

# Enforced Disappearance in Sri Lanka

## *Lessons from CHRD's Advocacy*



**Centre for Human Rights and Development**

## **ABSTRACT**

This report aims to provide an overview of CHRD's work on behalf of families of the disappeared in Sri Lanka, in order to reflect the State's continued failure to address the enormous problem of enforced or involuntary disappearances. Recently, Foreign Minister Mangala Samaraweera committed to work with the ICRC to set up a new mechanism to trace the missing. His promise is welcome, but promises have been made before without tangible results for families of the disappeared.

In setting up a credible mechanism to trace the missing, identify and prosecute those responsible, provide reparations, and ensure non-recurrence, the State and the international community should look to current advocacy to identify where the roadblocks to truth and justice lie. This report identifies specific roadblocks in connection with CHRD's advocacy before the current missing persons Commission and in CHRD's pending litigation of 21 Habeas Corpus cases and the Mannar mass grave case before Sri Lankan courts. The report concludes with constructive recommendations for the State and the international community.

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## I. Background

Six years after Sri Lanka's 26-year civil war came to an end in May 2009, the country has still not come to terms with its massive problem of enforced disappearances. In 2013, the U.N. Working Group on Enforced or Involuntary Disappearances reported that Sri Lanka has the second highest number of unresolved disappearance cases in the world, second only to post-war Iraq.<sup>1</sup> Several thousand are alleged to have disappeared during the last stage of the war (2008 to May 2009) after having surrendered to the Army or after arrest by security forces. Hundreds likewise disappeared before or after the final stage of the war in white van abductions or post-arrest by Army, Navy, military intelligence, or the police.

Families of the disappeared live each day in anguish, hoping for answers about their missing loved ones, some of whom were last seen in state custody. They file petitions with the police, Human Rights Commission of Sri Lanka, and the ICRC, and they brave harassment and threats to file cases and testify before domestic commissions.

Various governments have attempted to address the problem through flawed commissions of inquiry that have left families of the disappeared no closer to finding the truth.<sup>2</sup> For example:

- President Premadasa created a Presidential Commission of Inquiry into the Involuntary Removal of Persons in 1991, and two successive commissions in 1992 and 1993.<sup>3</sup> Following Premadasa's assassination in 1993, D.B. Wijetunga revoked the mandate of the prior three commissions and announced a new commission to investigate 'involuntary removals' between 1991 and 1993.<sup>4</sup> None of these commissions produced a public report.<sup>5</sup>

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<sup>1</sup> See Report of the Working Group on Enforced or Involuntary Disappearances, U.N. Doc. A/HRC/22/45, at 17-18 (Jan. 28, 2013). The U.N. Working Group on Enforced or Involuntary Disappearance sought to visit Sri Lanka since 2006 but was denied by the Rajapaksa administration. The Sirisena administration has agreed to a visit, which is tentatively scheduled for Fall 2015.

<sup>2</sup> See generally, Kishali Pinto-Jayawardena, International Commission of Jurists, *Post-War Justice in Sri Lanka: Rule of Law, the Criminal Justice System, and Commissions of Inquiry* (Jan. 2010).

<sup>3</sup> Gazette No. 644/27 (Jan. 11, 1991); Gazette No. 697/5 (Jan. 13, 1992); Gazette No. 751/1 (Jan. 25, 1993).

<sup>4</sup> Gazette (Extraordinary) No. 784/1 (Sept. 13, 1993).

<sup>5</sup> See, e.g., Kishali Pinto-Jayawardena, Law & Society Trust, *A Legacy to Remember: Sri Lanka's Commissions of Inquiry 1963-2002* (Sept. 2010), at 20-24.

- In 1994, President Kumaratunga established three linked commissions of inquiry to investigate disappearances in different regions of the country from 1988 to 1994. The final report for the Northern and Eastern Commission concluded that *ninety percent* of removals in those regions occurred at the hands of State security forces.<sup>6</sup> In total, the three commissions investigated 27,526 complaints, established 16,800 enforced disappearances, and identified suspected perpetrators in 1,681 cases.<sup>7</sup> The government created a “Disappearances Investigation Unit” to investigate these 1,681 cases. The unit transferred 1,175 cases to a newly-created “Missing Persons Commissions Unit” in the Attorney General’s Department and pressed charges against 597 security personnel, but 423 cases were closed in 2001 for want of evidence.<sup>8</sup>
- In 1998, President Kumaratunga created an “All Island Presidential Commission on Disappearances” to review 10,136 complaints from the three zonal commissions and receive additional complaints.<sup>9</sup> In 2000, the “All Island” Commission referred 16,305 complaints to the Human Rights Commission of Sri Lanka, which eventually identified 2,127 cases for further investigation. However, in July 2006, the Human Rights Commission decided not to investigate these cases further unless the Government directed it to do so.<sup>10</sup>
- In 2006, President Rajapaksa announced a Presidential Commission on the Disappeared (Mahanama Tilakaratne Commission) to investigate recent disappearances and unexplained killings throughout the Island. The Commission submitted a final report to the President, but its findings were not made public.<sup>11</sup>
- In 2010, President Rajapaksa announced a Lessons Learnt and Reconciliation Commission (LLRC) to investigate the breakdown of the 2002 ceasefire agreement and identify lessons learned to promote national unity and reconciliation. While narrow in its mandate and criticized by several human rights groups, the LLRC nevertheless made several constructive recommendations with regard to the issue of disappearances. However, these recommendations have not been effectively implemented. (*See* Section III, below.)

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<sup>6</sup> Pinto-Jayawardena, Post-War Justice in Sri Lanka, *supra* note 2 at 81.

<sup>7</sup> *Id.* at 79.

<sup>8</sup> *Id.* at 101-103.

<sup>9</sup> *Id.* at 93.

<sup>10</sup> Human Rights Watch, *Recurring Nightmare: State Responsibility for ‘Disappearances’ and Abductions in Sri Lanka* (Mar. 2008), at 21, 104.

<sup>11</sup> Gazette (Extraordinary) No. 1462/30 (Sept. 15, 2006); Gazette (Extraordinary) No.1505/17 (2007).



- In 2013, President Rajapaksa announced a Presidential Commission to Investigate Missing Persons in the north and east (the Paranagama Commission).<sup>12</sup> The mandate was eventually expanded to cover the entire civil war (1983 to 2009)<sup>13</sup> and investigate violations of international law during the last stages of the war.<sup>14</sup> The Paranagama Commission has received over 20,000 complaints of missing persons. However, CHRD and other human rights groups believe that this number speaks more to the magnitude of the disappearances problem than the effectiveness of the domestic mechanism. (See Section V below.)

Recently, the Ministry of Foreign Affairs has stated that it intends to work with the ICRC to set up a mechanism to address concerns pertaining to missing persons.<sup>15</sup> Before asking families of the disappeared to engage with yet another disappearances commission or missing persons unit, there must be assurance that the new mechanism will be credible. Given the risk of re-traumatizing victims through repeated testimony and the enormity of the disappearances problem, the State and the international community must ensure that any new mechanism actually advances the rights of families of the disappeared to truth, justice, reparations, and guarantees of non-recurrence.

## II. Overview

**Section III** examines the National Action Plan on implementation of the LLRC. The LLRC recognized that families of the disappeared have a right to know the whereabouts of their loved ones and the truth about what happened. The LLRC further declared that the Government has the obligation ‘to ensure that these allegations are properly investigated into and perpetrators brought to justice’.<sup>16</sup> These findings run parallel to international law, which requires Sri Lanka to investigate serious violations of international human rights law and punish

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<sup>12</sup> Gazette (Extraordinary) No. 1823/42 (Aug. 15, 2013).

<sup>13</sup> Gazette (Extraordinary) No. 1855/19 (Mar. 25, 2014).

<sup>14</sup> Gazette (Extraordinary) No. 1871/18 (Jul. 15, 2014).

<sup>15</sup> Statement by Minister of Foreign Affairs Mangala Samaraweera before the German Council on Foreign Relations (May 22, 2015), <http://www.mea.gov.lk/index.php/en/media/ministers-statements/6077-address-by-mangala-samaraweera-minister-of-foreign-affairs-at-the-german-council-on-foreign-relations>; see also Interview of ICRC Director of Operations (Mar. 26, 2015), <https://www.icrc.org/en/document/clarifying-fate-missing-persons-sri-lanka-requires-sustained-commitment>.

<sup>16</sup> Report of the Commission of Inquiry on Lessons Learnt and Reconciliation (Nov. 2011) (hereinafter, “LLRC Report”), ¶ 9.46.

perpetrators,<sup>17</sup> and to provide victims of serious human rights violations with ‘effective remedy’.<sup>18</sup>

**Section IV** provides summary statistics from CHRD’s advocacy since 2000 with the North-East Coordinating Committee for Enforced Disappearances (hereinafter, the “Coordinating Committee”) on behalf of 2,922 families of the disappeared in the north and the east.<sup>19</sup> This section provides breakdowns of disappearances in these districts by age, sex, and year of disappearance, as well as the alleged perpetrator (security forces, LTTE, or paramilitary groups), where known. These 2,922 cases reflect a fraction of the total number of unresolved disappearances, and they draw mostly from the 2008 to 2009 time period.

**Section V** documents significant concerns raised by CHRD and its partner organizations in the Coordinating Committee with regard to the Paranagama Commission capacity to adequately investigate disappearances. The Paranagama Commission recently suggested that 60% of allegations pointed to the LTTE, 30% to government security forces, and the remaining 10% to paramilitaries and unknown groups.<sup>20</sup> While CHRD’s data suggests significantly higher disappearances by the Army in 2008 and 2009, irrespective of who was responsible, the State is obligated to take action and provide meaningful redress to all of its citizens.

**Section VI** features the human stories at the heart of CHRD’s work. Each disappeared person is somebody’s spouse, child, or grandchild. Each family lives each day facing threats, fear, mental anguish, and economic hardship. The

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<sup>17</sup> International Covenant on Civil and Political Rights (ICCPR), G.A. Res. 2200A (XXI), U.N. Doc A/6316 (1966), Art. 2; Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment (CAT), G.A. Res. 39/46, U.N. Doc. A/39/51 (1987), Art. 4, 5, 7. Sri Lanka ratified the ICCPR on June 11, 1980 and CAT on February 2, 1994.

<sup>18</sup> ICCPR, Art. 2(3), 9(5); *see also* U.N. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Dec. 16, 2005).

<sup>19</sup> The North-East Coordinating Committee consists of the following organizations: CHRD, the Centre for Promotion and Protection of Human Rights, the Centre for Peace and Reconciliation-Jaffna, Aham-Trincomalee, Mannar Citizen’s Committee, and Mullaitivu-WAN.

<sup>20</sup> *SL Missing Persons Commission holds LTTE responsible for 60% of allegations*, News.lk (Official GoSL News Portal) (Apr. 28, 2015), <http://news.lk/news/sri-lanka/item/7393-sl-missing-persons-commission-holds-ltte-responsible-for-60-of-allegations> (‘Based on the inquiries conducted thus far, accountability and responsibility by these parties vary from district to district, and in the Northern Province, 60% of the allegations were levelled against the LTTE, 30% against the security forces, 5% against armed groups and 5% against unknown groups.’).

2014 arrest of CHRD's client, Balendran Jeyakumary, and human rights defenders Ruki Fernando and Father Praveen Mahesan highlight the state's use of the Prevention of Terrorism Act (PTA) to silence human rights activism. The story of CHRD's staff member, Sunthararaja Vathana, whose husband was abducted before her eyes in a white van, demonstrates the pressing need to trace the missing and hold perpetrators accountable.

**Section VII** discusses CHRD's Habeas Corpus litigation for families of the disappeared. CHRD has 21 Habeas Corpus cases currently pending before the Vavuniya and Mannar High Courts, 14 of which involve disappearances post-surrender during the last days of the war in May 2009. This report analyzes CHRD's pending cases in depth, noting that the State has been consistently unresponsive in the face of substantial evidence pointing to State responsibility. These 21 cases reflect a tiny portion of the bigger picture: CHRD and its partners have documented 2,922 complaints of enforced disappearances in the north and the east. CHRD has also filed more than 100 Habeas Corpus cases since the early 1990s, many of which have been dismissed on procedural grounds after witnesses, fearing retaliation and harassment, failed to come forward.

**Section VIII** discusses CHRD's litigation in the Mannar mass grave case. CHRD represents families of the disappeared in litigation regarding a mass grave found in 2013 in Mannar (located in Sri Lanka's Northern Province). Eighty-three bodies have been exhumed from the site, and there may be more skeletons yet to be unearthed. There has been little transparency in the forensic investigation to date and no indication that the investigation has complied with internationally accepted best practices for the forensic investigation of mass graves. This section draws attention to the shifting narratives put forth by the Criminal Investigation Division (CID) to block effective investigation and recommends that the Court invite an international forensics team with significant experience in the forensic analysis of skeletal remains.

**Section IX** concludes and offers recommendations to the State and to the international community based on CHRD's litigation and advocacy for families of the disappeared. This section will urge the international community to not take promises by the Sri Lankan Government at face value. Promises have been made and broken too many times. CHRD calls on the State to address its credibility deficit and take immediate steps to build trust with war-affected communities. Learning from Sri Lanka's past failures, CHRD also calls on the international community to press for genuine, credible progress toward tracing the missing, holding perpetrators accountable, providing reparations, and ensuring that disappearances do not recur.



