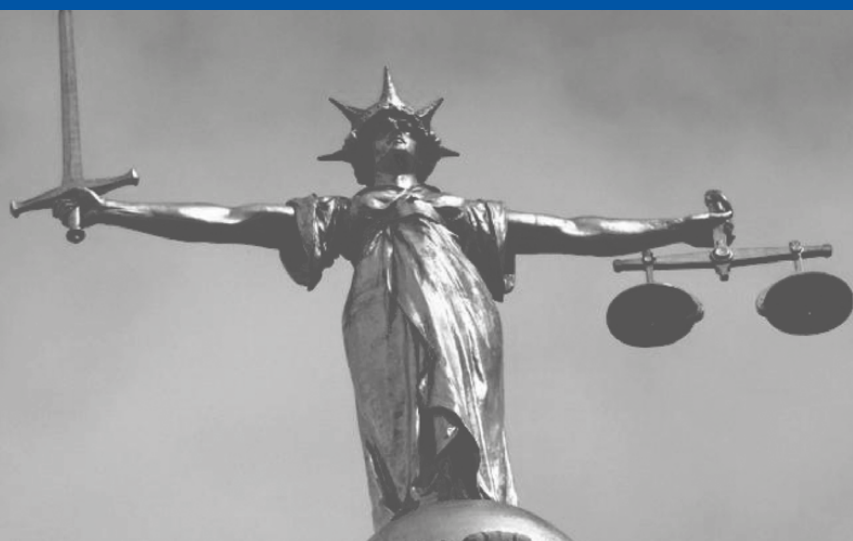


Authority without Accountability:

The Crisis of Impunity in Sri Lanka



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Authority without Accountability:

The Crisis of Impunity in Sri Lanka

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Acronyms and Abbreviations

ACF	-	<i>Action Internationale Contre la Faim</i>
AHRC	-	Asian Human Rights Commission
ALR	-	Appellate Law Recorder
C.A	-	Court of Appeal
CAT Committee	-	Committee against Torture
CHRD	-	Centre for Human Rights & Development
CID	-	Criminal Investigation Department
COI	-	Commission of Inquiry
CPA	-	Centre for Policy Alternatives
DIG	-	Deputy Inspector General
DIU	-	Disappearances Investigation Unit
DPP	-	Director of Public Prosecutions
ER	-	Emergency Regulation
F.R.	-	Fundamental Rights
H.C	-	High Court
HRC	-	United Nations Human Rights Committee
HRTF	-	Human Rights Task Force
HSZ	-	High Security Zone
IATR	-	International Association of Tamil Research
IBAHRI	-	International Bar Association
ICCPR	-	International Covenant on Civil and Political Rights

ICJ	- International Commission of Jurists
IGP	- Inspector General of Police
IIGEP	- International Independent Group of Eminent Persons
JMO	- Judicial Medical Officer
JOC	- Joint Operations Command
JSC	- Judicial Service Commission
JVP	- Jathika Vimukthi Peramuna
LLRC	- Lessons Learnt and Reconciliation Commission
LST	- Law & Society Trust
LTTE	- Liberation Tigers of Tamil Eelam
MLEF	- Medico Legal Examination Form
MP	- Member of Parliament
MPU	- Missing Persons Unit
MSF	- <i>Medecins Sans Frontieres</i>
OIC	- Officer in Charge
PSO	- Public Security Ordinance No. 25 of 1947
PTA	- Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979
PTP Unit	- Prosecution of Torture Perpetrators Unit
SIU	- Special Investigation Unit
SLMC	- Sri Lanka Muslim Congress
SOCO	- Scene of the Crime Officers
TID	- Terrorism Investigation Division

- TNA - Tamil National Alliance
- TRO - Tamil Rehabilitation Organisation
- UN - United Nations
- UNP - United National Party

EXECUTIVE SUMMARY

Sri Lanka is facing a crisis of impunity. It is increasingly difficult, in fact nearly impossible, for people who have suffered serious violations of their human rights to receive justice and accountability. Victims and survivors do not receive redress, and perpetrators are not brought to justice. The absence of justice removes an important deterrent to future perpetrators. This situation constitutes a serious breach of Sri Lanka's international obligation to protect and promote human rights. The failure by public authorities, whether due to legal obstacles or lack of political will, to fulfil that international obligation and bring perpetrators of human rights violations to account, is the definition of impunity.¹

It has become a cliché to speak of a 'culture of impunity' but the phrase is entirely apt in describing the situation in Sri Lanka, where impunity has over the years become institutionalized and systematized: mechanisms to hold state actors to account for their actions have been eroded; checks on the arbitrary use of power have been diluted, if not dissolved; institutions to protect the independence of the judiciary have been eviscerated; the Attorney-General has become politicized; and political forces have continually sought to influence and interfere with the judiciary. Blatant disregard for the rule of law and the independence of the judiciary has crippled the justice system, leaving victims with little or no prospect of remedies or reparations for serious human rights violations.

This Report is the first in a series of national studies examining *Authority without Accountability* in South Asia. This Report seeks to unravel and explain how the culture of impunity has developed over the years in Sri Lanka. It calls on the Government of Sri Lanka to respect its international obligation to investigate human rights violations; take appropriate measures in respect of perpetrators of such violations, bringing those responsible to justice for violations constituting crimes through prosecution and the imposition of penalties commensurate to the offence; provide victims with effective remedies and reparations for their injuries; ensure the inalienable right to know the truth; and take other necessary steps to prevent recurrence of violations.²

1 The international standards governing impunity are set forth in the *United Nations Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, UN Doc. E/CN.4/2005/102/Add.1, (*Updated Set of Principles to Combat Impunity*)

2 *Ibid.*, Principle 1, see also *UN General Assembly, 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* adopted and proclaimed by General Assembly resolution 60/147, 16 December 2005 (*UN Basic Principles and Guidelines on the Right to a Remedy*) para 3.

THE BLOODY LEGACY OF CONFLICT

The Sri Lankan government squandered a unique opportunity to improve the country's human rights situation after its bloody victory over the Liberation Tigers of Tamil Eelam (LTTE) in 2009. The LTTE, which for several years operated an essentially autonomous mini state in the north and east of Sri Lanka, had a horrific record of violating international human rights law as well as international humanitarian law. The Tamil Tigers enforced their rule through unlawful killings, including targeting of civilians, abductions, forced recruitment of child combatants, and forced labour. Needless to say, the LTTE's conduct significantly harmed the rule of law and respect for due process in the areas under their control in Sri Lanka.

The ICJ recognizes the right and duty of the State to protect the security of its people. The *ICJ Berlin Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism* affirms that while States have a duty to take measures to protect persons within their jurisdiction, such measures must at all times respect human rights law and international humanitarian law. There is no conflict between the State's duty to ensure the security of individuals and to protect human rights. Indeed, the protection of the security of people on its territory constitutes a human rights obligation for any State. One of the crucial results of the lack of accountability in Sri Lanka has been that the abuses perpetrated by the LTTE (as well as other armed groups) have not been properly accounted for in a court of law.

The conflict against the LTTE (which was only the latest in a series of armed conflicts and serious political crises that have wracked Sri Lanka over the past four decades) provided the backdrop, and in fact facilitated, much of the degradation of the human rights situation throughout Sri Lanka. But any hopes that the end of the conflict would result in an improvement in State accountability in Sri Lanka proved unfounded.

In fact the final stage of the armed conflict was characterized as a 'bloodbath', as Sri Lankan government troops forced the Tamil Tigers back into a rapidly vanishing pocket of territory, with more than a quarter of a million civilians caught between the two forces. Tens of thousands of civilians were killed or injured; thousands more have 'disappeared'. Despite an outcry inside and outside the country, to date there has been no accountability for the victims and survivors of this terrible ordeal.

The Sri Lankan government sought to diffuse the demands for justice by establishing a Lessons Learned and Reconciliation Commission (LLRC) that was explicitly not an accountability mechanism, and was widely and rightly criticized

as being faulty in its mandate, its membership, and its conduct. Yet even the LLRC concluded that “that there is a duty on the part of the State to ascertain more fully, the circumstances under which such incidents [violations of human rights law and the laws of war] could have occurred, and if such investigations disclose wrongful conduct, to prosecute and punish the wrong doers.”³ The LLRC emphasized the need for an independent judiciary, a transparent legal process, and strict adherence to the rule of law, stating that these were necessary for establishing and maintaining peace and stability in the country. These recommendations remain unfulfilled to date.

In the face of the Sri Lankan government’s intransigence and refusal to provide accountability, the international community responded to the challenge by convening a Special Advisory Panel of Experts on Accountability in Sri Lanka to the Secretary General of the United Nations to begin investigating the situation in Sri Lanka. The resulting report, damning in its condemnation of both sides of the conflict, also pointed out the systematic failure of the Sri Lankan government to hold perpetrators to account and the weakness of accountability mechanisms in Sri Lanka, most crucially, the lack of independence and impartiality of the country’s judicial system.

THE ELEMENTS OF IMPUNITY

The serious degradation of the independence and impartiality of the Sri Lankan judiciary as a result of decades of pressure from successive governments has been widely noted inside and outside the country for several years now.⁴ Throughout this Report, the politicization of the judiciary and the lack of judicial independence will continually resurface as key factors enabling, if not perpetuating impunity. Interference in the judiciary has been a long-standing issue in Sri Lanka that has significantly impaired the ability of the Sri Lankan government to meet its obligation to provide justice and accountability.⁵

3 *Report of the Commission of Inquiry on Lessons Learnt and Reconciliation*, November 2011, (LLRC Report) para 4.286, accessed at: <http://slembassyyusa.org/downloads/LLRC-REPORT.pdf>

4 See International Crisis Group, ‘Sri Lanka’s Judiciary: Politicised Courts, Compromised Rights’ Asia Report No. 172, 30 June 2009, (ICG, *Sri Lanka’s Judiciary: Politicized Courts, Compromised Rights*), p 8, accessed at: <http://www.crisisgroup.org/en/regions/asia/south-asia/sri-lanka/172-sri-lankas-judiciary-politicised-courts-compromised-rights.aspx> ; LLRC Report *supra* fn. 3; International Bar Association, ‘Justice in Retreat: A report on the independence of the legal profession and the rule of law in Sri Lanka’, May 2009 (International Bar Association, *Justice in Retreat*) accessed at: <http://www.ibanet.org/Document/Default.aspx?DocumentUid=C7793247-1498-409F-83D0-75B3DFD107C7>

5 *Ibid.*

The appointments process for the superior judiciary is widely cited as a key contributor to the politicization of the judiciary. Under the 1972 Constitution and the 1978 Constitution, political actors drove the appointments process for the superior judiciary and key public service posts.⁶ The 17th Amendment to the Constitution (2001) sought to inject more independence into the appointments process by creating the Constitutional Council, comprising of members from the majority and opposition political parties as well as independent political parties to oversee the appointment process.

The first term of the Constitutional Council ended in March 2005 and no further appointments were made to the Council, largely owing to a lack of political will. As a result, key public service posts went unfilled for over two years. In December 2008, the President began to make direct appointments to public institutions, including the Attorney General. Local civil society actors filed fundamental rights applications challenging the President's conduct but the constitutional protection of immunity granted to the President precluded judicial review. In 2010, the 18th Amendment to the Constitution was passed by Sri Lanka's Parliament. It abolished the Constitutional Council and created an ineffective Parliamentary Council, empowering the President to directly appoint key public service posts and the superior judiciary, including the Chief Justice, the President and Judges of the Court of the Appeal and those members of the Judicial Service Commission (JSC) other than its Chairman which is *ex officio*, the Chief Justice. The JSC is the body entrusted with the power to appoint, promote, transfer exercise disciplinary control and dismiss judicial officers of the subordinate courts. The result was a significant erosion of the independence and impartiality of the Sri Lankan judiciary.

But this Report goes beyond the assault on the Sri Lankan judiciary to explain how decades of Emergency rule and legal immunities granted to the President and other government officials weakened the checks and balances in the Sri Lankan government, while political interference—particularly in the conduct of the office of the Attorney-General—in practice led to a failure of justice in a number of key cases.

6 Article 122 of the Constitution of the Republic of Sri Lanka (Ceylon) adopted and enacted by the Constituent Assembly of the People of Sri Lanka on 22 May 1972 declared that judges of the Supreme Court and the Court of Appeal shall be appointed by the President, which was a ceremonial position under the Westminster system of government at that time. The 1978 Constitution (Article 107) conferred relevant powers in this regard to a powerful Executive President.

For forty years, Sri Lanka maintained an almost continuous state of emergency. Emergency rule not only displaced the criminal justice system, it eroded state accountability and undermined human rights. The emergency regime violated the prohibition on arbitrary detention and imposed unreasonable restrictions on the freedom of expression, the freedom of movement and the right to privacy. The use of emergency laws also facilitated unlawful killings, enforced disappearances, and the widespread use of torture and ill-treatment. The right to judicially review orders made under the emergency laws was restricted, if not altogether eliminated. Four decades of institutionalized emergency rule led to a serious erosion of the mechanisms of state accountability and the establishment of a dangerous culture of impunity in Sri Lanka.

Another corrosive development was the enactment of immunity provisions for the President under the 1978 Constitution and the conferral of immunity on State officials under emergency laws. In Sri Lanka, the President is given immunity for actions taken during his or her term under the Constitution.⁷ State officials are conferred wide immunities under the Public Security Ordinance No. 25 of 1947 and the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 (as amended) (PTA) as well as under the Indemnity Act. The President plays a pivotal role within the emergency regime. With the advent of the 1978 Constitution, the President was empowered to: declare states of emergency; order Armed Forces to maintain law and order under the Public Security Ordinance No. 25 of 1947 (as amended) (PSO); absorb the role of Minister of Defence and issue detention orders under the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 (as amended) (PTA). With a strong and independent judiciary, it would be possible to construe the constitutional and statutory immunity provisions in a manner to hold State actors accountable in conformity with Sri Lanka's obligations under international law. But in light of increased political pressure being exerted on the judiciary in recent years, such checks on executive authority are no longer sufficient to impose accountability.

A parallel, problematic trend was the increasing political pressure, and eventual control, exerted over all institutions involved in State accountability. This trend is clearly visible in the political usurpation of the institution of the Attorney-General. Following international standards, the Attorney-General as the State's chief prosecutor should be responsible for enforcing the law and

7 See Article 35(1) of the Constitution and section 8 of the PSO.

seeking accountability, including, crucially, on State actors. In Sri Lanka, the Attorney-General plays an indispensable role within the criminal justice system. Under the emergency and counter-terrorism laws, only the Attorney-General is empowered to override the wide immunity clauses shielding State officials. Under the Prevention of Terrorism Act, only the Attorney-General can secure a suspect's pre-trial release. In the normal course of criminal proceedings, the Attorney-General is empowered to withdraw a prosecution under the powers of *nolle prosequi*.⁸ The Attorney-General exercises a multitude of other discretionary powers which include: transferring cases; ordering a Magistrate to release a suspect; changing the location of proceedings; issuing indictments; and taking over private prosecutions. Exercised improperly, such discretionary powers could have far-reaching effects on the administration of justice and rule of law.

The politicization of the Attorney-General's office in recent years has significantly weakened the ability of the Sri Lankan government to provide accountability, in particular for violations perpetrated at the hands of State agents. Legal and constitutional analysts inside and outside Sri Lanka have noted with concern the weakening of the Attorney-General's independence over the years.⁹ The position has been pushed to that of a partisan representative for the government in power. In recent years, the Attorney-General has: (1) failed to properly investigate and prosecute state agents involved in human rights violations; (2) provided legal advice to the President and government to avoid accountability; (3) used its discretion improperly to withdraw and transfer cases; (4) used its powers improperly under the emergency laws to deny bail applications; (5) stymied *ad hoc* efforts at providing accountability through Commissions of Inquiry. Each of these actions has strengthened the culture of impunity in the country.

These developments are not just alarming because they violate international law and standards on the conduct of judges and lawyers. The failure of the State to provide justice and accountability means that individuals (tens of thousands of individuals) have suffered serious violations of their rights but have received no justice or redress. This Report examines some cases that are emblematic of how these factors have come together to create a crisis of impunity in Sri Lanka. The cases discussed span several decades and implicate several governments. They

⁸ Latin legal phrase meaning "be unwilling to pursue."

⁹ *United Nations Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka*, 31 March 2011, (*Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka*), p 118, accessed at: http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf

include: (1) the killing of five students in Trincomalee (2006); (2) the *Action Contre la Faim* massacre in Muttur (2006); (3) the Bindunuwewa massacre (2000); (4) the Mylanthanai massacre (1992); and (5) the Richard de Zoysa case (1990). Other cases focus on improper acquittals of State officials under the Convention against Torture Act, 1994, including: (1) Gerard Perera case (2002); (2) Nandini Herath case (2001); and (3) Lalith Rajapakse case (2002). This Report also includes an analysis of four cases in which State agents were held accountable for serious human rights violations.

THE SPIRAL DOWNWARD

As this Report was being prepared for publication, the rule of law and the Sri Lankan legal system were again under assault. On 7 October 2012, four unidentified individuals physically attacked the secretary of the Judicial Service Commission Manjula Tillekaratne in broad daylight on a public road in Colombo, Sri Lanka. One of the assailants pistol-whipped the senior High Court Judge while the others beat him with their bare fists and an iron rod.¹⁰ The assault came after the Judicial Service Commission issued a public statement recounting recent attempts by persons in power to destroy independence of the judiciary and undermine the rule of law. At the time this Report went to press, no one had been arrested or brought to justice for the assault.

This attack followed a string of other incidents of grave concern. In March 2012, High Court Judge W.T.M.P.B. Warawewa was threatened when he dissented in the *White Flag Case* (convicting former Army commander and presidential candidate Sarath Fonseka to three years imprisonment for allegedly suggesting that the senior leadership of the LTTE had been killed after it had surrendered in the final days of the armed conflict). In July 2012, Government Minister Rishad Bathiudeen threatened a Magistrate in Mannar and then allegedly orchestrated a mob to pelt stones and set fire to part of the Mannar courthouse. In September 2012, after the Supreme Court struck down the controversial *Divineguma* Bill,¹¹ the

10 'Sri Lanka's Judiciary: Enter the Goons' *The Economist*, 13 October 2012, accessed at: <http://www.economist.com/node/21564602>

11 'The Bill proposed to establish a new department by amalgamating the Samurdhi Authority, Southern Development Authority and the Udarata Development Authority and to confer wide financial and regulatory powers to the Minister of Economic Development. Following a challenge on its constitutionality under Article 121 of the Constitution, the Supreme Court determined that the Bill could not pass into law, as it failed to comply with the provisions of Article 154G(3) of the Constitution, which required the President to refer to the Provincial Councils all Bills dealing with items contained in the Provincial Council List. See SC (S.D.) 1, 2 and 3/2012, per Bandaranayake, C.J.

President through his Secretary requested a meeting with the Chief Justice and the other two members of the Judicial Service Commission. When the Judicial Service Commission refused the request, State-controlled print media engaged in a public campaign vilifying the Chief Justice and other members of the JSC.¹² On 18 September 2012, the Chief Justice directed Manjula Tillekaratne, the Secretary of the JSC, to issue a public statement citing interference, threats and intimidation. This was the first time the JSC had issued such a statement. On 28 September 2012, the JSC Secretary expressed concern for 'the security of all of us and our families beginning from the person holding the highest position in the judicial system.'¹³ These statements set the stage for the physical assault on Manjula Tillekaratne referred to above.

An independent judiciary, free of any interference from the executive and legislative branches, is a necessary precondition for the fair administration of justice and the promotion and protection of human rights.¹⁴ It is central to maintaining the rule of law and holding the State accountable for its actions, as required under international law. The United Nations General Assembly has on more than one occasion stressed the importance of an independent judiciary in promoting and protecting human rights.¹⁵

In Sri Lanka, multiple governments have contributed to the crisis of impunity. But the current government has been notable in its systematic approach to weakening the judiciary and other mechanisms for establishing State accountability. In 2011, the United Nations Report of the Secretary General's Panel of Experts on Accountability concluded that the current approach to accountability in Sri Lanka does not correspond to basic international standards that emphasize truth, justice and reparations for victims.¹⁶ The Report went on to note that the criminal justice system is ineffective in combating a culture of impunity, citing

12 See The International Commission of Jurists, *Sri Lanka: ICJ deplores attack on the Secretary of the Judicial Service Commission*, 10 October 2012, accessed at: <http://www.icj.org/sri-lanka-icj-condemns-attack-on-the-judicial-services-commission/>

13 *Ibid.*

14 International Commission of Jurists, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors*, *infra* fn. 15, pp. 3-4.

15 See for example, UN General Assembly Resolutions 50/181 of 22 December 1995 and 4/137 of 20 December 1993; International Commission of Jurists, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors: Practitioners Guide No. 1*, Geneva, 2007 (International Commission of Jurists, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors*) p 20.

16 *Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka*, *supra* fn. 9, p iv, 118.

a lack of political-will in the pursuit of accountability.¹⁷ The Committee against Torture in its most recent review of Sri Lanka expressed its 'concern about the prevailing climate of impunity...and the apparent failure to investigate promptly and impartially wherever there is reasonable ground to believe that an act of torture has been committed.'¹⁸ In the words of the UN Secretary-General Report, accountability for serious violations of international humanitarian or human rights law is not a matter of choice or policy; it is a duty under domestic and international law.¹⁹

With the goal of satisfying the duty to provide accountability, the International Commission of Jurists calls on the Government of Sri Lanka to immediately take the following measures (a more detailed series of Recommendations appear at the end of this Report):

Concerning Emergency Rule

- 1. Ensure that all legislation relating to counter-terrorism measures, notably the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 (PTA) and the 2011 Regulations under the PTA, complies with international law pursuant to UN Security Council resolution 1456 (2003) and subsequent resolutions affirming UNSC 1456.²⁰**
- 2. Repeal those sections of the Public Security Ordinance No. 25 of 1947 (PSO) and the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 (PTA) that protect State officials from prosecutions for human rights violations, ensuring that all persons against whom there are credible allegations of gross human rights violations, including crimes under international law, are brought to justice.**

¹⁷ *Ibid.*

¹⁸ Committee against Torture, *Consideration of reports submitted by States parties under Article 19 of the Convention: Concluding Observations of the Committee against Torture on Sri Lanka*, UN Doc CAT/C/LKA/CO/3-4, 25 November 2011 (Committee against Torture, *Concluding Observations on Sri Lanka*), para 18.

¹⁹ *Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka*, *supra* fn. 9.

²⁰ UN Security Council Resolution 1456, 20 January 2003, UN Doc. S/RES/1456 (2003); see also UN Security Council Resolution 1624, 14 September 2005, UN Doc. S/RES/1624 (2005); UN Security Council Resolution 1566, 8 October 2004, UN Doc. S/RES/1566 (2004).

Concerning the Powers of the President

3. **Repeal or amend Article 35(1) – (3) of the Constitution of Sri Lanka conferring immunity upon the President in respect of conduct in his or her private or personal capacity during office, so as to ensure that, as a minimum there is no immunity conferred for conduct constituting gross human rights violations or crimes under international law.**
4. **Ensure that executive and administrative regulations and orders issued by the President relating to emergencies are subject to judicial review.**

Concerning the Independence of the Judiciary

5. **Protect judicial institutions, notably the Judicial Service Commission from improper influences, inducements, pressures, threats or interference – direct or indirect – from any quarter or for any reason.**
6. **Amend or repeal the 18th Amendment to the Constitution to restore the independent appointment process of the superior judiciary and other key public service posts, in line with international standards and guidelines.**

Concerning the Attorney-General

7. **Reform the recruitment guidelines for the Attorney-General's Department to ensure that only those persons with appropriate education and training as well as integrity and ability are selected.**
8. **Establish an independent office of the prosecutor that is financed independently (i.e. through the Consolidated Fund) and accountable to Parliament to handle the prosecution of State officials, including those who participate in gross violations of human rights law and crimes under international law.**
9. **Allow complainants or interested third-parties the right to appeal withdrawals made by the Attorney-General's department where there is *prima facie* evidence of partiality, improper, corrupt or capricious conduct or incompetence.**

INTERNATIONAL LEGAL FRAMEWORK

1. International Law Applicable to Sri Lanka

Sri Lanka is a State party to many of the core UN human rights treaties, notably: (1) *the International Covenant on Civil and Political Rights* (ICCPR)²¹ and its First Optional Protocol;²² (2) *the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment* (CAT);²³ (3) *the International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD);²⁴ (4) *the International Covenant on Economic Social and Cultural Rights* (ICESCR);²⁵ (5) *the Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW)²⁶ and its Optional Protocol;²⁷ (6) *the Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others*;²⁸ (7) *the International Convention on the Rights of the Child* (CRC)²⁹ and the *Optional Protocol on the involvement of children in armed conflict*³⁰ as well as the *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*;³¹ and (8) *the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (CMW).³² Sri Lanka is not a State party to the following treaties on international law: (1) *the International Convention for the*

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- 21 999 U.N.T.S. 171, entered into force 23 March 1976, Sri Lanka acceded on 11 June 1980 (ICCPR).
- 22 *The Optional Protocol to the International Covenant on Civil and Political Rights*, 999 U.N.T.S. 302, entered into force 23 March 1976, Sri Lanka acceded on 3 October 1997. The Supreme Court in *Nallaratnam Singarasa v. The Attorney-General*, S.C. Spl. (LA) No. 182/99, 15 September 2006 held that the accession to the Optional Protocol was unconstitutional; however under international law Sri Lanka continues to be bound by the Optional Protocol, *infra*.
- 23 465 U.N.T.S. 85, entered into force on 26 June 1987, Sri Lanka ratified on 2 February 1994 (CAT).
- 24 660 U.N.T.S. 195, entered into force 4 January 1969, Sri Lanka acceded on 18 February 1982.
- 25 993 U.N.T.S. 3, entered into force 3 January 1976, Sri Lanka acceded on 11 June 1980.
- 26 UN G.A. Resolution 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, UN Doc. A/34/46, entered into force 3 September 1981, Sri Lanka ratified 5 October 1981.
- 27 UN G.A. Resolution 54/4, annex 54 U.N. GAOR Supp. (No. 49) at 5, UN Doc. A/54/49 (Vol. I) (2000), entered into force 22 December 2000, Sri Lanka acceded on 15 October 2002.
- 28 96 U.N.T.S., 271, entered into force 25 July 1951, Sri Lanka acceded 15 April 1958.
- 29 UN G.A. Resolution 44/25, annex 44 U.N. GAOR Supp. (No. 49) at 167, UN Doc. A/44/49 (1989), entered into force 2 September 1990, Sri Lanka ratified 12 July 1991.
- 30 *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts*, UN G.A. Resolution 54/263, Annex I, 54 UN GAOR Supp. (no. 49), at 7, UN Doc. A/54/49, Vol. III (2000), entered into force 12 February 2002, Sri Lanka ratified 8 September 2000.
- 31 *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, G.A. Resolution 54/263, Annex II, 54 UN GAOR Supp. (no 49) at 6, UN Doc. A/54/49, Vol. III (2000), entered into force 18 January 2002, Sri Lanka ratified 22 September 2006.
- 32 UN G.A. Resolution 45/158, annex 45 UN. GAOR Supp. (No. 49A) at 262, UN Doc. A/45/49 (1990), entered into force 1 July 2003, Sri Lanka ratified 11 March 1996.

Protection of All Persons from Enforced Disappearances;³³ (2) the *Convention on the Rights of Persons with Disabilities*³⁴ and its Optional Protocol;³⁵ (3) the *Second Optional Protocol to the International Covenant on Civil and Political Rights*, aiming at the abolition of the death penalty;³⁶ (4) the *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*;³⁷ (5) the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*;³⁸ and (6) the *Optional Protocol to the Convention on the Rights of the Child* on a communications procedure.³⁹ Sri Lanka is also a State party to the 1949 Geneva Conventions⁴⁰ on the law of international armed conflict and bound by rules of customary international law in respect of non-international armed conflict.⁴¹ As a member-State of the United Nations,⁴² Sri Lanka is bound by the resolutions of the Security Council and should act to give effect to resolutions of the General Assembly and authoritative UN legal standards. Sri Lanka may not invoke provisions of its domestic law to justify non-compliance with treaty obligations.⁴³ Where human rights obligations constitute peremptory norms of international law (*jus cogens*), including the prohibitions on torture and ill-treatment, extrajudicial or summary

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- 33 UN G.A. Resolution 61/177, UN Doc. A/Res/61/177 (2006), entered into force 23 December 2010.
- 34 2515 U.N.T.S. 3, entered into force 3 May 2008, Sri Lanka signed the Convention on 30 March 2007 but has yet to ratify the instrument.
- 35 *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, UN G.A. Res 61/106, 13 December 2006, UN Doc. A/61/611.
- 36 UN G.A. Resolution 44/128, annex 44 U.N. GAOR Supp. (No. 49) at 207, UN Doc. A/44/49 (1989), entered into force 11 July 1991.
- 37 UN G.A. Resolution 63/117, UN Doc. A/63/435, 10 December 2008.
- 38 2375 U.N.T.S. 237, entered into force 22 June 2006.
- 39 UN G.A. Resolution 66/138, UN Doc. A/RES/66/138, not yet in force.
- 40 *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (First Geneva Convention) 75 U.N.T.S. 31, 12 August 1949, entered into force 21 October 1950; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (Second Geneva Convention), 75 U.N.T.S. 85, 12 August 1949, entered into force 21 October 1950; *Geneva Convention Relative to the Treatment of Prisoners of War* (Third Geneva Convention), 75 U.N.T.S. 135, 12 August 1949, entered into force 21 October 1950; *Geneva Convention Relative to the Protection of Civilian Persons in Times of War* (Fourth Geneva Convention), 75 U.N.T.S. 287, entered into force 21 October 1950. Sri Lanka acceded on 28 February 1959.
- 41 Sri Lanka is not a State party to the *Protocol Additional to the Geneva Conventions* of 12 August 1949, and relating to the *Protection of Victims of International Armed Conflicts* (Protocol I), 8 June 1977 or the *Protocol Additional to the Geneva Conventions* of 12 August 1949, and relating to the *Protection of Victims of Non-International Armed Conflicts* (Protocol II), 8 June 1977. However, Sri Lanka remains bound by the rules of international and non-international armed conflict under customary international law, see Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules*, Cambridge University Press, Cambridge 2009.
- 42 *Declaration of Acceptance of the Obligations contained in the Charter of the UN – Admission of States to Membership in the UN in accordance with Article 4 of the Charter*, UN G.A. resolution 955(X), 14 December 1955, 223 U.N.T.S. 39.
- 43 Article 27, *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331, entered into force 27 January 1980 (Vienna Convention).

killings, enforced disappearances, war crimes, and crimes against humanity, Sri Lanka must guarantee such rights at all times and in all circumstances without exception.⁴⁴

The scope and full content of these rights obligations have been elaborated in authoritative standards, commentary and jurisprudence. These sources include: general comments from treaty-monitoring bodies; concluding observations from treaty-monitoring bodies; jurisprudence from regional human rights tribunals; jurisprudence from domestic legal systems; commentary from UN experts mandated by the UN Human Rights Council and its predecessor body, the Human Rights Commission; and scholarly writings. There are also a number of non-treaty sources of standards, including declarations and resolutions adopted by UN bodies, such as the General Assembly and the Human Rights Council, and reports of UN Independent experts. The aforementioned sources serve to clarify and expound upon the content of the enumerated human rights as well as State parties' corresponding obligations in upholding those rights.

