week in parliament only partially addressed the issues and risks confusing further the status of different rights in national law.”

**5.1.2.** That a parliamentary sub-committee be assigned, to which all recommendations of treaty bodies are submitted soon after they have been made to the government by any of the treaty bodies. To begin with all the recommendations made by the Human Rights Committee after periodic reviews, the CAT Committee, CEDOW and others which have already made many recommendations be referred to this parliamentary sub-committee. This sub-committee should be mandated to supervise the state response to such recommendations and to report to the parliament on all matters relating to such recommendations and the measures taken by the state to implement them.



### *Investigations*

**5.2.1.** Investigations into all human rights violations are primarily the duty of the Inspector General of Police through the department of the police. Except in some cases regarding police torture by lower ranking officers, the police have failed to investigate human rights abuses as required under the Criminal Procedure Code (CPC) of Sri Lanka. This failure demonstrates serious disorganization within Sri Lanka's criminal investigation system. This failure has been investigated by various commissions appointed for the purpose since the late 1940s. However, the situation in recent decades has further deteriorated rather than being improved. One of the major reasons for such deterioration is the state sponsored violence by way of abductions, disappearances, torture, the creation of mass graves and the maintenance of torture chambers within detention centres (particularly military detention centres). State sponsored violence has created two types of problems. One is that the police officers themselves including high ranking officers have taken part in such violence on a large scale. The other reason is that when the state itself is involved in such violence there is severe constraint to investigate such acts. This problem of the investigating unit is the key issue that guarantees immunity to perpetrators. This issue needs to be addressed if there is to be any improvement at all.

KINDLY NOTE: there are all sorts of attempts to avoid this problem by such suggestions as giving the function of human rights investigations to the Human Rights Commission of Sri Lanka (HRCSL) or by the appointment of various commissions which have been assigned with fact finding functions or supervisory functions relating to investigations into abuses of human rights. One such commission has even been given international experts to observe it. The AHRC does not believe that any such commissions can be a substitute for the restoration of the criminal investigation function which is vested by law with the Sri Lankan police. The AHRC has further constantly expressed the view that these attempts cannot by their very nature achieve the aim of conducting credible investigations into human rights violations. Whether intended or otherwise, such measures only serve to delay the investigations and thereby to dissipate the complainants by the pursuit of their complaints. Over a period of time the public pressure initially generated by such incidents also dissipates. At the end the problem returns to its original position which is the absence of investigations into abuses of human rights. The AHRC has struggled very hard to impress upon the government as well as the local human rights lobby and the international human rights lobby about this problem which is at the crux of dealing with human rights violations. The AHRC is deeply disappointed that the government, the local human rights lobby as well as the international human rights lobby has not paid adequate attention to this basic issue. The AHRC is also of the view that until the government, the local human rights lobby and the international human rights lobby take this issue as the central issue regarding human rights redress in Sri Lanka no significant improvement will happen, rather the situation will degenerate further.



**5.2.2** To achieve the above objective the following problems in the Sri Lankan policing system need to be addressed.

**5.2.3.** The collapse of the exercise of command responsibility by officers of higher ranks as required by the Department Code of the police as well as the normal practices of any policing system that has a credible record of investigations into crime. There is a serious problem at the very top of the policing system in terms of the quality as well as the willingness of the top ranking officers to exercise their responsibilities. The neglect of the duties of the top ranks has also contributed to the allegations of serious corruption in some of the top ranking officers of the police. There are further allegations of direct criminal involvement of some such officers. Without resolving the problems that lie at the very top of the policing system it is not possible to get this system to function in a manner that the law requires. All these problems of top layer of the police seep down to the lower ranks. As a result the entire system today suffers from dysfunctionality. The AHRC has through constant communication tried to highlight this issue. On this too the AHRC is disappointed that neither the government nor the local human rights lobby, nor the international human rights lobby on Sri Lanka has taken this issue as a significant one in dealing with human rights violations.

**5.2.4.** As a result of the above mentioned problems and others serious criminal investigators within, the policing system does not get the internal support as well as the security it needs to conduct investigations into serious crimes including serious human rights abuses. Such investigators are in danger of their lives from outside forces such as organised crimes, including alleged terrorism and also they suffer from internal problems of betrayal in their organisation itself. This has resulted in the waste of much talent and training that has gone into the creation of crime investigating capacity within the premier law enforcement agency in the country. Once again the AHRC notes that neither the government nor the local human rights lobby or the international lobby on human rights in Sri Lanka have paid sufficient attention to this problem.