### III. LLRC & International Law Obligations

#### A. LLRC National Action Plan

During its public sittings and field visits, Sri Lanka's Lessons Learnt and Reconciliation Committee (LLRC) heard from a large number of families of the disappeared, who testified about abductions, enforced or involuntary disappearances, and arbitrary detention.<sup>21</sup> The LLRC expressed alarm at the volume of reported cases and affirmed:

'[R]elatives of missing persons shall have the right to know the whereabouts of their loved ones. They also have the right to know the truth about what happened to such persons, and to bring the matter to closure'.<sup>22</sup>

The LLRC emphasized that, given the magnitude of the problem, the Government had a duty to take a comprehensive approach to investigate disappearances and ensure accountability. As the LLRC explained, 'if a case is established of a disappearance after surrender to official custody, this would constitute an offence entailing penal consequences'.<sup>23</sup> The LLRC stressed that the 'failure or refusal by the police to record an arrest, detention and transfer or to record complaints of abductions and failure to investigate the same would constitute a criminal offence and steps should be taken to prosecute such wrongdoers'.<sup>24</sup> Specifically, the LLRC advised the government to:

- 'direct the law enforcement authorities to take immediate steps to ensure that these allegations are properly investigated into and perpetrators brought to justice' (¶ 9.46);
- seek a comprehensive approach to address the issue of missing persons as a matter of urgency, including the 'immediate' implementation of recommendations of past Commissions (¶ 9.48);
- take all efforts by law enforcement, in cooperation with the ICRC and other agencies, to trace missing persons and ensure reunification, and inform families of progress being made (¶ 9.50);
- appoint a Special Commissioner of Investigation with a centralized system of data collection to investigate alleged disappearances, and provide material to the Attorney General to initiate criminal proceedings where appropriate (¶ 9.51);

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<sup>21</sup> LLRC Report, *supra* note 16, ¶ 9.46.

<sup>22</sup> *Id.*, ¶ 9.49.

<sup>23</sup> *Id.*, ¶ 9.23.

<sup>24</sup> *Id.*, ¶ 9.55.

- implement the Registration of Deaths Act, which provide Death Certificates for persons reported missing for over a year, and publicize relevant provisions of the Act in conflict-affected areas (¶ 9.52);
- provide trauma counseling, livelihood assistance, and legal aid for families of the disappeared (¶ 9.58); and
- enact domestic legislation to criminalize enforced or involuntary disappearances (¶ 9.59).

In July 2012, the Sri Lankan government announced a National Plan of Action (NPoA) to implement some of the recommendations of the LLRC.<sup>25</sup> With regard to enforced disappearances, the NPoA has committed to the following actions as of November 2014:<sup>26</sup>

- strengthen capacity of the police and community policing units to promote greater enforcement of the law (ref. LLRC ¶ 9.46);
- establish a Committee to strengthen current initiatives and identify new strategies to address the issue of missing persons (ref. LLRC ¶¶ 9.48, 9.50);
- appoint a Commission of Inquiry to investigate alleged abductions or disappearances of persons resident in the Northern and Eastern Provinces during the war, and establish an integrated database to collate information regarding missing persons (ref. LLRC ¶ 9.51);
- continue current procedures under the Registration of Deaths Act and raise awareness (ref. LLRC ¶ 9.52);<sup>27</sup>
- establish a social care centre in each Division in North & East and provide necessary legal support to victims of war (ref. LLRC ¶ 9.58); and

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<sup>25</sup> See *National Plan of Action to Implement the Recommendations of the LLRC* (Jul. 26, 2014), [http://www.priu.gov.lk/news\\_update/Current\\_Affairs/ca201207/20120726national\\_plan\\_action.htm](http://www.priu.gov.lk/news_update/Current_Affairs/ca201207/20120726national_plan_action.htm).

<sup>26</sup> National Plan of Action for Implementation of LLRC Recommendations (Nov. 2014) (hereinafter, “NPoA Nov. 2014 Report”), <http://www.llrcaction.gov.lk/assets/downloads/npoa/en/NPoA-November-2014-Thematic-Area-ENG.pdf>.

<sup>27</sup> Among other things, CHRD is pressing for the government to issue Certificates of Absence to families of the disappeared, rather than Certificates of Death, to allow families to seek compensation and livelihood assistance without foregoing rights to redress. The NPoA states that a proposal to issue Certificates of Absence has been submitted to the Cabinet. See *Id.*, recommendation 9.52.

- examine the need for legislation criminalizing enforced disappearances, and present a law to Parliament if reform is deemed necessary (ref. LLRC ¶ 9.59).

In several instances, the commitments in the NPoA do not correspond to the specific recommendations made by the LLRC. For example, the LLRC advised the government to direct law enforcement ‘to take immediate steps to ensure that [disappearances] allegations are properly investigated into and perpetrators brought to justice’.<sup>28</sup> The NPoA purports to address this recommendation by developing legal aid centres and developing capacity of police and community policing units.<sup>29</sup> Likewise, the LLRC advised the government to enact legislation criminalizing enforced disappearance, whereas the NPoA commits only to *examining the need for such legislation* and drafting legislation if deemed necessary.<sup>30</sup>

Moreover, the government has not satisfied the commitments it actually made in the NPoA. Most notably, three years into the NPoA, the Paranagama Commission has not managed to actually ‘investigate alleged abductions or disappearances of persons’ (see Section V).

## B. International Law Obligations

This report does not provide an in-depth analysis of Sri Lanka’s obligations under international law with regard to enforced disappearances.<sup>31</sup> In short, Sri Lanka is a signatory to the International Covenant of Civil and Political Rights (ICCPR) and Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment (CAT). Both of these instruments require Sri Lanka to investigate serious violations of human rights, such as enforced disappearance, and punish perpetrators.<sup>32</sup> International law also requires States to provide victims of serious human rights violations with ‘effective remedy’.<sup>33</sup> Sri Lanka is

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<sup>28</sup> LLRC Report, ¶ 9.46.

<sup>29</sup> NPoA Nov. 2014 Report, *supra* note 26, recommendation 9.46; *see also* Report of the Office of the High Commissioner for Human Rights (Feb. 24, 2014), U.N. Doc. A/HRC/25/23, ¶ 27.

<sup>30</sup> *Compare* LLRC Report, ¶ 9.59 *with* NPoA Nov. 2014 Report, *supra* note 26, recommendation 9.49.

<sup>31</sup> For a lengthier analysis of Sri Lanka’s obligations under international law, *see, e.g.*, Human Rights Watch, *Recurring Nightmare: State Responsibility for ‘Disappearances’ and Abductions in Sri Lanka* (Mar. 2008).

<sup>32</sup> International Covenant on Civil and Political Rights (ICCPR), G.A. Res. 2200A (XXI), U.N. Doc A/6316 (1966), Art. 2; Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment (CAT), G.A. Res. 39/46, U.N. Doc. A/39/51 (1987), Art. 4, 5, 7. Sri Lanka ratified the ICCPR on June 11, 1980 and CAT on February 2, 1994.

<sup>33</sup> ICCPR, Art. 2(3), 9(5); *see also* U.N. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights

not a signatory to the International Convention for the Protection of All Persons from Enforced Disappearance. Nevertheless, the U.N. Declaration on the Protection of All Persons from Enforced Disappearance affirms the obligation of all states to protect people from enforced disappearance.<sup>34</sup> Disappearances are deemed continuing offenses for so long as the State continues to conceal the whereabouts of the missing person.<sup>35</sup>

## IV. Quantifying the Problem

Since 2000, CHRD has operated at least 20 mobile legal clinics per year in the north and east, advising families of the disappeared on how to navigate the legal process. CHRD is also a member of the North-East Coordinating Committee for Enforced Disappearances (herein, the “Coordinating Committee”). In January and February 2015, documentation interns from the Coordinating Committee conducted a house-to-house survey in the north and the east to collect information on disappearances, gauge families’ needs and priorities, and provide legal assistance.

The following tables provide summary statistics of 2,922 families of the disappeared (of which all but 33 are Tamil) that have sought legal advice from CHRD and the Coordinating Committee since 2000 with the intention of pursuing legal options. These 2,922 families reflect a small fraction of the overall number of missing persons in the north and east and do not reflect disappearances across Sri Lanka as a whole. Moreover, the data is limited to the numbers gathered by CHRD and its partners in the Coordinating Committee since 2000 and is not necessarily a representative sample.

### A. Who Are the Disappeared?

Each district surveyed in the north and east has reported disappearances dating back to the 1980s. Disappeared persons are typically males in their twenties, though Kilinochchi and Mullaitivu also report significant numbers of disappeared women (dating to the last stages of the war).

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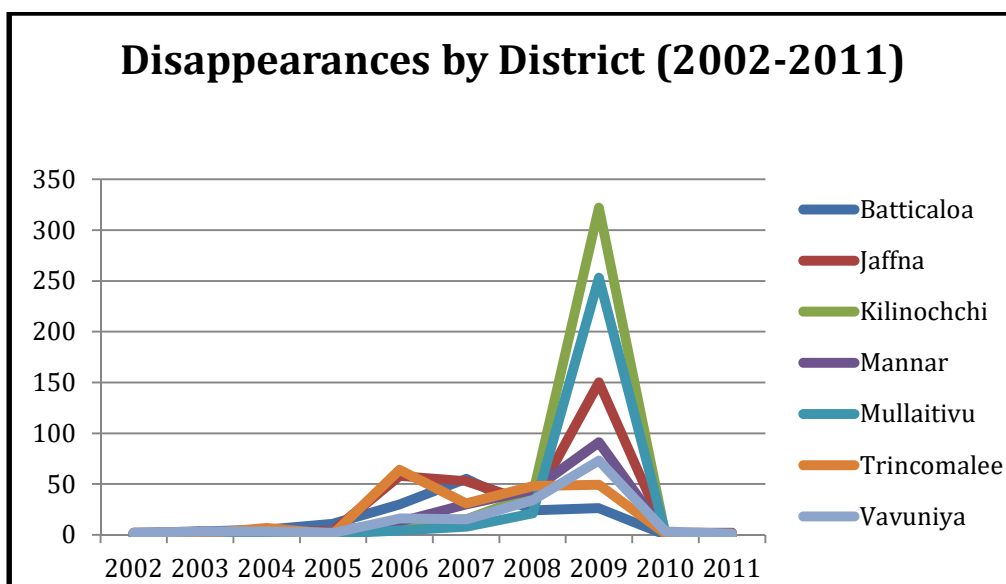
Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Dec. 16, 2005).

<sup>34</sup> U.N. Declaration on the Protection of All Persons from Enforced Disappearances, G.A. Res. 47/133, U.N. Doc. A/47/49 (1992), Art. 18. Although a non-binding standard, this Convention reflects international consensus on the crime of enforced disappearance.

<sup>35</sup> *Id.*

District	Total CHRD Complaints	Percent Male	Average Age	Time Period of Disappearances
Batticaloa	582	96%	26.7	1983-2014
Jaffna	529	89%	25.3	1985-2011
Kilinochchi	551	72%	23.9	1988-2013
Mannar	248	87%	26.8	1984-2009
Mullaitivu	443	76%	24.0	1986-2013
Trincomalee	351	94%	25.9	1985-2012
Vavuniya	218	83%	24.9	1984-2012

Focusing solely on the 2002 to 2011 period covered by the LLRC and the U.N. OHCHR Investigation on Sri Lanka,<sup>36</sup> disappearances were high in the eastern districts of Trincomalee and Batticaloa in 2006 and 2007, just as the fighting intensified in those areas. Likewise, each of the northern districts—and in particular, Kilinochchi and Mullaitivu—saw a marked increase in disappearances in 2009, just as the armed conflict between the LTTE and government forces reached its peak in those areas.



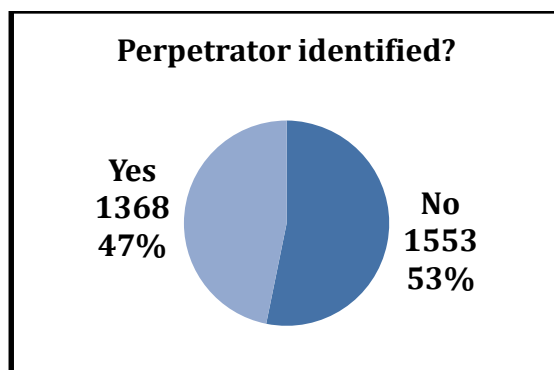
<sup>36</sup> See OISL Terms of Reference, <http://www.ohchr.org/EN/HRBodies/HRC/Pages/OISL.aspx>. Although the LLRC was mandated to look into events between 21 February 2002 and 19 May 2009, the Commission looked at a broader time period to understand ‘the causes underlying the grievances of different communities’ and ‘post-conflict issues that affect vulnerable groups and the citizens at large’. LLRC Report, *supra* note 16, at ¶ 1.22 and page 4 (preamble).

The graph above captures only the 2,922 complaints recorded by the Coordinating Committee and does not reflect the total number of disappeared persons. It also excludes 467 out of 2,922 complaints, for which the date of disappearance was not provided.<sup>37</sup>

Each disappearance left a hole in a family, depriving children of their father or mother, depriving spouses of their wife or husband. It is critical to remember the human stories behind the numbers; Section VI provides perspectives from CHRD's clients and staff to do just that.

## **B. Who Are the Perpetrators?**

In 1,553 out of 2,922 complaints gathered by the Coordinating Committee since 2000, families of the disappeared were not able to identify whether the missing person was abducted by government security forces (Army, Navy, Police, CID, TID, STF), the LTTE, or Tamil paramilitary groups (Karuna Group, TMVP, EPDP).<sup>38</sup> However, in the remaining 1,368 complaints, families were able to identify who was responsible.



Within this latter subset of 1,368, *over 70 percent* of complaints point to the Army:<sup>39</sup>

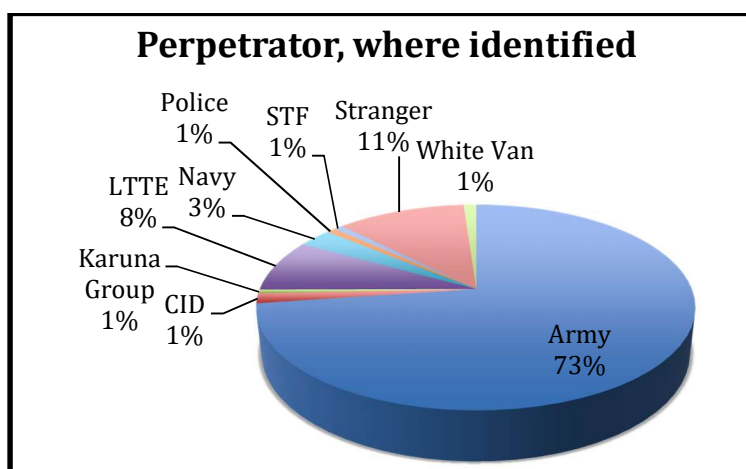
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<sup>37</sup> For example, other human rights groups have documented significant abductions and disappearances by the LTTE and paramilitaries in the Eastern Province in 2003 and 2004. It is possible that many of these disappearances are not reflected in the Coordinating Committee's documented cases.