The duty to guarantee human rights is grounded in both international law and customary international law.⁴⁵ In order to give effect to these guarantees, Sri Lanka must implement its international rights obligations in domestic law; refrain from violating human rights in both acts and omissions; and adopt measures to guarantee the enjoyment of human rights and to protect persons from the impairment of the enjoyment of human rights by third parties, including private actors. Sri Lanka must also act to prevent human rights violations and when such violations occur, investigate and hold accountable those persons responsible and provide for access to a remedy and reparation arising from the violations.⁴⁶

44 International Commission of Jurists, *Legal Commentary to the ICJ Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism* Geneva Switzerland, 2008 (International Commission of Jurists, *Legal Commentary to the ICJ Berlin Declaration*) pp. 35 – 40.

45 Article 2, ICCPR; Article 6, the *International Convention on the Elimination of All Forms of Racial Discrimination*; Article 2(c), the *Convention on the Elimination of All Forms of Discrimination against Women*; the *International Convention for the Protection of All Persons from Enforced Disappearance*; the *Declaration on the Protection of All Persons from Enforced Disappearance*, UN Doc. A/RES/47/133, 18 December 1992 (*Declaration on the Protection of All Persons from Enforced Disappearance*); *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*, recommended by Economic and Social Council resolution 1989/65 of 24 May 1989 (*UN Principles on Extra-Legal Executions*); Article 1.1, the *American Convention on Human Rights*; Article 1, the *Inter-American Convention on Forced Disappearance of Persons*; Article 1, the *Inter-American Convention to Prevent and Punish Torture*; Article 1, the *African Charter on Human and Peoples' Rights*; Article 3, the *Arab Charter on Human Rights*; Article 1, the *European Convention on Human Rights*.

46 UN Human Rights Committee, General Comment 31, *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 26 May 2004, UN CCPR/C/21/Rev.1/Add.13 (UNHRC General Comment 31); Inter-American Court of Human Rights, Judgment of 29 July 1988, *Velazquez Rodriguez Case*, paras 166 and 174; Inter-American Commission on Human Rights, Report No. 1/96 of 1 March 1996, Case 10,559, *Chumbivilcas v. Peru*; African Commission of Human and Peoples' Rights, *The Social and Economic Rights Action Centre for Economic and Social Rights v. Nigeria*, Communication No. 155/96 (2001); and the UN Observer Mission in El Salvador, ONUSAL, Report of 19 February 1992, UN Doc. A/46/876/S/23580, para. 28.

Where violations constitute gross human rights violations or crimes under international law, perpetrators must be held criminally responsible.

1.1 What is the Right to a Remedy?

The right to a remedy is a well-established principle under international law, contained in international human rights treaties and other international standards.⁴⁷ It is not only a right in itself; it is the mechanism by which all other rights are realized. The general standard, accepted by all UN Member States through adoption by UN resolution 147 of 16 December 2005,⁴⁸ is that

The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to:

(a) Take appropriate legislative and administrative and other appropriate measures to prevent violations;

(b) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law;

(c) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access

47 Article 2.3, ICCPR; Article 13, CAT; Article 6, *International Convention on the Elimination of All Forms of Racial Discrimination*; Article 12, 17.2(f) and 20, *International Convention for the Protection of All Persons from Enforced Disappearance*; Article 6.2, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the UN Convention against Transnational Organized Crime*; Article 6.2, *Universal Declaration of Human Rights*; *Declaration on the Protection of All Persons from Enforced Disappearance supra* fn. 45 Article 9 and 13; *UN Principles on Extra-Legal Executions supra* fn. 45, Principles 4 and 16; Principles 4-7, the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*; Article 27, *Vienna Declaration and Programme of Action*; Article 13, 160-162 and 165, the *Programme of Action of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance*; Article 9, the *Declaration on Human Rights Defenders*; Article 13, *European Convention on Human Rights*; Article 47, *Charter of Fundamental Rights of the European Union*; Article 7.1(a) and 25, *American Convention on Human Rights*; Article XVIII, *American Declaration of the Rights and Duties of Man*; Article III(1), *Inter-American Convention on Forced Disappearance of Persons*; Article 8.1, *Inter-American Convention to Prevent and Punish Torture*; Article 7(a) *African Charter of Human and Peoples' Rights*; Article 9, *Arab Charter on Human Rights*.

48 UN G.A. Resolution 60/147, 21 March 2006, UN Doc. A/RES/60/147.

to justice... irrespective of who may ultimately be the bearer of responsibility for the violation; and

(d) Provide effective remedies to victims, including reparation....⁴⁹

The UN Human Rights Committee describes the right to a remedy as 'a treaty obligation inherent in the Covenant as a whole': even in times of emergency, 'the State party must comply with the fundamental obligation, under Article 2, paragraph 3 of the Covenant to provide a remedy that is effective.'⁵⁰ Effectiveness requires that the remedy is practical and provides real access to justice.⁵¹

The Duty to Investigate Credible Allegations of Human Rights Violations

The duty to investigate credible allegations of human rights abuses⁵² encompasses four elements: (1) promptness;⁵³ (2) thoroughness; (3) independence; and (4) impartiality. For an investigation to be independent, it must be carried out by authorities that are not, individually or institutionally, involved in the alleged human rights violations.⁵⁴ In a commission of inquiry, Commissioners should be selected on the basis of their impartiality, competence and independence. Members of a commission of inquiry must be independent of any institution, agency or person that may be subject of the inquiry.⁵⁵ Equally, human rights

⁴⁹ *UN Basic Principles and Guidelines on the Right to a Remedy supra* fn. 2, para 3.

⁵⁰ UN Human Rights Committee, General Comment 29, *States of Emergency (Article 4)*, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001) (UNHRC General Comment 29), para 14; see also International Commission of Jurists, *The Right to a Remedy and to Reparation for Gross Human Rights Violations: a Practitioner's Guide*, Geneva, December 2006 (International Commission of Jurists, *Remedies and Reparations*), p 44.

⁵¹ *Airey v. Ireland*, European Court of Human Rights, Judgment of 9 October 1979, Series A, No 32, para 24.

⁵² Article 12, CAT; *UN Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, recommended by General Assembly resolution 55/89 of 4 December 2000, Annex I, Manual on the Effective Investigation and Documentation of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol), 2004, UN High Commissioner for Human Rights, recommended by the General Assembly on 4 December 2000, UN Doc. A/RES/55/89 (*UN Principles on the Investigation of Torture*); Article 12, Article 13, *International Convention for the Protection of All Persons from Enforced Disappearance; Declaration on the Protection of All Persons from Enforced Disappearance*. Article 62, *Vienna Declaration and Programme of Actions of 1993*; Principle 9, *UN Principles on Extra-Legal Executions*; UNHRC General Comment 31, *supra* fn. 46.

⁵³ Principle 2, *UN Principles on the Investigation of Torture supra* fn. 52; Article 12, CAT; Principle 9, *UN Principles on Extra-legal Executions*; para 15, UNHRC General Comment 31, *supra* fn. 46.

⁵⁴ International Commission of Jurists, *Remedies and Reparations, supra* fn. 50, pp 66-67; see also Principle, *UN Principles on the Investigation of Torture*.

⁵⁵ *Ibid.*

violations committed by armed forces should not be investigated by armed forces.⁵⁶

Other important aspects of an investigation include: (1) conducting the investigation with the intention of identifying the persons responsible for perpetrating the human rights violation;⁵⁷ (2) ensuring that all relevant evidence is gathered and documented;⁵⁸ (3) ensuring investigating authorities, particularly in commissions of inquiry, are afforded adequate resources and authority to conduct an effective investigation;⁵⁹ (4) suspending officials potentially implicated in the human rights violation;⁶⁰ (5) making the investigation process public and disclosing findings of commissions of inquiry to the public;⁶¹ (6) ensuring victims and victims' families are kept abreast of the developments in the investigation as

- ⁵⁶ *Ibid.*, see also para 19, 23, 32, 34, *Concluding Observations on Colombia*, UN Doc. CCPR/C/79/Add.76, 5 May 1997; para 8, *Concluding Observations on Venezuela*, UN Doc. CCPR/CO/71/VEN, 26 April 2001; para 7, *Concluding Observations on Kyrgyzstan*, UN Doc. CCPR/CO/69/KGZ, 24 July 2000; para 10, *Concluding Observations on Chile*, UN Doc. CCPR/C/79/Add.104, 30 March 1999; para 9, *Concluding Observations on Belarus*, UN Doc. CCPR/C/79/Add.86, 19 November 1997; para 10, *Concluding Observations on Macedonia*, UN Doc. CCPR/C/79/Add.96, 18 August 1998; para 16, *Concluding Observations on France*, UN Doc. CCPR/C/79/Add.80, 4 August 1997; para 249, Report of the UN Human Rights Committee to the General Assembly, 35th Period of Session, UN Doc. A/35/40 (1980).
- ⁵⁷ European Court of Human Rights, Judgment of 1 July 2003, *Finucane v. the United Kingdom*, para 69; European Court of Human Rights, Judgment of 27 September 1995, *McCann and other v. the United Kingdom*, Series A no 324, para 161; European Court of Human Rights, Judgment of 19 February 1998, *Kaya v. Turkey*, Reports 1998-I, para 86; European Court of Human Rights, Judgment of 28 October 1998, *Assenov v. Bulgaria*, Reports 1998-VIII, para 102; European Court of Human Rights, Judgment of 20 May 1999, *Ogur v. Turkey*, Reports 1999-III, para 88.
- ⁵⁸ 'The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including *inter alia* eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard.' European Court of Human Rights, Judgment of 1 July 2003, *Finucane v. the United Kingdom*, para 69; see also International Commission of Jurists, *Remedies and Reparations*, *supra* fn. 50, p 75.
- ⁵⁹ Article 12(3)(a), *International Convention for the Protection of All Persons from Enforced Disappearance*; Article 13(2), *Declaration on the Protection of All Persons against Enforced Disappearance*; Principle 10, *UN Principles on Extra-legal Executions*; Principle 3(a), *UN Principles on the Investigation of Torture*.
- ⁶⁰ 'Persons alleged to have committed serious violations should be suspended from official duties during the investigation of allegations', *Concluding Observations of the UN Human Rights Committee on Serbia and Montenegro*, UN Doc. CCPR/CO/81/SEMO, 12 August 2004, para 9; see also *Concluding Observations of the UN Human Rights Committee on Brazil*, UN Doc. CCPR/C/79/Add.66, para 20; *Concluding Observations of the UN Human Rights Committee on Colombia*, UN Doc. CCPR/C/79/Add.76, 5 May 1997, para 32 and 34; *Concluding Observations of the Committee against Torture on Bolivia*, 10 May 2001, UN Doc. A/56/44, para 88-89, 97; UN Committee against Torture, *Recommendations of the Special Rapporteur on torture*, UN Doc. E/CN.4/2003/68, 17 December 2002, Recommendation 26(k).
- ⁶¹ Article 13(4) *Declaration on the Protection of All Persons against Enforced Disappearance*.

well as given access to the final investigation report or transcripts of hearings; and (7) protecting victims, victims' families and witnesses against threats, intimidation and violence.⁶²

The Duty to Take Action and Ensure Accountability for Gross Human Rights Violations

Sri Lanka is required under its international legal obligations, notably Article 2(3) of the ICCPR and Article 12 of the CAT, to prosecute and punish perpetrators of human rights violations.⁶³ As expressed in the *UN Basic Principles and Guidelines on the Right to a Remedy*:

*In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him.*⁶⁴

62 Article 12(1), 12(4), *International Convention for the Protection of All Persons from Enforced Disappearance*; Article 13(3) *Declaration for the Protection of All Persons from Enforced Disappearance*; para 6, UN General Assembly Resolution, UN Doc. A/RES/42/142, 7 December 1987; UN General Assembly Resolution, UN Doc. A/RES/43/159, 8 December 1988; UN General Assembly Resolution, UN Doc. A/RES/44/160, 15 December 1989; UN General Assembly Resolution, UN Doc. A/RES/45/165, 18 December 1990; UN General Assembly Resolution, UN Doc. A/RES/46/125, 17 December 1991; UN General Assembly Resolution, UN Doc. A/RES/47/132, 18 December 1992; UN General Assembly Resolution, UN Doc. A/RES/49/193, 23 December 1994; UN General Assembly Resolution, UN Doc. A/RES/51/94, 12 December 1994; UN General Assembly Resolution, UN Doc. A/RES/53/150, 9 December 1998; UN General Assembly Resolution, UN Doc. A/RES/55/103, 4 December 2000; UN General Assembly Resolution, UN Doc. A/RES/57/215, 18 December 2002.

63 Article 2, paragraph 3 of the ICCPR and UNHRC General Comment 31 *supra* fn. 46; Article 12 of the CAT and Committee Against Torture, General Comment 2, Implementation of Article 2 by States Parties, UN Doc. CAT/C/GC/2/CRP. 1/Rev.4 2007 (Committee against Torture, General Comment 2); UN Human Rights Committee, views of 14 June 1993, case of *Bautista de Arellana v. Colombia*, Communication No. 563/1993, UN Doc. CCPR/C/55/563/1993 (1995) para 8.6; UN Human Rights Committee, views of 14 June 1994, case of *Jose Vicente and Amado Villafane Chaparro, Luis Napoleon Torres Crespo, Angel Maria Torres Arroyo and Antonio Hugues Chaparro Torres v. Colombia*, Communication No. 612/1995 UN Doc. CCPR/C/60/D/612/1995, para 8.8; UN Human Rights Committee, views of 31 March 1982, case of *Maria Fanny Suarez de Guerro v. Colombia*, Communication 45/1979, UN Doc. CCPR/C/15/D/45/1979), para 13.3; Velasquez para 166; see also European Court of Human Rights, judgment of 26 March 1985, *X and Y v. the Netherlands* Application No. 8978/80, para 27; see also European Court of Human Rights, judgment of 4 December 2003, *M.C. v. Bulgaria* Application no. 39272/98, para 153; *Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights*, para 60.

64 *UN Basic Principles and Guidelines on the Right to a Remedy*, *supra* fn. 2.

The *UN Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity* reiterates the obligation on States to

*...undertake prompt, thorough, independence and impartial investigations of violations of human rights and international humanitarian law and take appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished.*⁶⁵

In respect of humanitarian law, Sri Lanka must prosecute and punish those who commit war crimes or serious violations of the law on armed conflict.⁶⁶

There must be practical and real access to justice with the capability of determining whether a violation took place.⁶⁷ The matter must be brought before an independent authority.⁶⁸ In cases of serious human rights violations, the State must 'ensure that [victims] can effectively challenge...violations before a court of law.'⁶⁹ Disciplinary and administrative sanctions are not sufficient to constitute an effective remedy under Article 2(3) of the ICCPR.⁷⁰

Under Article 13 of the CAT, States must promptly and impartially investigate all allegations of torture. In its most recent and in prior unanimous resolutions on the prohibition of torture, the UN General Assembly has stressed the importance of holding State officials accountable, bringing those responsible to justice, and imposing a punishment that is commensurate with the severity of the offence.⁷¹

65 *Updated Set of Principles to Combat Impunity*, *supra* fn. 1.

66 Rules 156 – 160, Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, 2007, pp. 568 – 618.

67 European Court of Human Rights, Judgment of 9 October 1979, *Airey v. Ireland*, Series A No 32, para 24; I/ACTHR: Advisory Opinion OC-9/87, Judicial Guarantees in States of Emergency, 6 October 1987, Series A No 9, para 24; European Court of Human Rights, Judgment of 25 March 1983, *Silver v. the United Kingdom*, Series A No 61, para 113.

68 UNHRC General Comment 31, *supra* fn. 46, para 15; ECtHR: Case *Keenan v. the United Kingdom*, Judgment of 3 April 2001, Reports 2001-III, para 122; I/ACTHR: Advisory Opinion OC-9/87, Judicial Guarantees in States of Emergency, 6 October 1987, Series A No 9, para 24.

69 Case *F. Birindwaci Bithashwiwa and E. Tshisekedi wa Mulumba v. Zaire*, Views of 29 November 1989, UN Doc. CCPR/C/37/D/241/1987, para 14.

70 Case *Nydia Erika Bautista v. Colombia*, 13 November 1993, UN Doc. CCPR/C/55/D/563/1993, para 8.2; Case *José Vicente y Amado Villafañe Chaparro et al v Colombia*, 29 July 1997, UN Doc. CCPR/C/60/D/612/1995, para 8.2.

71 UN General Assembly Resolution, *Torture and Other Cruel, Inhumane and Degrading Treatment*, UN Doc. A/RES/66/150, 27 March 2012, para 7.

2. The Judiciary

The UN General Assembly has stated on more than one occasion that 'the rule of law and proper administration of justice [...] play a central role in the promotion and protection of human rights.'⁷² In times of crisis, the role of the judiciary is paramount in safeguarding human rights and the rule of law, as the judiciary serves as the essential check on the other branches of the State.⁷³ Sri Lanka, as a party to the ICCPR, is under an obligation to ensure absolutely and without exception the right to an independent, competent and impartial judiciary.⁷⁴ The UN Human Rights Council has stressed that an independent and impartial judicial system is an essential prerequisite for the protection of human rights and fundamental freedoms and for upholding human rights.⁷⁵

2.1 Judicial independence

The *UN Basic Principles on the Independence of the Judiciary* affirm the obligation on the State to guarantee the independence of the judiciary. Principle 4 requires States to protect the judiciary from inappropriate or unwarranted interference with the judicial process. Under Principle 2, the judiciary must be able to decide matters on the basis of facts and in accordance with law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect.⁷⁶

Judges must be 'independent vis-à-vis their judicial colleagues and superiors. Any hierarchical organization of the judiciary and any difference in grade or rank shall, in no way, interfere with the right of the judge to pronounce his judgment

72 UN General Assembly Resolution 50/181 of 22 December 1995; UN General Assembly Resolution 48/137 of 20 December 1993; see also International Commission of Jurists, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors* supra fn. 15, p 3.

73 International Commission of Jurists, *Legal commentary to the ICJ Geneva declaration: upholding the rule of law and the role of judges and lawyers in times of crises*, Geneva, 2011 (International Commission of Jurists, *Legal Commentary to the ICJ Geneva Declaration*), pp. xv-xvi.

74 UN Human Rights Committee, General Comment 32, *Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc. CCPR/C/GC/32 (2007), para 19 (UNHRC General Comment 32).

75 Human Rights Council Resolution, *Integrity of the judicial system*, UN Doc. A/HRC/RES/19/31, 18 April 2012; see also Human Rights Council decision 2/110 of 27 November 2006; UN Human Rights Council resolution 17/2 of 16 June 2011; Resolution of Commission on Human Rights 2005/30 of 19 April 2005.

76 *UN Basic Principles on the Independence of the Judiciary*, adopted by the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 (*UN Basic Principles on the Independence of the Judiciary*).

freely.⁷⁷ The judiciary as well as individual judges must not be subordinate to the other public powers, including the political branches of government. At all times, the judiciary must be kept independent of the executive and the legislature. The institutional independence of the judiciary is essential in maintaining the rule of law and the notion of a fair trial.

2.2 Impartiality of the judiciary

Impartiality, while closely related to independence, is a separate and distinct concept. The Human Rights Committee sets out two requirements to assess impartiality

*First, judges must not allow their judgment to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other. Second, the tribunal must also appear to a reasonable observer to be impartial. For instance, a trial substantially affected by the participation of a judge who, under domestic statutes, should have been disqualified cannot normally be considered to be impartial.*⁷⁸

2.3 Institutional and financial autonomy

States must give the judiciary and its judicial institutions adequate resources to discharge their functions. The UN Human Rights Committee has called on States to allocate sufficient resources to the judiciary to guarantee its independence.⁷⁹ The UN Human Rights Committee has noted a correlation between inadequate financial resources, low remuneration and corruption.⁸⁰

2.4 Appointment

The *UN Basic Principles* require that '[p]ersons selected for judicial office...be individuals of integrity and ability with appropriate training or qualifications in law.

77 Special Rapporteur on the Study on the Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers, *Draft Universal Declaration on the Independence of the Justice*, 1987, (Singhvi Declaration).

78 UNHRC General Comment 32, *supra* fn. 74.

79 *Concluding Observations of the Human Rights Committee on the Central African Republic*, UN Doc. CCPR/C/CAF/CO/2, para 16.

80 In the case of Congo, the UN Human Rights Committee noted that 'the low pay [the judges] receive...frequently results in their corruption.' *Concluding Observations of the UN Human Rights Committee on the Democratic Republic of the Congo*, UN Doc. CCPR/C/COD/CO/3, para 21.

Any method of judicial selection must safeguard against judicial appointments for improper motives.⁸¹

The UN Human Rights Committee has repeatedly stressed that 'the nomination of judges should be based on their competence, not their political affiliation.'⁸²

The appointment procedure must be transparent and based on objective criteria. The UN Human Rights Committee has, on more than one occasion, noted the importance of the appointment procedure in guaranteeing and maintaining the independence of the judiciary. The Committee has recommended that 'an independent body [be] charged with the responsibility of appointing, promoting and disciplining judges at all levels.'⁸³

3. The Role of Lawyers and Prosecutors in the Protection and Promotion of Human Rights

The judiciary on its own, however, cannot safeguard rule of law and protect human rights; an independent and impartial prosecutor is a prerequisite to the effective investigation and prosecution of human rights violations. The *UN Guidelines on the Role of Prosecutors* set out international standards aimed at ensuring that prosecutors are able to perform their functions impartially and independently, and thus able to uphold their international duty to investigate and bring to justice perpetrators of human rights violations.⁸⁴ Prosecutors should be permitted to prosecute public officials for offences committed by them, particularly corruption, unlawful use of power, grave violations of human rights and other crimes recognized by international law.⁸⁵

States must select persons 'of integrity and ability with appropriate training and qualifications.' There must be 'safeguards against appointments based on partiality or prejudice, excluding any discrimination against a person on the grounds of race, colour, sex, language, religion, political or other opinion, national, social or ethnic origin, property, birth, economic or other status...'⁸⁶

81 Principle 10, *UN Basic Principles on the Independence of the Judiciary* supra fn. 76.

82 *Concluding Observations of the UN Human Rights Committee on Bolivia*, UN Doc. CCPR/C/79/Add.74, para 34.

83 *Concluding Observations of the UN Human Rights Committee on Tajikistan*, UN Doc. CCPR/CP/84/TJK, para 17.

84 International Commission of Jurists, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors*, supra fn. 15, p 71.

85 Recommendation 19, *Council of Europe Committee of Ministers*, (2000) Committee of Ministers to member states on the role of public prosecution in the criminal justice system.

86 Guideline 2(a), *UN Guidelines on the Role of Prosecutors*, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990 (*UN Guidelines on the Role of Prosecutors*).

States must 'ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability.'⁸⁷

The office of the prosecutor must be strictly separated from judicial functions. It is understood that in many jurisdictions prosecutors exercise certain judicial functions, particularly in relation to collecting evidence or ordering preventative detention. Such functions however must be limited to the pre-trial stages of the proceedings and subject to independent judicial review.⁸⁸

Prosecutors must perform their duties fairly, consistently and expeditiously, respecting and protecting human dignity and human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.⁸⁹

Prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly corruption; abuse of power; grave violations of human rights and other crimes recognized by international law; and, where authorized by law or consistent with local practice, the investigation of such offences.⁹⁰

When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through unlawful methods, violating a suspect's human rights, notably torture or ill-treatment, they must refuse to use such evidence and take all necessary steps to ensure that those responsible for using such methods are brought to justice.⁹¹

Where a prosecutor has knowledge that his or her actions or inactions may facilitate or enable the perpetration of an international crime, he or she may be complicit in the crime.⁹²

87 *Ibid.*, Guideline 4.

88 International Commission of Jurists, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors*, *supra* fn. 15, p 75.

89 Guideline 12, *UN Guidelines on the Role of Prosecutors*, *supra* fn. 86.

90 *Ibid.*, Guideline 15.

91 *Ibid.*, Guideline 16.

92 *United States v. Ernst von Weizsaecker et al.*, Trials of War Criminals Before the Nuremberg Military Tribunals; 2 senior legal advisors were convicted of crimes against humanity for not objecting to the deportation of 6000 Jews from France to Auschwitz). The Tribunal held that Ernst von Weizsaecker (Secretary of State, Foreign Office) and Ernst Woemann (Under-Secretary of State and Head of Political Department, Foreign Office) had an absolute duty to object to actions they knew were violations of international law. 'If the program was in violation of international law the duty was absolute to inform the inquiring branch of government. Unfortunately for Woermann and his chief von Weizsaecker, they did not fulfil that duty. By stating that they had no 'misgivings' or 'no objections', they gave the 'go ahead' signal to the criminals who desired to commit the crime.' Control Council Law No. 10, volume 14 (1952).

The UN Committee against Torture stresses the role of government legal advisors in preventing torture

...State parties are obligated to adopt effective measures to prevent public authorities and ***other persons acting in an official capacity from directly committing, instigating, inciting, encouraging, acquiescing in or otherwise participating or being complicit in acts of torture as defined in the Convention***. Thus, States parties should adopt effective measures to ***prevent such authorities or others acting in an official capacity or under colour of law, from consenting to or acquiescing in any acts of torture***. [emphasis added]⁹³

The Committee against Torture has indicated that a Public Prosecutor violates his duty of impartiality if he fails to appeal the dismissal of a judicial decision in a case where there is evidence of torture.⁹⁴

In times of crisis, including declared or undeclared states of emergency, 'prosecutors have a duty to safeguard and uphold human rights and the Rule of Law.' As States will often enact extraordinary measures that curtail, suspend or derogate from certain rights in times of emergency, it falls on lawyers to ensure the rule of law, the principle of legality and individuals' rights are guaranteed.⁹⁵

In particular, it is the role of the prosecutor to continue 'to investigate and bring criminal action for violations of rights in times of emergency, notably the right to life.'⁹⁶

4. International Law on States of Emergency

Under international law, States have an obligation to protect the human rights of individuals within their jurisdiction, including their right to security.⁹⁷ Governments are thus allowed to take exceptional measures in times of crisis

93 Committee against Torture, General Comment 2, *supra* fn. 63, para 17.

94 Committee against Torture, Decision of 10 November 1999, case of *Khalen Ben M'Barek v. Tunisia*, Communication No. 60/1996, UN Doc. CAT/C/23/D/60/1996, para 11.10.

95 International Commission of Jurists, *Legal Commentary to the ICJ Geneva Declaration*, *supra* fn. 73, pp. 4-5.

96 Office of the High Commissioner for Human Rights in cooperation with the International Bar Association, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, New York and Geneva, 2003, p 884; International Commission of Jurists, *Legal Commentary to the ICJ Geneva Declaration*, *supra* fn. 73, p 4.

97 Article 2, ICCPR; UNHRC General Comment 31, *supra* fn. 46; see also International Commission of Jurists, *Legal Commentary to the ICJ Geneva Declaration*, *supra* fn. 73, p 58.

to protect the security of persons. In such situations, however, the State must still comply fully with the provisions of international human rights law relating to states of emergency, including continuing protection against human rights abuses. The judiciary must play an independent role in reviewing the measures taken in response to the crisis or emergency, supervising their operation to ensure compliance with domestic law and international human rights law and standards.⁹⁸

Measures of derogation must be limited in time, proportional and necessary to the legitimate aim pursued.⁹⁹ The UN Human Rights Committee stresses that each and every derogation or other measure restricting or limiting the scope of human rights protection must be provided by law and be strictly required by the exigencies of the situation.¹⁰⁰ The UN Human Rights Committee also indicates that it must be established from an objective perspective that no lesser measures would have been adequate to address the specific threat.¹⁰¹

All such measures of derogation must be in conformity with other international legal obligations, notably peremptory international norms that apply at all times.¹⁰² Should a violent situation escalate to the level of a full-fledged armed conflict, the rules of international humanitarian law become applicable.¹⁰³ The provisions of international human rights law relating to non-derogable rights and states of emergency nevertheless apply during both international and non-international armed conflicts.¹⁰⁴

Certain rights common to all human rights treaties must never be subject to derogation under any circumstances: the right to life; the right to be free from torture or cruel, inhuman or degrading treatment or punishment; the prohibition on slavery, the slave trade and servitude; freedom from enforced disappearance; the prohibition on imprisonment for failure to fulfill a contractual obligation; the right to recognition as a person before the law; the principle of legality in the field

98 International Commission of Jurists, *Legal Commentary to the ICJ Geneva Declaration*, *supra* fn. 73, p 58.

99 UNHRC General Comment 31, *supra* fn. 46, para 6; see also International Commission of Jurists, *Legal Commentary to the Geneva Declaration*, *supra* fn. 73, pp. 58-59.