**5.2.5.** The National Police Commission when functioning under the commissioners selected in conformity with the constitutional process were able to create a sense of protection to the law enforcement officers that the NPC is capable of protecting them from undue influences of their own higher officers as well as from political interference. The non-appointment of the constitutional council resulting from the inability to follow constitutional process has led to political appointments to the NPC itself. It has destroyed the moral authority that the earlier commissions had built to some degree during their term in office. Now the police officers will not turn to the protection of the NPC and therefore their subservience to a degenerated system has been reinforced. The revival of the implementation of the 17<sup>th</sup> amendment is a precondition to begin a process of recovery of institutional independence of the country's basic institutions.



### *The Attorney General*

**5.3.1.** The Attorney General – The failure to prosecute serious crimes including serious abuses of human rights is a failure on the part of the country's prosecuting office which is vested with the Attorney General. This failure and the way to remedy it have not yet become a key concern of the government or the local and international human rights lobby. The excuse of the Attorney General's Department is that it only prosecutes when evidence is made available by the police investigators. Its claim is that it also has no duty to ensure investigations. Therefore, when investigations do not taken place for the reasons stated above the Attorney General's Department claims that the prosecutors are not responsible for this situation. LEGISLATION NEEDS TO CLEARLY DEFINE THE ROLE OF THE ATTORNEY GENERAL IN CASES OF CRIMINAL PROSECUTIONS. IT MUST CLEARLY LAY DOWN THE DUTIES OF THE ATTORNEY GENERAL AS THE HEAD OF THE PROSECUTING BRANCH TO ENSURE THAT THE CRIMINAL BRANCH UNDERTAKES INVESTIGATIONS INTO ALL CRIMES AND THAT FROM THE VERY START OF SUCH INVESTIGATIONS THE ATTORNEY GENERAL'S DEPARTMENT PLAYS A SUPERVISORY ROLE TO ENSURE THE INVESTIGATIONS INTO EACH OF SUCH CRIMES. THE LEGISLATION MUST ENSURE THAT THE ATTORNEY GENERAL CANNOT CLAIM IGNORANCE ABOUT ANY OF THE ALLEGATIONS OF SERIOUS CRIMES INCLUDING HUMAN RIGHTS ABUSES AND THAT THE DEPARTMENT HAS THE DUTY TO INFORM THE GOVERNMENT AND THE PUBLIC OF PROGRESS INTO INVESTIGATIONS INTO SUCH CRIMES. SUCH LEGISLATION IS ESSENTIAL IN ORDER TO BREAK THE PRESENT DEADLOCK REAGARDING INVESTIGATIONS WITHIN THE POLICING SYSTEM AS WELL AS THE PRESENT DENIAL OF RESPOJNSIBILITY BY THE ATTORNEY GENERAL'S DEPARTMENT.

**5.3.2.** An alternative to the suggestion made in the above paragraph is to create an independent public prosecutor's office vested with the power to prosecute all cases of serious crimes which itself should be clearly specified. The head of such a department should have the independence to conduct prosecutions without the control of any other agency including the Attorney General himself. The 1973 model of the public prosecutor with suitable amendments to exclude the department being under the AG's department would result in such as institution. Such institution should have personnel and any material resources to perform its duties.

**5.3.3.** The two alternatives made in the previous paragraphs do not in any way imply that the prosecuting function and the investigating function should be combined. Given the massive extent of human rights violations in the country as well as the nature of organised crime it would be impossible to create an institution having both functions in one organisation. What is



suggested is only that the prosecuting agency should be closely linked to the investigating agency and should have supervisory responsibilities clearly defined by law.

**5.3.4.** Out of the two propositions made in paras C.i. and C.ii. above it is suggested that as the most implementable proposal in at least the transitional period is the suggestion made in paragraph C.i. which is to make legislation relating to the prosecuting function of the Attorney General clearly laying down the AG's responsibilities in this area.