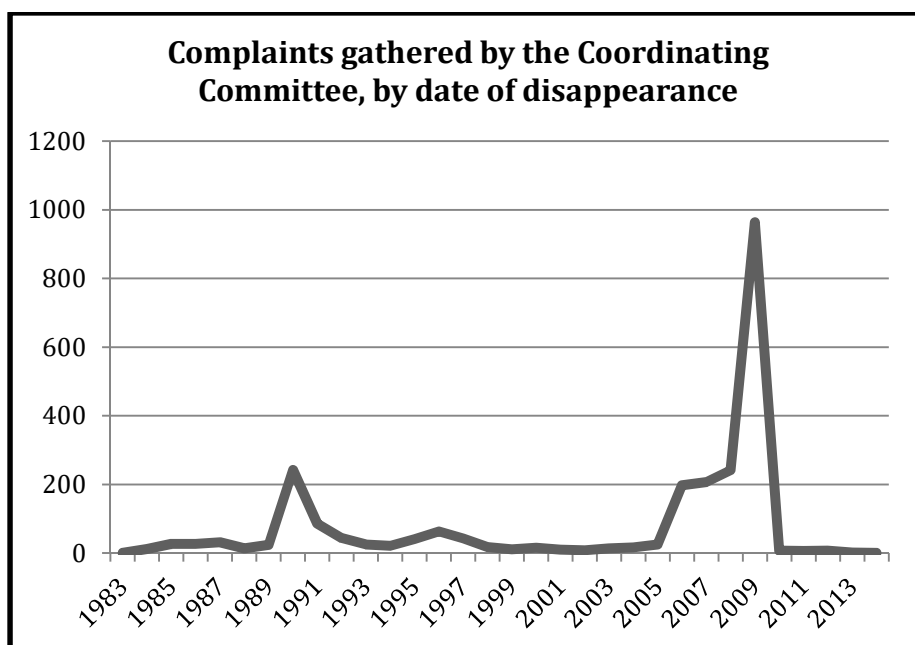
<sup>38</sup> Following Karuna Amman's breakaway from the LTTE in the east in 2004, the TMVP worked under his command with Sri Lankan security forces to control the east. Thereafter, the TMVP split as a rift emerged between the Pillaiyan and Karuna factions. The EPDP started as a militant group in the north but has, since 1990, worked with the government. Each of these groups is alleged to be responsible for widespread disappearances, torture, targeted killings, and extortion. In many instances, the Sri Lankan government has continued to keep leaders of Tamil paramilitary groups in power, in some cases even granting them ministerial portfolios.

<sup>39</sup> This chart reflects cases in which victim has evidence pointing to the Army, Navy, LTTE, CID, Karuna Group, Police, STF, White Van, and 'Stranger'. Note that 'Stranger' is





This 70 percent figure is attributable to disappearances during the last stages of the war. As depicted in the graph below, the bulk of the Coordinating Committee's complaints relate to disappearances in the north and east from 2006 to 2009 (and, in particular, from 2008-2009).



different from 'Unknown'—'Stranger' reflects cases in which the abductor was a stranger—but was seen and could be identified by the victim's family in a line-up. By contrast, 'Unknown' reflects cases in which the victim's family has no information about the perpetrator.

Focusing on a different time period would likely produce a different breakdown of perpetrator data. Nevertheless, given the Coordinating Committee's figures, the Paranagama Commission's attribution of 60% of disappearances in the north and east to the LTTE, 30% to the Army, and 10% to paramilitaries and unknown groups may require a closer look or a breakdown by time period.<sup>40</sup> The 60/30/10 breakdown does not appear to reflect the breakdown during the last stages of the war, based on the Coordinating Committee's available information. Likewise, the final report of the 1994 Northern and Eastern Commission concluded that *ninety percent* of disappearances in the north and east from 1988-1994 occurred at the hands of State security forces.<sup>41</sup>

Ultimately, however, irrespective of who the perpetrator was, the State has an obligation to all of its citizens to pursue truth, justice, reparations, and guarantees of non-recurrence.

## V. CHR D's Advocacy before the Paranagama Commission

Together with its partners in the Coordinating Committee, CHR D has monitored each of the public sittings of the Paranagama Commission on behalf of families of the disappeared. CHR D has noted several concerning trends, including harassment of families who attempted to provide evidence; pressure exerted for families to accept death certificates; grossly inaccurate translations; and ineffective lines of questioning by the Commissioners. Despite the change in government in January 2015, the new administration continued with the previous administration's approach for truth and accountability, without rectifying the concerns raised by civil society and those affected.

Frustrated with the process, some families began to boycott the proceedings, demanding a credible inquiry with international oversight. On February 28, 2015, the Coordinating Committee sent a letter to the Commission explaining the families' reasons to boycott the proceedings. The letter expressed concern with (i) death certificates being issued in parallel to the Commission's work; (ii) the questions asked by the Commission, which seemed to focus on reparations and livelihood support, rather than tracing the missing; and (iii) the Commission's capacity to investigate war crimes pursuant to its expanded mandate.

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<sup>40</sup>*SL Missing Persons Commission holds LTTE responsible for 60% of allegations, supra* note 20.

<sup>41</sup> Pinto-Jayawardena, *Post-War Justice in Sri Lanka, supra* note 2 at 81.

Thereafter, the Coordinating Committee arranged meetings for families of the disappeared with Chandrika Kumaratunga, in her capacity as head of the Office of National Unity and Reconciliation, and with Mano Ganesan, in his capacity as the head of the National Executive Council. During these meetings, the families expressed their frustration with the proceedings and pressed for a credible mechanism to trace the missing. The Coordinating Committee also wrote to President Sirisena on May 19, 2015 seeking a meeting and awaits a response.

On April 30, 2015, the Coordinating Committee wrote to the Commission, discussing specific concerns and offering constructive recommendations. That same day, the Coordinating Committee met with the Commission. On June 16, 2015, the Commission sent a response to the Coordinating Committee. While appreciating that the Commission took time to respond, their letter failed to critically engage with the Coordinating Committee's concerns.<sup>42</sup>

The LLRC acknowledged the rights of families to know the whereabouts of their loved ones—and the duty of the State 'to ensure that these allegations are properly investigated into and perpetrators brought to justice'.<sup>43</sup> Regretfully, the Paranagama Commission has failed in both regards.

## **A. Concerns Raised by Families of the Disappeared**

### **1. Harassment and intimidation by intelligence personnel**

In each and every public sitting of the Commission, the Coordinating Committee noted the presence of various intelligence personnel (CID and TID) observing participants, observing protesters, taking photographs and videos, and visiting families and intimidating them at their homes. Other civil society organizations have made these same observations.<sup>44</sup> The lack of witness protection mechanisms exacerbates the situation: while the Commission insists that hearings be public for transparency, it fails to provide adequate safeguards to protect those who testify.

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<sup>42</sup> The Coordinating Committee replied by letter dated August 3, 2015.

<sup>43</sup> LLRC Report, ¶¶ 9.46, 9.49.

<sup>44</sup> For example, the Centre for Policy Alternatives (CPA) reported that TID officers held an alternate hearing parallel to that of the Commission's January 20, 2014 sittings in Kilinochchi, offering families incentives such as money for their children's education and other forms of aid. Families who went for the meeting were pressured by TID officers to accept death certificates to receive compensation. Likewise, CPA noted interference, intimidation, and surveillance by TID and CID officers during Commission hearings in Mannar in August 2014. See *A Commentary on the Presidential Commission to Investigate Missing Persons during the Period of June 1990-May 2009 in the Northern and Eastern Provinces*, Centre for Policy Alternatives (Mar. 6, 2014); *The Presidential Commission to Investigate into Complaints Regarding Missing Persons: Trends, Practices and Implications*, Centre for Policy Alternatives (Dec. 2014).

The Commission 'rejected outright' the Coordinating Committee's assertions of harassment and intimidation, stating that these allegations were 'baseless, unfounded and do not carry any justification to initiate an inquiry as these allegations are not substantiated by any evidence to prove that such incidents occurred except for statements made by Tamil Civil Society Organizations'. The Commission added: 'Contrary to the allegation of harassment the Commission was notified that the security forces have visited the house of the complainants and encouraged them to give evidence before the Commission.' The Commission pointed to the 21,000 complaints it had received, implying that affected communities viewed the mechanism as credible. Finally, the Commission asserted that it was Tamil Civil Society Organizations that had kept families of the disappeared from testifying.

This response failed to critically engage with the Coordinating Committee's concerns. ***The Commission's own internal report from July 2014 cited witness tampering and harassment by the TID and CID during sittings in Mullaitivu:***

'In general, testimonies indicated that some of the families continue to face various interferences by the Officials from the Terrorist Investigations Department and the Criminal Investigations Department. Actions of interferences differ ranging from gathering information via phone or house visits to call for inquiries at the relevant office premises. Some of the testimonies revealed the experiences of family members who are being approached by the Officials of the Terrorist Investigations Department persuading them to obtain death certificate for the missing personnel, despite the fact that families continue to deny to cooperate with such requests.'

While the Paranagama Commission has received over 21,000 complaints, these numbers (which mirror numbers of past disappearances commissions) merely underscore the magnitude of the problem rather than the credibility of the mechanism. The decision by those directly affected by the last stages of the war to boycott recent sittings in Trincomalee underscore this point. As to the allegations that Tamil Civil Society Organizations had prevented persons from testifying, several thousand have testified, but the growing protests indicate that some of those invited to testify have lost faith in the process.

## 2. Ad Hoc expansions of the Commission's mandate

The Paranagama Commission's mandate has expanded dramatically since its inception, both in time period and the substantive scope. Families of the disappear fear that these ad hoc expansions of the Commission's mandate undermine the Commission's ability to investigate disappearances, trace the disappeared, and identify those responsible.

- a) The time period is too broad to credibly investigate (rather than merely record) disappearances.

When established in August 2013, the Commission was mandated to investigate disappearances in the north and east between 1990 to May 2009.<sup>45</sup> Specifically, the Commission was asked to investigate:

- a. Whether any persons resident in the Northern and Eastern Provinces during the period June 10, 1990 to May 19, 2009 have been abducted or have disappeared from their places of residence;
- b. Evidence in proof of the fact that such persons have been abducted or have disappeared;
- c. Who are those so abducted or have disappeared and their present whereabouts;
- d. Cogent factors or evidence that would help form an idea about the person or persons responsible for the said abduction or disappearances;
- e. Legal action that could be instituted against the person or persons who are found to be responsible;
- f. Measures that should be taken to ensure that there will be no recurrence of such acts in the future;
- g. If there is any reasonable relief to be granted as an obligation on the part of the Government to the parents, spouses and dependents of those alleged to have been so abducted or have disappeared.

The initial mandate itself was incredibly broad—it required fact-finding into 19 years of disappearances. In March 2014, after several sittings had already taken place, President Rajapaksa extended the mandate dramatically, to cover the time period from 1983 to May 2009.<sup>46</sup>

With such an expansive temporal scope, it is no surprise that the Paranagama Commission has failed to make headway in *investigating*, rather than merely *documenting*, disappearances. During hearings, Commissioners ask families questions that could have been answered by looking at the case file. Often,

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<sup>45</sup> Gazette (Extraordinary) No. 1823/42 (Aug. 13, 2013).

<sup>46</sup> Gazette (Extraordinary) No. 1855/19 (Mar. 25, 2014).

Commissioners appear to focus their questions on issues of livelihood support, at the expense of investigating the circumstances of disappearances. At many hearings, they asked questions about how many goats or chickens a family needed—at one sitting, a woman became outraged, shouting that she had come to find her son, and not to discuss goats and chickens.<sup>47</sup>

Moreover, given the volume of cases in this 26-year period, civil society groups estimate that at the current pace, it would take *thirteen years* to merely hear the complaints—much less investigate them.<sup>48</sup> There is no indication that cases with sufficient evidence have been transferred to appropriate investigative authorities for follow-up, and where appropriate, prosecutions.

Many of the families that the CHRD represents have filed complaints and lodged inquiries with the Police, Human Rights Commission of Sri Lanka, the ICRC, and in some cases, the relevant Army or Navy camp. Many have testified before the LLRC and submitted evidence to the U.N. Working Group. The Paranagama Commission was supposed to cover new ground, not re-traumatize families by forcing them to relay the same facts to yet another flawed domestic mechanism. Regrettably, the 26-year period of inquiry does not render this possible.

The Paranagama Commission asserted that the Coordinating Committee's concerns were 'unfounded' because the expanded mandate reflected the government's 'commitment to ensure that the families of missing persons are entitled to know the truth regarding their missing loved ones'.

The Coordinating Committee agrees that all victims of Sri Lanka's protracted conflict have a right to truth under international law. However, by setting such a broad time period, the Commission is unlikely to succeed in actually investigating the missing. The Coordinating Committee has found that families of those who disappeared in 1983 have very different needs than of those who disappeared in 2009. For the earlier disappearances, families are more likely to seek livelihood assistance and compensation, as the passage of time has produced some answers as to their missing relative's fate. By contrast, for the

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<sup>47</sup> CHRD Notes. See also Speech made in Sri Lankan Parliament by Hon. M.A. Sumanthiran (Mar. 17, 2015) ('I have seen personally, the moment a witness comes close to identifying the perpetrator in her evidence, immediately, the Commission intervenes and stops that evidence and starts asking about whether they have received some chicken or some goats for their livelihood, and invariably the mothers of the disappeared scream and say, 'I do not want a goat, I want my son back because I handed over my son to the security forces. I am an eyewitness to this. I, myself, handed the person over. I do not want your chickens, I do not want your goats'.')

<sup>48</sup> See, e.g., Centre for Policy Alternatives, *The Presidential Commission to Investigate into Complaints Regarding Missing Persons: Trends, Practices and Implications* (Dec. 2014), at 4.



more recent disappearances, many families believe that their loved ones may still be alive—e.g., because they saw their relatives surrender to Army custody in the final stages of the war. Such eyewitness evidence, combined with recent reports of secret detention camps,<sup>49</sup> fuels the belief among these families that the disappeared may still be detained somewhere in Sri Lanka. This latter group thus requires a credible mechanism to trace the missing—and, where sufficient evidence is found, to prosecute perpetrators in accordance with internationally accepted due process standards.