100 UNHRC General Comment 29, *supra* fn. 50, para 4.

101 *Ibid* para 4, 6, 7, 9; UNHRC General Comment 31, *supra* fn. 46 para 6.

102 UNHRC General Comment 29, *supra* fn. 50, para 9 and ff; see International Commission of Jurists, *Legal Commentary to the Geneva Declaration*, *supra* fn. 73, pp. 58-60.

103 See M. Nowak, *UN Covenant on Civil and Political Rights*, CCPR Commentary (2nd rev. ed.). Kehl am Rhein: Engel, 2005, p 99. Also see L. Doswald-Beck, Sylvain Vite, *International Humanitarian Law and Human Rights Law*, International Review of the Red Cross, No. 293, 94-119 p 98.

104 International Commission of Jurists, *Legal Commentary to the Geneva Declaration*, *supra* fn. 73, p 61.

of criminal law; and the right to freedom of thought, conscience and religion.¹⁰⁵

Torture or ill-treatment, hostage taking, and enforced disappearances are absolutely prohibited in all circumstances under international law.¹⁰⁶ Only a court of law may try and convict a person for a criminal offence, and presumption of innocence must be respected.¹⁰⁷ Any form of detention or measures affecting the human rights of an arrested or detained person must be subject to effective review by a judicial authority.¹⁰⁸ Finally, measures taken in times of crisis, including properly declared states of emergency, must not discriminate on grounds of race; colour; gender; sexual orientation; religion; language; political or other opinion; national, social or ethnic origin; property; and birth or any other status.¹⁰⁹

4.1 Judicial oversight

Judicial oversight is the ‘essential control mechanism,’ ensuring that emergency measures comply with international human rights obligations.¹¹⁰ The judiciary plays a vital role in ensuring the executive branch does not abuse its wide-ranging powers during states of emergency.¹¹¹ Courts must be able to examine the motives for a declaration of a state of emergency and any subsequent derogation of rights, with the authority to limit emergency measures if they contravene national and international law.¹¹²

105 Article 6, 7, 8.1, 8.2, 11, 15, 16 and 18, ICCPR, Article 2.2, the CAT; see also International Commission of Jurists, *Legal Commentary on the Geneva Declaration*, *supra* fn. 73, p 61.

106 Article 7, ICCPR; Article 2(2), CAT; Article 5, *Universal Declaration of Human Rights*; UNHRC General Comment 29, *supra* fn. 50, para 13; *Declaration on the Protection of All Persons from Enforced Disappearance*, *supra* fn. 45 Article 7; Article 2(2)(i) and (j) of the ASEAN Charter; see also International Commission of Jurists, *Legal Commentary on the Geneva Declaration*, *supra* fn. 73, pp 61-62.

107 Common Article 3(d) to the *Geneva Conventions* of 1949; UNHRC General Comment 29, *supra* fn. 50, para 15; Article 11(1) *Universal Declaration of Human Rights*; Article 2(2)(i) and (j) ASEAN Charter.

108 Article 9, ICCPR; UNHRC General Comment 29, *supra* fn. 50, para 15-16; Article 7 of the *Declaration on the Protection of All Persons from Enforced Disappearance* *supra* fn. 45; Article 2(2)(i) and (j) of the ASEAN Charter.

109 Article 4 and 26, ICCPR; Article 7 *Universal Declaration of Human Rights*; Article 2(2) (i) and (j) of the ASEAN Charter; UN Security Council Resolution, UNSC Res 1325 (2000), UN Doc. S/RES/1325 (2000), 31 October 2000, paras. 8(c), 9-11; UN Security Council Resolution, UNSC Res 1889 (2009), UN Doc. S/RES/1889 (2009), 5 October 2009, para 2; UN Human Rights Committee, General Comment 28, *Equality of rights between men and women (Article 3)*, UN Doc. CCPR/C/21/Rev.1/Add/10, 29 March 2000, para 9; UNHRC General Comment 29, *supra* fn. 50, para 8; see also International Commission of Jurists, *Legal Commentary to the ICJ Berlin Declaration*, *supra* fn. 44 Principle 4; see also International Commission of Jurists, *Legal Commentary on the Geneva Declaration*, *supra* fn. 73, p 62.

110 *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, UN Doc. A/63/271, 12 August 2008, para 17.

111 *Ibid.*

112 *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, UN Doc. A/63/271, 12 August 2008, para 17.

4.2 The right to a remedy in a state of emergency

At all times, especially in a state of emergency, the State must provide the means and mechanisms to challenge the lawfulness of measures restricting human rights and to provide effective remedies for any abusive application.¹¹³ A State must provide an effective remedy for human rights violations committed by its own officials and human rights abuses committed by non-state actors.¹¹⁴

A failure to respect procedural rights violates an individual's right to an effective remedy.¹¹⁵ Where lodging a judicial complaint would put an individual in fear for his or her life, or where courts' jurisdiction have been ousted by domestic legislation, no effective remedy exists.¹¹⁶

5. Impunity

Impunity is defined as

...[T]he impossibility, de jure or de facto, of bringing perpetrators of violations to account – whether in criminal, civil, administrative or disciplinary proceedings since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims.

Amnesty laws and other similar measures foster a climate of impunity, undermining efforts to re-establish respect for human rights and the rule of law.¹¹⁷ The *UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* stress that under 'no circumstances, including

113 Article 12(3) of the ICCPR; UN Human Rights Committee, General Comment 27, *Freedom of Movement (Article 12)*, UN Doc. CCPR/C/21/Rev.1/Add.9, 2 November 1999, paras 11-18; see also International Commission of Jurists, *Legal Commentary to the ICJ Geneva Declaration*, *supra* fn. 73, pp 64-65.

114 Article 2, ICCPR; UNHRC General Comment 29, *supra* fn. 50, para 14; UN Human Rights Committee, General Comment 24, *Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocol thereto, or in relation to declarations under Article 41 of the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.6, 4 November 1994, para.11.

115 International Commission of Jurists, *Legal Commentary to the ICJ Geneva Declaration*, *supra* fn. 73, pp. 66-67.

116 *Ibid.* See also African Commission on Human and Peoples' Rights, African Commission on Human and Peoples' Rights, *Sir Dawda K Jawara v. The Gambia*, Communications 147/95 and 149/96, 11 May 2000, para 35-37.

117 *Preliminary Concluding Observations of the UN Human Rights Committee on Peru*, UN Doc. CCPR/C/79/Add.67, para 10.

a...public emergency, shall blanket immunity from prosecution be granted to any person allegedly involved in extra-legal, arbitrary or summary executions.¹¹⁸

The UN Committee against Torture 'considers that amnesties or other *impediments which preclude or indicate unwillingness to provide prompt and fair prosecution and punishment* of perpetrators of torture or ill-treatment violate the principle of non-derogability'¹¹⁹ and violate States' obligations under the CAT.

The UN Human Rights Committee, the treaty-monitoring body for the ICCPR, stresses that 'State Parties...may not relieve perpetrators from personal responsibility...with...prior legal immunities and indemnities...*no official status justifies persons who may be accused of responsibility for such violations being held immune from legal responsibility*.'¹²⁰

The *UN Principles on Action to Combat Impunity* in 2004, reiterate that '[t]he official status of the perpetrator of a crime under international law – even if acting as head of State or Government – does not exempt him or her from criminal or other responsibility and is not grounds for a reduction of sentence.'¹²¹

118 Principle 19, *UN Principles on Extra-Legal Executions*.

119 Committee against Torture, General Comment 2, *supra* fn. 63, para 11.

120 UNHRC General Comment 31, *supra* fn. 46, para 18.

121 *Updated Set of Principles to Combat Impunity*, *supra* fn. 1, p 6.

CHAPTER 1: FORTY YEARS OF EMERGENCY - THE NEXUS BETWEEN EMERGENCY LAWS AND STATE ACCOUNTABILITY

During the past forty years, Sri Lanka has systematically failed to fulfill its obligations to respect and protect human rights. Hundreds, if not thousands of individuals belonging to the minority Tamil and Muslim communities and the majority Sinhala community were 'disappeared' under the cover of emergency laws, which conferred extraordinary powers on the Police and Armed Forces. Violations of the rights to life and liberty, including arrest and *incommunicado* detention without valid reason and for unreasonably long periods of time were common. Incursions on the right to liberty were often accompanied with torture and other cruel, inhuman or degrading treatment or punishment. The emergency regime also imposed arbitrary restrictions on rights such as freedom of expression, freedom of movement and the right to privacy. Emergency laws granted far-reaching immunities to almost all State officials, including Police and Armed Forces, and as such allowed human rights violations to go unpunished.

The emergency regime was framed as a response to terrorism and armed conflict in Sri Lanka. The Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 (PTA) created a culture of emergency, conflating emergency powers with counter-terrorism measures. This rhetorical position was further strengthened by the 'global war on terror' following the 9/11 attacks. Invoking emergency powers as a counter-terrorism measure had a significant impact on the ordinary criminal justice system.

The ICJ recognizes the security threat the Government faced for many years, notably in the North and East of Sri Lanka. The ICJ unequivocally condemns all human rights abuses and breaches of international humanitarian law committed by non-state actors, notably the Liberation Tigers of Tamil Eelam (LTTE) as well as other armed groups, in Sri Lanka. The *ICJ Berlin Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism* affirms that while States have a duty to take measures to protect persons within their jurisdiction, such measures must at all times respect human rights law and international humanitarian law. There is no conflict between the State's duty to ensure the security of individuals and to protect human rights. Indeed, the protection of the security of people on its territory constitutes a human rights obligation for any State. One of the crucial results of the lack of accountability in Sri Lanka has been that the abuses perpetrated by the LTTE (as well as other armed groups) have not been properly accounted for in a court of law.

1. Historical Context

1.1 Post independence period

i. Public Security Ordinance No. 25 of 1947(PSO)

The Public Security Ordinance No. 25 of 1947 (PSO 1947) was enacted immediately prior to Sri Lanka's independence: it was the first legislation used in the post-independence period to declare a state of emergency. It was initially used to subvert a potential general strike organised by leftist trade unions;¹²² however, successive governments used the PSO 1947 to quell dissenting voices and respond to insurgencies. In 1961, the Executive issued a declaration of emergency to control the activities of the Federal Party, which sought political reform and autonomy for the North.¹²³ This state of emergency continued even after agitation by the Tamil parties in the North had been suppressed—at times violently.

ii. Historical background: emergency rule in the 1970s

Emergency rule in the 1970s commenced on 16 March 1971, following the arrest of Janatha Vimukthi Peramuna (JVP) leader Rohana Wijeweera on 13 March 1971. The government issued Emergency Regulations (ERs) under the PSO 1947 to suppress the JVP insurrection. The JVP leader and others were detained under the Emergency Regulations.¹²⁴ Under section 9 of the PSO 1947, conduct of State officials in good faith under the Emergency Regulations was immune from prosecution.¹²⁵

As far back as 1971, Sri Lankan civil society warned that conferring wide immunities to State officials under the emergency laws could give rise to a culture of impunity. However, the law was not amended nor were safeguards put in place to narrow the immunity provisions.

122 Abeywickrema, P., *Overview of Sri Lanka's Emergency Regime and Some Useful Historical Background Information*, (Unpublished Manuscript), p 9.

123 The Federal Party or the 'Ilankai Tamil Arasu Katchi' Party led a *Sathyagraha* campaign i.e. a nonviolent direct action campaign, against the government in 1961. The campaign was mainly against the implementation of Sinhala as the official language in the Northern and Eastern provinces.

124 Emergency (Miscellaneous Provisions and Powers) Regulations, 16 March 1971.

125 See *Wijesuriya v. The State* (1973) 77 NLR 25 (Court of Criminal Appeal).

iii. The 1972 and 1978 Constitution of the Republic of Sri Lanka

Soon after the declaration of emergency in March 1971, the 1972 Republican Constitution of Sri Lanka came into force. The 1972 Constitution conferred power on the Prime Minister to advise the President on when to declare a state of public emergency and the President was compelled to act on such advice. The Prime Minister was answerable to Parliament, but there was no requirement to obtain approval from Parliament. The new Constitution gave greater power to the head of government to exploit his or her powers pertaining to the declaration of emergency.

The system was once again overhauled in 1978. The 1978 Constitution set out an emergency regime, affording constitutional protection to the PSO and the immunity clauses contained therein. The implications of this provision are discussed in the next section. The 1978 Constitution conferred the power to issue writs of *habeas corpus* on the Court of Appeal under Article 141.¹²⁶ This power was specifically protected from any legislative interference.¹²⁷

The 1978 Constitution also included a Fundamental Rights Chapter, guaranteeing the right of every person to apply to the Supreme Court for remedy in respect of an infringement or imminent infringement of a fundamental right by executive or administrative action.¹²⁸ Amongst the rights protected is the freedom from arbitrary arrest and detention: Article 13(1) states that no person shall be arrested 'except according to procedure established by law' and that all persons arrested 'shall be informed of the reason for arrest', and Article 13(2) states that every person held in custody 'shall be brought before the judge of the nearest competent court according to a procedure established by law, and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such judge made in accordance with procedure established by law.' As a result, many subsequent landmark cases dealing with

126 Later, the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 gave the High Courts authority to issue orders in the nature of writs of *habeas corpus* in respect of persons illegally detained within the province and to issue orders in the nature of writs of *certiorari*, prohibition, *procedendo*, *mandamus* and *quo warranto* against any person.

127 'In the post-1978 constitutional era, while the Administration of Justice Law itself was repealed and replaced by a new statute, the writ of *habeas corpus* was elevated to a constitutional remedy. The importance of the aforesaid constitutional changes is demonstrable from the manner in which the judiciary attempted to positively respond to the writ of *habeas corpus* as a remedy to protect individual freedom and liberty.' Pinto-Jayawardena, K. & de Almeida Guneratne, J., *Habeas Corpus in Sri Lanka: Theory and Practice of the Great Writ in Extraordinary Times*, Law & Society Trust, 2011 (Pinto-Jayawardena, K. & de Almeida Guneratne, J., *Habeas Corpus in Sri Lanka*) p. 31.

128 Article 17 (1), 1978 Constitution.

emergency regulations are fundamental rights cases. Some of these decisions are discussed in greater detail below.

iv. The emergence of terrorism: the late 1970s until the present day

During the late 1970s and the decade that followed, emergency regulations were promulgated in response to acts of terrorism by militant groups, most of whom sought a separate State in the North and East of the country. Several armed conflicts were fought during this period between the Government of Sri Lanka and the separatist organization, the Liberation Tigers of Tamil Eelam (LTTE). The Armed Forces were called upon to defend the territorial integrity of the country.

The period of emergency continued throughout the late 1980s and 1990s, and lasted up until 2002 when for a brief three-year period, the state of emergency was lifted, largely owing to a Ceasefire Agreement between the Government and the LTTE. However, following the assassination of Foreign Minister Lakshman Kadirgamar in 2005, new emergency regulations were issued. The LTTE was defeated militarily in May 2009.

The 2005 Emergency Regulations, and subsequent additions (such as the 2006 ERs) remained in force until the state of emergency lapsed on 29 August 2011. The Government announced that it would not extend the emergency further; however, fresh regulations under Section 27 of the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 (PTA) were immediately promulgated, replicating many of the problematic provisions of the Emergency Regulations.¹²⁹

2. Emergency laws under the 1978 Constitution

Article 155 of the 1978 Constitution provides that the amended PSO 1947 that was in force immediately prior to the commencement of the Constitution 'shall be deemed to be a law enacted by Parliament.' Article 80(3) of the Constitution precludes any challenge to the validity of an enactment of Parliament, effectively barring any challenge to PSO 1947 for being incompatible with the Constitution.

¹²⁹ See the Prevention of Terrorism (Proscription of the Liberation Tigers of Tamil Eelam) Regulations No. 1 of 2011, the Prevention of Terrorism (Proscription of the Tamil Rehabilitation Organisation) No. 2 of 2011, the Prevention of Terrorism (Extension of Application) Regulations No. 3 of 2011, the Prevention of Terrorism (Detainees and Remandees) Regulations No. 4 of 2011, and the Prevention of Terrorism (Surrendees Care and Rehabilitation) Regulations No. 5 of 2011, respectively published in Extraordinary Gazette Notifications 1721/2, 1721/3, 1721/4 and 1721/5 of 29 August 2011.

The 1978 Constitution also recognizes that emergency regulations promulgated under the PSO 1947 may validly restrict the application of certain fundamental rights. Article 15(7) provides that the exercise and operation of fundamental rights recognized by Articles 12, 13(1), 13(2) and 14 shall be subject to such restrictions as may be prescribed by law in the interests of *inter alia* national security, public order and the protection of public health or morality. It then goes on to say that 'law' within the meaning of that paragraph 'includes regulations made under the law for the time being relating to public security.'¹³⁰

Yet Article 155(2) of the 1978 Constitution unequivocally states that the power of the President to make ERs under the PSO 1947 does not override the provisions of the Constitution, ostensibly including the chapter on fundamental rights. Article 155(2) provides:

The power to make emergency regulations under the Public Security Ordinance or the law for the time being in force relating to public security shall include the power to make regulations having the legal effect of over-riding, amending or suspending the operation of the provisions of any law, except the provisions of the Constitution.

Hence it would appear that ERs cannot override the fundamental rights chapter of the 1978 Constitution, even though certain restrictions under Article 15(7) may be permitted. The ouster clauses, however, exclude the courts from reviewing the conduct of State officials, who through their conduct can violate fundamental rights beyond the permissive provisions of Article 15(7). The courts' response to this question is dealt with later in this chapter.

3. The Public Security Ordinance No. 25 of 1947 (PSO)

The Public Security Ordinance No. 25 of 1947 (PSO) was one of the final pieces of legislation to be passed by the British prior to independence. The PSO enabled the then Governor General to declare a state of emergency and to make ERs under Section 5, where necessary or expedient 'in the interests of public security

¹³⁰ The courts have later interpreted the above provisions to specifically refer to ERs issued under the PSO and not under any other law. In the Supreme Court judgment *Thavaneethan v. Dayananda Dissanayake, Commissioner of Elections and Others* [2003] 1 Sri L.R. 74, p 98 it was held: 'The word 'includes' in Article 15(7) does not bring in regulations under other laws. 'Law' is restrictively defined in Article 170 to mean Acts of Parliament and laws enacted by any previous legislature, and to include Orders-in-Council. That definition would have excluded all regulations and subordinate legislation. The effect of the word 'includes' was therefore only to expand the definition in Article 170 by bringing in regulations under the law relating to public security.'

and the preservation of public order and the suppression of mutiny, riot or civil commotion, or for the maintenance of supplies and services essential to the life of the community.’ Under Part I of the PSO, the President is vested with the power to issue a Proclamation of Emergency, which must then receive the approval of Parliament every month. The Ordinance specifically ousts the jurisdiction of the courts with respect to several measures that the President may adopt under the Ordinance.

Section 3 provides:

Where the provisions of Part II of this Ordinance are or have been in operation during any period by virtue of a Proclamation under section 2, the fact of the existence or imminence, during that period, of a state of public emergency shall not be called in question in any court.

Similarly, Section 8 provides:

No emergency regulation, and no order, rule or direction made or given thereunder shall be called in question in any court.

Section 21(3) provides:

An Order made under section 12 [calling out the armed forces] section 16 [curfew], or section 17 [essential services] or the circumstances necessitating the making of such Order, shall not be called into question in any court.

Under international law and standards, courts must be competent to monitor and ensure that a declaration of a state of emergency complies with the requirements of Article 4 of the ICCPR.¹³¹ Judicial oversight of states of emergency is inherent to the principle of legality.¹³² The *ICJ Geneva Declaration* stresses ‘the role of the judiciary...is paramount in safeguarding human rights and the Rule of Law in times of crisis, including declared states of emergency.’¹³³ The judiciary serves as the essential check on the other branches of the State; it ensures that laws and measures adopted to address the emergency comply with the rule of law,

131 *Concluding Observations of the UN Human Rights Committee on Colombia*, UN Doc. CCPR/C/79/Add.76, 5 May 1997, para 23 and 38.

132 UN Doc. E/CN.4/Sub.2/1997/19, 23 June 1997.

133 Principle 1, International Commission of Jurists, *Legal Commentary to the ICJ Geneva Declaration*, *supra* fn. 73, p xvi.

human rights and international humanitarian law.¹³⁴ Emergency laws must not under any circumstances oust the jurisdiction of the courts.

Another troubling feature of the PSO is the conditional immunity clause for officials acting 'in good faith.' Section 9 and Section 23 grant conditional immunity to persons acting in good faith under the PSO or the ERs passed under it:

No prosecution or other criminal proceeding against any person for any act purporting to be done under any provision of any emergency regulation or of any order or direction made or given thereunder shall be instituted in any court except by, or with the written sanction of, the Attorney-General; and no suit, prosecution or other proceeding, civil or criminal, shall lie against any person for any act in good faith done in pursuance or supposed pursuance of any such provision.

Section 23 provides:

No prosecution or other criminal proceeding against any person for any act purporting to be done under any provision of this Part [Part III Special Power of the President] or of any Order made thereunder shall be instituted in any court except by, or with the written sanction of, the Attorney-General; and no such suit, prosecution or other proceeding, civil or criminal, shall lie against any person for any act in good faith done in pursuance or supposed pursuance of any such provision.

The fact that a person has acted in good faith must not be used as a basis for immunity for a human rights violation. It may be a factor that could be taken into consideration during the sentence phase after a conviction is made. A sanction requirement violates the duty under international law to provide a remedy for human rights violations; it interferes, if not obstructs, the ability to hold State officials accountable for human rights violations. The UN Human Rights Committee has indicated that immunities or other similar provisions 'are generally incompatible with the duty of States to investigate; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future.'¹³⁵ This duty continues in times of emergency and under no circumstances may it be subject to derogation, as it constitutes a treaty obligation

¹³⁴ *Ibid.*

¹³⁵ UN Human Rights Committee, General Comment 20, Article 7 (*Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment*), 10 March 1992, (UNHRC General Comment 20), para 15.

inherent in the Covenant as a whole.¹³⁶ Where violations are recognized as criminal under domestic or international law - such as torture and other cruel, inhuman and degrading treatment, summary or arbitrary killing and enforced disappearance - a State's failure to investigate and bring perpetrators to justice for such violations could in and of itself give rise to a separate breach of the Covenant.¹³⁷

The one remedy enforceable against the immunity provisions under Section 9 and Section 23 of the PSO 1947 is the writ of *habeas corpus* through the superior courts.¹³⁸ The Supreme Court was conferred authority to grant writs of *habeas corpus* under the Courts Ordinance of 1889 that prevailed until 1972, and following the promulgation of the 1972 Constitution, under the Administration of Justice Law No. 44 of 1973.¹³⁹ Under Article 141 of the 1978 Constitution, the writ of *habeas corpus* is now exercised before the Court of Appeal. Since 1990, the writ is also exercised before the Provincial High Court.¹⁴⁰ The writ of *habeas corpus*, however, is a procedural writ that cannot lead to criminal prosecution: it cannot bring perpetrators to justice for human rights violations, or confer a sentence on perpetrators for such violations. Thus, the writ of *habeas corpus* cannot be used by the State to discharge its duty to provide effective remedy for human rights violations.

4. The Prevention of Terrorism Act (Temporary Provisions) Act No. 48 of 1979 (PTA)

The Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 (PTA) was introduced by the Government as a temporary measure to deal with what the preamble identified as 'elements or groups of persons or associations that advocate the use of force or the commission of crime as a means of, or as an aid in, accomplishing governmental change within Sri Lanka.'¹⁴¹

136 UNHRC General Comment 29, *supra* fn. 50, para 14.

137 UNHRC General Comment 31, *supra* fn. 46, para 18.

138 See Section 7 of the Administration of Law of 1973; see also Pinto-Jayawardena, K. & de Almeida Guneratne, J., *Habeas Corpus in Sri Lanka*, *supra* fn. 127, pp. 23-24.

139 See Section 7 of the Administration of Justice Law of 1973. Also Pinto-Jayawardena, K. & de Almeida Guneratne, J., *Habeas Corpus in Sri Lanka*, *supra* fn. 127, p 23.

140 High Court of the Provinces (Special Provisions) Act No. 19 of 1990 gives the High Courts authority to issue orders in the nature of writs of *habeas corpus* in respect of persons illegally detained within the province and to issue orders in the nature of writs of *certiorari*, prohibition, *procedendo*, *mandamus* and *quo warranto* against any person.

141 See Preamble to the PTA.

A senior lawyer and human rights activist¹⁴² commented that many had not fully realized the dangers of resorting to emergency during the 1970s. This general apathy facilitated the easy passage of the PTA Bill. The Bill was introduced in Parliament under Article 122 of the Constitution as 'urgent in the national interest', giving the Supreme Court only twenty-four hours to rule on its constitutionality. When the PTA Bill was referred to the Supreme Court, the Court was not permitted to decide the constitutionality of the Bill's provisions, - specifically whether restrictions on Articles 12(1), 13(1) and 13(2) were saved by Article 15(7) -¹⁴³ because the Bill was going to be approved with a two-thirds majority of Parliament.¹⁴⁴ As per Article 84 of the Constitution, when a Bill passes with a two-thirds majority in Parliament, it can be enacted notwithstanding inconsistencies with the Constitution. The Supreme Court determined that the Bill did not require a referendum to be passed, as it was of the view that the Bill did not repeal or amend any entrenched provision in the Constitution.¹⁴⁵

An act of terrorism does not necessarily constitute a public emergency, threatening the life of a nation. Whether specific acts of terrorism constitute armed conflict or a public emergency, as per Article 4 of the ICCPR depends on a series of objective criteria established by international law.¹⁴⁶ Thus, the duty under international law to suppress acts of terrorism¹⁴⁷ cannot be used as the basis for instituting emergency laws or measures that derogate from human rights obligations in perpetuity.¹⁴⁸ The United Nations Security Council has on more than one occasion stressed that counter-terrorism measures must comply with international law, in particular international human rights law, refugee law and humanitarian law.¹⁴⁹ In the absence of a properly declared state of public emergency, pursuant to Article 4 of the ICCPR, counter-terrorism measures cannot suspend or dispense with human rights obligations. Such measures should be undertaken through the normal criminal law system.

142 Name withheld for reasons of confidentiality.

143 Article 15(7) of the Constitution provides: 'The exercise and operation of all the fundamental rights declared and recognized by Articles 12, 13(1), 13(2) and 14 shall be subject to such restrictions as may be prescribed by law in the interests of national security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society. For the purposes of this paragraph 'law' includes regulations made under the law for the time being relating to public security.'

144 See S.C. S.D No. 7/79, decided on 17 July 1979.

145 See *Weerawansa v. The Attorney-General* [2000] 1 Sri.L.R. 387, p 395.

146 International Commission of Jurists, *Briefing Paper on Sri Lanka*, *infra* fn. 162, p 6.

147 UNSC Resolution 1373 (2001), UN Doc. S/RES/1373 (2001), 28 September 2001.

148 International Commission of Jurists, *Briefing Paper on Sri Lanka*, *infra* fn. 162, p 6.

149 UNSC Resolution 1566 (2004), UN Doc. S/RES/1566 (2004), 8 October 2004; see also UNSC Resolution 1624 (2005), UN Doc. S/RES/1624 (2005), 14 September 2005.

It is crucial that any legislation dealing with emergency or counter-terrorism be compatible with fundamental legal principles. Such legislation must not violate: the principle of legality; the right to a fair trial; the right to the presumption of innocence; the prohibition against torture or ill-treatment by admitting information obtained through torture, ill-treatment or coercion as evidence in trial. Moreover, exceptional circumstances such as political instability or public emergencies, cannot exempt law enforcement or other officials from possible criminal or civil liability for violating human rights during emergency operations.¹⁵⁰

Section 9(1) of the PTA provides:

Where the Minister has reason to believe or suspect that any person is connected with or concerned in any unlawful activity, the Minister may order that such person be detained for a period not exceeding three months in the first instance, in such place and subject to such conditions as may be determined by the Minister, and any such order may be extended from time to time for a period not exceeding three months at a time: Provided, however, that the aggregate period of such detention shall not exceed a period of eighteen months.

Section 10 prevents Courts from judicially reviewing a Minister's orders: 'An order made under Section 9 shall be final and shall not be called in question in any court or tribunal by way of writ or otherwise.' Section 10 of the PTA when read with Section 22 of the Interpretation (Amendment) Act No. 18 of 1972 decrees that the Minister's decision in authorizing an arrest and detention is beyond judicial review.

The actions of the Minister, imposing prohibitions or restrictions on persons suspected to be connected or concerned with the commission of unlawful activity, are also *ex facie* exempted from review under the PTA in Section 11(1).