### ***Judiciary -***

**5.5.1.** The judicial role in ensuring fair trial by preventing abuses of the investigating process and the prosecution is one of the areas which requires great attention in dealing with the present situation of the collapse of criminal justice. Clearly there are provisions of the law as well as judicial decisions dealing with the judicial role to some extent. However, the role has not been expressed so clearly as in the Indian case known as the Best Bakery case decided by the Indian Supreme Court. Please see Zahira Habibulla H Sheikh and Anr (Petitioner) vs. State of Gujarat and Ors (Respondent) CASE NO.: Appeal (crl.) 446-449 of 2004 decided on 12/04/2004. In this case the Supreme Court insisted on the duties of a trial court to deal with issues of perfunctory and not impartial investigations, improper conduct of trial by public prosecutor, state failures to provide witness protection as all aspects that go into the duty of the state to ensure fair trial. In a lengthy judgement the court detailed the obligations of a trial judge not just to be a recorder or passive observer but to play an active role in ensuring fair trial in criminal cases emphasizing that those cases which affects the public security such as the massacre which took place in Gujarat where organised Hindu mobs killed Muslims, as matters of extreme importance from the point of view of maintaining rule of law and public confidence in law. It is unlikely in the present circumstances that there will be a clear articulation of these duties in Sri Lanka by way of a judicial decision to bring on legislation to improve the criminal procedure law by more clearly articulating the duties of a trial court to address issues regarding proper investigations and prosecution of crimes. This would contribute a great deal to resolve some of the problems regarding investigations and prosecutions mentioned above.

**5.5.2.** It has also been observed that in recent times in the case of alleged extrajudicial killings, where the police or the military claim that the death took place due to the suspect attempting to escape, the magistrate has made decisions on the matter at the very early stages of the inquest itself. Clear instructions need to be issued to the magistrates in dealing with suspicious deaths and particularly those deaths which are alleged to have been carried out by law enforcement officers. Such instructions should clearly lay down that the decision on culpability should lie with the trial court, which will have arrived at such decisions only after hearing all the evidence available.





**5.5.3.** There have also been emergency laws and anti terrorism laws, which deprive the magistrates to intervene into the cases of suspicious deaths under certain circumstances. In the past some regulations have allowed the police officers of some rank to permit disposal of human bodies. This virtually amounts to facilitating the carrying out of forced disappearances. There should be a bar to making such emergency or anti terrorism laws, which take away the most essential powers of the judges to safeguard the liberty of persons.

**5.5.4.** The procedures for habeas corpus applications are beset with serious limitations. The possibility of quick access to the judiciary, for example in the Philippines where habeas corpus applications can be made to the nearest magistrate at any time of the day even outside court, and other such practices need to be brought in to improve the judicial capacity to intervene into the cases of abductions and alleged disappearances. A law more clearly defining the provisions of the habeas corpus law and procedure is very much needed.

**5.5.5.** The applications under Article 126 of the Constitution to the Supreme Court on fundamental rights is beset with serious problems. Despite constitutional provisions for speedy disposal of fundamental rights issues, there are great delays in the disposal of such cases. The work load of the Supreme Court is usually given as the cause for such delays. Practices have also developed, such as postponing the hearing of fundamental rights petitions until criminal cases relating to the same issue are disposed. Thus, the delays in High Courts also affect the delays in the Supreme Court. Further it is still very difficult for people living in various parts of the country to come to the Supreme Court by way of such applications. The present situation makes the people more dependent on the lawyers in the city and this also often implies payments of high costs to the lawyers, which most victims of human rights abuses coming from the poorer classes of society cannot afford. Although there are some legal aid schemes they are not adequate at all to provide a competent and speedy service. There are also many allegations of corruption in the administration of such services. There is also the problem in recent times that many lawyers do not want to undertake applications on human rights issues or on public law, which are averse to the ruling regime to the courts. Further the Supreme Court rulings on compensation to torture victims do not reflect the international law on these matters. Further the Supreme Court decision on the Singarassa case has also created discouragement for the pursuit of international norms and standards before the courts of Sri Lanka.

**5.5.6.** The absence of a clearly defined law of contempt has also resulted in the intimidation of citizens as well as lawyers, who pursue matters relating to rights issues in a forceful manner. The Human Rights Committee decision on Tony Fernando's case (Communication 1289/2003) has not been implemented by the Sri Lankan government. The lawyers are officers of the court and are an essential part of the functioning of a justice system. If the citizens cannot find lawyers who are willing to take up difficult problems of human rights violations and public law before courts, this seriously affects access to justice. The inability of the lawyers to participate actively