In short, by conflating different groups of victims with different needs and priorities, the Paranagama Commission is unlikely to achieve truth, justice, or redress for any single group. Indeed, the Commission's response, 'that it would not be possible to provide answers to all cases without conducting a proper investigation'—and that it has selected 2,200 cases (out of 21,000 complaints) for further analysis—prove the Coordinating Committee's point. The Paranagama Commission was established precisely to investigate the circumstances of each disappearance and identify those responsible—not merely to make recommendations for further investigation. As the Commission acknowledged, proper investigation of each disappearance will take significant time. This is why ad hoc expansions of the mandate's temporal scope thwart efforts by families of the disappeared to achieve truth and justice.

**b) The directive to look into violations of international law during the last stages of the war undermines the purpose of the Commission.**

In July 2014, the Paranagama Commission's mandate was extended again—this time, fundamentally altering the purpose of the Commission.<sup>50</sup> After several public sittings and after the Commission had already received 16,000 complaints, President Rajapaksa expanded the mandate of the Commission to investigate alleged violations of international human rights law and international humanitarian law (IHL) during the last stages of the war.

IHL in particular is a complex body of law. An investigation of IHL violations during the last stages of Sri Lanka's civil war requires at minimum an understanding of the principles of distinction, proportionality, precautions, perfidy, hostage-taking, and human shields. The assessment of whether a violation of IHL occurred must be made on a case-by-case basis, looking to the facts prevailing on the ground at the time of launching each individual military attack.

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<sup>49</sup> For example, recent reports suggest a secret Navy detention camp at Trincomalee. *See Secret Camp operated in Trincomalee naval base*, Colombo Page (Feb. 21, 2015), [http://www.colombopage.com/archive\\_15A/Feb21\\_1424503390CH.php](http://www.colombopage.com/archive_15A/Feb21_1424503390CH.php).

<sup>50</sup> Gazette (Extraordinary) No. 1871/18 (Jul. 15, 2014).

There is simply no indication that the Commissioners possess the requisite training in IHL to make these assessments. To the contrary, the Commissioners noted in their June 2015 reply that ‘the answering of those questions required experienced experts and assistance’ beyond the training or knowledge of any of the Commissioners.

Judging from the Commission’s June 2015 letter, it appears that the Commission seeks to complete its IHL mandate by sending its existing evidence and findings on *disappearances* to the Advisory Council. There are many problems with this approach.

First, disappearances do not cover the scope of alleged violations under IHL during the last stages of the war. For example, evidence of disappearances would not address whether the Sri Lankan security forces had shelled a hospital or whether the LTTE used civilians as human shields. Second, the IHL mandate was given in July 2014, after several sittings had already taken place. There is no indication that the Commission would *revisit* testimonies already gathered to comb through for evidence of IHL violations. Nor is there any indication that the Commission would gather new evidence of IHL violations. The Advisory Council has likewise not conducted any fact-finding investigation of its own. Yet, IHL must be applied on a case-by-case basis looking at the facts on the ground at the time of each attack. Ultimately, it is highly questionable on what basis the Commission or the Advisory Council are to establish the ‘principal facts and circumstances that led to the loss of civilian life’ under IHL. There are also concerns about conflicts of interest of the Chair of the Advisory Council, as discussed below.

As the Coordinating Committee explained in its February 2015 letter to the Commission:

‘It is indeed our position that all aspects of violations committed during and after the war have to be investigated but this cannot be done haphazardly. The piece-meal expansion of your mandate points to the lack of seriousness of your commission’s work.’

### **3. The Advisory Council’s apparent conflict of interest**

In July and August 2015, President Rajapaksa appointed international experts to an Advisory Council to assist the Paranagama Commission in investigating violations of international law during the last stages of the war.<sup>51</sup> The Coordinating Committee expressed concern, noting that there had been no

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<sup>51</sup> Gazette (Extraordinary) No. 1871/18 (Jul. 15, 2014); Gazette (Extraordinary) No. 1876/40 (Aug. 22, 2014).

transparency regarding the experts' mandate or appointment. The Coordinating Committee also noted that one of the experts, Sir Desmond de Silva, had a conflict of interest, having been retained by the Rajapaksa administration in February 2014 to provide a legal opinion on alleged war crimes.

Subsequent to the Coordinating Committee's letter, Sir Desmond de Silva came under investigation by the U.K. Bar Standards Board for his role in advising the Paranagama Commission, despite his apparent conflict of interest.<sup>52</sup> In March and April 2015, leaked opinions of the international experts advising the Commission were published in the Island newspaper.<sup>53</sup> Several of these opinions appear to stretch the bounds of IHL.<sup>54</sup> Moreover, the any conclusions regarding IHL are highly suspect, given that (i) the Commissioners themselves lacked expertise to investigate IHL violations; (ii) several sittings had already been completed by the time the Commission was mandated to investigate IHL violations; and (iii) the Advisory Council did not do any independent fact-finding inquiry to support its legal conclusions under IHL. The Paranagama Commission's letter to the Coordinating Committee did not address the concerns raised as to the experts.

In a welcome development, on August 24, 2015, President Maithripala Sirisena did not extend the mandate of the Advisory Council.<sup>55</sup> It remains to be seen

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<sup>52</sup> See, e.g., Dharisha Bastians, *UK Bar launches formal inquiry into Sir Desmond's conduct*, Daily FT (Aug. 5, 2015), <http://www.ft.lk/article/454005/UK-Bar-launches-formal-inquiry-into-Sir-Desmond-s-conduct>.

<sup>53</sup> *Legal Opinion concerning the Law Applicable to Military Operations in the Final Stages of the Armed Conflict between the Government of Sri Lanka and the LTTE that ended on 19 May 2009 following intense combat in the Vanni Area of Northern Sri Lanka* by Sir Geoffrey Nice, QC and Rodney Dixon, QC, The Island (Mar. 10, 2015), [http://www.island.lk/index.php?page\\_cat=article-details&page=article-details&code\\_title=121064](http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=121064); *Review of 'Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka' by Sir Geoffrey Nice QC & Rodney Dixon QC*, The Island (Mar. 24, 2015), [http://www.island.lk/index.php?page\\_cat=article-details&page=article-details&code\\_title=121959](http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=121959); *What the international experts say (3) 'War Crimes in Sri Lanka' by D.M. Crane and Sir Desmond de Silva, QC*, The Island (Mar. 18, 2015), [http://www.island.lk/index.php?page\\_cat=article-details&page=article-details&code\\_title=121568](http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=121568); (Untitled), The Island (Apr. 9, 2015), [http://www.island.lk/index.php?page\\_cat=article-details&page=article-details&code\\_title=122896](http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=122896).

<sup>54</sup> The South Asian Centre for Legal Studies, a Colombo-based organization, will soon release a report that lays out core principles of IHL and how certain arguments in the Sri Lankan context do not comport with these core principles.

<sup>55</sup> Easwaran Rutnam, *Sir Desmond's mandate was not extended*, Colombo Gazette (Aug. 24, 2014), <http://colombogazette.com/2015/08/23/sir-desmonds-mandate-was-not-extended/>.

whether the Sirisena administration will also scale back the mandate of the Paranagama Commission with respect to questions of IHL.

#### **4. Technical Problems: translation errors, ineffective lines of questioning, and gender dynamics**

Families who provide evidence to various authorities and to the Paranagama Commission are asked to narrate their most painful memories. The risk of re-traumatization is high, and technical errors with the Paranagama Commission compound the problem.

Translation errors have been a recurring problem. During several of the sittings, the Coordinating Committee noted gross errors in Tamil translations resulting from inadequate translation staff. Noting also the slow progress of the proceedings to date, the Coordinating Committee asked the Commission to appoint additional translators and adequate numbers of Tamils, preferably women, to assist with investigations.

The Coordinating Committee also expressed concern with the lines of questioning by the Commissioners. During several sittings, it became clear that Commissioners lacked adequate contextual knowledge to understand witness testimony regarding certain key events.<sup>56</sup> Likewise, Commissioners often asked questions that could be answered by the case file (details of the disappearance and the alleged perpetrator), at the expense of asking more probing questions. In several instances, the Coordinating Committee noted that the bulk of questioning was being done by the translators, and not by the Commissioners. In several other instances, Commissioners would hear half of the victim's story before cutting them off and asking questions about family details and livelihood needs. Livelihood support is critical, but it should be just one part of a broader credible inquiry that seeks to trace the missing.

The Paranagama Commission has also failed to account for applicable gender and power dynamics. Many war-affected women are doubly marginalized: first, by losing their husbands, and second, by having to support their children and families in a militarized and patriarchal society. Many women have told CHRD that they will wear *pottus* (sign of marriage) even if they think their husbands are dead, to protect themselves from sexual violence and avoid further marginalization as a widow in Tamil society. A credible mechanism might account for these dynamics by providing Certificates of Absence to grant

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<sup>56</sup> The Centre for Policy Alternatives has also noted that in some cases, Commissioners stopped their questioning abruptly when the witness testified that the disappeared was last seen surrendering to Sri Lankan government forces. *The Presidential Commission to Investigate into Complaints Regarding Missing Persons: Trends, Practices and Implications*, Centre for Policy Alternatives (Dec. 2014), at 10.

pensions to all families of the disappeared, regardless of who the perpetrator or the victim were.

In its letter to the Coordinating Committee, the Paranagama Commission stated that it had appointed two new Commissioners to expedite processing of the cases. However, these new commissioners are Sinhalese and male, failing to address the Coordinating Committee's concerns. The Commission's response failed to address translation errors or concerns raised about lines of questioning during hearings.

## **B. Reflections on the Paranagama Commission**

CHRD and the Coordinating Committee have engaged with the Paranagama Commission, with hopes that it would bring families of the disappeared closer to finding the truth about their missing loved ones. After two years, however, it does not appear that the Commission can be salvaged.

The Commission's responses to the Coordinating Committee show an unwillingness to critically engage with civil society and families of the disappeared to strengthen the domestic process. The Commission's failure to acknowledge widespread witness harassment by the TID and CID, when its own internal report finds it, underscores this point. Ultimately, two years on, the most victims can hope for is a recommendation for further investigation; the Paranagama Commission appears to have made little progress in its mandate to *investigate* (rather than merely record) disappearances and identify suspected perpetrators. It has utterly failed in meeting the LLRC's recommendation to keep families informed about progress made in investigating their cases.<sup>57</sup>

CHRD seeks a credible mechanism to trace the missing, identify those responsible, and prosecute perpetrators. Compensation is important, but for those who believe their relatives may still be alive, it is of secondary concern. The Sirisena administration has indicated that it plans to set up a missing persons unit, in coordination with the ICRC. Families of the disappeared welcome any credible mechanism that will bring them closer to finding truth and seeking justice. However, any unit to trace the missing should learn from mistakes made with the Paranagama Commission. It should have: a narrow time period (or proceed in stages of narrow time intervals); a mandate solely to trace the missing and investigate those responsible; and sufficient Tamil translators, female investigators, and Commissioners with adequate contextual understanding of the events in question. It should also provide witness

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<sup>57</sup> LLRC Report, *supra* note 16, ¶¶ 5.38, 9.50.

protection, be independent from the Attorney General's Department,<sup>58</sup> and provide families of the disappeared with timely progress updates on the status of the unit's investigation.

Any newly created missing persons unit can, and should, start with the information already gathered by the Paranagama Commission. However, the unit will need to investigate much further in order to make genuine progress toward truth and accountability for families of the disappeared. Meanwhile, families of the disappeared should be given Certificates of Absence, rather than Death Certificates, to permit them to receive financial assistance without jeopardizing their rights to pursue truth and accountability.

## **VI. Perspectives from Families of the Disappeared**

### **A. Client Story: Balendran Jeyakumari and the Targeting of HRDs**

Balendran Jeyakumari is a widow and a mother of three sons and a daughter. She lost two of her sons in the war: one was killed by either paramilitaries or the Sri Lankan security forces in Trincomalee, and the second died a few years later in a shelling attack. Her third teenage son joined the LTTE during the final stages of the war and disappeared sometime after December 2008.

After the war ended, Jeyakumari began searching for her son and became an active campaigner for families of the disappeared. In August 2012, the Centre for Policy Alternatives published a report on the LLRC containing a photograph of Jeyakumari's missing son among 'rehabilitated' LTTE cadres. The photograph was obtained from the Sri Lankan Ministry of Defence website. Thereafter, Jeyakumari and her teenage daughter Vibhushika stood in protests, filed complaints, and met with high profile figures, such as former U.N. High Commissioner for Human Rights Navi Pillay. In March 2013, the Human Rights Commission informed her that they could not locate her son.

On March 13, 2014, when the U.N. Human Rights Council was considering a resolution for an international investigation into alleged war crimes in Sri Lanka, TID officers arrested Jeyakumari and Vibhushika in Kilinochchi under the Prevention of Terrorism Act (PTA) on suspicion of harbouring an LTTE suspect. Jeyakumari was detained at the Boosa Detention Centre for 9 months, and her daughter was taken to the Department of Probation and Child Care Services in Kilinochchi.

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<sup>58</sup> In this regard, CHRD notes that the 1994 and 1998 Disappearances Commissions called for a special prosecutor, independent from the Attorney General's office, to investigate disappearances.



The timing of Jeyakumari's arrest, coinciding with international advocacy for war crimes accountability, effectively silenced families of the disappeared. Jeyakumari's arrest made many families question the utility of engaging in protests and advocacy. As one woman in the north stated, 'I have lost both our children. Ever since then I have never eaten peacefully. I have approached all possible avenues. But to date I have never received any reply. No solution. Look at Jeyakumari and her daughter – we protested together. She is still in the prison and her daughter somewhere else.'<sup>59</sup>

Jeyakumari's arrest speaks to a broader problem of the use of the PTA to target human rights defenders and silence speech. On March 16, 2014, TID officials arrested two human rights defenders, Ruki Fernando and Father Praveen Mahesan, for their inquiries about Jeyakumari's arrest. Ruki, a long-time human rights activist affiliated with several human rights organizations, and Father Praveen, a Catholic priest, both worked to help war-affected families file complaints about missing persons and seek redress. They had traveled together to Kilinochchi to inquire as to the circumstances of Jeyakumari's arrest.