Section 11(1) of the PTA provides:

Where the Minister has reason to believe or suspect that any person is connected with or concerned in the commission of any unlawful activity referred to in subsection (1) of section 9, he may make an order in

¹⁵⁰ International Commission of Jurists, *Briefing Paper on Sri Lanka*, *infra* fn. 162, p 7. Also see UNHRC General Comment 29, *supra* fn. 50, para 14; International Commission of Jurists, *Legal Commentary to the ICJ Berlin Declaration*, *supra* fn. 44, para 9.

writing imposing on such person such prohibitions or restrictions as may be specified in such order in respect of –

- (a) his movement outside such place of residence as may be specified; or
- (b) the places of residence and of employment of such person; or
- (c) his travel within or outside Sri Lanka; or
- (d) his activities whether in relation to any organisation, association or body of persons of which such person is a member, or otherwise; or
- (e) such person addressing public meetings or from holding office in, or taking part in the activities of or acting as adviser to, any organisation, association or body of persons, or from taking part in any political activities, and he may require such person to notify his movements to such authority, in such manner and at such times as may be specified in the order.

Section 11(5) specifically provides: '[a]n order made by the Minister under subsection (1) shall be final and shall not be called in question in any court or tribunal by way of writ or otherwise.' This framework essentially gives license to the Minister to curtail the rights of citizens with almost no accountability. The framework is wholly consistent with the general legislative intent to exclude courts from reviewing government conduct during times of emergency.

The Supreme Court has held, on more than one occasion, that statutory ouster clauses cannot override the courts' authority to review unreasonable or *ultra vires* decisions by executive or administrative authorities. In the *Joseph Perera case*,¹⁵¹ the Supreme Court held that Section 8 of the PSO, purporting to oust the court's jurisdiction over detention orders, must give way to the petitioner's constitutional rights.

In *Senthilnayagam v. Seneviratne*, the State conceded that an ouster clause would not apply to a writ of *habeas corpus*.¹⁵² Hence the idea that conduct under the PSO and PTA are completely beyond the scrutiny of the courts has been effectively challenged.¹⁵³

151 *Joseph Perera Alias Bruten Perera v. The Attorney-General and Others* [1992] 1 Sri.L.R. 199.

152 [1981] 2 Sri L.R. 187, p 206.

153 The second proviso to Section 22 of the Interpretation (Amendment) Act No. 18 of 1972 puts the issue beyond any contrary contention. Hence the PSO and PTA must be read with Section 22 of the Interpretation (Amendment) Act in as much as the said enactments do not expressly take away the jurisdiction of the Court of Appeal to issue orders in the nature of writs under Article 140 of the Constitution. See in this connection the Supreme Court decision in *Moosajees Ltd v. Arthurs and Others*, 2004 (1) ALR 1.

Administrative detention or detention without a charge inherently undermines human rights and rule of law and often creates conditions not only for arbitrary detention but also related human rights violations. The UN Special Rapporteur on Torture in 2002 recommended that countries 'consider abolishing, in accordance with relevant international standards, all forms of administrative detention.'¹⁵⁴ Similarly the *ICJ Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights* recommended

*States should repeal laws authorizing administrative detention without charge or trial outside a genuine state of emergency; even in the latter case, States are reminded that the right to habeas corpus must be granted to all detainees and in all circumstances.*¹⁵⁵

The UN Working Group on Arbitrary Detention declared that administrative detention as a counter-terrorism measure was unacceptable¹⁵⁶ and detention of persons suspected of terrorist activities must be accompanied with concrete charges.¹⁵⁷ Administrative detention on the basis of public security should not be used save in exceptional circumstances involving a lawfully declared state of emergency pursuant to Article 4 of the ICCPR, which allows for derogation of human rights treaty obligations.¹⁵⁸ Even in such circumstances, the UN Human Rights Committee indicates that preventive detention will be deemed arbitrary and in violation of Article 9 unless a State can show 'that other, less intrusive, measures could not have achieved the same end.'¹⁵⁹ Also, it must be shown that the administrative detention was 'necessary in all circumstances of the case and proportionate to the ends sought.'¹⁶⁰

154 *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc. E/CN.4/2003/68, 17 December 2002, para 26(h); see also *Beyond Lawful Constraints: Sri Lanka's Mass Detention of LTTE Suspects* September 2010 accessed at: <http://www.unhcr.org/refworld/docid/4ca0ae592.html> (International Commission of Jurists, *Beyond Lawful Constraints*), p 22.

155 International Commission of Jurists, *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights* Geneva 2004 (International Commission of Jurists, *Assessing Damage, Urging Action*) p 19; see also International Commission of Jurists, *Beyond Lawful Constraints*, *supra* fn. 154, p 2.

156 Report of the *Working Group on Arbitrary Detention*, UN Doc. A/HRC/10/21, 16 February 2009, (Report of the *Working Group on Arbitrary Detention*, 2009) para 54; see also International Commission of Jurists, *Beyond Lawful Constraints*, *supra* fn. 154, p 22.

157 *Ibid.*

158 International Commission of Jurists, *Legal Commentary to the ICJ Berlin Declaration*, *supra* fn. 44, p 55; see also *Concluding Observations of the UN Human Rights Committee on Jordan*, UN Doc. CCPR/C/79/Add.35, A/49/40, (UNHRC *Concluding Observations on Jordan*) para 21; see International Commission of Jurists, *Beyond Lawful Constraints*, *supra* fn. 154 pp 21-27.

159 UN Human Rights Committee: Views of 29 October 2003, case of *Bakhtiyari v. Australia*, Communication 1069/2002, UN Doc. CCPR/C/79/D/1069/2002, para 9.3.

160 UN Human Rights Committee: Views of 13 November 2004, case of *Shafique v. Australia*, Communication 1324/2004, UN Doc. CCPR/C/88/D/1324/2004, 13 November 2004, para 7.2.

In situations where persons are deprived of their liberty, the State must provide all of the guarantees under Article 9 of the ICCPR: (1) detainees must be informed of the reasons for their arrest (Article 9(2) of ICCPR); (2) the detention must be based on grounds and procedures established by law – it must not be arbitrary (Article 9(1) of ICCPR); (3) court control of the detention must be available (Article 9(4) of ICCPR); and (4) there must be an enforceable right to compensation where the detention is found to be unlawful (Article 9(5) of ICCPR).¹⁶¹

Additionally, in the context of counter-terrorism, there are minimum safeguards that must be applied when detaining persons:

- (1) Detainees must be informed of the reasons for their detention; must be afforded access to legal counsel (within 24 hours); must be given access to family; and where necessary or applicable, be given access to medical and consular assistance;
- (2) Detainees must receive humane treatment; have access to habeas corpus remedies; and the right to appeal to a competent court;
- (3) Detainees must not be held in prolonged incommunicado or indefinite detention;
- (4) Detainees must be held in official places of detention and the authorities must keep a record of their identity;
- (5) The grounds and procedures for detention must be prescribed by law and reasonable time limits must be set on the length of preventive detention;
- (6) Any such detention must continue only as long as the situation necessitates and appropriate judicial bodies and proceedings should review detentions on a regular basis when detention is prolonged or extended.¹⁶²

A State is never permitted to arbitrarily detain a person under international law. In other words, the grounds or basis for detention must always be clear and specific enough that an ordinary person would know which actions would

¹⁶¹ Article 9, ICCPR; UN Human Rights Committee, 'General Comment 8, *Article 9*', UN Doc. HRI/GEN/1/Rev.1 at 8 (1994), para 4.

¹⁶² International Commission of Jurists, Sri Lanka: Briefing Paper- *Emergency Laws and International Standards*, March, 2009, accessed at: <http://www.icj.org/IMG/SriLanka-BriefingPaper-Mar09-FINAL.pdf> (International Commission of Jurists, *Briefing Paper on Sri Lanka*).

trigger detention. The grounds for detention under Section 9(1) –‘connected with or concerned in any unlawful activity’- are broad and vague. There is no definition of ‘connected with’ or ‘concerned in’ nor are there any guidelines to assist in understanding the meaning of these terms. Without greater specificity or clarity, Section 9(1) violates Article 9(1) of ICCPR.

Equally, under the ICCPR, a State is never permitted to derogate from the practical functioning of judicial or other remedies that are required to provide an effective remedy. The Committee stresses that the right to take proceedings before a court to enable it to decide without delay on the lawfulness of detention can never be derogated from. Administrative detention must be subject to court control at all times. Prohibiting courts from reviewing orders issued by the Minister of Defence under Sections 9 and 11 of the PTA contravenes obligations under international law.

4.1 Admission of information obtained by torture or cruel, inhumane or other degrading treatment or punishment

Statements, including ‘confessions’ made to a police officer of or above the rank of Assistant Superintendent, are presumptively admissible into evidence unless the accused is able to prove the statement was not voluntary.¹⁶³

Judges have convicted persons on the basis of confessions admitted under Section 16 despite medical reports evidencing torture before court, the absence of legal representation during interrogation or before a Magistrate, and the absence of an independent and competent interpreter during interrogation.¹⁶⁴ In the majority of cases filed under the PTA, persons are convicted on the sole strength of a confession.¹⁶⁵

Presumptively admitting statements, with the burden on the victim of torture or ill-treatment to seek their exclusion, enables information obtained by torture or other ill-treatment to be admitted as evidence in criminal proceedings. Admitting such information into evidence violates: the prohibition on torture and ill-treatment under Article 7 of the ICCPR; the right to not testify against oneself

¹⁶³ Section 16 of the Evidence Ordinance No. 14 of 1895.

¹⁶⁴ Pinto-Jayawardena, K., *The Rule of Law in Decline: Study on Prevalence, Determinants and Causes of Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (CIDTP) in Sri Lanka*, The Rehabilitation and Research Centre for Torture Victims (Copenhagen) (2009), (Pinto-Jayawardena, *The Rule of Law in Decline*) p 130.

¹⁶⁵ *Ibid*; see also Committee against Torture, *Concluding Observations on Sri Lanka*, *supra* fn. 18, para 11.

or confess guilt under Article 14 (3) of the ICCPR;¹⁶⁶ the obligation to prevent torture or ill-treatment under Article 2 of the CAT; and the duty to explicitly exclude evidence obtained by torture or ill-treatment under Article 15 of the CAT.

The UN Committee against Torture in its most recent concluding observations on Sri Lanka expressed its concern over these provisions of the PTA, calling on Sri Lanka to comply with Article 15 of the CAT and explicitly exclude evidence obtained by torture or ill-treatment.¹⁶⁷

The Human Rights Committee has noted the importance of not only prohibiting torture and ill-treatment, but also discouraging its practice through laws that explicitly prohibit the admissibility of statements obtained through torture or other prohibited treatment.¹⁶⁸ The UNGA in its most recent unanimous resolution and in previous unanimous resolutions, '*strongly urged* States to ensure that no statement that is established to have been made as a result of torture is invoked as evidence in any proceedings.'¹⁶⁹

5. Emergency Regulations

In August 2005, following the assassination of Foreign Minister Lakshman Kadirgamar, President Chandrika Bandaranaike Kumaratunga introduced a new set of ERs entitled the Emergency (Miscellaneous Provisions and Powers) Regulations, No. 1 of 2005 (2005 ERs). As the Ceasefire Agreement between the Government and the LTTE was still in operation, these Regulations were introduced when sections of the PTA dealing with arrests and search operations were technically suspended.¹⁷⁰

Regulation 19(1) of the 2005 ER¹⁷¹ provides:

Where the Secretary to the Ministry of Defence is of opinion with respect to any person that, with a view to preventing such person:

166 UNHRC General Comment 32, *supra* fn. 74 para 60.

167 Committee against Torture, *Concluding Observations on Sri Lanka, supra* fn. 18, para 11.

168 UNHRC General Comment 20, *supra* fn. 136, para 12.

169 UN General Assembly, Resolution 65/205, para 14; UN General Assembly resolution 64/153, para 13; UN General Assembly resolution 63/166, para 13; UN General Assembly resolution 62/148, para 10; UN General Assembly resolution 61/53, para 7; UN General Assembly resolution 59/182, para 6.

170 See Ceasefire Agreement signed by the government of the Democratic Socialist Republic of Sri Lanka and the Liberation Tigers of Tamil Eelam (February 2002). According to clause 2.12: 'The Parties agree that search operations and arrests under the Prevention of Terrorism Act shall not take place. Arrests shall be conducted under due process of law in accordance with the Criminal Procedure Code.'

171 Emergency (Miscellaneous Provisions and Powers) Regulation, No. 1 of 2005, 13 August 2005.

- (a) from acting in any manner prejudicial to the national security or to the maintenance of public order, or to the maintenance of essential services; or
- (b) from acting in any manner contrary to any of the provisions of sub-paragraph (a) or sub-paragraph (b) of paragraph (2) of regulation 40 or regulation 25 of these regulations, It is necessary so to do, the Secretary may order that such person be taken into custody and detained in custody.

Regulation 19(10) provides: 'An order under paragraph (1) of this regulation shall not be called in question in any court on any ground whatsoever.'

Regulations 54 to 58 lay down the procedure that must be followed with regard to the death of persons caused by the Police or the Army, or the death of persons while in the custody of the Police or Army. Provisions of the ordinary law relating to an inquest are bypassed under the Regulations, and special procedures are laid down vesting extraordinary authority in police officers, including the power to move the High Court to inquire into the death of such persons.

The basis for detention under regulation 19 is extremely vague and broad. The terms 'prejudicial,' 'national security,' 'public order,' and 'essential services' are not defined. There are no guidelines to assist the ordinary person in understanding what actions would trigger detention under the regulations. It is likely a person who poses little or no threat to national security could be detained under Article 9 of the Regulations. This lack of clarity and specificity contravenes obligations under Article 9(1) of the ICCPR and constitutes arbitrary detention.¹⁷²

Even if the administrative detention provisions under Section 19 of the 2005 ER 93 were valid, the prohibition on any sort of court control or judicial review under Regulation 19(10) is entirely incompatible with Article 9, paragraph 4 of the ICCPR which provides that the right to challenge a detention must be available at all times.¹⁷³

The Emergency (Prevention and Prohibition of Terrorism and Specified Terrorist Activities) Regulations No. 07 of 2006, (2006 ERs)¹⁷⁴ were introduced in

172 See International Commission of Jurists, *Beyond Lawful Constraints*, *supra* fn. 154 pp, 26-27; see also International Commission of Jurists, *Briefing Paper on Sri Lanka*, *supra* fn. 162, p 14.

173 UNHRC General Comment 29, *supra* fn. 50.

174 The Emergency (Prevention and Prohibition of Terrorism and Specified Terrorist Activities) Regulations No. 07 of 2006.

December 2006 as the armed conflict between the Government forces and the LTTE intensified.

Regulation 19 of the 2006 ERs declares:

No action or suit shall lie against any Public Servant or any other person specifically authorized by the Government of Sri Lanka to take action in terms of these Regulations, provided that such person has acted in good faith and in the discharge of his official duties.

The immunity granted under Regulation 19 is so broad that it could be read to cover conduct outside what was envisaged by these Regulations. Regulation 19 thus effectively forecloses the right of individuals to a remedy. As the Centre for Policy Alternatives notes:

Given the wide ranging powers provided to the State and its officers under these regulations, the absence of independent review, the history of abuse of similar draconian legislation, including the Prevention of Terrorism Act, to stifle legitimate democratic activity and political dissent, and the culture of impunity that has developed in Sri Lanka in recent months in particular, such a clause could easily become one that promotes impunity rather than providing for immunity for bona fide actions.¹⁷⁵

As noted above, whether a person has acted in good faith or in the proper discharge of their duties cannot be a basis for immunity from responsibility for gross human rights violations. Equally, the fact that a person has acted under the authorization or orders of a person in superior authority will not relieve them of criminal responsibility for gross human rights violations. The Committee against Torture stresses that 'an order of a superior or public authority can *never* be invoked as a justification of torture.'¹⁷⁶ Subordinates may not seek refuge in superior authority and should be held to account individually.¹⁷⁷ The UN Human Rights Committee also calls on States to remove the defence of obedience to superior orders for State agents committing human rights violations.¹⁷⁸ The

175 Centre for Policy Alternatives, *Statement on Emergency (Prevention of Terrorism and Specified Terrorist Activities) Regulations of December 2006*, accessed at: <http://www.nation.lk/2006/12/24/opini.htm>.

176 Committee against Torture, General Comment 2, *supra* fn. 63, para 26.

177 *Ibid.*

178 UNHRC General Comment 31, *supra* fn. 46, para 18.2.

UN Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity,¹⁷⁹ also affirm that acting on orders of a superior does not exempt an individual from responsibility, in particular criminal responsibility.¹⁸⁰ The defence of obedience of superior orders is further barred under international criminal law, notably in the statutes of the UN *ad hoc* tribunals¹⁸¹ established by the UN Security Council resolutions as well as under the *Rome Statute for the International Criminal Court*.¹⁸² As already noted throughout this Study, official status cannot be used to relieve persons accused of human rights violations from legal responsibility for such violations.¹⁸³

During mid-2011, the Government of Sri Lanka began to proclaim to the Sri Lankan public and the international community that terrorism within the country had been eradicated and that normalcy had been restored. In a speech to Parliament on 25 August 2011, President Mahinda Rajapaksa proposed that Parliament should repeal all existing Emergency Regulations for 'administrative activities to function democratically under the ordinary law.'¹⁸⁴ The Government decided to officially bring to an end the period of emergency in the country. However, as discussed below, the *status quo* did not change, as new regulations were introduced under the PTA, which effectively maintained a *de facto* state of emergency.

6. Prevention of Terrorism Regulations 2011

Almost immediately after the state of emergency ended, the President, acting in his capacity as Minister of Defence, promulgated five new regulations under Section 27 of the PTA:¹⁸⁵

1. The Prevention of Terrorism (Proscription of the Liberation Tigers of Tamil Eelam) Regulations No. 1 of 2011;

179 *Updated Set of Principles to Combat Impunity*, *supra* fn. 1.

180 *Ibid.*, Principle 27.

181 Article 7, para 4, *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991* adopted by Security Council on 25 May 1993, UN SCOR. 48th Sess., 3217th mtg. at 6, UN Doc. S/RES/827 (1993), 32 I.L.M. 1203 (1993) (ICTY Statute); Article 6, para 4, *Statute of the International Tribunal for Rwanda*, adopted by S.C. Res. 955, U.N. SCOR, 49th Sess. 3456d mtg. at 3, UN Doc. S/RES/955 (1994), 33 I.L.M. 1598, 1600 (1994) (ICTR Statute).

182 Article 33, *Rome Statute of the International Criminal Court*, 2187 U.N.T.S. 90, entered into force 1 July 2002 (Rome Statute).

183 UNHRC General Comment 31, *supra* fn. 46, para 18.

184 See 'No extension of emergency regulations - President', News Line, 25 August 2011, accessed at: http://www.priu.gov.lk/news_update/Current_Affairs/ca201108/20110825president_proposes_to_lift_emergency_law.htm.

185 See Extraordinary Gazette Notifications 1721/2, 1721/3, 1721/4 and 1721/5 of 29 August 2011.

2. The Prevention of Terrorism (Proscription of the Tamil Rehabilitation Organization) No. 2 of 2011;
3. The Prevention of Terrorism (Extension of Application) Regulations No. 3 of 2011;
4. The Prevention of Terrorism (Detainees and Remandees) Regulations No. 4 of 2011; and
5. The Prevention of Terrorism (Surrendees Care and Rehabilitation) Regulations No. 5 of 2011.

The Minister of Defence is empowered by Section 27(1) of the PTA to make regulations 'for the purpose of carrying out or giving effect to the principles and provisions' of the PTA. The Regulations pertain to provisions of the PTA dealing with *inter alia* arrests, seizures and searches,¹⁸⁶ remand orders,¹⁸⁷ detention and restriction orders,¹⁸⁸ detention during trial,¹⁸⁹ admissibility of certain statements as evidence against a person¹⁹⁰ and offences under the Act.¹⁹¹

The first two sets of PTA Regulations, Nos. 1 and 2 of 2011 outlaw the LTTE and the Tamil Rehabilitation Organization (TRO). Although the underlying objectives of these Regulations appear to be legitimate and important for protecting the population against acts of terrorism, their provisions are overly expansive and are couched in such overbroad terms that they effectively criminalize the supply of even professional legal services to an individual or organization in some way connected to the LTTE or TRO.¹⁹²

The Regulations confer broad powers to the President to seize properties of persons he may think have custody of money, securities or credits that are being used or are intended to be used for the purposes of an illegal organization.¹⁹³ The President may order the property be forfeited to the State. The decision of the President is not subjected to judicial oversight and is considered final: in other words, if a President seizes a person's property, that person has no recourse

186 See Section 6 of the PTA.

187 See Section 7 of the PTA.

188 See Section 9 of the PTA.

189 See Section 15A of the PTA.

190 See Section 16 of the PTA.

191 See Section 2 of the PTA.

192 See Regulation 4 of the Prevention of Terrorism (Proscription of the Liberation Tigers of Tamil Eelam) Regulations No. 1 of 2011 and Regulation 5 of the Prevention of Terrorism (Proscription of the Tamil Rehabilitation Organisation) Regulations No. 2 of 2011.

193 See Regulation 7 of Regulations No. 1 of 2011 and Regulation 6 of Regulations No. 2 of 2011.

to challenge the decision. Under Section 4 of the parent PTA, properties could only be forfeited by the State *after* a conviction by a court of law.

PTA Regulations No. 4 of 2011 deal with detainees and remandees, facilitating the continuation of a *de facto* state of emergency

Regulation 2(1) of Regulations No. 4 of 2011

*Any person who has been detained in terms of the provisions of any emergency regulation which was in operation on the day immediately prior to the date on which these regulations came into operation, shall forthwith on the coming into operation of these regulations, be produced before the relevant Magistrate, who **shall** take steps to detain such person in terms of the provisions of the Criminal Procedure Code Act, No. 15 of 1979. [emphasis added]¹⁹⁴*

Regulation 2(1) of Regulations No. 4 of 2011 converts the detention of all detainees under the previous Emergency Regulations in force on 28 August 2011 to 'detention' under the terms of the provisions in the Criminal Procedure Code. The use of the word 'shall' means a Magistrate cannot exercise any discretion to make reasonable orders for the release of such persons. The Magistrate must continue the detention of such persons under the Criminal Procedure Code. The Regulations even remove the requirement of the Minister—who initially detains the suspect—to exercise his or her discretion to continue the detention, 'either upon personal knowledge or credible information.'¹⁹⁵

As noted above, administrative detention is generally not permitted under international human rights law. Administrative detention is tolerated only in exceptional cases, when it is part of a temporary measure taken in a state of emergency properly declared pursuant to the requirements of Article 4 of the ICCPR. In such a case, the administrative detention must be necessary and proportionate, constituting the least restrictive measure available. States are never permitted to arbitrarily detain a person under international law and detainees must be afforded all of their guarantees under Article 9 of the ICCPR.

¹⁹⁴ See Regulation 2(1) of Regulations No. 4 of 2011.

¹⁹⁵ See Regulation 2(2)(b) of Regulations No. 4 of 2011. This Regulation provides that persons who are or have been suspected of being connected with or concerned in the commission of any unlawful activity under the previous Emergency Regulations be treated as if remanded under the PTA.

Under Regulation 2(1) of Regulations No. 4 of 2011, there is no legal basis for the detention. The administrative detention under the emergency regulations is automatically transformed into detention under the criminal justice system through a mandatory remand; there is no clear legal basis for the continued detention and no opportunity to challenge its legality. Regulation 2(1) of Regulations No. 4 of 2011 contravenes Sri Lanka's obligations under Article 9 and Article 14 of the ICCPR.

Regulations No. 5 of 2011 deals with persons who come forward 'in connection with' specified offences or 'through fear of terrorist activities'. They are also placed in custody and subjected to rehabilitation. The 'rehabilitation' appears to be mandatory under the Regulations. The Regulations require that persons deemed to be surrendeers are handed over to the Commissioner General of Rehabilitation, and that the Secretary to the Ministry of Defence may make an order to keep such persons for a period of up to one year in the first instance and subsequently for three-month periods not exceeding two years in total. This scheme of rehabilitation is inconsistent with Section 37 of the Criminal Procedure Code, which requires that any person who is arrested without a warrant be produced before a Magistrate within twenty-four hours. For the reasons already noted above, this scheme constitutes arbitrary detention and violates obligations under Articles 9, 14 and 2(3) of the ICCPR.

It is pertinent to note that the recent report of the Lessons Learnt and Reconciliation Commission (LLRC)¹⁹⁶ revealed at least 45 cases of persons 'disappearing' after surrendering to the Armed Forces.¹⁹⁷ This number reflects only the complaints made to the LLRC, and is likely to constitute a fraction of the real number of enforced disappearances. A further 1,018 cases where persons had allegedly 'disappeared' after arrest by the Armed Forces were also recorded by the LLRC.¹⁹⁸ This number is staggering given the fact that it only reflects complaints made by civilians in specific locations to a government-appointed body. Persons who surrender for so-called rehabilitation purposes are in an extremely vulnerable position and are exposed to a range of human

196 The President appointed the LLRC on 15 May 2010 under Section 2 of the Commissions of Inquiry Act No. 17 of 1948. The broad mandate of the LLRC was to examine the events that led to the breakdown in the ceasefire agreement between the government and the LTTE, to examine events that took place during the war up to 19th May 2009, and to propose a framework for future reconciliation. It released its final report to the public on 16 December 2011.

197 See *Annexes to the Report of the Commission of Inquiry on Lessons Learnt and Reconciliation* (November 2011), Annex 4.15.

198 *Ibid.*, Annex 5.1.

rights violations, including arbitrary arrest and detention, extra-judicial killing and enforced disappearance.

7. The Case Law

7.1 Will Courts intervene in the legality of orders issued under the PTA and the ER?

In 1971, the Supreme Court in *Hirdaramani v. Ratnavale*,¹⁹⁹ held that a detention order issued by the Permanent Secretary in good faith pursuant to Regulation 18(1) was not justiciable.²⁰⁰

In 1972, the Supreme Court in *Gunasekera v. De Fonseka*²⁰¹ held that the power to arrest without a warrant under the ER was not unfettered,²⁰² and the arresting officer must have reasonable grounds to suspect an offence has been committed. The Supreme Court held that if the arresting officer is not personally aware or in possession of information of the alleged commission of an offence, any arrest made by such officer is unlawful under *habeas corpus* proceedings. This judgment was not followed in *Gunasekera v. Ratnavale* or later cases.²⁰³

In 1972, the Supreme Court in *Gunasekera v. Ratnavale* held that without any proof that the Permanent Secretary had an ulterior motive or acted for a collateral purpose and not for the purpose stated, the detention orders were *ex facie* valid. The majority judgment further held that any order under Regulation 18(1) of the ERs of 1971 should not be called into question in any Court on any ground whatsoever, and the Regulation itself was *intra vires* of the PSO.²⁰⁴ Where a detention order under Regulation 18(1) is *ex facie* valid, the issue of good faith of the Permanent Secretary is not a justiciable matter.²⁰⁵ The petitioner,

199 (1971) 75 NLR 67.

200 *Ibid.*, p 74.

201 (1972) 75 NLR 246; In this case, an Assistant Superintendent of Police purported to arrest the detainee under Regulation 19 of the ERs of 1971, merely because he had orders to do so from his superior officer, the Superintendent of Police.

202 *Ibid.* Also see Pinto-Jayawardena, K. & de Almeida Guneratne, J., *Habeas Corpus in Sri Lanka supra* fn. 127, p 26.

203 (1972) 76 NLR 316.

204 *Ibid.*, pp 330-331. Also see Pinto-Jayawardena, K. & de Almeida Guneratne, J., *Habeas Corpus in Sri Lanka, supra* fn. 127, pp. 29-30.

205 *Ibid.*, p 334. This position appears to have been contrary to the long line of authority on the separation of powers doctrine. In *Anthony Naide v. The Ceylon Plantations* (1966) 68 N.L.R. 558, a doubt was expressed as to whether Parliament had the power to interfere with the jurisdiction of the Supreme Court in connection with the issue of prerogative writs and *habeas corpus*, although it was conceded that Parliament could alter the jurisdiction of the courts even retrospectively. However, the Privy Council in the case of *Liyanage v. The Queen* (1966) 68 N.L.R. 265 (P.C.), recognised the existence of the separate power of the judiciary that cannot be usurped even by Parliament, except by way of a constitutional amendment. See Pinto-Jayawardena, K. & de Almeida Guneratne, J., *Habeas Corpus in Sri Lanka, supra* fn. 127, p 54.

Gunasekera, was released just a few hours before pursuant to the Supreme Court judgment in *Gunasekera v. De Fonseka*, only to be taken into custody under a fresh detention order pursuant to Regulation 18(1).

In 1983, the Supreme Court in *Visuvalingam v. Liyanage*²⁰⁶ held that the Courts must not substitute their own opinion for that of the Competent Authority.

In 1987, the Court of Appeal in *Susila de Silva v. Weerasinghe*²⁰⁷ held that there was no requirement for the arresting officer to have first-hand knowledge of the commission of an offence. Knowledge may be acquired from the statements of others in a way that justifies a police officer giving them credit.²⁰⁸ It was further held that because there was no allegation in the petitioner's affidavit of the arrest being made due to any malice in fact or in law, the detention orders were lawfully made: being *ex facie* valid, there was no reason to hold that they were motivated by any kind of malice -legal or otherwise- or made for a collateral purpose as contended by learned counsel for the petitioner.²⁰⁹

In 1988, the Court of Appeal in *Dhammika Siriyalatha v. Baskaralingam*²¹⁰ examined the Secretary to the Ministry of Defence's authority under Regulation 17(1)(a), holding that such opinion of the authority should be based on satisfaction that certain action was necessary due to the existence of an objective state of facts.²¹¹ The Court opined:

The objective state of facts should render it 'necessary' to detain the person. The required objective state of facts is revealed, if the question is posed, why is it necessary to detain this person? The answer lies in the component 'with a view to preventing such person from acting in any manner prejudicial to the national security or to the maintenance of essential services'. Therefore, the objective state of facts must be such that if the person is not so prevented, he is likely to sit in a manner prejudicial to the national security or to the maintenance of the essential service.