in the rights of their clients may depend on matters arising from a lack of competence or unwillingness on the part of the lawyers. Unwillingness may arise from professional concerns for security and fears that they will be adversely affected if they take up such cases vigorously. It may also arise due to intimidation where either powerful state officers or organised criminals may make them targets. It may also arise from sheer lack of proper remuneration for such work. It may also arise from a realization that professional lawyers organizations are weak and unworthy of being relied upon for the defence of professional rights. All these factors seem to be combined in the present situation of lawyers in Sri Lanka. Without radical improvement in the professional involvement of lawyers brought through genuine encouragement by the judiciary as well as serious defence of professional rights by lawyers associations, the present situation cannot be changed for the better. The high demoralization that is spread throughout the country among the lawyers needs to be an issue that must concern all persons and organizations, including international human rights organisations and the United Nations, in trying to find solutions to the present impasse relating to human rights in Sri Lanka.

### ***Witness protection***

**5.6.1.** None of the issues mentioned regarding investigations, prosecutions, judicial functions and lawyers' obligations will have much effect without a serious attempt to improve witness protection in Sri Lanka. Witnesses are the eyes and the ears of courts as mentioned by Bentham and of course known to any person with common sense who knows about legal process. The requirements for the improvement of witness protection are as follows. A clear and comprehensive law creating obligations of protection and the supervisory duties of all agencies, including the prosecuting authority and the judiciary. The law must also clearly lay out the organizational responsibilities of maintaining a witness protection programme. It must also clearly lay down the obligations to provide alternative safe houses, the possibility of changing places of abode for short or long periods, livelihood issues affected by the conditions of secrecy and anonymity required in being witnesses on some occasions, the possibility of maintaining pseudo names or non revelation witness identities and all other such matters which are associated with witness protection in modern times. The law must also specify where the fund allocation for such an operation is to take place. Perhaps it may be said that the most primary need to make a difference to the present situation lies in the creation of an authentic witness protection scheme.

### ***Monitoring***

**5.7.1.** To remove the obstacles to monitoring local human rights bodies, including human rights organisations and international human rights monitoring, given the extremely collapsed nature of Sri Lanka's investigating and prosecuting branches, the major role in monitoring human rights



violations will lie with civil society initiatives, media initiatives and international human rights initiatives. Without the mediation of these elements it is not possible for any of the institutions mentioned above to function. At present there are severe restrictions by way of death threats and actual execution of such threats to all persons engaged in such monitoring and lobbying. A climate of fear is created on the basis of propaganda on war and pseudo security. This is an area in which particularly the international human rights lobby can play a major role in trying to create a greater space for local human rights monitoring and lobbying. The need for an international monitoring mission is primarily to create this local space for many persons to participate freely in the affairs of the country. To portray international human rights monitoring as an interference in sovereignty completely belies the fact that the sovereignty of the people has been lost by massive violence and intimidation. And the very purpose of an international monitoring mission on human rights is to revive this internal capacity. The experiences from Cambodia, East Timor and Nepal shows how effective the international human rights intervention can be to revive local spirit and to unleash local resources.

### ***Not to overestimate the Human Rights Commission of Sri Lanka***

**5.8.1.** Falsification on human rights protection in Sri Lanka often happens when the state claims that greater responsibility will be given to the HRCSL. In fact according to the words of the present Chairman of the HRCSL, S. Anandacoomaraswamy, [This commission has] “neither legislative, executive or administrative or judicial powers..... commission has no enforcement powers.” While the commission claims thus, the government at international forums claims to put all the burden of human rights protection on the Human Rights Commission. Sometimes the suggestion is that the law will be amended to improve its powers. However, the AHRC’s position consistently expressed over several years that an ombudsman like institution like the HRCSL cannot be a substitute to police criminal investigations, prosecutions and responsibilities of the judiciary. In the developed liberal democracies the ombudsman function was created only after solid foundations for police investigations, the prosecutory functions and judicial responsibilities were established. The functions of the ombudsman can be performed only on the basis of the infrastructure of justice already well laid. It is unfortunate to note that even the local and international lobby on human rights in Sri Lanka has failed to expose the great fallacy of trying to attribute an important role to the HRCSL for human rights protection. It can play some marginal role like for example visits to places of detention, assistance to victims in early stages of their violations by helping them with medical, psychological and legal assistance and by playing the role of a spokesman which can be a critical voice on the defects of the justice system in dealing with protection and promotion of human rights. However, at present the HRCSL does not have moral or constitutional credibility as it has been appointed against the provisions of the constitution itself.