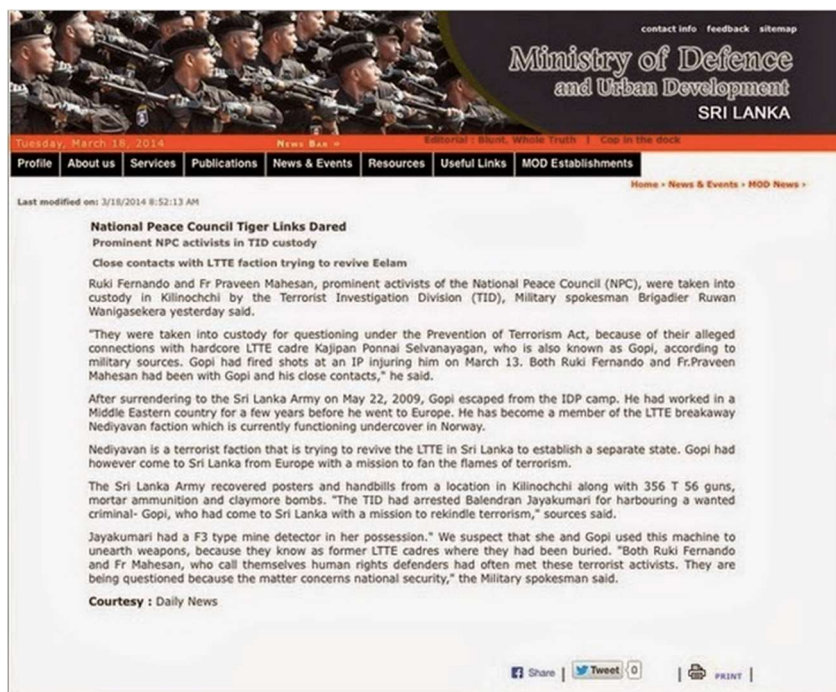
On reaching Kilinochchi, Ruki and Fr. Praveen were arrested under the PTA. The Ministry of Defence declared that Ruki and Fr. Praveen had 'tiger links', alleging 'connections with [a] hardcore LTTE cadre' named Gobi.<sup>60</sup> An article posted on the Ministry of Defence website stated: 'Investigations have revealed that Mr. Fernando and Father Praveen had been in Killinochchi engaging with persons connected to Gobi.'<sup>61</sup>

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<sup>59</sup> *How can we have peace?*, Sri Lanka Campaign for Peace and Justice (Mar. 2015), page 4, <http://www.srilankacampaign.org/how-can-we-have-peace-new-report-says-survivors-needs-must-drive-sri-lanka-reconciliation/>

<sup>60</sup> See image below. *See also Gota ordered to delete the libelous statement on activists* (Mar. 19, 2014), <http://www.srilankaguardian.org/2014/03/oops-gota-ordered-to-delete-libelous.html>.

<sup>61</sup> *Misconceptions on detention of Balendran Jayekumari* (Mar. 19, 2014), [http://www.defence.lk/new.asp?fname=Misconceptions\\_on\\_detention\\_of\\_Balendran\\_Jayekumari\\_20140318\\_07](http://www.defence.lk/new.asp?fname=Misconceptions_on_detention_of_Balendran_Jayekumari_20140318_07).



Article posted on MoD website, saved by CHRD on 18 March 2014

CHRD, together with 311 individuals and organizations, condemned the arrest as an attempt to silence their human rights activism.<sup>62</sup> TID officers questioned Ruki and Fr. Praveen harshly over several hours, denying them counsel and questioning them extensively on their involvement in sending information to the U.N. Human Rights Council in Geneva.<sup>63</sup>

Ruki and Fr. Praveen were released on March 19, 2014, following international outcry<sup>64</sup> and significant diplomatic pressure.<sup>65</sup> Jeyakumari was released on bail nearly a year later, but a criminal investigation remains pending before the Colombo Magistrate Court. CHRD filed a fundamental rights petition before the Sri Lankan Supreme Court contesting the legality of Jeyakumari's arrest and represents her in pending Magistrate Court proceedings.

<sup>62</sup> *Statement condemning the arbitrary arrest and detention of Human Rights Defenders, Ruki Fernando, Father Praveen Mahesan, victims and their families* (Mar. 19, 2014).

<sup>63</sup> *Ibid.*

<sup>64</sup> *See, e.g.,* Joint Statement by Human Rights Watch, Amnesty International, International Crisis Group, International Commission of Jurists, and Forum-Asia (Mar. 17, 2014), <http://www.hrw.org/news/2014/03/17/sri-lanka-free-prominent-rights-defenders>; FIDH Statement, <http://www.fidh.org/en/asia/sri-lanka/14941-sri-lanka-arbitrary-arrest-of-mr-ruki-fernando-a-human-rights-adviser-to> (Mar. 17, 2014), AHRC Statement (Mar. 17, 2014), <http://www.humanrights.asia/news/ahrc-news/AHRC-STM-045-2014>.

<sup>65</sup> *US Government Concerned Over Detention of Human Rights Defenders*, U.S. Embassy Press Release (Mar. 17, 2014), <http://srilanka.usembassy.gov/pr-17march14.html>.

As these stories indicate, human rights advocacy puts families of the disappeared and human rights defenders at risk of harassment and arbitrary detention under the PTA. TID officers have followed families of the disappeared after protests, taking pictures and visiting their homes, in an attempt to silence human rights activism.

Despite the change in government in January 2015, many families of the disappeared report continued harassment from CID and TID officials. For example, as discussed above, some TID and CID officials have threatened families not to participate in the Paranagama Commission or continue with their habeas corpus cases. These threats have continued after the January 2015 election. For example, in February 2015, human rights defenders reported that participants in workshops and community meetings in the north and east were subsequently interrogated by the CID and TID.

The PTA facilitates continued harassment, threats, and surveillance of human rights defenders. It must be repealed to prevent prolonged arbitrary detention without charge. Those currently detained under the PTA should be charged or released, and human rights defenders should be allowed to engage in legitimate advocacy for victims and survivors of human rights abuse. The government should ensure the safety and physical and mental well-being of those currently detained, including providing access to medical care and visiting rights with their families.

## **B. Staff Story: Sunthararaja Vathana on Families' Needs for Truth and Justice**

Stephen Sunthararaja is a well-known sociologist who had recently received an award in the United States. He worked at CHRD and lived in Colombo with his wife Vathana and three children (Winslow, Dilon, and Shelindra). On February 12, 2009, about ten members of the Special Task Force (STF) tried to force Stephen into a van as he was leaving CHRD's office in the evening. A nearby police officer and a colleague were able to prevent the STF members from taking Stephen, but the STF officers then requested that the police arrest him and take him to the Kollupitiya Police Station under the PTA. Soon thereafter Vathana received a telephone call stating in clear Tamil: 'even if you get Stephen released from police we will see that he is lifted again'.

Stephen was released on May 7, 2009, after the Magistrate Court in Colombo found no grounds to detain him (Case No. B330/09). After the hearing on 7th May, Vathana, Stephen, and their kids came with Mr. K.S. Ratnavale, CHRD's Director, to CHRD's offices. CID officers followed them from the court to CHRD, but Mr. Ratnavale assured Vathana not to worry, as the court had ordered Stephen's release. To take precautions, Vathana and Stephen decided that their

family would spend that night at her colleague's residence. The van of her colleague left CHRD's offices with Stephen, Vathana, and their three children in tow. On the way, they stopped at the Kollupitiya Police Station to collect Stephen's mobile phone, passport and bank books.

As they drove, suddenly a motorcycle swerved in front of their van, and a white van simultaneously pulled up alongside them. The two men on the motorcycle jumped down and grabbed the keys of the CHRD van, preventing them from driving away. Four men appeared from the nearby police station. All were armed, and one wore a military uniform. The uniformed person called Stephen out by name. Their daughter Shelindra, who was 4-years-old at the time, said to the officer: 'Uncle, my father. Please don't shoot.' The officer grabbed Stephen and dragged him into the white van, as Malini, her husband, Vathana, and the children watched. That is the last time anyone has seen Stephen.

Vathana filed inquiries with the Human Rights Commission and ICRC. She wrote six letters to President Rajapaksa but received no response. An unknown person extorted large sums of money, promising to provide information about Stephen. Stephen's disappearance led Vathana to start working at CHRD. She pushes on with her daily life so that her kids will do well in school, but there is not a day that she does not think about Stephen.

Around July 2015, Vathana wrote to President Sirisena demanding truth, justice, and redress for her husband's disappearance. Unlike his predecessor, President Sirisena responded to her letter in August 2015. President Sirisena stated that his government would provide for her children's education. While appreciating the time taken to reply, Vathana feels that the response did not address her primary concerns. She wants to know where Stephen is, first and foremost. She wants the perpetrators to be held accountable and to receive meaningful redress.

## **VII. CHRD's Habeas Corpus Litigation**

CHRD represents families of the disappeared in 21 habeas corpus cases currently pending before the Vavuniya and Mannar High Courts. Of these, 14 cases involve the disappearance of persons who surrendered to the Army in Mullaitivu on or around May 18, 2009 (herein, "May 2009 Surrender Cases"). The remaining 7 cases relate to abductions and disappearances by State security forces (Army, Navy, and police) before the last stages of the war ("Other Habeas corpus cases").

In each of these cases, families of the disappeared exhausted all avenues to trace their missing relatives without avail, filing inquiries with the police, Human Rights Commission, Grama Sevakas (village council), and the ICRC. In

each case, State Respondents filed nonresponsive objections to the habeas petition, failing to offer any coherent response to witness testimony implicating security forces in the disappearance. The State's responses demonstrate the impediments to pursuing truth and accountability in Sri Lanka within a purely domestic mechanism.

#### A. May 2009 Surrender Cases

CHRD represents 14 families of persons who surrendered to Army custody in May 2009 in habeas corpus litigation pending before the Sri Lankan High Courts:

1. Case No. HCV/Writ/507/13 [missing: *Selliah Vishwanathan*]
2. Case No. HCV/Writ/508/13 [missing: *Nadesu Muralitharan, wife, and 2 children*]<sup>66</sup>
3. Case No. HCV/Writ/509/13 [missing: *Ponnampalam Kanthasamy*]
4. Case No. HCV/Writ/510/13 [missing: *Sinnathurai Sasitharan*]
5. Case No. HCV/Writ/511/13 [missing: *Uruthiramoorthy Krishnakumar*]
6. Case No. HCV/Writ/515/13 [missing: *Kanthasamy Thushisankar*]\*
7. Case No. HCV/Writ/516/13 [missing: *Thiyagaraja Thinesh*]
8. Case No. HCV/Writ/517/13 [missing: *Sinnathamby Mahalingam, wife, and 3 children*]<sup>67</sup>
9. Case No. HCV/Writ/518/13 [missing: *Nadesamoorthy Vishnukumar*]
10. Case No. HCV/Writ/519/13 [missing: *Mahendran Murugathas*]
11. Case No. HCV/Writ/520/13 [missing: *Thangabalasingam Pushpambal*]
12. Case No. HCV/Writ/521/13 [missing: *Father Francis Joseph*]
13. Case No. HCV/Writ/525/14 [missing: *Sigvalingam Pathmalosini and husband*]
14. Case No. HC/Writ/2/15 [missing: *Kalimuththu Sajeevan*]

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<sup>66</sup> The petitioner in Case 508/13, Kanthasamy Ponnamah, is the mother-in-law of the disappeared Nadesu Muralitharan. In 2006, CHRD helped this same woman file a case about the disappearance of her son. See Case No. 42/06. Many in war-affected areas report two or more disappearances in their families. The inadequacy of trauma counseling in this context is particularly problematic.

<sup>67</sup> After the war, Sinnathamby Mahalingam's mother, the petitioner in his habeas case, was taken to Ananthakumaraswamy camp. She and several young girls were stripped naked, insulted, and abused by military, police, and paramilitary personnel. After great effort, she was released on June 6, 2009 due to her old age. Sexual violence is another documented aspect of the war that requires accountability.

While each case is unique, the underlying story below is common to 13 of the 14 cases.<sup>68</sup> Each of the missing persons surrendered to the Sri Lankan Army in the Wattuvahal Army Camp at Mullaitivu on or around May 18, 2009. Relatives and acquaintances witnessed the surrender and have provided affidavit evidence of the following:

Families were displaced from one place to another as the fighting between the LTTE and Sri Lankan government forces intensified. Around mid-May, each family above made the decision to cross over to government-held territory. On May 18, 2009, Sri Lankan security forces made public announcements calling all LTTE cadres to surrender, with a promise to grant general amnesty to those who did. The announcements stated that those who served for even one day should surrender into Army custody. Thereafter, each of the missing persons in the cases listed above surrendered into custody of the 58th Division of the Sri Lankan Army. In several cases, family members gave the individual a small parcel containing clothing, money, and personal effects. Father Francis Joseph and three other priests facilitated the surrender, as they spoke fluent English and could communicate with the Army. Army officers separated those who surrendered into a separate line, while their families were asked to join a civilian queue.

The Army then took the missing persons into an enclosure fortified by barbed wire. Their families could see them from a short distance away. Their families and acquaintances witnessed the missing persons board CTB buses, as directed by the Army. Army personnel told the families that the missing persons would be taken for questioning and would reunite in an IDP camp. However, in each case, this was the last the families saw of the missing persons.