206 [1983] 2 Sri.L.R. 311.

207 [1987] 1 Sri L.R. 88.

208 *Ibid.*, p 93 citing *Nanayakkara v. Henry Perera* [1985] 2 Sri L.R. p 383. Also see Pinto-Jayawardena, K. & de Almeida Guneratne, J., *Habeas Corpus in Sri Lanka supra* fn. 127, p 75. The authors posit that this position remains contrary to the principle later enunciated in *Sunil Rodrigo (On Behalf of B. Sirisena Cooray) v. Chandananda De Silva and Others* (1997) 3 Sri.L.R. 265. According to the later case, the Defence Secretary is required to place material before the Supreme Court to justify his actions in arresting and detaining a person.

209 [1987] 1 Sri L.R. 88, p 94.

210 C.A. (H.C.) 7/88, Court of Appeal Minutes, 7 July 1988.

211 C.A. (H.C.) 7/88, per Justice Sarath. N. Silva (as he was then).

*The existence of the objective state of facts can be deduced from the conduct of the person proximate from the point of time. Conduct in the wider sense of, is referable to acts done, words spoken, behaviour and association with others of that person, as coming to the knowledge of the Secretary (sic).*²¹²

This case set a precedent in terms of the scope and availability of the writ of *habeas corpus* under the present Constitution, particularly in the face of detention orders made pursuant to the Emergency Regulations.²¹³ It is one of few instances where the Court was willing to review conduct of the executive that was, up to that point, largely regarded as exempt from scrutiny. By applying an objective test to a detention under the Emergency Regulations, the Court devised an important safeguard against official impunity.

In 1992, the Supreme Court in *Joseph Perera Alias Bruten Perera v. The Attorney*²¹⁴ examined clauses contained in the PSO that sought to oust the jurisdiction of the courts. The Court held that while Section 5 of the PSO enables the President to make regulations, under Article 15(7) of the Constitution 'it is not all regulations which appear to the President to be necessary or expedient in the interests of public security and preservation of public order, made under Section 5 of the Public Security Act which can impose restrictions on the exercise and operation of fundamental rights.' The Court held: '[i]t is only regulations which survive the test of being in the interests of national security [or] public order...' that are valid. The Court ruled that under Article 15(7), 'the Regulation must in fact be in the interest of national security, [or] public order' and to be valid, it must satisfy this objective test.

The Court held that the ouster clause in Section 8 of the PSO, which ousted the jurisdiction of courts to review detention orders, must give way to the petitioner's constitutional rights. This case set an important precedence on the non-applicability of ouster clauses where the impugned action appeared to be arbitrary or *ultra vires*.

In 2000, the Supreme Court in *Weerawansa v. The Attorney-General*²¹⁵ ruled that a detention order purportedly issued in terms of Section 9 of the PTA was invalid. Justice Mark Fernando reasoned: 'the Minister did not independently

²¹² *Ibid.*

²¹³ See Pinto-Jayawardena, K. & de Almeida Guneratne, J., *Habeas Corpus in Sri Lanka supra* fn. 127, p 76.

²¹⁴ [1992] 1 Sri.L.R. 199.

²¹⁵ [2000] 1 Sri.L.R. 387.

exercise her statutory discretion, either upon personal knowledge or credible information. She merely adopted the Second respondent's opinion. That was a patent abdication of discretion.' The Supreme Court endorsed the following test laid down by Justice Amerasinghe in *Farook v. Raymond*²¹⁶ on the justiciability of Magistrates' remand orders:

*If an officer appointed to perform judicial functions exercised the discretion vested in him, but did so erroneously, his order would nevertheless be 'judicial'. However, an order made by such an officer would not be 'judicial' if he had not exercised his discretion, for example, if he had abdicated his authority, or had acted mechanically, by simply acceding to or acquiescing in proposals made by the police—of which there was insufficient evidence in that case.*²¹⁷

The Court condemned the mechanical issuance of detention orders. The case established important safeguards under the PTA, requiring the Minister to either have personal knowledge or credible information when issuing detention orders. Even today, such safeguards remain crucial to making the Minister accountable for issuing irregular detention orders under the PTA.

In 2003, the Supreme Court in *Thavaneethan v. Dayananda Dissanayake*²¹⁸ held that detention regulations and orders made under the PTA are not 'law' within the meaning of Article 15(7) of the Constitution. Justice Mark Fernando held that the word 'includes' in Article 15(7) does not bring in regulations under other laws. Crucially, Justice Fernando went on to explain the nature and scope of Article 15 of the Constitution:

'Article 15 does not permit restrictions on fundamental rights other than by plenary legislation—which is subject to pre-enactment review for constitutionality. It does not permit restrictions by executive action (i.e. by regulations), the sole exception permitted by Article 15(1) and 15(7) being emergency regulations under the Public Security Ordinance because those are subject to constitutional controls and limitations, in particular because the power to make such regulations arises only upon a Proclamation of emergency, because such Proclamations are

216 [1996] 1 Sri.L.R. 217.

217 [2000] 1 Sri.L.R. 387, p 419.

218 [2003] 1 Sri.L.R. 74.

subject to almost immediate Parliamentary review, and because Article 42 provides that the President shall be responsible to Parliament for the due exercise of powers under the law relating to public security...Other regulations and orders which are not subject to those controls made under the PTA and other statutes, are therefore not within the extended definition of 'law'.²¹⁹

Thavaneethan narrowed the powers of the executive to issue regulations that effectively restricted fundamental rights. This decision has been used to challenge a range of subsequent attempts by the executive to restrict fundamental rights through regulations issued under laws other than the PSO.²²⁰

The Centre for Policy Alternatives and the Tamil National Alliance relied on *Thavaneethan* in their fundamental rights application challenging the validity of the 2011 PTA regulations.²²¹ The PTA Regulations go well beyond the purposes of the PTA and as such are *ultra vires* of the PTA. Also, because the PTA Regulations do not enjoy the protection of Article 15(7), they should not infringe on fundamental rights. On this basis, the Regulations should be held to be unconstitutional. The Supreme Court, however, without adducing reasons for its decision, refused to grant leave to proceed on the petition, finding that the Regulations did not violate the Constitution.

8. Conclusion: The Emergency Regime and Impunity

For forty years, Sri Lanka maintained an almost continuous state of emergency. The right to judicially review orders made under the emergency laws was restricted, if not altogether eliminated. The emergency regime violated the prohibition on arbitrary detention and imposed unreasonable restrictions on the freedom of expression, the freedom of movement and the right to privacy. The use of emergency laws also facilitated unlawful killings, enforced disappearances, and the widespread use of torture and ill-treatment. Emergency rule not only displaced the criminal justice system, it eroded state accountability and undermined human rights.

The ICJ recognizes the right and duty of the State to protect the security of its people. The *ICJ Berlin Declaration on Upholding Human Rights and the Rule*

²¹⁹ *Ibid.*

²²⁰ See for example, *Centre for Policy Alternatives v. Minister of Mass Media & Others*, S.C. (F.R.) Application No. 478/2008, Petition. The case involved the challenge of certain media regulations issued under the Sri Lanka Rupavahini Corporation Act No.6 of 1982.

²²¹ S.C. (F.R.) Applications No. 494/2011 and No.491/2011.

of Law in Combating Terrorism affirms that while States have a duty to take measures to protect persons within their jurisdiction, such measures must at all times respect human rights law and international humanitarian law. It is crucial that any legislation dealing with an emergency or counter-terrorism be compatible with fundamental legal principles. Such legislation must not violate: the principle of legality; the right to a fair trial; the right to the presumption of innocence; the prohibition against torture or ill-treatment by admitting information obtained through torture, ill-treatment or coercion as evidence in trial. Moreover, exceptional circumstances such as political instability or public emergencies, cannot exempt law enforcement or other officials from possible criminal or civil liability for violating human rights during emergency operations.²²² Four decades of institutionalized emergency rule have led to a serious erosion of the mechanisms of state accountability and established dangerous culture of impunity in Sri Lanka.

²²² International Commission of Jurists, *Briefing Paper on Sri Lanka*, *supra* fn. 162, p 7. Also see UNHRC General Comment 29, *supra* fn. 50, para 14; International Commission of Jurists, *Legal Commentary to the ICJ Berlin Declaration*, *supra* fn. 44 para 9.

CHAPTER 2: IMMUNITY UNDER THE CONSTITUTION AND LEGISLATIVE FRAMEWORK

Under international law, States must bring perpetrators of human rights abuses to justice, irrespective of their designation or role within the government. In Sri Lanka, the President is given immunity under Article 35 of the 1978 Constitution,²²³ which provides absolute personal immunity to the President during his or her term. For a fixed period of time, the President is effectively not held accountable for his or her conduct. However, conduct can be called into question after the President leaves office. There have been instances in the past, in the right political circumstances that Presidents have been held to account for their conduct after leaving office. With a strong and independent judiciary, it would be possible to construe the constitutional and statutory immunity provisions in a manner to hold the President accountable in conformity with Sri Lanka's obligations under international law. However in recent years, the increased political pressure exerted on the judiciary has weakened its ability to act as a check on the executive authority.

Regulations and proclamations issued by the President are sought to be barred from judicial review under the Public Security Ordinance No. 25 of 1947 (as amended). Orders made by the Minister of Defence (often a portfolio taken by the President) are similarly barred under the Prevention of Terrorism Act No. 48 of 1979 (as amended).

State officers are also afforded immunity from suit under the Code of Criminal Procedure Act No. 15 of 1979 (as amended) for actions taken in good faith in the discharge of their duties. Special laws such as the Indemnity Act have also been in force in Sri Lanka during particular periods of time. Conferring wide immunity to both the executive and State officials interferes with Sri Lanka's obligations under international law to hold State officials accountable for serious human rights violations, and goes against Sri Lanka's own commitments to the international community to combat impunity:

All allegations of the violation of human rights are and will be fully and impartially investigated and where there exists reliable and sufficient material to launch prosecutions, all alleged perpetrators of human rights violations would be prosecuted.

223 See Article 35 of the 1978 Constitution.

*Measures necessary to expedite the process of investigation, launch of prosecutions and conduct of trials would be adopted. It is indeed our intention to ensure that, notwithstanding the identity of the person, his designation and the role supposedly performed by such persons, all those who human rights violations which are also recognized as criminal offences are dealt with under the due process of law, prosecuted and appropriately punished [emphasis added]*²²⁴

Instances where the judiciary sought to override immunity clauses by reviewing presidential immunity or challenging Emergency Regulations have been rare and largely contingent on the judge's individual capacity and commitment as well as the political context of the day.

1. Presidential Immunity

1.1. The basis for presidential immunity

Article 35(1) of the Constitution:

While any person holds office as President, no proceedings shall be instituted or continued against him in any court or tribunal in respect of anything done or omitted to be done by him either in his official or private capacity.

Article 35(1) appears to provide absolute immunity to the individual holding the office of President. The provisions of Article 35(2), however, explicitly limit immunity to the duration of tenure; therefore, a President's conduct prior to assuming office may be subject to litigation once the term in office is over. Pending actions against an incumbent President are suspended from the moment he or she takes office until the moment he or she ceases to hold office. Further, official or private acts or omissions of the President while holding office may be subject to litigation once the President ceases to hold office under the Constitution. This would seem to be a simple reading of the text of Article 35(1) read with Article 35(2).

224 Universal Periodic Review – Sri Lanka, Presentation of the Attorney-General, 13 May 2008.

1.2. Restrictions on presidential immunity

Article 35(3) provides:

The immunity conferred by the provisions of paragraph (1) of this Article shall not apply to any proceedings in any court in relation to the exercise of any power pertaining to any subject or function assigned to the President or remaining in his charge under paragraph (2) of Article 44 or to proceedings in the Supreme Court under paragraph (2) of Article 129 or to proceedings in the Supreme Court under Article 130 (a) relating to the election of the President or the validity of a referendum or to proceedings in the Court of Appeal under Article 144 or in the Supreme Court, relating to the election of a Member of Parliament.

Provided that any such proceedings in relation to the exercise of any power pertaining to any such subject or function shall be instituted against the Attorney-General.

The provisions of Article 35(3) of the Constitution appear to further restrict the extent of immunity granted to an incumbent President. The President is permitted under Article 44(2) of the Constitution to assign to himself or herself any ministerial subject or function. The incumbent President has assigned to himself *inter alia* the subjects of Defence, Finance, Ports & Aviation and Highways. However, it appears that acts done in his capacity as a Minister are not exempt from suit. This is particularly important in terms of the President's conduct in his capacity as Minister of Defence, where he is authorized to issue detention orders and promulgate regulations under the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979.

Case Law – How have the Courts interpreted Presidential Immunity?

The Supreme Court is reticent to challenge the direct actions of a sitting President. However, in certain instances, the Supreme Court has been willing to challenge and restrict Presidential immunity. Such instances include: (1) matters relating to the President's power to promulgate ERs;²²⁵(2) matters involving

²²⁵ *Joseph Perera v. Attorney-General* [1992] 1 Sri.L.R. 199; *Wickremabandu v. Herath* [1990] 2 Sr. L.R. 348. More recently, see *Centre for Policy Alternatives v. Defence Secretary and Others S.C. (F.R.) 351/08*, Supreme Court Minutes, 15 December 2008 (per S.N. Silva CJ). The case sought to challenge the proposed ERs of 2008. The Supreme Court granted leave to proceed despite the fact that the President had promulgated the impugned ERs. The Regulations were subsequently withdrawn, so the issue of presidential immunity in relation to the promulgation of the relevant ERs was not thoroughly examined by the Court.

public officials – such as the Inspector General of Police and the Commissioner of Elections – relying on Presidential immunity to bar judicial review of their conduct; and (3) matters involving the conduct of a retired President.

In 1983, the Supreme Court in *Visuvalingam v Liyanage (Case No. 1)*²²⁶ held that although the, 'President cannot be summoned to Court to justify his action... [it] is a far cry from saying that the President's acts cannot be examined by a Court of Law.'²²⁷ The Court drew a crucial distinction between the person of the President—who is necessarily granted immunity from suit—and the acts of the President—which necessarily remain subject to judicial review. Justice Sharvananda held that:

*Though the President is immune from proceedings in Court a party who invokes the acts of the President in his support will have to bear the burden of demonstrating that such acts of the President are warranted by law; the seal of the President by itself will not be sufficient to discharge that burden.*²²⁸

In 1984, the Supreme Court in *Kumaranatunga v. Jayakody*²²⁹ went the other way, holding:

*'The language of Article 35 is clear and unambiguous. Article 35(1) embraces all types of proceedings and confers a blanket immunity from such proceedings, except those specified in Article 35(3). **The fact that the immunity will be misused is wholly irrelevant** [emphasis added].'*

This case demonstrated unhealthy judicial deference towards presidential acts, and created a wide space for the President to act with impunity.

In 1985, the Supreme Court in *Mallikarachchi v. Attorney-General*²³⁰ held that immunity afforded by Article 35(1) is personal to the President. Chief Justice Sharvananda explained the rationale for immunity:

226 [1983] 1 Sri.L.R. 203.

227 *Ibid.*, p 210.

228 *Ibid.*

229 [1984] 2 Sri.L.R. 45.

230 [1985] 1 Sri.L.R. 74.

*The principle upon which the President is endowed with this immunity is not based upon any idea that, as in the case of the King of Great Britain, he can do no wrong. The rationale of this principle is that persons occupying such a high office should not be amenable to the jurisdiction of any but the representatives of the people, by whom he might be impeached and be removed from office, and that once he has ceased to hold office, he may be held to account in proceedings in the ordinary courts of law.*²³¹

Following this reasoning, Chief Justice Sharvananda observed that the immunity of Head of State is not unique to Sri Lanka and noted that the efficient functioning of the executive required the President to be immune from judicial process:

*If such immunity is not conferred, not only the prestige, **dignity** and status of the high office will be adversely affected, but the smooth and efficient working of the Government of which he is the head will be impeded. That is the rationale for the immunity cover afforded for the President's actions, both official and private [emphasis added].*²³²

C.J. Sharvananda's reasoning was that presidential immunity is needed for the dignity of the office. Yet, accountability to the courts, in which the judicial power of the people is reposed, surely cannot undermine the dignity of the executive. There is no incompatibility between accountability to courts and 'dignity' in a democratic sense, and no citizen is less dignified by virtue of his or her answerability to the judicial process. What the former Chief Justice possibly meant by his sentiments on the loss of dignity was that a spate of frivolous cases against the President would cause unnecessary embarrassment to the office. Yet granting blanket immunity on these grounds is an overreaction. Frivolous cases could certainly be dismissed at a threshold stage without burdening the President's office. However, serious cases that credibly call into question the integrity of the President or his or her decisions ought to be heard by the courts. In fact, the integrity of the executive, and indeed, the entire system of governance is contingent on treating such allegations against the President seriously. In these circumstances, the view that the conduct of the President is completely beyond the reach of the courts — however serious the allegations

²³¹ *Ibid.*, p 78.

²³² *Ibid.*

against the President – erodes state accountability. As history demonstrates, the absence of state accountability is a precondition for impunity.

In 1999, the Supreme Court in *Karunathilaka v. Dayananda Dissanayake (Case No. 1)*²³³ held that Article 35 did not oust this jurisdiction; it only prohibited the institution of legal proceedings against the President while in office. It did not exclude judicial review of an impugned act or omission against some other person who did not enjoy immunity from suit, but relied on an act done by the President in order to justify his conduct. The Supreme Court further held that it had the power, notwithstanding the ouster clause in Section 8 of the PSO, to review the validity of Regulations issued. The Court opined that in the present case, the impugned Regulation was not a valid exercise of power under Section 5 of the PSO, and as such could not be sustained.

This case is significant for two reasons. First, the Court was prepared to grant a purposive interpretation to the presidential immunity clause in the Constitution. The Court effectively castigated public officials who sought to rely on the concept of presidential immunity to acquire immunity for their own personal conduct. Hence the Court established the principle that even when acting upon or in anticipation of an act of the President, public officials were not immune from suit. This principle was crucial for the purpose of restricting official acts of impunity, since public officials could no longer use the broad cover of presidential immunity to shield their conduct. The principle may be expanded to include unlawful acts purportedly committed under Emergency Regulations notwithstanding the fact that the President was responsible for the promulgation of the Regulations. Second, the Court ignored the application of the ouster clause in Section 8 of the PSO. As discussed later in this Study, this departure from a strict application of ouster clauses has been crucial for the occasional maintenance of checks and balances on the conduct of public officials.

In 2003, the Supreme Court in *Senasinghe v. Karunatileke*²³⁴ dealt with the question of presidential immunity, as the President herself had issued the two Proclamations that were under scrutiny. Justice Fernando observed:

It is now firmly established that all powers and discretions conferred upon public authorities and functionaries are held upon trust for the public, to be used reasonably, in good faith, and

233 [1999] 1 Sri.L.R. 157.

234 [2003] 1 Sri.L.R. 172.

*upon lawful and relevant grounds of public interest; that they are not unfettered, absolute or unreviewable; and that the legality and propriety of their exercise must be judged by reference to the purposes for which they were conferred.*²³⁵

The judgment also clarified that Article 35 of the Constitution 'only provides a shield of personal immunity from proceedings in courts and tribunals, leaving the impugned acts themselves open to judicial review.'²³⁶ This case illustrates the scope for judicial review for presidential acts. Unfortunately, the instances where the Court has been willing to challenge presidential immunity remain exceptions to the general trend of judicial deference towards the President.

In 2001, the Supreme Court in *Victor Ivan and Others v. Sarath Silva*²³⁷ unanimously held that the conduct of the first respondent in holding office as Chief Justice in consequence of his appointment by the President under Article 170 of the Constitution did not constitute 'executive or administrative action' within the ambit of Articles 17 and 126 of the Constitution. Hence the first respondent could not have been invoking the President's acts to justify his holding of office. In other words, because the President's acts were beyond review, those that benefit from such acts could not be questioned in a court of law.

The judgement effectively nullified earlier rulings²³⁸ where Justice Fernando had engineered a means to review of decisions flowing from the President. The Court re-established the fundamental principle that the President's acts were beyond review and that even those that benefitted from such acts could not be questioned in a court of law. In the present case, the alleged misconduct of a high official was shielded by the fact that the President had now appointed him as Chief Justice. The resulting position was simply that the former Attorney-General (later appointed Sri Lanka's Chief Justice) was afforded the space to act with complete impunity.

235 *Ibid.*, p 186.

236 [2003] 1 Sri.L.R. 172, p 186.

237 [2001] 1 Sri.L.R. 309. Piquantly, then Chief Justice Sarath Silva, in constituting the Supreme Court Bench to hear the very case against him (in a clear conflict of interest) nominated a Bench including judges who were junior in rank thereby bypassing the most senior judges of the Supreme Court. This was just one example of judicial bias in the composition of Benches during this period; for a more detailed analysis, see *Judicial Corruption in Sri Lanka*, Pinto-Jayawardena, Kishali and Weliamuna, JC in Transparency International Global Report, Cambridge University Press; first edition, 2007.

238 See *Karunathilaka v. Dayananda Dissanayake (Case No. 1)* [1999] 1 Sri.L.R. 157; *Senasinghe v. Karunathilleke* [2003] 1 Sri.L.R. 172.

The case remains a classic example of how presidential immunity often lays the practical groundwork for acts of impunity by other public officials.

The issue of presidential immunity also received attention in cases challenging Presidential inaction in regard to the adherence to the 17th Amendment to the Constitution, and these cases are perhaps the best illustration as to how Presidential immunity may work to safeguard abuse of constitutional power.

In *Public Interest Law Foundation v. the Attorney-General*²³⁹ a public interest group sought to compel the President to appoint members of the Elections Commission under the 17th Amendment to the Constitution. Under Article 41B of the Constitution, the President had no discretion over appointments to the Elections Commission once the Constitutional Council forwarded its recommendations.

The Court refused the petition, holding that Article 35(1) of the Constitution gave 'blanket immunity' to the President from proceedings instituted or continued against her in any court in respect of anything done or omitted to be done in her official or private capacity, except in limited circumstances constitutionally specified in Article 35(3). The Court later reiterated this position in *Visvalingam v. Attorney-General*.²⁴⁰

In regard to the acts of a retired president, the Court has generally been receptive to judicial review. In 2005, the Supreme Court in *Senarath v. Kumaratunga*²⁴¹ held that where the Executive, being the custodian of the People's power, abuses a provision of the law and secures benefits that would not come within the purview of such law, it is in the public interest to plead a violation of the right to equality before the Court. The Court further concluded that a denial of *locus standi* in circumstances where there has been a brazen abuse of power to wrongfully gain benefit from public resources would render the constitutional guarantee of equality before the law meaningless.

239 C.A. Application No 1396/2003, Court of Appeal Minutes, 17 December 2003.

240 C.A. Application No. 668/2006, Court of Appeal Minutes, 2 June 2006, also published in *LST Review*, Volume 16 Issue 224 June 2006. This position may, however, be contrasted with the previous case of *Silva v. Bandaranayake* [1997] 1 Sri LR 92 where the majority of the Supreme Court examined the presidential act of appointing a Supreme Court judge despite the constitutional bar relating to presidential immunity. The appointment itself, however, was ultimately not struck down. Commentators have compared the two cases to arrive at the conclusion that the immunity principle has been inconsistently applied by the courts, which has led to uncertainty in the law. See Pinto-Jayawardena, *The Rule of Law in Decline*, *supra* fn. 164, p 334.

241 S.C. (FR) Application No. 503/2005, Supreme Court Minutes, 3 May 2007, also published in *LST Review*, Volume 17 Issue 233 March 2007.

The Court thus allowed the application and issued a declaration that the fundamental rights of the petitioners, guaranteed by Article 12(1), had been infringed by executive action in the purported grant of benefits to the first respondent contrary to the provisions of the President's Entitlements Act. Hence the case furnished authority for the ability to sue a President for acts committed during his or her term of office after the end of such term of office.

This political context of the case is relevant. At the time, the relationship between the former Chief Justice Sarath Silva and former President Chandrika Bandaranaike Kumaratunga was tense. The case was filed soon after President Kumaratunga ceased to hold office. The alleged conduct involved securing for herself a free grant of developed land from which two public authorities were ejected, purportedly under the President's Entitlement Act No. 4 of 1986.

In 2007, the Supreme Court in *The Waters Edge Case*²⁴² held that former President Chandrika Bandaranaike Kumaratunga had acted in excess of her power as Head of the Executive as well as Finance Minister. It was revealed that the President herself was responsible for issuing the Cabinet Memorandum that set in motion the entire land transaction. Hence the Court thought it fit to hold the former President responsible for the corrupt transaction and ordered her to pay compensation of three million rupees to the State. On the applicability of the doctrine of presidential immunity, the Supreme Court held:

*The expectation of the first Respondent as a custodian of executive power places upon the first Respondent a burden of the highest level to act in a way that evinces propriety of all her actions. Furthermore, although no attempt was made by the first Respondent to argue such point, we take opportunity to emphatically note that the constitutional immunity preventing actions being instituted against an incumbent President cannot **indefinitely shield those who serve as President from punishment for violations made while in office, and as such, should not be a motivating factor for Presidents—present and future—to engage in corrupt practices or in abuse of their legitimate powers** [emphasis added].²⁴³*

242 *Sugathapala Mendis v. Kumarathunga* S.C. (F.R.) 352/2007, Supreme Court Minutes, 8 October 2008.

243 *Ibid.*

In light of the fact that former President Kumaratunga had betrayed public trust, the Court found no reason to hold that any remnants of previous immunity granted to her should hinder full judicial scrutiny of her conduct. In light of this judgment, which the Supreme Court later refused to review,²⁴⁴ it appears that the pervasive nature of presidential immunity is capable of being controlled. Hence Presidents who seek to abuse their power may no longer assume that they enjoy immunity for life. Such a realization may form the necessary basis for preventing immunity from transforming into impunity with the ease at which this has happened during the past few decades under the present Constitution. Yet, cases such as the *Waters Edge case* cannot be genuinely regarded as trend-setting interventions of the Court. Such cases, unfortunately, remain anomalies or in a harsher sense, products of the peculiar political environment of the day.

In summation, Article 35 provides absolute personal immunity to the President during his or her term. For a fixed period of time, the President is effectively not held accountable for his or her conduct. However, after the President leaves office, in the right political circumstances, he or she may be held to account for their actions.

2. Statutory Immunities

State officials have also been conferred wide immunities under the Public Security Ordinance No. 25 of 1947 (PSO) and the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 (as amended) (PTA) which established an emergency regime constituting an exception to the Code of Criminal Procedure Act. The Indemnity Act, which is no longer in operation, also conferred wide immunities on State officials. Limited immunity is granted to State officials under the Code of Criminal Procedure. Immunity on State officials, whether broad or limited, interferes with Sri Lanka's obligations under international law to hold all persons, irrespective of their official status, accountable for serious human rights violations.

2.1. The Indemnity Act

The Indemnity Act²⁴⁵ was passed within a specific context to provide indemnity to politicians, service and police officers, and any person acting in good faith

244 'No Variation', *Lanka Business Online*, 3 August 2009, accessed at: <http://www.lankabusinessonline.com/fullstory.php?nid=1896574906>.

245 No. 20 of 1982.

under the direction of a Minister, Deputy Minister or a person holding office. The Indemnity Act was an early precursor to widespread indemnity legislation in the Emergency Regulations and Prevention of Terrorism Act.²⁴⁶ It was made applicable between 1 to 31 August 1977, and thereafter extended to 16 December 1988 by the Indemnity Amendment Act No. 60 of 1988.²⁴⁷

The salient provisions of the Act are found in Section 2:

No action or other legal proceeding whatsoever, whether civil or criminal, shall be instituted in any court of law for or on account of or in respect of any act, matter or thing, whether legal or otherwise, done or purported to be done with a view to restoring law and order during the period August 1, 1977, to the relevant date, if done in good faith, by a Minister, Deputy Minister or person holding office under or employed in the service of the Government of Sri Lanka in any capacity whether, naval, military, air force, police or civil, or by any person acting in good faith under the authority of a direction of a Minister, Deputy Minister or a person holding office or so employed and done or purported to be done in the execution of his duty or for the enforcement of law and order or for the public safety or otherwise in the public interest and if any such action or legal proceeding has been instituted in any court of law whether before or after the date of commencement of this Act every such action or legal proceeding shall be deemed to be discharged and made null and void.

The *UN Secretary General's Panel of Experts on Accountability in Sri Lanka* described the Act as a law that 'greatly weakened the State's duty to pursue serious violations of rights.'²⁴⁸

²⁴⁶ The relevant ER provisions applicable between 2005-2011 rely a similar framework and were discussed earlier in this Study. For instance, Regulation 19 of Emergency Regulations of 2006 provides: 'No action or suit shall lie against any Public Servant or any other person specifically authorized by the Government of Sri Lanka to take action in terms of these Regulations, provided that such person has acted in good faith and in the discharge of his official duties.' Moreover, Regulation 73 of the Emergency Regulations of 2005, Section 9 and 23 of the Public Security Ordinance No. 25 of 1947 and Section 26 of the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 each provide indemnity to public officials acting in good faith. See International Commission of Jurists, *Briefing Paper on Sri Lanka*, *supra* fn. 162. It is noted that these clauses were left untouched in the May 2010 amendments to the Emergency Regulations.

²⁴⁷ Amnesty International, *Sri Lanka, Implementation of the Recommendations of the UN Working Group on Enforced or Involuntary Disappearances following their visits to Sri Lanka in 1991 and 1992*, AI Index, ASA/37/04/98, February 1998, p 9.