Among the missing were two entire families, including children as young as three, who obviously were not LTTE fighters. (*See pictures, below.*)

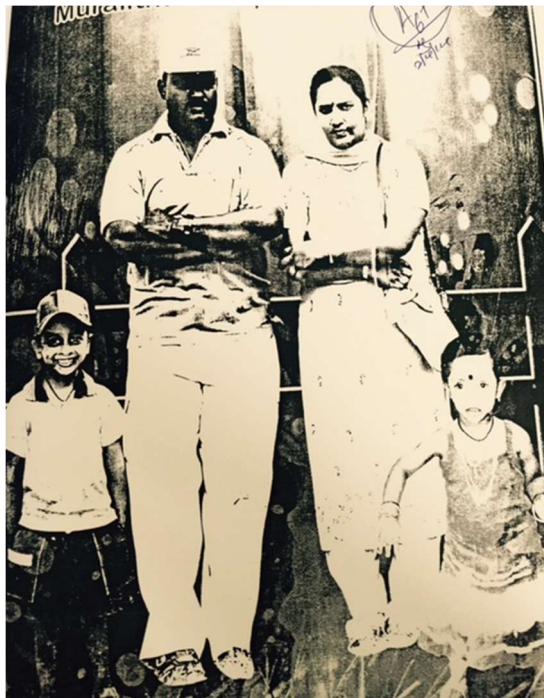
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<sup>68</sup> Kanthasamy Thushisankar's disappearance, on May 16, 2009, differs slightly from the rest. He was hit by an artillery shell and could no longer walk. When the Army captured Mullaivaikkal, they ordered everyone to walk toward the Wattuvahal Army Camp in Mullaitivu. On May 16, 2009, Thushisankar's mother pleaded with Army officers to transport her son in a tractor, since he could not walk. The Army volunteered to transport him to Mullaitivu for medical treatment. When Thushisankar's mother and father reached Wattuvahal, they were told to board a CTB bus toward an IDP camp in Vavuniya. Before they boarded the bus, they could see Thushisankar in a tractor being driven by members of the 58th Division of the Sri Lankan Army, along with about 20 other injured persons. This was the last time they saw their son.





*Missing Persons: Mahalingam Sivajini (b. 1970), Sinnathamby Mahalingam, alias Illamparithi (b. 1965), Mahilini (b. 1999), Tamiloli (b. 2001), and Elilini (b. 2006)*



*Missing Persons: Nadeshu Muralitharan, alias Majeed (b.1972), Muralitharan Krishnakumary (b. 1979), Muralitharan Sharujan (b. 2004), Muralitharan Apitha (b. 2006)*

The families filed complaints and inquiries with the ICRC, Grama Sevaka (village council), Human Rights Commission of Sri Lanka, and the police. Many of them testified before the LLRC and the Paranagama Commission. They filed petitions for writ of habeas corpus in the Vavuniya High Court and included

affidavits from eyewitnesses who saw their loved ones in Army custody. They named as respondents the Army Commander and the Commander of the 58th Division of the Army. Some petitions also named the Attorney General and the Human Rights Commission of Sri Lanka.

The Army Commander and 58th Division Commander filed Objections in each of these 14 cases. Their Objections are revealing: they fail to address eyewitness testimony attached to each complaint demonstrating that the missing person was last seen in Army custody. The Objections deny that the person had ever been arrested, detained, or in the custody of the Army and asserted that at all times, the Army “acted lawfully and ensured the safety and welfare of the civilians who came to the areas liberated by the Army.” In some petitions, the Army Respondents further asserted that “at all times Sri Lankan Armed Forces followed the applicable international norms governing warfare.”

For example, on August 12, 2014, the Army Respondents in Case No. 525/2014 filed Objections, stating “that the corpus never surrendered to or otherwise came into the hands of the Army.” They further averred that:

- i. ‘Sri Lanka Armed forces never fired on safe zones as alleged by the petitioner.’
- ii. ‘It is specifically denies that the Sri Lanka Air force planes dropped bombs indiscriminately on civilians.’
- iii. ‘At all times Sri Lanka Armed forces followed the applicable international norms governing warfare.’
- iv. ‘LTTE terrorists had used civilians as human shields and also forcibly conscripted them for combat purposes and this is confirmed by the UN report annexed hereto as R1.’
- v. ‘In order to avoid such brutal treatments by the LTTE terrorists from January 2009 civilians regularly escaped from the LTTE held areas to the areas liberated by the Army.’
- vi. ‘To prevent the exodus of civilians to the areas liberated by the Army, LTTE had deployed patrols to intercept the fleeing civilians and executed the captured escapees as deterrent to the others and that they also fired artillery rounds regularly into likely escape routes of civilians and due to these acts, a large number of civilians were killed. LTTE sympathizers attribute these deaths to the Sri Lanka Army.’
- vii. ‘A substantial number of LTTE cadres and civilians fled to India by sea and later illegally migrated to West a[re] presently domiciled in Western countries. However their relatives pretend that they were abducted and killed by the Army.’
- viii. ‘In order to escape the brutal acts of LTTE terrorists as described above, by 18th May 2009 over 200,000 civilians had come to the areas liberated by the Army and on arrival they were immediately sent to IDP centers in Vavuniya where they were well looked after.’

- ix. 'In terms of UN Guidelines on IDPs international agencies such as UNHRC, ICRC etc were given free access to IDP centers in Vavuniya. Photographs confirming this are annexed hereto marked as R-2, R-3, R-4, R-5, R-6, R-7, R-8 and R-9.
- x. Throughout the Humanitarian Operation the Sri Lanka Army had observed IHL and applicable international norms with regard to the treatment of civilians and surrendered/captured LTTE cadres and no person was killed after he had come into the hands of the Army.'
- xi. 'In many instances the so called disappeared cases are either LTTE terrorists who died during confrontations with the Army or the persons who had fled the country illegally and presently domiciled in Western countries.'

Not only are several of these objections contrary to the available evidence (for example, the ICRC denied that it had free access to IDP centres in Vavuniya from July 2009 to October 2009)<sup>69</sup>—they do not respond to the specific allegations made in the habeas petition. Blanket denials and claims that many 'LTTE terrorists' died in confrontations with the Army are non-responsive when the available eyewitness testimony indicates that the missing person was last seen in Army custody.

Most of these 14 habeas corpus cases are currently pending in the Vavuniya High Court.<sup>70</sup> The Vavuniya High Court sent three of the five first-filed cases (case numbers 507/13 to 511/13) to the Mullaitivu Magistrate Court for non-summary criminal inquiries. The Mullaitivu Magistrate has heard evidence from CHRD's clients and witnesses, and the State attorneys will now have an opportunity for cross-examination. Once there is a ruling, the case will be returned to the Vavuniya High Court.

It bears mention that nearly all fourteen families that CHRD represents in the May 2009 surrender cases have received threats by anonymous persons, who have harassed the families to withdraw their cases.

## **B. Other Habeas Corpus cases**

In addition to the May 2009 surrender cases, CHRD represents other families of the disappeared in habeas proceedings. In each of the cases discussed below, families filed complaints with the ICRC, Human Rights Commission of Sri Lanka, and the police before filing petitions for habeas corpus in Sri Lankan courts. In each of these cases, the State's Objections in the habeas corpus case

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<sup>69</sup> CHRD has an ICRC letter dated October 29, 2009 on file in Case No. 507/13 that states: 'ICRC had a restricted access and a limited activity since early July 2009'. The undated photographs annexed in R-2 through R-9 to the Army Respondents' Objections, which depict ICRC staff in various IDP camps, do not prove otherwise.

<sup>70</sup> Case No. 2/15 is pending before the Mannar High Court.

fail to respond to allegations and evidence that the missing person was last seen in State custody. In many of these cases, the families faced threats and pressure to drop their cases.

Case No. HCV/writ/41/06 [missing: *Kanthasamy Ellarangan*] and Case No. HCV/writ/42/06 [missing: *Kanthasamy Ravichandran*]

Two men went missing in 2006 after they were last seen being questioned by the Army at the Omanthai Army Checkpoint, between LTTE-held territory and government-held territory. In both cases, the Army Respondents filed Objections to the habeas petitions, stating that they had done a “customary search” and allowed the missing persons to proceed. In Case No. 41/06, the family called the phone number belonging to their son more than two years after he went missing. Someone claiming to be from the CID picked up the phone and demanded Rs. 5 million for the son’s release. The family pleaded with the person to reduce the ransom amount, as they lacked the funds, but the person would not agree.

Case No. HCV/Writ/527/14 [missing: *Annamalai Ananthan*]

29-year-old Ananthan went missing in June 2006 in Vavuniya. His parents received a letter signed by the Administrative Officer for the Commandant of the 23rd Brigade Headquarters in Vavuniya, stating that Ananthan had been arrested on June 1, 2006, and that a sum of 30,000 / = in cash, Gold jewellery, and a Victor [motorbike] key were being held in police custody. In response to the family’s habeas petition, the Army filed Objections denying that the missing person had ever been arrested, abducted, or detained by the Army. The Objections further questioned the authenticity of the letter produced by the family, stating that it was a fabricated document. The Objections further argued that the Petitioner had failed to identify the specific brigade involved, and that the details provided were insufficient to identify who was allegedly responsible.

Case No. HCV/Writ/524/14 [missing: *Anton Joseph Manivannan*]; Case No. HCV/Writ/526/14 [Murugaiah Rubakanthan]

Two men disappeared on January 16, 2008 in Vavuniya. They had been called in for questioning at the Karuveppankulam Army camp and did not return that evening. The next morning, a sentry at the Army camp told the wives of the missing persons that the two were being interrogated by his supervisor, Suresh, who would release them soon. Thereafter, Suresh came out with the commanding officer of the camp, told the women that the Army had not arrested anyone, and chased the women away. The women filed complaints before the Vavuniya police, and the police initiated a magisterial inquiry. However, the inquiry stalled when the Army refused to provide information to

the police. In filing Objections to the two habeas petitions, filed on August 8, 2014, the Army Commander averred that the two men had never been arrested or detained by the Army, and that the petitioners were 'taking advantage of the court process to level unsubstantiated allegations against the Army which are fabricated and/or based on hearsay'.

Case No. HCV/Writ/3/15 [missing: *Antony Ranjan*]

27-year-old Antony Ranjan went missing on March 6, 2008 in Mannar. Two men came on a three-wheeler asking Ranjan to accompany them on a fishing trip for work. The next day, his employer called, stating that Ranjan had been taken by Navy officials at Oolaithoduwai junction, who took him to the Navy camp at Tharapuram. Ranjan's wife Jeyakumary filed a complaint with the Mannar police, who launched a magisterial inquiry, but the Navy denied having taken Ranjan into custody. In July 2008, TID officers searched Jeyakumary's home. When they came out, they saw four men with their faces covered by helmets in a blue-colored Jeep outside. Suddenly, Ranjan lifted his helmet, and the family cried out when they saw him. The Jeep quickly drove away, and that was the last the family saw of him.

Since 2008, there has been no progress in the Mannar magisterial inquiry case. The judge was transferred, and the Navy has repeatedly threatened Jeyakumary not to continue with the case. Petitioner stopped going to court due to fear of Navy officers, who often threatened that what happened to her husband would also happen to Jeyakumary and her other family members. In 2015, Petitioner filed a habeas petition before the Mannar High Court, supported by affidavit testimony of another person who saw Ranjan's face during the TID's visit in July 2008. (The Navy Respondents have yet to file their Objections.)

Case No. HCV/Writ/1/2015 [missing: *Amirthanathan Anantharaja*]

In August 2008, Navy officials in Mannar abducted 44-year-old Amirthanathan in a white van. Earlier that day, Navy officers had asked him to bring two bottles of arrack to them later that night. When he delivered the arrack, four men pulled him a white van and sped away to the Vangalaipaadu Navy Camp. Amirthanathan's mother-in-law had followed Amirthanathan from a distance and witnessed the white van abduction. A parish priest went on the family's behalf to the Vangalaipaadu Navy Camp, but the officers there denied that anyone had been brought to the camp. In 2015, Amirthanathan's wife filed a habeas petition before the Mannar High Court. (The Navy Respondents have yet to file their Objections.)

### C. Reflections on CHRD's Habeas Corpus Litigation

CHRD files habeas petitions in an attempt to engage with the domestic process. However, to date, these cases have not brought families of the disappeared closer to the truth.

Almost all of CHRD's habeas corpus clients have been harassed by security forces. This is not a new phenomenon: several of CHRD's past habeas corpus cases were closed, despite substantial evidence of State culpability, after security forces transferred the case to a more favorable venue and harassed families not to participate in proceedings.

For example, in 2004, CHRD filed 45 habeas corpus petitions in the Jaffna High Court on behalf of the disappeared in Navatkuli, Kaithady, Ariyalai, Pasaiyoor, and Gurunagar areas of the Jaffna peninsula. These cases followed a 2003 fact-finding mission in which CHRD lawyers documented 160 complaints of disappearances from the 1996-1997 period. Of the 45 cases, 24 persons disappeared on 19 July 1996 during a cordon operation conducted by Army Lt. Col. Duminda Kepetiwelane, the commanding officer of the Navatkuli Army Camp. The cases were granted leave to proceed before the Chavakachcheri Magistrate Court for non-summary inquiries. In 2007, the Chavakachcheri Magistrate Court determined that there was substantial evidence to prove that security forces were behind many of the enforced disappearances that took place in 1996 in the Jaffna peninsula. Thereafter, the cases were transferred to the Anuradhapura High Court, after the Army Respondents alleged that they could not get a fair trial in Jaffna. Families of the disappeared initially showed great interest and travelled to Anuradhapura for proceedings. However, they faced harassment by unknown persons, and as the fighting in the Vanni increased, they could not travel to Anuradhapura. In late 2010, the families and their attorneys did not turn up to court for a hearing, and the Anuradhapura High Court dismissed all 45 cases on procedural grounds. Meanwhile, the families have not received compensation and are no closer to learning the truth about their disappeared loved ones.

Even where cases do proceed, CHRD's habeas corpus litigation shows that security forces do not respond to concrete evidence of State complicity. As discussed above, Objections by the Army and Navy Respondents in CHRD's habeas corpus cases are uniformly non-responsive to concrete allegations and evidence suggesting State responsibility for the disappearance.

The State is not merely non-responsive in Tamil cases or in cases involving wartime surrender. Sandhya Egnalikoda has been campaigning for answers about her disappeared husband Prageeth, a cartoonist for Lanka e-News, since he went missing before Presidential Elections in 2010. In early August 2015, new revelations emerged pointing to Army responsibility. However, on 18

August 2015, Tamil newspaper Sudar Oli reported that Prime Minister Ranil Wickremesinghe had directed the CID to stop the investigation, due to military pressure.<sup>71</sup> According to the article, high-ranking military officials informed CID that they could not hand over the specific officer in question because it would risk revealing military secrets and threaten military cohesion:

If the officer in question is arrested, information in relation to a special military intelligence unit which formed during the war will come out. This special military intelligence unit consisted of nearly 650 persons and was formed by former military commander Sarath Fonseka.

After the end of the war, this military intelligence unit acted as Rajapaksa's military unit. One of its activities was to make Egnalikoda disappear.

This unit has been involved in many similar activities. If information is revealed, there will be disturbances. Revealing information will also cause conflicts within the military, undermining military unity/ cohesion, as occurred in relation to the Millenium City incident.

Under the supervision of the former Defence Secretary Gotabhaya Rajapaksa, there are a few officers, including Major General Jagath Jayasuriya and Brigadier Vanninayake, who were also part of this special military intelligence unit. In this context, the Prime Minister ordered the CID to stop the investigation in relation to Prageeth Egnalikoda.<sup>72</sup>

Sandhya has been a vocal campaigner for truth and justice for families of the disappeared. She has met with high-ranking diplomats and officials, and there is widespread sympathy for her case among the Sinhalese polity. While Prageeth's case appears to be moving forward, the allegations made in the Sudar Oli newspaper must be fully investigated. If the allegations are true, it means that Sri Lankan security forces erect roadblocks to truth and justice at the highest levels of government.

Any mechanism to trace the missing must learn from the roadblocks encountered by CHRD. Even where families have concrete evidence identifying the perpetrator or circumstances of the disappearance, they are unable to get relief in Sri Lankan courts. Genuine progress in tracing the missing must

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<sup>71</sup> *PM to stop Prageeth investigation due to military pressure* [in Tamil], Sudar Oli (Aug. 18, 2015), p. 4.

<sup>72</sup> *Ibid.*

account for structures that thwart effective relief through Sri Lanka's justice system.

Past disappearances commissions have suggested appointing a Special Prosecutor, independent from the Attorney General, to investigate disappearances and prosecute perpetrators where sufficient evidence is found. This would be an important start: learning from CHRD's habeas litigation, the Special Prosecutor should issue summons to demand meaningful responses from the Army, Navy, CID, and TID. Those who fail to provide responsive information should face disciplinary action. Finally, there should be international technical assistance and oversight to ensure that cases proceed without interference or harassment.

## **VIII. CHRD's Litigation in the Mannar Mass Grave Case**

CHRD represents families of the disappeared in the Mannar mass grave case, currently pending before the Mannar Magistrate Court (Case No. B 768/2013).

On December 20, 2013, construction workers of the National Water Supply and Drainage Board were digging trenches to lay water pipes adjacent to a road in Thiruketheeswaram village, Mannar, when they discovered skeletal remains. The workers informed the Mannar Police, who launched a magisterial inquiry.<sup>73</sup> In the excavations that followed, skeletal remains of 83 individuals were found at the site.

CHRD represents families of the disappeared from Mannar, whose relatives may be among those buried in the Mannar mass grave. Victims and survivors still searching for their disappeared relatives need to credibly determine who the buried individuals in the grave are, whether government security forces, paramilitaries, or the LTTE killed them, whether they were tortured, and how and when they were killed.

The Mannar case remains in the inquiry phase before the Mannar Magistrate Court, but there are several reasons for CHRD to question the State's commitment to finding the truth or seeking justice for families of the disappeared. This section discusses the status of the Mannar case and roadblocks to truth and justice put forth by the State.

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<sup>73</sup> Sri Lanka to probe mass grave in former war zone, *The Hindu* (Dec. 23, 2013), <http://www.thehindu.com/news/international/south-asia/sri-lanka-to-probe-mass-grave-in-former-war-zone/article5490464.ece> (last visited Nov. 10, 2014); Sri Lanka Police commence investigation into human skeletal remains unearthed in Mannar, Colombo Page (Dec. 21, 2013), [http://www.colombopage.com/archive\\_13B/Dec21\\_1387640318JV.php](http://www.colombopage.com/archive_13B/Dec21_1387640318JV.php) (last visited Nov. 10, 2014),



## A. Summary of Case Proceedings

On December 22, 2013, Mannar Magistrate Judge Ananthi Kanagaratnam issued an order to excavate the site, located in the Manthai division of Thiruketheeswaram village in Mannar.<sup>74</sup> On December 23, 2013, Judge Kanagaratnam visited the suspected crime scene with Dr. D.L. Waidyaratne (Consultant Judicial Medical Officer, M.D. in Forensic Medicine), police officers, and Medico Legal Officers. The objective of the preliminary visit was to ‘study the location and evaluate the potential extent of the excavation with a view to plan out the excavation process. It was decided that the medico legal investigation of the suspected mass-grave would consist of two phases. Phase I: Excavation, recovery of human remains, preservation, transportation, and safe storage for further examination. Phase II: Forensic anthropological and forensic pathological examination of recovered human remains, further investigations and reporting to Courts.’<sup>75</sup>

- Phase I: Excavation took place between December 23, 2013 and March 5, 2014. On January 18, 2014, the BBC interviewed Dr. Waidyaratne, who said that he was “very much worried” that no signs of clothing or human-made artifacts had been found in the mass grave.<sup>76</sup> Several skeletonized remains were recovered, packed for preservation in boxes, labeled and sealed by Dr. Waidyaratne, and transported under court order to the Teaching Hospital in Anuradhapura for storage and further examination.<sup>77</sup> Upon information and belief, the excavated remains are still located in Anuradhapura Teaching Hospital.
- Phase II: The forensic analysis of excavated remains has yet to commence. This process will take place at the Anuradhapura Teaching Hospital with the participation of experts in Forensic Medicine and

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<sup>74</sup> Dr. D.L. Waidyaratne, *Report on the Excavation of the Suspected Mass Grave in Manthai, Mannar*, Case No. B 768/2013 (Oct. 23, 2014).

<sup>75</sup> *Ibid.*

<sup>76</sup> Charles Haviland, *Sri Lanka mass grave yields more skeletons*, BBC News (Jan. 18, 2014), <http://www.bbc.com/news/world-asia-25782902> (last visited Nov. 10, 2014).

<sup>77</sup> Dr. D.L. Waidyaratne, *Report on the Excavation of the Suspected Mass Grave in Manthai, Mannar*, Case No. B 768/2013 (Oct. 23, 2014) (“Skeletal remains suspected of Human origin were packed in 82 boxes, labeled and sealed by the Consultant Judicial Medical Officer, before the Honorable Magistrate Mannar and transported on Court order to Teaching Hospital, Anuradhapura for storage and further examination.”); Dr. D.L. Waidyaratne, *Application with regard to the forensic examination of skeletal remains recovered from the excavation of suspected mass grave at Manthai, Mannar*, Case No. B 768/2013 (May 23, 2014) (“We have completed the excavation phase of the investigation concerned and the 81 boxes containing skeletal remains have been duly transported and safely stored in the medico legal morgue of the Teaching Hospital Anuradhapura.”).

Pathology, under the supervision of Dr. D.L. Waidyaratne, who will submit his findings to the Court.<sup>78</sup>

In 2015, Judge Alex Rajah took over proceedings from Magistrate Judge Kanagaratnam. At present, families of the disappeared in Mannar lack any clarity on what time period the mass grave relate to, and it is not clear what (if any) testing has been done on the exhumed skeletal remains. Families are also concerned about the integrity of the exhumed remains of the 83 skeletons, which are currently being stored in the Anuradhapura Teaching Hospital.

For context, it is important to consider the the Matala mass grave case, involving over 150 skeletons exhumed in 2013. Lab results from a foreign lab suggested that the Matala grave dated to the 1950s, despite contemporaneous physical artifacts found at the site that pinpointed the grave to the late 1980s. The forensic archaeologist in that case, Raj Somadeva, questioned the lab results, explaining that there was no transparency as to what sample was sent for testing, whether it had been contaminated, and whether proper chain of custody information had been preserved.<sup>79</sup> Doubts as to chain of custody meant that there could be no assurance that the bone sent for testing even came from the Matala mass grave.

For this reason, and learning from the political roadblocks that hampered the Matala investigation, CHRD is seeking the appointment of an international expert in forensic archaeology and forensic anthropology to assist the Court in leading and overseeing all aspects of the investigation of the Mannar mass grave, including in the preparation of samples for testing.

## **B. Roadblocks to Truth and Justice**

### **1. No archaeology report dating the mass grave**

To date, there has been no forensic archaeology or forensic anthropology report dating the mass grave. Two junior members of the Department of Archaeology were assigned to produce a report. However, their mandate was limited to assisting the JMO and CID in *excavating* the site—not to arrive at a date estimate for the grave.<sup>80</sup> By contrast, in the Matala mass grave case, the Matala Magistrate Court asked Professor Raj Somadeva early in the excavation process to arrive at a date estimate for the grave. Likewise, in the Matala case, a forensic archaeology team was involved in the excavation process and dated

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<sup>78</sup> Dr. D.L. Waidyaratne, *Report on the Excavation of the Suspected Mass Grave in Manthei, Mannar*, Case No. B 768/2013 (Oct. 23, 2014).

<sup>79</sup> Testimony of Raj Somadeva before Presidential Commission of Inquiry on Matala (Nov. 19, 2014).

<sup>80</sup> Archaeology report [in Sinhala], Case No. B 768/2013 (May 27, 2014).

the grave based on physical artifacts found at the gravesite.<sup>81</sup> By contrast, the archaeologists in the Mannar case were invited *after* CID and the JMO had already begun excavation, raising serious questions as to whether physical artifacts were properly preserved for analysis.

In August 2014, the CID informed the Court that it had appointed an expert from the Geology Department to analyze saliva, soil, calcium, and phosphate samples recovered from the site, and that someone from the Atomic Energy Department was reviewing metal fragments also found at the site.<sup>82</sup> International forensic experts inform CHRD that it is quite unusual to invite analyses by a Geologist and Atomics expert before mandating a forensic archaeologist / anthropologist to determine the age of the grave.

On June 18, 2015, Professor Nawaratne submitted a geology report recommending the Court 'to send [the samples] to a foreign laboratory for analysis'.<sup>83</sup> Based on conversations with experts in the field, CHRD believes that it is premature to send samples to a lab (foreign or otherwise) for testing until a forensic archaeologist and forensic anthropologist determine the relative age of the grave. Moreover, drawing lessons from the Matale experience, there should be oversight of the sampling process, to avoid contamination and ensure proper chain of custody. A foreign expert could help bring greater transparency and credibility to the process from start to finish.

## 2. The 'ancient cemetery' hypothesis

One controversy that has emerged is whether the Mannar gravesite is a cemetery, instead of a mass grave. On March 7, 2014, Director General of the state-run Department of Archaeology, Senerath Dissanayake, told Reuters that the bodies had been "buried systematically," indicating that the site was in fact a graveyard that was about 50 years old.<sup>84</sup> Police spokesman SSP Ajith Rohana stated on March 9, 2014: 'We decided to halt the excavations as we were uncertain whether there was a grave site prior to the road being constructed.'<sup>85</sup>

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<sup>81</sup> Testimony of Raj Somadeva before Presidential Commission of Inquiry on Matale (Nov. 19, 2014); Raj Somadeva, Human Skeletal Remains found at the District General Hospital Premises in Matale: The Report on Forensic Archaeology, Case No. B 1810/2012 (2013).

<sup>82</sup> Report from Criminal Investigation Division [in Tamil], Case No. B 768/2013 (Aug. 16, 2014).

<sup>83</sup> Report of Professor Nawaratne, Case No. B 768/2013

<sup>84</sup> Shihar Aneez, *Sri Lanka says suspected wartime mass grave is an old cemetery* (Mar. 7, 2014), <http://www.reuters.com/article/2014/03/07/us-srilanka-rights-grave-idUSBREA261FT20140307> (last visited Nov. 10, 2014).

<sup>85</sup> *Mass Graves raise suspicions*, Sunday Leader (Mar. 9, 2014), <http://www.thesundayleader.lk/2014/03/09/mass-graves-raise-mass-suspicions/> (last visited Aug. 21, 2015).

On March 10, 2014, the state-run English Daily News quoted Dissanayake as stating that a cemetery had existed at that site between 1940 and 1953.<sup>86</sup>

However, in March 2014, the respected citizen journalism site Groundviews obtained survey plans for the area from 1955. The plans did not record the existence of any cemetery.<sup>87</sup> Looking at official survey documents from 1954, 1955, and 1961, Groundviews determined that the gravesite was recorded only as featuring “high jungle and a masonry well,” and concluded, “adjacent lots also show no record of a cemetery or burial grounds.”<sup>88</sup> As Groundviews reported:

P.Plan S 677 of Thirukethiswaram Village, does not record the existence of any cemetery during the time of the survey, or before. The lots in the area are explained in detail in the official survey documents from 1954, 1955 and 1961.<sup>89</sup>

Further, on May 21, 2014, S. Martin Dias, Chairman of the Mannar Pradeshiya Sabha (local council) submitted a letter to the Court through CHRD, stating that there were no local government records of a cemetery in that area. In response, on July 20, 2014, the CID sent a notice to Dias asking him to come in for questioning at the ‘Fourth Floor’—i.e., CID headquarters in Colombo. CHRD objected that the CID would have to record the statement at the Pradeshiya Sabha, and the Court agreed. The CID took a statement from Dias. Dias was afraid for his security but again affirmed that there were no records of a cemetery in that area.

CHRD brought these land records and local government records to the court’s attention, and they are now part of the court record.

There are additional reasons to question the ‘ancient cemetery’ hypothesis. The gravesite is situated very close to the Thiruketheeswaram temple, which has stood in that place for at least many hundreds of years. As Magistrate Judge Alex Rajah noted in his August 7, 2015 order, Hindu custom would prevent a cemetery or burial ground from being built so close to the temple. Given the

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<sup>86</sup> Chaminda Perera & S. Kathiragamathamby, *Mass Grave? No, Graveyard – Archaeologists*, Daily News (Mar. 10, 2014), <http://www.dailynews.lk/local/mass-grave-no-graveyard-archaeologists> (last visited Nov. 10, 2014).

<sup>87</sup> *From mass grave to cemetery: Questioning the claims in Mannar*, Groundviews (Mar. 12, 2014), <http://groundviews.org/2014/03/12/from-mass-grave-to-cemetery-questioning-the-claims-in-mannar/> (last visited Nov. 10, 2014) (survey plans enclosed).

<sup>88</sup> *Ibid.*

<sup>89</sup> Area residents did not recall any cemetery in the area since they moved there in 1970. See Shihar Aneez, *Sri Lanka says suspected wartime mass grave is an old cemetery* (Mar. 7, 2014), <http://www.reuters.com/article/2014/03/07/us-srilanka-rights-grave-idUSBREA261FT20140307> (last visited Nov. 10, 2014).

age of the temple and the condition of the bones, it is also not possible that the cemetery pre-dated the Thiruketheeswaram temple.