²⁴⁸ Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka, *supra* fn. 9, p 10.

2.2. The Penal Code and the Criminal Procedure Code

Two provisions in the Penal Code No. 11 of 1887 and the Criminal Procedure Code Act No. 15 of 1979 are relevant to this discussion.

Section 69 of the Penal Code allows for the defence of mistake of fact in good faith under its chapter on 'General Exceptions' to liability. Interestingly, the first illustration contained in the section refers directly to a military official's action in good faith:

A, a soldier, fires on a mob by the order of his superior officer in conformity with the commands of the law. A has committed no offence.

Similar latitude is provided by Section 97(2) of the Criminal Procedure Code in relation to the provisions dealing with unlawful assembly. The section reads:

(a) A Magistrate, Government Agent, police officer or member of the Sri Lanka Army, Navy or Air Force or any other person acting under this Chapter in good faith; and

(b) A member of the Sri Lanka Army, Navy or Air Force doing any act in obedience to any order which under military law he was bound to obey,

Shall not be liable in civil or criminal proceedings for any act purported to be done under this Chapter.

In 1991, the Supreme Court in *Bernard Soysa v. The Attorney-General & Others*²⁴⁹ considered police conduct in a public protest near the *Dalada Maligawa* (translated to mean the Temple of the Sacred Tooth Relic), an important public place of worship. The protest was deemed unlawful, and police intervened to restore public order. The Supreme Court was of the view that police were entitled, as per the Criminal Procedure Code and the Police Ordinance No. 16 of 1865, to take steps to disperse protestors. The Court held that Section 97(2) of the Code provided immunity to police officers from civil or criminal proceedings as long as their actions were taken in good faith.²⁵⁰ The Court thus found that the

249 [1991] 2 Sri.L.R. 56.

250 *Ibid.*, p 66. The Court was of the opinion that '[i]f upon being so commanded such assembly does not disperse or if without being so commanded it conducts itself in such a manner as to show a determination not to disperse, the police officer is empowered to proceed to disperse such assembly by the use of such force as may reasonably be necessary to disperse such assembly.'

police's conduct was justified and there was no infringement of the fundamental rights of peaceful assembly and expression.

Though the Criminal Procedure Code does not specifically refer to good faith clauses in relation to any other specific offence, the concept of good faith in relation to law enforcement is also found in Section 92 of the Code. The relevant section reads:

(1) There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by a public servant acting in good faith under colour of his office, though that act may not be strictly justifiable by law.

(2) There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by the direction of a public servant acting in good faith under colour of his office, though that direction may not be strictly justifiable by law.

Section 92 restricts the right of self-defence against an act of a public servant or a person acting on the direction of a public servant, where the public servant acts in good faith, notwithstanding the fact that the act may be unlawful. The broad scope of this section appears to permit a public servant to engage in unlawful activities falling short of causing the apprehension of death or grievous hurt, provided that the defence of good faith is invoked.

With respect to Section 2 of the Indemnity Act and Section 97(2) of the Criminal Procedure Code, the fact that a State official has acted in good faith in the discharge of his duties cannot be used as a basis to relieve personal legal responsibility for human rights violations under international law. It certainly cannot be used as a basis for immunity under international law. At best, it can be a mitigating factor taken into account by the Court during the sentencing phase.²⁵¹

Under international law, States must investigate, hold accountable and punish those guilty of human rights violations.²⁵² Immunity provisions foster a climate of impunity, undermining efforts to re-establish respect for human

²⁵¹ International Commission of Jurists, *Briefing Paper on Sri Lanka*, *supra* fn. 162, p 7.

²⁵² Principle 3 of the UN *Basic Principles and Guidelines on the Right to a Remedy*, *supra* fn. 2.

rights and the rule of law.²⁵³ The *UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* stress that under no circumstances shall blanket immunity from prosecution be granted to any person allegedly involved in extra-legal, arbitrary or summary executions.²⁵⁴

The Committee against Torture has also stressed that failure to provide prompt and fair prosecution and punishment for torture or ill-treatment violates the CAT.²⁵⁵

The UN Human Rights Committee affirms that State Parties cannot relieve perpetrators from personal responsibility using statutory immunities and indemnities. The Committee stresses that 'no official status justifies persons who may be accused of responsibility for such violations being held immune from legal responsibility.'²⁵⁶

The *UN Principles on Action to Combat Impunity* reiterated, '[t]he official status of the perpetrator of a crime under international law – even if acting as head of State or Government – does not exempt him or her from criminal or other responsibility and is not grounds for a reduction of sentence.'²⁵⁷

2.3. Constitutional restrictions and implied immunities in the Armed Forces

Article 15(8) of the Constitution

The exercise and operation of the fundamental rights declared and recognized by Articles 12(1), 13 and 14 shall, in their application to the members of the Armed Forces, Police Force and other Forces charged with the maintenance of public order, be subject to such restrictions as may be prescribed by law in the interests of the proper discharge of their duties and the maintenance of discipline among them.

Article 15(8) effectively bars the police and army from seeking remedies and reparations for violations of their fundamental rights as long as the restriction is prescribed by law. As a consequence, Article 15(8) also grants senior

253 *Preliminary Conclusions of the UN Human Rights Committee on Peru*, UN Doc. CCPR/C/79/Add.67, para 10.

254 *UN Principles on Extra-Legal Executions* supra fn. 45, Principle 19.

255 Committee against Torture, General Comment 2, supra fn. 63, para 11.

256 UNHRC General Comment 31, supra fn. 46, para 18.

257 *Updated Set of Principles to Combat Impunity*, supra fn. 1, p 6.

decision-makers immunity for their conduct towards lower-ranking police and army officers.

For example, if a lower-rank police officer was arbitrarily detained in violation of his or her fundamental rights under Article 13 of the Constitution, he or she could be barred from seeking a remedy and reparations where a properly enacted restriction was in place. The senior officials within the Police Department responsible for the arbitrary detention would effectively be granted immunity under Article 15(8).

2.4. Applicability of the Army Act

In 1973, the Court of Criminal Appeal (the apex court at the time) in *Wijesuriya*,²⁵⁸ held that no soldier could obey an order of his superior and plead a good faith defence if the order is manifestly and obviously illegal.

In *Wijesuriya*, a young woman was shot by the accused-appellants, two members of the Voluntary Force of the Ceylon Army. Both accused were found guilty for attempted murder in a trial before the Supreme Court. The woman, however, was shot dead by another unidentified soldier after the appellants had shot at her. At the time the offences were committed at Kataragama, there was an armed insurrection amounting to civil war in the country, which commenced on 5 April 1971. A state of emergency had been declared on 16 March 1971 under the provisions of the Public Security Ordinance, and Emergency Regulations were promulgated for the preservation of public order and 'for the suppression of riots and civil commotions.' Accordingly, the Prime Minister had called out members of the Armed Forces on 7 March 1971 under Section 12(1) of the Public Security Ordinance. Crucially, the shooting of the deceased - who was a suspected insurgent held in custody by the Police - occurred when there was a 'lull in the fighting'.²⁵⁹ Moreover, there was no evidence of ongoing armed conflict at Kataragama on that day.

The first accused argued that in shooting the deceased, he was only carrying out the order of his superior officer (a Colonel who was the Co-ordinating Officer of the District) to destroy certain prisoners and that the second accused shot the deceased on the order of the first accused, his superior officer.

²⁵⁸ *Wijesuriya v. The State* (1973) 77 NLR 25 (Court of Criminal Appeal). In the legal regime prevalent at that time, the Supreme Court was subordinate to the Court of Criminal Appeal which was the highest court.

²⁵⁹ (1973) 77 NLR 25, p 28.

Examining the case on appeal, the Court of Criminal Appeal held that irrespective of a period of combat on 17 April 1971 or a state of actual armed conflict, there is no justification for shooting a prisoner held in custody. The Court opined that a soldier subject to military law 'continues to remain the custodian of the civil law and it will be his duty to shoulder the responsibility of police duties, in the discharge of which he is as much subject to the civil law as the ordinary policeman. If he claims that he acted on the orders of his superior officer as justification, such a defence must be related to the provisions of the civil law.'²⁶⁰

The Court went on to distinguish certain indemnity provisions in the law and held that they were inapplicable to the present case. For instance, it was held that Section 69 of the Penal Code referred to above had no application when a person obeys an order that is 'manifestly and obviously illegal.'²⁶¹ A soldier stands on the same footing as an ordinary citizen as far as his legal liability is concerned, and that if he wishes to seek the protection of Section 69 either under the military law or under the Emergency Regulations, the burden is on him to prove that he is entitled to protection under that section. Moreover, the Court examined Section 100 of the Army Act and held that its stipulations were not applicable to a command that was obviously unlawful:²⁶² a soldier is only required to obey orders if they are lawful commands and cannot be penalised when he disobeys an order that is manifestly and obviously illegal, such as shooting a helpless and unarmed person in custody.²⁶³

The Supreme Court followed *Wijesuriya*,²⁶⁴ in *Perera v. Balapatabendi, Secretary to the President and Others*.²⁶⁵ This case involved the exclusion of the petitioner, the editor of a news channel, from covering the oath-taking ceremony of then Prime Minister, Ranil Wickramasinghe. The second respondent was a Superintendent of Police, who denied access to the petitioner on the purported instructions of the then President, Chandrika Bandaranaike Kumaratunga. The Supreme Court held that the fundamental rights of the petitioner had indeed been violated. The Court also specifically dealt with the second respondent's reliance on the purported directive of the President to justify his action.

Citing the case of *Wijesuriya*, Justice Wigneswaran held that a directive from

260 *Ibid.*, pp 32-33.

261 *Ibid.*, p 36.

262 *Ibid.*, p 43.

263 It is noted that the Army's internal code of conduct also reflects this position.

264 (1973) 77 NLR 25 (Court of Criminal Appeal).

265 [2005] 1 Sri.L.R. 185.

the President could not amount to a defence if it was 'manifestly and obviously illegal.'²⁶⁶ The following excerpt from Justice Wigneswaran's judgment remains not only relevant to the so-called defence of superior orders, but also to the general framework within which immunity operates in this country:

*A leader of a sovereign country is not expected to be parochial nor vindictive nor spiteful whatever the provocations of his subjects might be, real or imaginary. Leaders no doubt are human beings. But they are humans clothed with power and privileges granted by their compatriots out of their love and respect. This power is not to be used to harass such compatriots. The Chapter on Fundamental Rights as well as Article 35 of the Constitution have been enacted to curb such harassment by the Executive which is clothed with tremendous power and privileges. Leaders in authority should not transgress the fundamental rights of their compatriots by becoming subjective in their attitudes and decisions...Nor should minions take cover under the provisions of Article 35 transgressing the law while claiming orders from 'above.'*²⁶⁷

International law rejects the defence of obedience to superior orders for human rights violations.²⁶⁸ The Committee against Torture in its General Comment states that 'an order of a superior or public authority can *never* be invoked as a justification of torture.'²⁶⁹ Subordinates may not seek refuge in superior authority and should be held to account individually.²⁷⁰ The UN Human Rights Committee calls on States to remove the defence of obedience to superior orders for State agents committing human rights violations.²⁷¹ The *UN Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*,²⁷² reiterate under Principle 27 that acting on orders of a superior does not exempt an individual from responsibility, in particular criminal.²⁷³ The defence of obedience of superior orders is also rejected under

²⁶⁶ *Ibid.*, p 194.

²⁶⁷ *Ibid.*

²⁶⁸ *Concluding Observations of the UN Human Rights Committee on Moldova*, UN Doc. CCPR/C/MDA/CO/2 (2009) para 8(b).

²⁶⁹ Committee against Torture, General Comment 2, *supra* fn. 63, para 26.

²⁷⁰ *Ibid.*

²⁷¹ UNHRC General Comment 31, *supra* fn. 46, para 18.2.

²⁷² *Updated Set of Principles to Combat Impunity*, *supra* fn. 1.

²⁷³ *Ibid.*, Principle 27.

international criminal law, notably in the statutes of the UN *ad hoc* tribunals²⁷⁴ established by the UN Security Council resolutions as well as under the *Rome Statute for the International Criminal Court*.²⁷⁵

2.5. Military tribunals are competent to try serious human rights violations in Sri Lanka

Recently, the Sri Lankan government stated its intention to set up military courts of inquiry to investigate acts of human rights abuses allegedly committed by security forces during the last stages of the war between the government troops and the LTTE in 2009. This came after the Lessons Learnt and Reconciliation Commission (LLRC) recommended in its November 2011 report that effective investigations be conducted with the intent of holding those persons responsible accountable.²⁷⁶

In the past, military tribunals have been used to circumvent state accountability for serious human rights violations. In the Kakkadicholai incident, eighteen Sinhalese soldiers killed sixty-seven Tamil villagers. A Commission of Inquiry determined that the offences were punishable under the Penal Code, but should be tried before a Military Tribunal.²⁷⁷ A Military Court subsequently tried the offences and acquitted seventeen of the eighteen Sinhalese army men, finding the officer in charge guilty for failing to control his subordinates and improperly disposing of dead bodies. The officer-in-charge was subsequently dismissed.²⁷⁸

In the controversial reference regarding the parliamentary eligibility case of General Sarath Fonseka, the Supreme Court considered whether courts martial were within the ambit of 'any court' under Article 89(d).²⁷⁹ The Court held that

274 International Criminal Tribunal for the Former Yugoslavia, Article 7, para 4; International Criminal Tribunal for Rwanda, Article 6, para 4.

275 *Rome Statute*, *supra* fn. 182.

276 See LLRC Report, *supra* fn. 3, para 9.9, 9.23, 9.37, 9.46 and 9.51.

277 Final report of the Kakkadicholai Commission of Inquiry, Sessional Paper No. 11, 1992, p 6.

278 Charles Abeysekera, *Human Rights 1992 - A Dismal Record*, Social Scientist's Association (1993).

279 *Sarath Fonseka v. Dhammika Kithulegoda, Secretary General of Parliament & Others* S.C. Ref. No. 1/2010, Judgement of Chief Justice J.A.N. de Silva, decided on 10 January 2011. Article 89(d) of the Constitution provides: 'No person shall be qualified to be an elector at an election of the President, or of the Members of Parliament or to vote at any Referendum, if he is subject to any of the following disqualifications, namely (d) if he is serving or has during the period of seven years immediately preceding completed serving of a sentence of imprisonment (by whatever name called) for a term not less than six months imposed after conviction by any court for an offence punishable with imprisonment for a term not less than two years or is under sentence of death or is serving or has during the period of seven years immediately preceding completed the serving of a sentence of imprisonment for a term not less than six months awarded in lieu of execution of such sentence' (emphasis added).

'competent court' under Article 13(4)²⁸⁰ of the Constitution included a court martial, as military tribunals were already conferred jurisdiction to impose sentences of death or imprisonment.²⁸¹ The implication of the Court's judgment was to place courts martial on the same footing as civilian courts under Article 89(d) of the Constitution.²⁸²

In that case,²⁸³ General Sarath Fonseka argued that he should not be unseated from Parliament on the basis of a conviction from a court martial because a military tribunal was not a 'court' as contemplated by Article 89(d) of the Constitution.²⁸⁴ The *ad hoc* nature of courts martial as well as the lack of procedural safeguards, including the denial of fair trial rights, placed these tribunals outside the ambit of the term 'court' under Article 89(d).²⁸⁵ The Court of Appeal referred this question to the Supreme Court.

Writing for the majority, Chief Justice J.A.N. de Silva held that courts martial are already empowered to impose valid sentences of death and imprisonment,²⁸⁶ and as such are already within the description of 'competent court' under Article 13(4) of the Constitution.²⁸⁷ On this basis, the Court concluded that a court martial must be a 'court' in terms of Article 89(d) of the Constitution.²⁸⁸

In his concurring opinion, Justice Saleem Marsoof held that 'the institution of court martial, being an emanation of executive power, is not a court, tribunal or institution set up as described in Article 105 of the Constitution, and has no place in Chapter XV of the Constitution' because a 'member of the Armed Forces who sits on a Court Martial does not hold paid office as such, nor does he fall within the definition of 'judicial officer' found in Article 170 of the Constitution'.²⁸⁹ However, Justice Marsoof concurred with the majority that 'competent court' in Article 13(4) includes any court -regular or extraordinary- capable of imposing

280 Article 13(4) provides: 'No person shall be punished with death or imprisonment except by order of a competent court, made in accordance with procedure established by law. The arrest, holding in custody, detention or other deprivation of personal liberty of a person, pending investigation or trial, shall not constitute punishment' (emphasis added).

281 S.C. Ref. No. 1/2010, Judgement of Chief Justice J.A.N. de Silva, p 25.

282 *Ibid.*, p 26.

283 CA (Writ) Application No. 676/2010.

284 S.C. Ref. No. 1/2010, Judgement of Chief Justice J.A.N. de Silva, p 21.

285 *Ibid.*, p 6.

286 *Ibid.*, p 20.

287 Under Article 13(4), only 'competent courts' may impose death or imprisonment sentences.

288 *Ibid.*, p 26.

289 *Ibid.*, p 14.

punishments.²⁹⁰ Because the Court Martial was capable of imposing punishment, it must be within the ambit of 'competent court.' Thus, Article 89(d) should be interpreted to include all court martials.²⁹¹

Justice Saleem Marsoof delved deeper into the question of whether the Army Act, interfered with the jurisdiction vested in the civilian judiciary under the Ceylon (Constitution) Order in Council (Soulbery Constitution). While the Courts Martial have jurisdiction over 'persons subject to military law' for military offences, Section 77(1) of the Army Act confers concurrent jurisdiction over civilian offences committed by persons subject to military law. He concluded that, while a court martial 'functions primarily as a disciplinary authority for the Armed Forces, it is also retains jurisdiction for civilian offences committed by military personnel.'²⁹²

Extending the discussion beyond the particular circumstances of that case, the Supreme Court judgment has largely negative implications in regard to the competence of a court martial even in trying civilian abuses by military personnel. The judicial reasoning contained in that judgment - which places the court martial at the same level as a civilian court of law - goes largely against international law. First, the use of the death penalty, on its own, violates the right to life.²⁹³ Where capital punishment is imposed, it must be carried out pursuant to a final judgment rendered by a competent court after a legal process giving all possible safeguards to ensure a fair trial, including at minimum those contained in Article 14 of the ICCPR.²⁹⁴ The UN Human Rights Committee stressed that in cases where the death penalty is imposed, scrupulous respect of the guarantees of fair trial is particularly important.²⁹⁵ Failure to respect and guarantee the provisions of Article 14 is a violation of the right to life under Article 6 of the Covenant.²⁹⁶ A court martial does not always provide all of the procedural guarantees of Article 14, notably the right to a fair and public hearing before an impartial and independent tribunal established by law.²⁹⁷ The non-applicability of the

290 *Ibid.*, p 15. Also see *In Re Application for a Writ of Prohibition to be directed to the Members of a Field General Court Martial* (1915) 18 NLR 334, p 339.

291 *Ibid.*, p 17.

292 *Ibid.*, p 9.

293 Article 10 of the *Universal Declaration of Human Rights*; Article 6 of the ICCPR.

294 *UN Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*, E.S.C. Resolution 1984/50, annex, 1984 UN ESCOR Supp. (No. 1) at 33, UN Doc. E/1984/84 (1984).

295 UNHRC General Comment 32, *supra* fn. 74, para 59.

296 *Ibid.*

297 *Ibid.*, para 22.

Evidence Ordinance²⁹⁸ in Sri Lankan courts martial means that duly established legal procedures are disregarded. An *ad hoc* court martial established under the Army Act No. 17 of 1949 is not an ordinary court established under the law.

Second, military tribunals can never be competent to try serious human rights offences.²⁹⁹ Civilian courts are the courts of competent jurisdiction to prosecute and punish serious human rights violations. The UN Human Rights Committee,³⁰⁰ the Committee against Torture,³⁰¹ the Committee on the Rights of the Child,³⁰² as well as various special procedures of the UN Human Rights Council considering extrajudicial executions,³⁰³ enforced disappearances,³⁰⁴ torture

298 See Section 2 of the Evidence Ordinance No. 14 of 1895, which provides: 'This Ordinance shall apply to all judicial proceedings in or before any court other than courts martial.'

299 Diane Orentlicher, *Report of the Independent expert to update the Set of principles to combat impunity*, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2006, p 16; Emmanuel Decaux, *Administration of Justice, Rule of Law and Democracy: Issue of the administration of justice through military tribunals*, UN Doc. E/CN.4/Sub.2/2004/7, 14 June 2004, para 19.

300 *Concluding Observations on the UN Human Rights Committee on Guatemala*, UN Doc. CCPR/C/072/GTM (2001), para 20; *Concluding Observations of the UN Human Rights Committee on Colombia*, UN Doc. CCPR/C/79/Add.2, 25 September 1992, para 393; *Concluding Observations of the UN Human Rights Committee, Colombia*, UN Doc. CCPR/C/79/Add.76 (1997), para 18 and 34; *Concluding Observations of the UN Human Rights Committee, Peru*, UN Doc. CCPR/C/79/Add.8, 25 September 1992, para 8; *Concluding Observations of the UN Human Rights Committee, Croatia*, UN Doc. CCPR/C/79/Add.15 – A/48/40, 28 December 1992, para 369; *Concluding Observations of the UN Human Rights Committee, Brazil*, UN Doc. CCPR/C/79/Add.66, 24 July 1996, para 10; *Concluding Observations of the UN Human Rights Committee, Lebanon*, UN Doc. CCPR/C/79/Add.78, 1 April 1997, para 14; *Concluding Observations of the UN Human Rights Committee, Chile*, UN Doc. CCPR/C/79/Add. 104, 30 March 1999, para 9; see also *Concluding Observations of the UN Human Rights Committee, Bolivia*, UN Doc. CCPR/C/79/Add.74, para 11; *Concluding Observations of the UN Human Rights Committee, El Salvador*, UN Doc. CCPR/C/79/Add.34, 18 April 1994, para 5; *Concluding Observations of the UN Human Rights Committee, Ecuador*, UN Doc. CCPR/C/79/Add.92, 18 August 1998, para 7; Case of Jos Vicente and Amado Villafane Chaparro, Luis Napoleon Torres Crespo, Angel Maria Torres Arroyo and Antonio Hugues Chaparro Torres v. Columbia, Communication No. 612/1995, decision dated 29 July 1997, UN Doc. CCPR/C/60/D/612/1995, 19 August 1997; Case of Nydia Erika Bautista v. Columbia, Communication No. 563/1993, decision dated 13 November 1995, UN Doc. CCPR/C/55/D/563/1993.

301 *Conclusions and Recommendations of the Committee against Torture, Peru*, UN Doc. A/55/44, 16 November 1999, para 62; *Concluding Observations of the Committee against Torture, Colombia*, UN Doc. A/51/44, 9 July 1996, para 80; *Concluding Observations of the Committee Against Torture, Venezuela*, UN Doc. A/54/44, 5 May 1999, para 142.

302 *Concluding Observations of the Committee on the Rights of the Child, Colombia*, UN Doc. CRC/C/15/Add.30, 15 February 1995, para 17.

303 *Report of the Special Rapporteur on extrajudicial, summary and arbitrary executions*, 20 August 2008, UN Doc. A/63/313, para 48; *Human Rights Questions: Human Rights Questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms, Report on Extrajudicial, Summary or Arbitrary Executions*, prepared by Mr Bacre Waly Ndiaye, Special Rapporteur, 7 October 1996, UN Doc. A/51/1457, para 125; *Report of the Special Rapporteur on extrajudicial, summary and arbitrary executions*, prepared by Ms Asma Jahangir, Special Rapporteur, 6 January 1999, UN Doc. E/CN.4/1999/39, para 67; *Report of the Special Rapporteur on extrajudicial, summary and arbitrary executions*, prepared by Ms Asma Jahangir, Special Rapporteur, 25 January 2000, UN Doc. E/CN.4/2000/3, para 89.

304 Para 57, *Report of the Working Group on Enforced or Involuntary Disappearances: Best Practices on enforced disappearances in domestic criminal legislation*, Addendum, prepared by the Working Group on Enforced or Involuntary Disappearances, 28 December 2010, UN Doc. A/HRC/16/48/Add.3 see also para 408, UN Doc. E/CN.4/1990/13; para 367, UN Doc. E/CN.4/1992/18; para 46, UN Doc. E/CN.4/1993/25; para 29 and 63 of UN Doc. E/CN.4/2000/64/Add.1.

or ill-treatment,³⁰⁵ arbitrary detention³⁰⁶ and the independence of judges and lawyers³⁰⁷ firmly reject the use of military court or courts martial to try serious human rights offences.

Trying cases of serious human rights violations before military courts has been cited as a key contributor to impunity: 'even when an isolated act is involved, one may question the willingness of the military hierarchy to shed full light on an incident that is likely to damage the army's reputation and spirit de corps.'³⁰⁸

The *UN Draft Principles Governing the Administration of Justice through Military Tribunals* requires that in all circumstances, the jurisdiction of military courts should be set aside in favour of the ordinary courts to conduct enquiries into serious human rights violations such as extrajudicial executions, enforced disappearances and torture, and to prosecute and try persons accused of such crimes.³⁰⁹

Third, a hearing before a Court Martial does not necessarily guarantee the accused his or her right to a fair trial under Article 14 of the ICCPR.³¹⁰ The UN Human Rights Committee has consistently found, in respect of the various domestic military tribunals it has reviewed, that trying civilians before military tribunals is incompatible with ICCPR Article 14. It has been strongly recommended that

305 Para 39(j), *Question of torture and other cruel, inhuman or degrading treatment or punishment*, prepared by Sir Nigel Rodley, Special Rapporteur, 3 July 2001, UN Doc. A/56/156.

306 *Report of the Working Group on Arbitrary Detention*, prepared by the Working Group on Arbitrary Detention, 18 December 1998, UN Doc. E/CN.4/1999/63, para 80.

307 *Implementation of General Assembly Resolution 60/251 of 15 March 2006, entitled 'Human Rights Council: Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy*, 18 January 2007, UN Doc. A/HRC/4/25, para 29; *Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, Report of the Special Rapporteur on the Independence of Justice and Lawyers Mr Param Cumaraswamy*, Addendum, 19 February 1998, UN Doc. E/CN.4/1998/39/Add.1 paras 79, 80 and 133.

308 Emmanuel Decaux, *Administration of Justice, Rule of Law and Democracy: Issue of the administration of justice through military tribunals*, 14 June 2004, UN Doc. E/CN.4/Sub.2/2004/7, para 19.

309 The UN Human Rights Committee created a Sub-Commission on the Promotion and Protection of Human Rights. This sub-Commission was led by a Special Rapporteur, Professor Emmanuel Decaux. The Report of the Special Rapporteur to the Sub-Commission on the Promotion and Protection of Human Rights enumerates 20 principles on the administration of justice before Military Tribunals. The Updated Set of Principles was submitted to the Commission on Human Rights on 2 June 2005. Emmanuel Decaux, *Administration of Justice, Rule of Law and Democracy: Issue of the administration of justice through military tribunals*, 2 June 2005, UN Doc. E/CN.4/Sub.2/2005/9, Principle 8 (*Decaux Principles*).

310 Article 10, *Universal Declaration of Human Rights*; Article 14, para 1, *ICCPR*; Article 5(a), *International Convention on the Elimination of All Forms of Racial Discrimination*; Article 37(d) and Article 40, para 2, *Convention on the Rights of the Child*; the *UN Basic Principles on the Independence of the Judiciary supra* fn. 76; the *UN Guidelines on the Role of Prosecutors supra* fn. 86; *Decaux Principles supra* fn. 309, Principle 4 and 12.

civilians be tried only in civilian courts.³¹¹ It has indicated that military tribunals 'raise serious problems as far as the equitable, impartial and independent administration of justice is concerned' and that the guarantees of Article 14 'cannot be limited or modified because of the military or special character of the court concerned.'^{312'}

Fourth, a court martial is not independent of the executive branch. The courts martial in Sri Lanka are convened by, and consist of, members of the executive branch.³¹³ The executive branch in a State should not be able to interfere in a court's proceedings and a court should not act as an agent for the executive against an individual citizen.³¹⁴ Principle 5 of the *UN Basic Principles on the Independence of the Judiciary* require that 'everyone...have the right to be tried by ordinary courts...using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.'³¹⁵

3. Conclusion

Presidential immunity and other indemnity provisions within the law, though undesirable, could be narrowly interpreted to ensure accountability of State

311 For examples, see *Concluding Observations of the UN Human Rights Committee on the United States of America*, UN Doc. CCPR/C/USA/CO/3 (2006); *Concluding Observations of the UN Human Rights Committee on Cameroon*, UN Doc. CCPR/C/CMR/CO/4 (2010), para 24; *Concluding Observations of the UN Human Rights Committee on the Democratic Republic of Congo*, UN Doc. CCPR/C/COD/CO/3 (2006), para 21; *Concluding Observations of the UN Human Rights Committee, Equatorial Guinea*, UN Doc. CCPR/CO/79/GNQ (2004), para 7; *Concluding Observations of the UN Human Rights Committee on Peru*, UN Doc. CCPR/C/79/Add. 67, para 12; *Concluding Observations of the UN Human Rights Committee on Uzbekistan*, UN document CCPR/CO/71/UZB, para. 15; *Concluding Observations of the UN Human Rights Committee on the Syrian Arab Republic*, UN Doc. CCPR/CO/71/SYR, para. 17; *Concluding Observations of the UN Human Rights Committee on Kuwait*, UN Doc. CCPR/CO/69/KWT, para 10; *Concluding Observations of the UN Human Rights Committee on Egypt*, UN Doc. CCPR/C/79/Add. 23, para. 9; UN Doc. CCPR/CO/76/EGY, para. 16; *Concluding Observations of the UN Human Rights Committee on the Russian Federation*, UN Doc. CCPR/C/79/Add. 54, para. 25; *Concluding Observations of the UN Human Rights Committee on Slovakia*, UN Doc. CCPR/C/79/Add. 79, para. 20; *Concluding Observations of the UN Human Rights Committee on Venezuela*, UN Doc. CCPR/C/79/ Add. 13, para 8; *Concluding Observations of the UN Human Rights Committee on Cameroon*, UN Doc. CCPR/C/79/Add. 116, para. 21; *Concluding Observations of the UN Human Rights Committee on Algeria*, UN Doc. CCPR/C/79/Add. 1, para. 5; *Concluding Observations of the UN Human Rights Committee on Poland*, UN Doc. CCPR/C/79/Add. 110, para. 21; *Concluding Observations of the UN Human Rights Committee on Chile*, UN Doc. CCPR/C/79/Add. 104, para. 9; see International Commission of Jurists, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors supra* fn. 15.