### 3. The case of the missing well

On October 27, 2014, Judge Kanagaratnam held a hearing on the Mannar case. She received the JMO report filed by Dr. Waidyaratne and ordered a sealed well near the mass grave, alleged to contain additional skeletons, opened. At the subsequent hearing on January 26, 2015, CID officers told Judge Kanagaratnam that they could not find the well. Mr. Puvitharan asked for a site visit and subsequently went with the police and community elders to identify the well.

On March 16, 2015, after taking over the case, Magistrate Judge Alex Rajah granted permission to excavate the well sometime between April 6 to April 10, 2015.<sup>90</sup> This date was pushed back several times. Surveys and excavation were finally scheduled for August 18-20, 2015 but were postponed again when the CID failed to appear in Mannar for the August 18 hearing. At the rescheduled hearing on August 26, 2015, the CID told the Court that it was not ready to survey or excavate the well and asked for additional time. Judge Rajah rejected this request and ordered the Survey Department to visit the site.

Shortly after that hearing, the Survey Department located the missing well, precisely where land records had suggested it would be. CHRD staff monitored the survey and photographed clear evidence of a well approximately 3 meters in diameter and roughly 1 foot thick. As only 25 percent of the well was visible, the Court ordered the CID to make arrangements to clear the brush around the remaining 75 percent of the well by August 28, 2015 to prepare for excavation.

After months of denial and obstruction by the Police and CID, it is now clear that the well exists.

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<sup>90</sup> *Permission granted to excavate the well located at the premises of mass grave*, Global Tamil News (Mar. 16, 2015), <http://www.globaltamilnews.net/GTMNEditorial/tabid/71/articleType/ArticleView/articleId/117662/language/en-US/Permission-granted-to-excavate-the-well-located-at-the-premises-of-mass-grave.aspx> (last visited Mar. 20, 2015); *Permission granted to exhume suspected mass grave well*, Tamil Diplomat (Mar. 17, 2015), <http://tamildiplomat.com/permission-granted-to-exhume-suspected-mass-grave-well/> (last visited Mar. 20, 2015).





*CHRD Pictures of well surveyed on August 26, 2015*

#### 4. The proposal to send samples to ‘Smith University’

On July 6, 2015, the CID requested foreign assistance in analyzing the remains found in the Mannar mass grave. In a submission to the Court, the CID requested permission to send samples to “Smith University” in the United States but stated that it lacked the funds to do so.

CHRD filed a motion on August 5, 2015, asking the Court to invite an international forensics team with the requisite credentials in forensic analysis of skeletal remains to oversee all aspects of the investigation, including the preparation of samples for testing. CHRD’s motion highlighted the problems in the Matala mass grave case—where the lack of transparency regarding sample preparation and chain of custody called into question test results obtained from a U.S. lab.

On August 7, 2015, the court ordered the CID to send the samples to “Smith University” or to invite international forensics experts to assist with the analysis.

CHRD made a submission before the Court on August 26, 2015, stating that it was not clear what institution “Smith University” refers to. Smith College is a ladies college in Massachusetts, and Johnson C. Smith University is a small college in North Carolina. Neither appear to have experts or expertise in forensic testing of skeletal remains. The submission reiterated the need to invite an international forensics team and recommended three suitable options from Peru, Argentina, and Guatemala.

In response to CHRD’s submission, the CID stated that it was merely suggesting the same institution that provided assistance in Matala—Professor Ubelaker of the *Smithsonian Institute*, who reviewed test results from a U.S. lab.

Ultimately, irrespective of what ‘Smith University’ refers to, it would be problematic to allow the CID to suggest an institution for sample testing without having to prove to the Court that it is competent to handle this type of analysis. The lack of transparency raises credibility concerns for any test results. The CID should be made to answer why it has suggested this institution and to prove that this institution has the requisite expertise in the forensic analysis of skeletal remains.

#### C. Reflections on CHRD’s Mass Grave Litigation

CHRD is pushing the Court to seek appointment of an international expert in forensic archaeology and forensic anthropology to assist the court in leading and overseeing all aspects of the Mannar mass grave investigation.

To date, the investigation of the Mannar mass grave has not met with international best practices. There is no assurance as to the integrity of the skeletons exhumed or that they have been stored in the Anuradhapura Teaching Hospital with appropriate chain of custody. It is deeply concerning that 83 bodies were exhumed without mandating a forensic archaeologist/anthropologist to determine the age of the grave. While critical evidence may already have been lost or destroyed, it is essential to invite an international forensics team to oversee the remainder of the investigation so that families of the disappeared can be one step closer to knowing the truth. The international team should work closely with in-country experts to build capacity and understand the necessary contextual background in undertaking this work.

There are three teams in the world that have the necessary expertise, all from Latin American countries that dealt with massive disappearances:

- The Peruvian Team of Forensic Anthropology [EPAF]
- The Argentine Forensic Anthropology Team [EAAF]
- The Foundation for Forensic Anthropology in Guatemala [FAFG]

One of these teams should be invited to Sri Lanka to lead the Mannar mass grave investigation.

Recently, Foreign Minister Mangala Samaraweera has stated that the government intends to create a missing persons unit with assistance from the ICRC. To be credible, any such missing persons unit will necessarily include a forensics component with oversight by international experts.<sup>91</sup> The forensics unit should start with investigating known mass graves, including the Mannar mass grave, to determine the time period of the grave, the identities of victims, the circumstances of death, and the perpetrators responsible. Support from the international community is critical—including from Latin American countries that have experience dealing with large-scale disappearances and mass graves, such as Peru, Argentina, and Guatemala.

## **IX. Conclusion and Recommendations**

In September, the U.N. Human Rights Council will convene in Geneva to assess the report of the U.N. OHCHR Investigation on Sri Lanka. The U.N. Working

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<sup>91</sup> Of the three organizations listed, there are some advantages with EPAF, which has experience both in investigating mass graves all over the world and in setting up missing persons units. EPAF is led by the former Chief Forensic Scientist for the International Criminal Tribunal for the former Yugoslavia, who later started and led the U.N. Office of Missing Persons in Kosovo.



Group on Enforced and Involuntary Disappearances is also expected to visit Sri Lanka. As the international community evaluates Sri Lanka's transitional justice framework, it is essential to take a close look at where the domestic system has failed in promoting the rights of victims to truth, justice, and redress. This report discusses CHRD's work on behalf of families of the disappeared and highlights roadblocks to justice.

CHRD's Director, Mr. K.S. Ratnavale states:

'CHRD files cases in Sri Lankan courts not expecting any real results—for this has not been our experience. Rather, we file these cases to demonstrate that our clients have exhausted all possible domestic remedies and have no recourse but to petition the international community for truth, justice, and redress.'

While it is encouraging that Foreign Minister Samaraweera wants to create a new missing persons unit with ICRC assistance, too many commissions and disappearances units have failed to achieve results in the past. The international community should not take the government's promises at face value. In order to be credible, any mechanism to trace the missing and identify those responsible must avoid the pitfalls encountered in CHRD's work.

### **CHRD offers the following recommendations:**

- The work of the Paranagama Commission should cease, but any new mechanism should start with the information gathered by the Paranagama Commission and probe much further.
- Recognizing the risk of re-traumatization, the roadblocks in domestic litigation, and the enormity of the disappearances problem, **any new mechanism to investigate disappearances must be credible.** Specifically, it should do the following:
  - Prioritize tracing the missing and identifying the person or group responsible, not on areas such as IHL that require significant outside expertise. While livelihood assistance is an important goal, the mechanism should not focus on such assistance at the expense of tracing the missing and identifying those responsible.
  - Focus on a narrow time period, perhaps working backwards in time intervals, to ensure that each set of cases is systematically investigated.

- Provide families of the disappeared with timely progress updates on the status of the investigation into their case.
- Appoint sufficient professionally trained Tamil translators, female investigators, and Commissioners to investigate complaints in a timely manner.
- Appoint Commissioners who have adequate contextual understanding of the events that led to the disappearances in question.
- Provide witness protection, including means for the Commissioners to review evidence *in camera*. Recognizing that witness protection is not merely an issue of enacting legislation but also one of implementation, any new mechanism should understand and work to address the structures that facilitate witness intimidation and harassment.
- Be independent from the Attorney General's Department.
- Appoint an international team of experts with requisite experience to lead the forensic investigation into pending mass graves cases in Mannar and Matala, consistent with international best practices. Specifically, it should appoint one of the three Latin American forensics teams that have the necessary expertise.
- Appoint international experts in a transparent manner, keeping the public informed as to their selection criteria and mandate and providing families of the disappeared with an opportunity to engage with the experts.
- Permit families of the disappeared to receive Certificates of Absence, rather than death certificates, to receive livelihood assistance without jeopardizing their legal claims.
- Address the gender and power dynamics that doubly marginalize war-affected wives and mothers of the disappeared.
- Provide comprehensive trauma counseling and psychosocial support to families of the disappeared, and in particular, war-affected women.
- Include technical assistance and oversight by international advisors to avoid political interference, witness tampering, and harassment.
- Appoint a Special Prosecutor, independent from the Attorney General's Department, to work with the missing persons

mechanism to gather admissible evidence and prosecute those responsible.

- The Special Prosecutor should be sufficiently independent from the government and security forces to be able to resist the significant pressure likely to be exerted to halt investigations of high-ranking military, police, or intelligence officials.
  - The Special Prosecutor should have demonstrated expertise in investigating disappearances. He or She should have no conflicts of interest with the matter under investigation. Conflicts of interest would include, for example, having served as an advisor to the current or any former government for the relevant times in question.
  - The Special Prosecutor, court, or commission should issue summons to demand meaningful responses from the security forces or armed groups, and it should discipline those who fail to provide responsive information to a summons.
  - The Special Prosecutor should work closely with international organizations, such as the ICRC, OHCHR, the U.N. Working Group on Enforced and Involuntary Disappearances, and the U.N. Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, in order to prevent political interference with the investigative process.
- The Sri Lankan government should engage in ***confidence-building measures to address its trust deficit with families of the disappeared***. Specifically, it should do the following:
- Criminalize enforced disappearance under Sri Lankan law in strict compliance with international standards,<sup>92</sup> and ratify the International Convention to Protect Persons from Enforced and Involuntary Disappearance.
  - Repeal the Prevention of Terrorism Act and ensure the protection of families of the disappeared and human rights defenders who engage in litigation and advocacy.
    - Release or charge those currently detained under the PTA or Emergency Regulations, taking into account the

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<sup>92</sup> Section 353 of the current Sri Lankan Penal Code criminalizes abductions, but this does not capture the crime of enforced disappearance under international law.

fact that many have been arbitrarily detained for prolonged periods without charge.

- Ensure the safety and physical and mental well-being of those currently detained, including providing access to medical care and visiting rights with their families.
  - Immediately release information under the government's exclusive control, including the names, dates of birth, and places of detention of those currently in custody of prisons, detention camps, refugee camps, and rehabilitation centres, and (if persons remain in custody) to permit regular access for their families.<sup>93</sup> It should grant the ICRC access to all persons currently in custody.
  - Release past reports of all domestic commissions of inquiry.
  - Follow through with recent promises to set up a tracing unit in coordination with the ICRC.<sup>94</sup>
  - Restrain the CID and TID from continued harassment of victims seeking truth and justice, and reform the security apparatus that allows such harassment to take place.
- In CHRD's advocacy on enforced disappearance, we have noticed that it is women who are left to negotiate and demand justice and accountability. Their agency in this struggle, despite significant threats to their physical security, needs to be recognized. Any mechanism put in place should be the result of **close consultation with those women who were most affected by the war in the north and east.**

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<sup>93</sup> CHRD notes that the Paranagama Commission requested this information from the Ministry of Justice and the Ministry of Defence, but neither complied with this request. See *SL Missing Persons Commission holds LTTE responsible for 60% of allegations*, *supra* note 20 ('The Commission had made written requests to the Ministry of Defense and Ministry of Justice to release to the Commission names of persons who were in custody of prisons, detention camps, refugee camps, and rehabilitation centers. While noting with regret that such requests had not been complied with, the Commission decided to notice the respective officers to appear before the Commission in terms of the powers vested in the Commission by the Special Presidential Commission of Inquiry Act.').

<sup>94</sup> This unit should examine the Family Tracing Unit, set up in partnership with UNICEF in December 2009 to trace missing children in the north. Of hundreds of cases received, the FTU could only trace a handful of missing children. See *Hope and uncertainty: the vital search for missing children in Northern Sri Lanka*, UNICEF (Jul. 12, 2011), [http://www.unicef.org/srilanka/Hope\\_and\\_uncertainty.pdf](http://www.unicef.org/srilanka/Hope_and_uncertainty.pdf). The FTU's remaining cases should be transferred to any new tracing unit set up with the ICRC—recognizing, of course, that the FTU only gathered cases of children in the north—and disappearances were also prevalent in the east, in Colombo, and among adults.

- Such consultation, and the ultimate mechanism for truth and justice, should take into consideration the structural inequalities that are faced by women due to their gender. It also take into consideration that these structural inequalities are not only war- or post-war-related but also intertwined with cultural or social gender norms.
- Meaningful consultations require more than ad hoc meetings with civil society in Colombo: there should be workshops and community meetings held throughout war-affected areas to identify priorities, needs, and strategies of those directly affected by the problem of enforced disappearance in Sri Lanka.

Families of the disappeared are clear in their demands for truth, justice, redress, and guarantees of non-recurrence. It is critical to address the enormous problem of enforced or involuntary disappearances in Sri Lanka by tracing the missing, determining what happened, and prosecuting those responsible. This will be a critical first step in dealing with the past. However, in setting up a *credible* mechanism to address disappearances, the State and the international community must analyze CHRD's current advocacy to understand where the domestic roadblocks lie. Moreover, the State should endeavor to build trust with war-affected communities, who are weary about participating in yet another flawed domestic mechanism purporting to address enforced or involuntary disappearances.



*In remembrance of Shanthi Satchithanandan (Member  
of the Board of Governors, CHRD) whose commitment  
and contribution towards social justice  
will be long remembered*

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