312 UNHRC General Comment 32 supra fn. 74, para 22.

313 It is noted that courts martial are not composed of 'judicial officers' within the meaning of Article 170 of the Constitution.

314 Decaux Principles, *supra* fn. 309 Principle 1, para 11.

315 Principle 5 of the *UN Basic Principles on the Independence of the Judiciary supra* fn. 76.

officials and compliance with international law. Such an approach, however, is contingent on a judiciary that is able to function independently and impartially.

The lack of judicial independence has reached a crisis point in Sri Lanka. The politicization of the judiciary has been a long-standing issue. In 1999, former President Chandrika Kumuratunga appointed her personal friend Sarath Silva to the position of Chief Justice, by-passing late Justice Mark Fernando. During the ten years of Chief Justice Sarath Silva's tenure, the Court issued a series of judgments motivated by personal or political considerations damaging the integrity and independence of the judiciary and undermining the separation of powers.

In the case of *Singarasa v. Attorney-General*³¹⁶ Chief Justice Silva held that the ratification of the Optional Protocol to the *International Covenant on Civil and Political Rights* by President Kumaratunga was *ultra vires*. In the case of *Wijesekara v. Attorney-General*,³¹⁷ the act of merging the Northern and Eastern Province through a Proclamation made under the Emergency Regulations was held to constitute a continuing violation of the rights of the petitioners who were from the Eastern province. In *Senarath v. Kumaratunga*,³¹⁸ the former President's act of securing a grant of land under the President's Entitlement Act No. 4 of 1986 was held to be an abuse of power to wrongfully gain benefit from public resources.

This political bias further affected the independent functioning of institutions within the judiciary. In July 2008, the UN Human Rights Committee indicated that the Judicial Service Commission headed by former Chief Justice Sarath Silva was arbitrarily disciplining subordinate judicial officers, not affording them a fair hearing or informing them of the charges against them.³¹⁹ Two justices of the Supreme Court (current Chief Justice Shirani Bandaranayake and retired Judge T.B. Weerasuriya) stepped down from their positions, citing 'differences of conscience' with the former Chief Justice.

The appointments process of the superior judiciary is often blamed for the politicization of the judiciary. Under the 1972 Constitution and the 1978

316 S.C. Spl. (LA) No. 182/99.

317 S.C. (FR) Application No. 243, 244 and 245/06 – Judgment delivered on 16 October 2006.

318 S.C. (FR) Application No. 503/2005.

319 *Soratha Bandaranayake v. Sri Lanka*, CCPR/C/93/D/1376/2005, adoption of views, 24.07.2008.

Constitution, political actors make appointments to the superior judiciary.³²⁰ The 17th Amendment to the Constitution sought to change this process by creating an independent body to oversee the appointment process – the Constitutional Council. The 18th Amendment to the Constitution passed in 2010 abolished the Constitutional Council, empowering the President to directly appoint the superior judiciary, including the Chief Justice, the President and Judges of the Court of the Appeal and majority of the members of the Judicial Service Commission (the body entrusted with the power to appoint, promote, transfer exercise disciplinary control and dismiss judicial officers). In recent years, the proportion of appointees from the Attorney-General’s Department to the higher judiciary has increased.³²¹

An independent judiciary, free of any interference from the executive and legislative branches, is a necessary precondition for the fair administration of justice and the promotion and protection of human rights.³²² It is central to maintaining the rule of law and holding the state accountable for its conduct.

320 Articles 125 of the Constitution of the Republic of Sri Lanka (Ceylon) adopted and enacted by the Constituent Assembly of the People of Sri Lanka on 22 May 1972, created a Judicial Service Advisory Board. Under Article 126, the Judicial Service Advisory Board could only recommend to the Cabinet of Ministers the appointment of lower court judges.

321 See ICG, *Sri Lanka’s Judiciary: Politicized Courts, Compromised Rights*, *supra* fn. 4.

322 See International Legal Framework.

CHAPTER 3: THE TRANSFORMATION OF THE ATTORNEY-GENERAL

The Attorney-General's office, initially established to act as 'chief legal advisor of the government' and 'head public prosecutor', has effectively become 'political spokesman' and 'press officer for the government'.³²³ The disregard for the separation of powers in the 1972 and 1978 Constitution affected the independence of the judiciary and the role of the Attorney-General.³²⁴ The 17th Amendment to the Constitution, which attempted to rectify the situation, was undone by the 18th Amendment to the Constitution. The 18th Amendment eroded the institutional independence of the Attorney-General's office. The subsequent politicization of the office has had a far-reaching effect on state accountability. Political actors who engage in criminal acts are now able to influence and manipulate the office charged with the duty of prosecuting such crimes.

As Chief Legal Advisor to the Government and State Public Prosecutor, it falls on the Attorney-General, to investigate credible allegations of human rights violations and where sufficient evidence is found, to prosecute and hold accountable perpetrators of such violations.³²⁵ The UN Secretary General Report of the Panel of Experts has lamented that this function has gone largely unfulfilled.

1. Historical Evolution of the Role of the Attorney-General

1.1. The politicization of the office

It is widely accepted that the Attorney-General's duty as chief legal advisor to the government should be carried out with 'complete objectivity and detachment.' In 1981, the Supreme Court in *Land Reform Commission v. Grand Central Limited*³²⁶ considered the right of the Attorney-General to appear in court for litigants in their private capacity. Chief Justice Samarakoon concluded:

323 Basil Fernando, *The Kafka metamorphosis of Sri Lanka's Attorney-General*, accessed at: <http://www.Article2.org/mainfile.php/0701/308>.

324 *Ibid.*

325 UNHRC General Comment 31, *supra* fn. 46 para 12; Inter-American Court of Human Rights, Judgment of 29 July 1988, *Velazquez Rodriguez Case*, paras. 166 and 174; Inter-American Commission on Human Rights, Report No. 1/96 of 1 March 1996, Case 10,559, *Chumbivilcas v. Peru*; African Commission of Human and Peoples' Rights, *The Social and Economic Rights Action Centre for Economic and Social Rights v. Nigeria*, Communication No. 155/96 (2001); and the UN Observer Mission in El Salvador, ONUSAL, Report of 19 February 1992, UN Doc. A/46/876/S/23580, para 28.

326 Judgment of the Court of Appeal [1981] 2 Sri.L.R. 147 and of the Supreme Court [1981] 1 Sri.L.R. 250.

The Attorney-General is the Chief Legal Officer and adviser to the State and thereby to the sovereign and is in that sense an officer of the public. He is the Leader of the Bar and the highest Legal Officer of the State and as such, has a duty to the Court, to the State and to the subject to be wholly detached, wholly independent and to act impartially with the sole object of establishing the truth. ...No Attorney-General can serve both the State and private litigant.

Notwithstanding the Court's ruling, the Attorney-General's Department has become overwhelmingly politicized in recent years.³²⁷ A former Acting Attorney-General, who later became a distinguished judge of the Supreme Court, observed:

... [A] gradual decline in the independence of the officers of the Attorney-General's Department. They are unable to tender correct advice to the State for fear of incurring the displeasure of the executive. State officers do not appear to accept the Attorney-General's advice. The cause of this situation is the fear psychosis created by politicization³²⁸

This politicization developed over time through a series of legislative changes, constitutional amendments and Department practices.

1.1.1. Pre-1978

Sir Francis Fleming was the first Attorney-General of Ceylon, assuming the position after Ordinance No. 1 of 1883.³²⁹ The Attorney-General's power grew over the course of the 19th century, and by mid-19th century, the Attorney-General was involved in all three branches of government: he played an integral role in the Executive; prepared and certified legislation before it was enacted into law; and exercised quasi-judicial powers as well as supervisory powers over the minor judiciary.³³⁰

The Attorney-General was redefined in the Donoughmore Commission of 1930. The Attorney-General ceased to be a member of the Cabinet and instead was

³²⁷ Name kept confidential on request.

³²⁸ *Ibid.*

³²⁹ Savitri Goonsekere, *The Constitution and the Attorney-General*, The Fourth Kanchana Abhayapala Memorial Lecture, delivered on 25 November 1994 (Savitri Goonsekere, *The Constitution and the Attorney-General*).

³³⁰ *Ibid.*

charged with responsibilities relating to the administration of justice and providing legal advice to the government.³³¹ In removing the Office of Attorney-General from the Executive branch, the Commission established a degree of independence for the Attorney-General, shifting towards de-politicization.

1.1.2. *Soulbury Constitution*

Sri Lanka's first post-independence Constitution, the Soulbury Constitution, retained the Donoughmore model, establishing the Attorney-General's role as a non-political and independent entity outside the Government. The Attorney-General was appointed by the Governor General, the Chief Justice and the other judges of the Supreme Court. The Attorney-General was distinct and independent of the Ministry of Justice, tasked with supervising prosecutions, acting as chief legal officer of the government. Separating the Attorney-General from the Ministry of Justice eliminated any opportunity for the Minister of Justice to interfere with or influence the Attorney-General's judicial, quasi-judicial or prosecutorial functions, strengthening the independence and integrity of the Attorney-General's office.

1.1.3. *1972 Constitution*

The First Republican Constitution of 1972 departed from the Donoughmore Commission and Soulbury Constitution, vesting legislative sovereignty in a National State Assembly. It marked the beginning of the politicization of the Attorney-General's office.³³² Although the independence of the Attorney-General's office was constitutionally guaranteed, the Attorney-General was to be appointed by the President and placed under the Ministry of Justice. Placing the Attorney-General within the Ministry of Justice meant that the Secretary to the Ministry of Justice could theoretically act in the office of the Attorney-General. In fact, between 1977 and 1978, the Deputy to the Attorney-General acted for the Secretary to the Ministry of Justice. The 1972 Constitution undermined the independence of public servants by allowing Cabinet Ministers to appoint, transfer, dismiss and discipline public servants. The overall effect of these changes was to erode the independence of the Attorney-General's office and pave the way for its overt politicization.

The 1972 Constitution also largely undermined the judiciary. The Judicial Service Commission was replaced by a Judicial Services Advisory Board (JSAB), which

³³¹ *Ibid.*

³³² Savitri Goonsekere, *The Constitution and the Attorney-General*, *supra* fn. 329.

had no competency to appoint judges to the minor courts but could recommend their appointment to the Cabinet of Ministers. A Judicial Services Disciplinary Board (JSDB) was also established which could exercise disciplinary control and dismissal of judges from the minor courts and State officers holding judicial power.³³³

1.1.4. Office of the Director of Public Prosecutions

In 1972, Justice Minister Felix Dias Bandaranaike tabled the Criminal Procedure Code (Amendment) Bill, creating a Director of Public Prosecutions (DPP). Although the Justice Minister acknowledged the DPP was 'not a separate and distinct entity,'³³⁴ working 'under the authority of the Attorney-General,'³³⁵ the objective was to delegate the powers of the Attorney-General to handle criminal prosecutions. There was overwhelming support for the Bill in Parliament³³⁶ and it was passed on 9 November 1972.³³⁷

The DPP held a variety of powers including: (1) sanction over certain types of prosecution; (2) power to apply to the High Court for remanding suspects in custody; and (3) the power to take over private prosecutions. The DPP was also tasked with directing police on investigations and providing advice in difficult cases. Finally the DPP was to be informed of any withdrawals or decisions not to proceed with cases before the Magistrate's court.

There were high expectations for the new Director of Public Prosecutions. The Director of Public Prosecutions was to be accountable to the Attorney-General as well as the Ministry of Justice, and thus accountable to Parliament.³³⁸ The Supreme Court was also empowered by way of writ to direct the Director of Public Prosecutions to take action.

333 See Articles 122 and 124, The Constitution of the Republic of Sri Lanka (Ceylon) adopted and enacted by the Constituent Assembly of the People of Sri Lanka on the 22 of May 1972.

334 See Parliamentary Debates (Hansard), 9 November 1972, p 1586.

335 *Ibid.*

336 Mr N. Wimalasena, MP for Senkadagala, 'We are in full agreement and we support the establishment of an office of Director of Public Prosecutions and the defining of his powers and duties. This might be done even administratively by the creation of two or three departments under the AG, one being the Director of Public Prosecutions, the other as he says, being the department in charge of civil matters, and the third being the drafting department.' 'Parliamentary Debates (Hansard), 9 November 1972, p 1440; Mr C.X. Martin, MP for Jaffna, I wish to make my observations with regard to three items, namely, summary dealing with matters affecting movable property, the Director of Public Prosecutions and suspended sentences...I congratulate the Minister for giving effect to these provisions which should have been enacted at least 20 years ago.' Parliamentary Debates (Hansard), 9 November 1972, p 1442.

337 Clause 5, Criminal Procedure Code (Amendment) Act of 1972, passed on 9 November 1972.

338 Minister of Justice, Felix Dias Bandaranaike, Parliamentary Debates (Hansard) 20 December 1973, p 1552.

The Office of Director of Public Prosecutions was abolished in 1978. While the impact of the office was negligible, the idea of an independent official to oversee criminal prosecutions remains compelling.

1.1.5. 1978 Constitution

The 1978 Constitution expressly recognizes the independence of the judiciary. It confers a very limited power of judicial review of Bills in the Supreme Court; however, the Chapter on Fundamental Rights vests a wide power in the Court to question executive and administrative actions.

The enhancement of the Supreme Court's status increased the level of responsibility of the Attorney-General. The powers conferred to the Attorney-General under the 1978 Constitution include: (1) the right to be given notice and heard in all fundamental rights proceedings; (2) the right to be given notice when the Supreme Court is consulted on matters of national importance; and (3) the right to be conferred a special status when the Supreme Court exercises special constitutional powers.³³⁹

In *Mallikarachchi v. The Attorney-General*³⁴⁰ the Supreme Court held that the Attorney-General's role was to assist and advise the Court on constitutional questions. In *Land Reform Commission v. Grand Central Ltd*³⁴¹ the Supreme Court interpreted the role of the Attorney-General under the Constitution as an 'uncommitted officer proffering to the Supreme Court assistance untrammelled by any extraneous consideration...and [giving] important assistance which would not carry with it even the slightest hint of it being anything but impartial.'³⁴² Judge Ranasinghe observed that the Attorney-General is one of the few – if not the only – officers appointed under the Constitution who has contact with all three organs of Government: Parliament, the President and the Courts.

The 1978 Constitution promised some resurgence in the independence and integrity of the Attorney-General's Department. However, as the post-1978 constitutional era unfolded, the structural weaknesses in the 1978 Constitution further undermined the independence and integrity of the Attorney-General's Department.

339 See Article 134 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

340 [1985] 1 Sri. L.R. 74.

341 [1981] 2 Sri. L.R. 147 (Court of Appeal). The matter was later appealed to the Supreme Court, which upheld the judgment of the Court of Appeal. See [1981] 1 Sri L.R. 250.

342 *Ibid.*, p 158.

1.1.6. The 17th Amendment

The 17th Amendment to the Constitution established an independent Constitutional Council with the mandate to make appointments to key public institutions. The Council comprised key officials including the Prime Minister, the Speaker, the Leader of the Opposition, five persons appointed by the President on the nomination of the Prime Minister and Leader of the Opposition, and crucially, one person nominated upon the agreement by the majority of the Members of Parliament belonging to political parties or independent groups other than the respective political parties or independent groups to which the Prime Minister and the Leader of the Opposition belongs.³⁴³

The Amendment received unanimous support from all political parties and was seen as a genuine effort to improve checks on executive power and ensure the independence of key public institutions. Article 41C (1) of the Constitution, which was introduced through the 17th Amendment, provides: 'No person shall be appointed by the President to any of the Offices specified in the Schedule to this Article, unless such appointment has been approved by the Council upon a recommendation made to the Council by the President.' The Attorney-General's Office is in the said schedule.³⁴⁴

These reforms constitutionally strengthened the office of the Attorney-General. The appointments procedure became more accountable to the Constitutional Council and the removals procedure was subjected to more stringent safeguards by subsidiary legislation passed consequent to the 17th Amendment.³⁴⁵ The Removal of Officers (Procedure) Act No. 5 of 2002 created a new framework whereby the President could only remove the Attorney-General through the process stipulated by the Act. The Attorney-General could be removed from office only on certain grounds³⁴⁶ subject to parliamentary oversight. Section 5 of the Act provided:

343 Article 41A(1) of the Constitution, as introduced by the 17th Amendment.

344 See item (a) in Part II of the schedule to Article 41C.

345 Kishali Pinto-Jayawardena, *Still Seeking Justice in Sri Lanka: Rule of Law, The Criminal Justice System and Commission of Inquiry Since 1977*, International Commission of Jurists, Bangkok, January 2010 (Pinto-Jayawardena, *Still Seeking Justice in Sri Lanka*), pp. 134-135.

346 See Section 3 of the Act. The grounds for removal from office include: (a) being adjudged an insolvent by a court of competent jurisdiction; (b) being unfit to continue in office by reason of ill health or physical or mental infirmity; (c) being convicted of an offence involving moral turpitude, treason or bribery; (d) being found guilty of misconduct or corruption; (e) being found guilty of gross abuse of power of his office; (f) being found guilty of gross neglect of duty; (g) being found guilty of gross partiality in office; or (h) ceasing to be a citizen of Sri Lanka.

(1) The removal by the President of the holder of...the [office of the Attorney-General] on any one or more of the grounds referred to in paragraphs (d), (e), (f) or (g) of section 3 [i.e. being found guilty of misconduct or corruption; being found guilty of gross abuse of power of his office; being found guilty of gross neglect of duty; or being found guilty of gross partiality in office] shall be after the presentation of an address of Parliament supported by a majority of the total number of Members of Parliament (including those not present) for the appointment of a Committee of Inquiry: Provided however, that no resolution for the presentation of such an address shall be entertained by the Speaker, unless notice of such resolution is signed by not less than one-third of the total number of Members of Parliament including those not present.

(2) Upon receipt of a resolution in accordance with subsection (1), a Committee of Inquiry shall be constituted to inquire and report its findings in respect of the alleged grounds on which the removal is being sought.

Section 6 of the Act provided that where there is an inquiry in relation to the Attorney-General, the Committee of Inquiry 'shall consist of three persons of which the Chairman shall be the Chief Justice and two other persons appointed from among persons who have previously held the office of Attorney-General or persons who have reached eminence in the field of law, appointed by the Speaker with the concurrence of the Prime Minister and the Leader of the Opposition.'

Accordingly, the Attorney-General no longer held office at the pleasure of the President, but enjoyed some security of tenure. This should have strengthened the independence of the Attorney-General's office; however, the independence of the Attorney-General's office deteriorated further due to prevailing political factors, the deliberate removal of checks and balances on executive power, and the disregard for rule of law.

In March 2005, the first term of the Constitutional Council came to an end. No new appointments were made to the Council, primarily due to a lack of political will.³⁴⁷ The responsible parliamentary groupings failed to nominate candidates to replace members whose terms had lapsed. In December 2008, the President

³⁴⁷ See Cyrene Siriwardena, 'Public Institutions and de-politicization: Rise and the fall of the 17th Amendment' in Elizabeth Nissan (Ed.) *Sri Lanka State of Human Rights 2007* (2007), p 237.

began to make direct appointments to public institutions, including the Attorney-General, leading to concern over the dissolution of the Constitutional Council.³⁴⁸

Local civil society actors filed fundamental rights applications. In S.C. (F.R.) Application Nos. 297/2008 and 578/2008, the petitioners respectively challenged the dissolution of the Constitutional Council and the direct appointment of the Attorney-General by the President. The applications claimed the President was bound by the Constitution to reinstate the Constitutional Council and any acts carried out in contravention of the 17th Amendment were illegal.

1.1.7. *The 18th Amendment and its aftermath*

The 18th Amendment was adopted in 2010. It resolved the constitutionality of the President's acts and vested power in the President to directly make or influence appointments. Following the enactment of the 18th Amendment, the above-mentioned fundamental rights applications were dismissed immediately.

The 18th Amendment abolished the Constitutional Council and replaced it with an effectively weaker mechanism.³⁴⁹ This new mechanism was the Parliamentary Council, comprising of the Prime Minister; the Speaker; the Leader of the Opposition; a nominee of the Prime Minister, who shall be a Member of Parliament; and a nominee of the Leader of the Opposition, who shall be a Member of Parliament.³⁵⁰ However, the real power over appointments was now vested in the President. Article 41A, as amended, provides:

The Chairman and members of the Commissions referred to in Schedule I to this Article, and the persons to be appointed to the offices referred to in Part I and Part II of Schedule II of this Article, shall be appointed to the Commissions and the offices

348 Amnesty International, *Sri Lanka: Amnesty International Submission to the UN Universal Periodic Review Second session of the UPR working group, 5-16 May 2008*, accessed at: <http://www.amnesty.org/en/library/info/ASA37/003/2008> [‘Amnesty International Report to the UPR’]. According to the report, ‘[i]n February 2006, following the resignation of two senior Supreme Court Judges from the three member Judicial Service Commission (JSC), new appointments to the JSC were made directly by the Chief Justice and the President Mahinda Rajapaksa rather than through the [Constitutional Council]. This undermined the credibility and authority not only of the two judges but also of the JSC. In April 2006 the President appointed members to the National Police Commission and the Public Service Commission. In May 2006 the President unilaterally appointed new members of the Human Rights Commission after their predecessors’ terms of office had expired.’

349 Aruni Jayakodi, *The 18th Amendment and the Consolidation of Executive Power*, in Rohan Edirisinha & Aruni Jayakodi (eds.), *The Eighteenth Amendment to the Constitution: Substance and Process*, The Centre for Policy Alternatives (2011), p 29.

350 See Article 41A (1) of the Constitution, as amended by the 18th Amendment to the Constitution.

referred to in the said Schedules, by the President. In making such appointments, the President shall seek the observations of a Parliamentary Council.

The Attorney-General is among the officers mentioned in Part II of Schedule II.

All members of the Parliamentary Council³⁵¹ are part of the Legislature. There is no requirement for the President to abide by the recommendations of the Parliamentary Council; the President is only required to 'seek the observations of a Parliamentary Council.' The 17th Amendment provided that '[n]o person shall be appointed by the President...unless such appointment has been approved by the [Constitutional] Council.'³⁵² The 18th Amendment overrides this safeguard and facilitates the politicization of the Attorney-General's office. As observed by one senior academic, the 18th Amendment was essentially a culmination of a process that had begun forty years ago – politicization was now 'constitutionalized'.³⁵³

Just a few years prior to the Amendment, the office of the Attorney-General drew criticism for its handling of investigations into human rights abuses. The role of the Attorney-General's Department in the 2006 Presidential Commission of Inquiry (COI) into alleged serious human rights violations (the Udalagama Commission) was criticized by the International Independent Group of Eminent Persons (IIGEP), who cited the conflict of interest in having the Attorney-General's Department inquiring into acts purportedly committed by State officials.

In April 2010, the politicization of the Attorney-General's office was taken to an unprecedented level. The Department was removed from the purview of the Ministry of Justice and brought directly under the authority of the President. In Gazette Extraordinary No. 1651/20 of 30 April 2010, the Attorney-General's Department no longer featured under the 'Departments, Statutory Institutions & Public Corporations' assigned to the Ministry of Justice.³⁵⁴ In fact, the Attorney-General's Department is not specifically mentioned in the *Gazette* notification.

351 As mentioned above, the composition of the Constitutional Council was determined by the previous version of Article 41A of the Constitution. The composition was as follows: (a) the Prime Minister; (b) the Speaker; (c) the Leader of the Opposition in Parliament; (d) one person appointed by the President; (e) five persons appointed by the President, on the nomination of both the Prime Minister, the Leader of the Opposition; (f) one person nominated upon agreement by the majority of the Members of Parliament belonging to political parties or independent groups other than the respective political parties or independent groups to which the Prime Minister and the Leader of the Opposition belongs and appointed by the President.

352 See Article 41C (1), as per the 17th Amendment to the Constitution.

353 Name kept confidential on request.

354 See The Gazette of the Democratic Socialist Republic of Sri Lanka (Extraordinary) No. 1651/20 of 30 April 2010, at 37A-38A.

The absence of any reference to the Department attracts the provisions of Article 44(2) of the Constitution:

*The President may assign to himself any subject or function and shall remain in charge of any subject or function **not assigned** to any Minister under the provisions of paragraph (1) of this Article or the provisions of paragraph (1) of Article 45 and may for that purpose determine the number of Ministries to be in his charge, and accordingly, any reference in the Constitution or any written law to the Minister to whom such subject or function is assigned, shall be read and construed as a reference to the President [emphasis added].*

The Department is now under the direct control of the President. Retired High Court Judge W.T.M.P.B. Warawewa commented in a recent interview: 'the politicization of the Attorney-General's Department is now complete, as the Department is now under the direct control of the President.'³⁵⁵

The new structure has been widely criticized. Member of Parliament and President's Counsel, Wijedasa Rajapakshe, commented that 'taking the Attorney-General's department under the President who has enormous powers would have a disastrous effect on the country as far as law and order is concerned. The independence of the institution as well as the legal system will [fail].'³⁵⁶

The degree of actual political influence depends largely on the particular Attorney-General. In the words of one senior lawyer, 'not all state attorneys lack independence. It is a culture fostered by certain Attorney-Generals.'³⁵⁷

Under former Attorney-General Mohan Peiris, it was not uncommon for the Attorney-General to visit State officials at their offices, departing from the long-standing tradition of public officials visiting the Attorney-General to seek legal advice – a practice considered important for maintaining the Attorney-General's independence.

As this practice developed, the number of political actors approaching the Attorney-General seeking various favours and concessions increased with practical

355 See 'This is a country in which even judges do not receive fairness' – an interview with retired High Court Judge W.T.M.P.B. Warawewa, *Mawubima*, 25 March 2012.

356 See Namini Wijedasa, 'Attorney-General and Legal Draftsman Depts directly under President now', *Transcurrents*, 8 May 2010, accessed at: http://transcurrents.com/tc/2010/05/attorneygeneral_and_legal_draf.html.

357 Name kept confidential.

consequences for the Department's ability to hold State officials accountable for their actions. As a senior lawyer³⁵⁸ noted, the spate of withdrawals during this period were highly irregular. Retired High Court Judge W.T.M.P.B. Warawewa commented that the majority of withdrawn cases were indictments against defendants who were either politicians or who wielded political influence.³⁵⁹

In 2011, when Eva Wanasundara became Attorney-General, there was a noticeable change in the policy and practice within the Department. The Attorney-General expressed public discontent over politicians demanding meetings and attempting to interfere with the Department's work.³⁶⁰

An early example of this policy-change involved³⁶¹ a writ application in 2011 against the Incorporated Council of Legal Education. The application challenged the Council's decision to place an age criterion of 'below 35-years' for the Sri Lanka Law College Entrance Examination.³⁶² Initially Former Attorney-General Mohan Peiris' Department resisted the petition; however, when Eva Wanasundara took over the Department, the Council was advised to withdraw the age criterion. Attorney-General Eva Wanasundara was appointed as a judge to the Supreme Court less than a year after joining the Attorney-General's Department.

In July 2012, Palitha Fernando was appointed Attorney-General by President Mahinda Rajapaksa. Attorney-General Palitha Fernando served as a senior state law officer for many years with an honorable service record. It remains to be seen how the Department will manage under his leadership to cope with pervasive political pressures.

2. Functions of the Attorney-General's Department

As noted in the preamble of the *UN Guidelines on the Role of Prosecutors*, prosecutors 'play a crucial role in the administration of justice.' Any deterioration in the integrity, impartiality and independence of the Attorney-General's office is likely to reverberate throughout the entire justice system. The UN General Assembly has also noted on more than one occasion that the administration of justice plays a central role in the promotion and protection of human rights.³⁶³

358 Name kept confidential on request.

359 See 'This is a country in which even judges do not receive fairness' – an interview with retired High Court Judge W.T.M.P.B. Warawewa, *Mawubima*, 25 March 2012.

360 Rhian Deutrom, 'Politicians trying to interfere -AG', *Ceylon Today*, accessed at: http://www.ceylontoday.lk/news-detail.php?news_id=1392&news_category_id=16.

361 Name kept confidential on request.

362 See for example, *Weerasinghe v. Incorporated Council of Legal Education*, CA (Writ) Application No. 285/2011, Petition.

363 See for instance, resolutions 50/181 of 22 December 1995 and 48/137 of 20 December 1993.

2.1. *The practice of nolle prosequi*

The Latin phrase 'nolle prosequi' literally means, 'unwilling to pursue'.³⁶⁴ In modern legal contexts it means 'a power used by the Attorney-General to stop a criminal trial.'³⁶⁵

The Attorney-General's power of *nolle prosequi* has been described as a discretionary power. This seemingly unreviewable power has been subject to abuse by the Attorney-General's office and, as such, warrants particular examination.

Under Sections 191(1) and 193 of the Criminal Procedure Code, the Attorney-General is vested with the power to prosecute offenders in the High Court. Importantly, the Attorney-General also possesses wide-ranging powers pertaining to the withdrawal of indictments. Under Section 194, he enjoys the power to terminate proceedings in High Court:

*(1) At any stage of a trial before the High Court under this Code before the return of the verdict the Attorney-General may, **if he thinks fit**, inform the court that he will not further prosecute the accused upon the indictment or any charge therein, and thereupon all proceedings on such indictment or charge as the case may be against the accused shall be stayed and he shall be discharged of and from the same.*

(2) The information under this section may either be oral or in writing under the hand of the Attorney-General.

(3) The prosecuting counsel may with the consent of the presiding Judge at any stage of the trial before the return of the verdict withdraw the indictment or any charge therein and thereupon at proceedings on such indictment or charge as the case may be against the accused shall be stayed and he shall be discharged of and from the same [emphasis added].

Two distinct powers appear to be incorporated within Section 194 of the Criminal Procedure Code. First, the Attorney-General is empowered to inform the court that he or she wishes to terminate the prosecution against the accused. This

³⁶⁴ *Oxford English Dictionary*, (2nd ed.) (1989).

³⁶⁵ *Dictionary of Law*, (5th ed.) (2007).

power, referred to as *nolle prosequi*, has been argued to be a prerogative of the Attorney-General that may not be questioned in any court of law.³⁶⁶ The use of Sections 194(1) and 194(2) remains an extraordinary power reserved for the Attorney-General alone.³⁶⁷ These sections must be read with the relevant constitutional provisions examined previously, which stipulate that the Attorney-General -as a public officer- holds office in the public interest on behalf of the people in trust. Powers of *nolle prosequi* should, therefore, be exercised with a great deal of caution.

Second, under Section 194(3), a prosecuting counsel may withdraw an indictment with leave of the court. The prevailing view is that the Attorney-General's personal endorsement is not necessary for withdrawal of applications under Section 194(3). Rather the Court must consider the case and approve of the withdrawal. The direct involvement of the Attorney-General is often circumvented through the use of Section 194(3), as opposed to Section 194(1).

The scope of the two sections appears to have been conflated in recent practice. According to the view of one State counsel, the judge often assumes that State counsel's decision to withdraw an indictment under Section 194(3) carries with it the sanction of the Attorney-General and thus cannot be scrutinized by the Court. Such an assumption confuses the requirements of Section 194(1) with 194(3) and may explain the Court's mechanical acceptance of applications to withdraw indictments under Section 194(3). However, Section 194(3) explicitly requires the consent of the presiding judge to withdraw an indictment. Thus the judge retains full authority to determine whether such an application for withdrawal ought to be allowed or not. Yet courts seldom exercise their discretionary authority under this provision.

366 See for example, *The Queen v. Abeyasinghe* (1965) 68 NLR 386. Also see *The Attorney-General v. Sivapragasam* (1959) 60 NLR 468.

367 The old Criminal Procedure Code No.15 of 1898 contemplated slightly different powers of the Attorney-General in relation to withdrawing charges in a trial in the District Court and in a trial in the Supreme Court. Under Section 202 of the old Code, the Attorney-General had no power to withdraw a charge from the indictment at a trial in the District Court. Instead, the section enabled either the Attorney-General or the prosecuting counsel (with the consent of the District Judge) to withdraw the whole indictment. By contrast, Section 217 of the old Code enabled prosecuting counsel to legitimately withdraw some of the charges in a trial before the Supreme Court. The wording of the latter section was later followed in section 110 of the Administration of Justice Law No. 44 of 1973, and Section 194 of the current Criminal Procedure Code – see an interesting discussion on this point in G.L. Peiris, *Criminal Procedure in Sri Lanka* (1975), pp 394-396.

2.1.1. Kirindiwela Police Custodial Death Case (2010)

In 2010, the Pugoda Magistrate remanded two police personnel on suspicion of killing a man in custody.³⁶⁸ The remand order was made after the Attorney-General instructed the Magistrate to discharge the policemen, despite eyewitness evidence and a post-mortem report concluding death from blunt force to the head. The policemen filed a writ application in the Court of Appeal. The Court held the Magistrate had acted contrary to law and that it was the duty of the Magistrate to carry into effect the instructions of the Attorney-General.³⁶⁹

The Court observed that the Magistrate had acted contrary to law, as he had failed to comply with the provisions contained in section 398(2) of the Criminal Procedure Code No. 15 of 1979. The Court stated that according to the section, the Magistrate was obliged to carry into the effect the instruction of the Attorney-General—subject to the provisions of the Code. The relevant section reads:

It shall be competent for the Attorney-General upon the proceedings in any case being transmitted to him by a Magistrate under the provisions of this section to give instructions with regard to the inquiry to which such proceedings relate as he may consider requisite; and thereupon it shall be the duty of the Magistrate to carry into effect subject to the provisions of this Code the instructions of the Attorney-General and to conduct and conclude such inquiry in accordance with the terms of such instructions.

The section vests in the Attorney-General certain powers to issue instructions 'with regard to the inquiry to which such proceedings relate'. However, there appears to be no basis to conclude that such powers extend to instructing the Magistrate to terminate proceedings against an accused.

This may be cited as a classic example of the Attorney-General's interference with the administration of justice. In this case, the Police had arrested the deceased for drunk and disorderly conduct. The Police thereafter alleged that the suspect had jumped out of a moving jeep and had sustained fatal head injuries. However, the post-mortem report appeared to suggest otherwise. Despite this fact, the Attorney-General's Department recommended that the two police officers

³⁶⁸ Case No. NS/577 (Pugoda Magistrate's Court).

³⁶⁹ *Ibid.*

suspected of foul play be released. Moreover, the Attorney-General informed the Magistrate that the case was to be withdrawn despite the fact that there was evidence, including eyewitness accounts, that needed to be considered. Further, the post mortem report suggested that the death had occurred due to wounds caused by some blunt force exerted on the head. It was upon an application by counsel moving the Pugoda Magistrate not to release the two suspects that the Magistrate decided to refuse the withdrawal of the charges.

The question remains as to whether there would have been a gross miscarriage of justice if the Magistrate had complied with the instructions of the Attorney-General. Should not the Magistrate retain judicial authority to avoid any miscarriage of justice that may have been caused by the premature release of the suspects? Yet, the strict wording of Section 398(2) of the Criminal Procedure Code No. 15 of 1979 precluded such liberality.

2.1.2. *Nampamunua Murder Case (1996)*

In 1996, D.C. Chandrasena was killed during an election campaign for the Nampamunuwa Cooperative Society.³⁷⁰ There were multiple re-trials due to threats to jury members and transfers of judges. Close to fifteen years after the incident, in February 2011, the prosecuting State counsel withdrew charges against some accused, acting under Section 194 of the Criminal Procedure Code.

One accused in this case was Former People's Alliance government deputy minister Chandana Kathiriarachchi. He was charged with: (1) unlawful assembly and use of firearms; (2) murder; and (3) murder (acts done by several persons in furtherance of a common intention). State counsel appearing in the matter sought to amend Count 1 by removing the reference to firearms in count 1 (unlawful assembly) and withdraw withdrawing counts 2 (murder) and 3 (murder done by several persons with a common intention). The High Court of Colombo allowed the amendment to count 1 and the withdrawal of counts 2 and 3. Although the request for withdrawal was made under Section 194(3) of the Criminal Procedure Code, the judge appeared to have assumed that the withdrawal was under Section 194(1). The decision of the High Court Judge could be said to be *per incuriam*,³⁷¹ as there was no formal application made under Section 194(3)

370 *Democratic Socialist Republic of Sri Lanka v. Grabrial Pathirannahalage Sunil Perera and Others*, H.C. Case No. 4323/08.

371 Latin for 'through lack of care'. This phrase refers to a judgment of a court that has been decided *inter alia* without reference to an applicable statutory provision or earlier judgment that would have been relevant.

of the Code nor did the Attorney-General communicate—either orally or in writing— an intention to discontinue the prosecution as per Section 194(1).³⁷²

The High Court Judge recorded the pleas of the first, second, third and fifth accused for the offense of unlawful assembly, issuing suspended sentences on all the accused.

2.1.3. *Withdrawal of cases against State officials*

The Attorney-General's Department withdrew an indictment against parliamentarian, A.R.M. Abdul Cader in a case before the Kandy High Court involving a double murder. Remarkably, the present Media Minister Keheliya Rambukwella was also an accused in the same case. Both accused were former UNP parliamentarians who later crossed over to the government and now hold ministerial portfolios.

The Attorney-General's Department withdrew a torture indictment against Anura De Silva,³⁷³ an officer of the Criminal Investigation Department (CID), for the torture of a suspect named Aruna Roshan Suranga Wijewardena.³⁷⁴ According to the case record, the High Court of Colombo recorded Wijewardena's evidence on 6 June 2007. While the case was pending, a motion was filed on behalf of the accused requesting the case to be called on 28 June 2010. On that day, the lawyer appearing for the accused informed the Court that the Attorney-General had decided not to proceed with the torture case against the accused.³⁷⁵ The AG withdrew the indictment because the accused had been selected to serve in a UN Peacekeeping Force and was scheduled to attend an interview. Because any legal proceedings against the accused would disqualify him from serving in the UN Peacekeeping Force, the presiding judge of the High Court allowed the application for withdrawal and released the accused.³⁷⁶

372 See H.C. Case No. 4323/08, Written Submissions of the Aggrieved Party dated 30 March 2011.

373 Anura De Silva was the chief investigating officer in the 'white flag' case against former Army Commander, Sarath Fonseka. The 'white flag' case was filed against former Army Commander, Sarath Fonseka. Fonseka was indicted for inciting communal violence over his alleged comment in *The Sunday Leader*, stating that Defence Secretary Gotabaya Rajapaksa had ordered the shooting of LTTE cadres who surrendered to the Sri Lanka Army holding white flags. The alleged comment was made during 2010 Presidential Election campaign in which Fonseka lost to incumbent President, Mahinda Rajapaksa. See Santhush Fernando, *Sri Lanka's ex-Army chief Sarath Fonseka's appears in civil Court for 'white flag' case*, Asian Tribune, 5 October 2010, <http://www.asiantribune.com/news/2010/10/05/sri-lanka%E2%80%99-ex-army-chief-sarath-fonseka%E2%80%99s-appears-civil-court-%E2%80%98white-flag%E2%80%99-case>.

374 See High Court Case No. 3518/2006.

375 *Ibid.*

376 *Ibid.* See proceedings dated 28 June 2010.

Another case concerned proceedings instituted by Sri Lanka's Bribery and Corruption Commission against former General Manager of Railways, P.P Wijesekera in the Magistrate's Court on corruption charges. It was reported that a Deputy Solicitor General informed the Supreme Court in a related matter that the Attorney-General had instructed the Commission to withdraw the charges since there would be no end result in continuing the case further.³⁷⁷

A senior lawyer³⁷⁸ noted that the spate of withdrawals under the direction of the former Attorney-General, Mohan Peiris, was highly irregular.

Retired High Court Judge W.T.M.P.B. Warawewa recently commented³⁷⁹ that the Attorney-General's Department in the past had used its powers to withdraw indictments sparingly and only when the case genuinely lacked merit as the Department's role was to assist the court in filtering out frivolous applications. The practice has now changed: at present, the majority of withdrawn cases are indictments against defendants who are either politicians or who wield political influence. Some judges resist such trends, whereas others question why they ought to take a stand when the prosecution itself makes an application to withdraw indictment.

Using the power of *nolle prosequi* to withdraw cases in situations of gross human rights violations -including crimes under international law- where there is a reasonable prospect of conviction, violates the international duty to investigate, hold to account and punish human rights offences.³⁸⁰ Principle 15 of the *UN Guidelines on the Role of Prosecutors* requires Prosecutors to give due attention to the prosecution of crimes committed by public officials...particularly grave violations of human rights.³⁸¹

The UN Human Rights Committee warned that 'failure to bring to justice perpetrators of ...violations could in and of itself give rise to a separate breach

377 See 'AG advised Bribery Commission to withdraw the case against former GMR Wijesekera' *Sinhale Hot News*, 28 February 2011, accessed at: <http://sinhale.wordpress.com/2011/02/28/ag-advised-bribery-commission-to-withdraw-the-case-against-former-gmr-wijesekera>. Wijesekera was charged at the Colombo Chief Magistrate's Court on 5 August 2010 for criminal misappropriation of public funds over Rs 10 million in purchasing spare parts for locomotive engines when he was a senior mechanical engineer of the Railways Department.

378 This observation was made by a prominent lawyer in the field of human rights and criminal law. Name kept confidential on request.

379 See 'This is a country in which even judges do not receive fairness' – an interview with retired High Court Judge W.T.M.P.B. Warawewa, *Mawubima*, 25 March 2012.

380 See International Legal Framework, *infra* section 3, pp 18-20.

381 Guideline 15 of the *UN Guidelines on the role of Prosecutors*, *supra* fn. 86.

of the Covenant'.³⁸² The Committee also noted: '[W]here public officials or State agents have committed violations of the Covenant rights...State Parties concerned may not relieve perpetrators from personal responsibility.'³⁸³

While the power of *nolle prosequi* is subject to frequent abuse, it should not be altogether removed.³⁸⁴ State counsel often file indictments mechanically without fully establishing the facts of a case, making it an important residuary power to correct wrongful indictments.

It has been strongly recommended that the recruitment process within the Department be overhauled to ensure greater independence. Sri Lanka should adopt selection criteria that complies with the *UN Guidelines on the Role of Prosecutors*. Notably, there must be 'safeguards against appointments based on partiality, or prejudice, excluding any discrimination against a person on the grounds of race, colour, sex, language, religion, political or other opinion, national, social or ethnic origin, property, birth, economic or other status...'³⁸⁵

There have, of course, been instances where certain judges have taken exception to the improper use of *nolle prosequi* by the Attorney-General. In one instance involving the prosecution of a school principal, the High Court refused to accept the Attorney-General's motion for withdrawal, insisting that the State law officer record reasons for the motion.³⁸⁶ Exceptionally, both the sitting Chief Justice and a retired Chief Justice questioned the Attorney-General's actions in withdrawing rape and murder indictments against government politicians, warning that such acts could affect the independence of the judiciary.³⁸⁷ Unfortunately, these challenges were limited to media statements and there has been little or no effort to judicially constrain the Attorney-General from acting *mala fide* and in abuse of the power of *nolle prosequi*.

3. Other statutory powers of the Attorney-General

The Attorney-General exercises other powers key to the functioning of the criminal justice system. Such powers include: the power to tender pardon to

382 UNHRC General Comment 31, *supra* fn. 46 para 18.

383 *Ibid.*

384 Name kept confidential on request.

385 Guideline 2, *UN Guidelines on the Role of Prosecutors*, *supra* fn. 86.

386 Kishali Pinto-Jayawardena, 'Can the State Law Office Deny the Right to Justice? Focus on Rights', *The Sunday Times*, 10 April 2011.

387 'Attorney-General wrong to withdraw charges - CJ', BBC Sinhala.com, 17 April 2011, accessed at: http://www.bbc.co.uk/sinhala/news/story/2011/04/110417_asoka_duminda.shtml.

an accomplice;³⁸⁸ the power in respect of summary offences to either forward an indictment directly to the High Court or to direct the Magistrate to hold a preliminary inquiry;³⁸⁹ powers in the case of concluded non-summary inquiries;³⁹⁰ the power to determine whether a trial in the High Court shall be by jury or otherwise;³⁹¹ the power to exhibit information for a Trial-at-Bar by three judges of the High Court sitting without a jury;³⁹² the power to decide the Magistrate's Court's jurisdiction to try a case where there is doubt;³⁹³ the power to prosecute offenders in both the High Court and the Magistrate's Court except in the case of purely private cases instituted;³⁹⁴ the power to call for the record from the High Court or the Magistrate's Court in any case whether pending or concluded;³⁹⁵ the power to sanction an appeal from an acquittal in the Magistrate's Court;³⁹⁶ the power to appear for the State in all criminal appeals;³⁹⁷ and the power to quash commitment and issue instructions to a Magistrate.³⁹⁸ The latter power has far reaching consequences with respect to proceedings before the Magistrate's Court.

Section 396 provides:

*If, after the receipt by him of the certified copy of the record of an inquiry forwarded under section 159, the Attorney-General is of opinion that there is not sufficient evidence to warrant a commitment for trial, or if **for any reason** he is of opinion that the accused should be discharged from the matter of the complaint, information or charge, and if the accused is in custody from further detention, he may by order in writing quash the commitment made by the Magistrate and may direct the Registrar of the High Court to return the record of the inquiry to the Magistrate's Court. The Attorney-General shall in every such case issue to the Magistrate such directions as to the disposal of the complaint, information or charge against*

388 See Criminal Procedure Code No. 15 of 1979, Sections 256 (1) and 257.

389 *Ibid.*, sections 393 and 400 (1), and specifically Section 393(7), as introduced by Act No. 52 of 1980.

390 *Ibid.*, Sections 395(1), 396, 397(1) and 399.

391 *Ibid.*, Section 161, as amended by Act No. 11 of 1988.

392 *Ibid.* Sections 393 and 450(4), as amended by Act No. 21 of 1988.

393 *Ibid.* Sections 133.

394 *Ibid.* Sections 136(1)(e), 191(1), 193 and 400(1).

395 *Ibid.* Section 398(1).

396 *Ibid.* Section 318.

397 *Ibid.* Section 360.

398 *Ibid.* Section 396.

the accused as to him may seem expedient, and it shall be the duty of the Magistrate to comply with the directions so issued [emphasis added].

The Attorney-General is vested with wide discretionary powers with respect to the Magistrate's committal decision of those accused of crimes. Its powers are somewhat quasi judicial in nature, as the Attorney-General is empowered to evaluate evidence and determine whether an accused should be discharged.

3.1 The Attorney-General practices – the release of magistrate inquiry reports

In *habeas corpus* cases, a *prima facie* inquiry report issued by a Magistrate may be obtained by a petitioner in ordinary practice. However, some recent instances have been documented where the Office of the Attorney-General has used its discretionary powers to prevent Magistrates from releasing their *prima facie* inquiry reports.³⁹⁹ The consequence is to deny petitioners access to information on the status of their case until the substantive application is taken up in the High Court, which is often years later due to delays.

Several petitioners who had lost their sons or husbands in 2007 had given evidence before the Trincomalee Magistrate Court, but 'did not know what had happened to their cases'⁴⁰⁰ almost two years later.

Often, these reports contain findings identifying criminal acts committed by State agents. By denying access to these reports, the Attorney-General appears to play an active role in undermining accountability. In recent discussions with lawyers based in the Northern Province, it was pointed out that officers from the Attorney-General's department continue to obstruct those seeking vital information about complicity of State agents in illegal acts.⁴⁰¹

The government talks of special courts being established to deal with long pending detainees. But with state law officers being directed to subvert the course of justice, we are uncertain as to the actual benefit of these special courts. What is needed

399 See Law & Society Trust, *Position Paper by the Civil and Political Rights Programme of the Law & Society Trust Regarding Perspectives from the Provinces on Prosecutorial Policy*, (Unpublished, August 2011) (LST Position paper); see also Pinto-Jayawardena, K. & de Almeida Guneratne, J., *Habeas Corpus in Sri Lanka*, *supra* fn. 127, p 219.

400 *Ibid.*

401 Discussions held with members of the Northern Bar at an undisclosed location in the North on 20 and 21 June 2012. Confidentiality preserved on request.

*is the due and proper application of the legal process, not a façade which has only the appearance of justice.*⁴⁰²

Victims and victims' families must be given access to information relating to the status of their case, including investigation reports and transcripts of hearings. Under Article 13(4) of the *UN Declaration on the Protection of All Persons from Enforced Disappearance*⁴⁰³ and Article 16 of the *UN Principles on Effective Prevention and Investigations of Extra-legal, Arbitrary and Summary Executions*,⁴⁰⁴ victims and victims' families must have access to investigation reports. Under Principle 4 of the *Updated Set of Principles to Combat Impunity*, victims and their families have the imprescriptible right to know the truth about the circumstances in which violations took place...⁴⁰⁵

Obstructing access to Magistrate reports interferes with the State's duty to provide an effective remedy to victims of serious human rights violations and their families.⁴⁰⁶

3.2 Attorney-General discretionary power misused – transfers of cases

Section 398 of the Criminal Procedure Code and section 47(1) of the Judicature Act No. 2 of 1978 vest in the Attorney-General certain powers to transfer criminal proceedings from one court to another. The latter section in particular grants the Attorney-General certain far reaching powers of transfer. Section 47(1) provides:

*Whenever it appears to the Attorney-General that it is expedient that any inquiry into or trial of any criminal offence shall be transferred from any court or place, to any other court or place, it shall be lawful for the Attorney-General **in his discretion by his fiat in writing** to designate such last-mentioned court or place, and such inquiry or trial shall be held accordingly on the authority of such fiat which shall be filed of record with the proceedings in such inquiry or trial so transferred as aforesaid [emphasis added].*

402 *Ibid.*

403 Declaration on the Protection of All Persons from Enforced Disappearance *supra* fn. 45; G.A. Resolution 47/133, 47 U.N. GAOR Supp. 8 (No. 49) at 207, UN Doc. A/47/49 (1992).

404 *UN Principles on Extra-Legal Executions*, *supra* fn. 45.

405 *Updated Set of Principles to Combat Impunity*, *supra* fn. 1.

406 See section on International Legal Framework, *infra* section 1, pp 12-16.

In the absence of sustained judicial scrutiny of the reasons why transfers are requested, these powers are open to serious abuse. In the context of *habeas corpus* applications, it has been found that where cases were originally heard in locations convenient to the applicants—particularly those residing in the North and East—the Attorney-General routinely transferred cases to locations convenient to the accused in what appeared to be a manipulation of the process of justice. A recent study on *habeas corpus* alludes to such an abuse of process:

*Disturbingly, it became clear that a spate of applications filed in Jaffna, Vavuniya and Mullaitivu had been routinely transferred to the Anuradhapura High Court at various stages of the proceedings. Such transfers had been made on the application of the Attorney-General with scant regard for the petitioner's interests and therefore offended the notion of the Rule of Law*⁴⁰⁷

The Attorney-General's Department handling of transfer of cases was noted in strong terms by provincial lawyers. The provincial lawyers pointed out that applications filed in Jaffna, Vavuniya and Mullaitivu on criminal offences involving security officers were routinely transferred to the Anuradhapura High Court during the proceedings. One of the lawyers asked: 'How can witnesses travel, particularly when they, the petitioners and the détenues all are Tamils? When, most of the area in Anuradhapura still remains a High Security Zone?'⁴⁰⁸ The Attorney-General's practice of ordering transfer of these cases was standard throughout the period 2007-2009.⁴⁰⁹ Not surprisingly, whenever such applications for transfer were made for the convenience of State agents represented by the Attorney-General, the Court generally conceded.

Under international law, the State must provide practical and real access to justice with the capability of determining whether a violation took place.⁴¹⁰ Victims must be able to effectively challenge the violations before a court of law. Transferring cases with the knowledge that petitioners will not be able to attend or participate in hearings obstructs access to justice, denying victims the opportunity to challenge the violations before a court of law. This conduct

407 Pinto-Jayawardena, K. & de Almeida Guneratne, J., *Habeas Corpus in Sri Lanka supra* fn. 127, p xxxii.

408 See LST Position Paper *supra* fn. 399, p 9; Name of lawyer withheld on request.

409 *Ibid.*

410 EctHR: Case Airey v. Ireland, Judgment of 9 October 1979, Series A No 32, para 24; I/ActHR: Advisor y Opinion OC-9/87, Judicial Guarantees in States of Emergency, 6 October 1987, Series A No 9, para 24; Case Silver v. the United Kingdom, Judgment of 25 March 1983m Series A No 61, para 113.

deliberately disregards Sri Lanka's duty under Article 2(3) of the ICCPR to provide an effective remedy for human rights as well as Articles 2 and 13 of the CAT where the petitions involve torture or ill-treatment.

Provincial lawyers have emphasized the need for the High Court to be more selective in accepting the Attorney-General's transfer applications.⁴¹¹

3.3 Sanction for offences against public officials

A court is precluded from seizing jurisdiction of offences mentioned in Section 135 without the sanction of the Attorney-General. Offences include contempt of the lawful authority of public servants, certain offences by or relating to public servants, giving false evidence, certain types of fraud, forgery, and certain offences relating to religion.⁴¹² The Attorney-General enjoys wide discretion in granting sanction to institute proceedings against public officials. The exercise of such powers is not susceptible to public scrutiny as they constitute confidential decisions taken in the office of the Attorney-General. Courts have been willing, however, to dispense with the requirement for sanction in certain situations.

In 1998, the Supreme Court in *Victor Ivan v. Sarath N. Silva, Attorney-General*,⁴¹³ briefly referred to Section 135, holding that no prosecution for criminal defamation can be instituted either by the victim or by any other person except with the sanction of the Attorney-General. In 1946, the Supreme Court in *Vander Poorten v. Vander Poorten*⁴¹⁴ held that even though prior sanction of the Attorney-General was needed, such sanction was not required for the related charges of abetment. The Court was willing to dispense with the strict requirement of prior sanction by giving a purposive interpretation to the relevant provisions of the old Code.

In 1980, Justice Ranasinghe of the Court of Appeal in *Wijesiri v. Attorney-General*,⁴¹⁵ held:

It is...clear that the Attorney-General is a creature of law and that he is possessed of, and is entitled to exercise only such

411 See LST Position Paper, *supra* fn. 399, pp 9-10.

412 See Sections 170 to 185, 158, 159, 160, 161, 210, 211, 212, 190, 193, 196, 197, 202, 203, 204, 205, 206, 207, 223, 452, 459, 463, 464, 290A, 291B and 291A of the Penal Code No.11 of 1887. Also see the Criminal Procedure Code Amendment Act No. 52 of 1980.

413 [1998] 1 Sri.L.R. p 340.

414 (1946) 31 CLW. p 77.

415 [1980] 2 Sri.L.R. 317.

*powers as have been vested in him by express provisions of law. There do not seem to be any inherent powers vested in him to which recourse could be had to justify any step taken by him which is not specially authorised by an express provision of law.*⁴¹⁶

The above cases demonstrate that courts are willing under certain circumstances to dispense with the strict requirement of the Attorney-General's prior sanction, as well as review the Attorney-General's prosecutorial decisions. In this respect, courts have an important role to play in prosecutorial decision-making, and in the interests of justice, courts ought to intervene.

Sections 9 and 23 of the Public Security Ordinance No.25 of 1947 require the written sanction of the Attorney-General to prosecute acts committed under the Ordinance. Officials acting under the Ordinance are presumptively immune from prosecution, except where the Attorney-General decides to directly intervene with written sanction. Where sanction is withheld for improper reasons, the Attorney-General acts in contravention of the international obligation to hold persons criminally accountable for human rights violations constituting a crime under international law, and to provide for an effective remedy for such violations.

3.4 Prosecutorial decisions – notice to the original complainant

Under international law, the victim has a right to effective participation in criminal proceedings.⁴¹⁷ Effective participation includes the right to have full access and capacity to act at all stages and levels of investigations.⁴¹⁸ The *UN Principles on Extra-Legal Executions* and the *UN Principles on the Investigation of Torture* require victims and victims' families to be informed of the developments in the case as well as the right to present evidence.⁴¹⁹

The Attorney-General is empowered to intervene and take over private prosecutions under Section 191(2) of the Criminal Procedure Code.

Recently, the Attorney-General took over the private prosecution of a Superintendent of Police in Panadura.⁴²⁰ The Superintendent of Police requested

416 [1980] 2 Sri.L.R., p 327.

417 See International Commission of Jurists, *Remedies and Reparations*, supra fn. 50, p 73.

418 *Juan Humberto Sanchez Case*, Judgment of 7 June 2003, Series C No 99, para 186.

419 Principle 16, *UN Principles on Extra-Legal Executions* supra fn. 45; see also Principle 4 of the *UN Principles on the Investigation of Torture*, supra fn. 52.

420 MC Panadura, Case No. 92368. See Asian Human Rights Commission, *SRI LANKA: AG takes over a private plaint in order to help the accused police officer*, accessed at: <http://www.humanrights.asia/news/ahrc-news/AHRC-STM-008-2012>.

the Attorney-General to conduct the prosecution against him for the assault of a suspect in his custody. The complainant was not aware of the Attorney-General's decision. Senior State counsel communicated the decision to the Magistrate on 15 December 2011.⁴²¹ The complainant, M. Nishantha Fernando Jayawardena, had originally filed a case against Lesly Hamilton Gregory Cooray, the Panadura Superintendent of Police at the time for: (1) causing voluntary hurt to the petitioner inside a police station; (2) threatening to cause injury with an intent to cause fear; and (3) using criminal force without grave and sudden provocation.⁴²² The petitioner's wife witnessed the incident. The Medico Legal Report from the Panadura Base Hospital and a Consultant Judicial Medical Officer of the Kalubowila Teaching Hospital confirmed that the petitioner's injuries were consistent with the allegations.

The intervention of the Attorney-General was inappropriate for several reasons. First, allowing the Attorney-General to take over the prosecution means the assault committed by the Superintendent of Police becomes 'a matter connected with or related to the discharge of the official duties' of the accused.⁴²³ Second, it was argued that after taking over the prosecution, the Attorney-General could decide to exercise his powers of *nolle prosequi* in respect of this case.⁴²⁴ Third, if the Attorney-General decided to withdraw the indictment, it could send a message to police officers that ill-treatment or abuse are acceptable.⁴²⁵ Finally, it vitiates the victim's right under international law to effective participation in obtaining remedy for the human rights violations.

3.5 Attorney-General practices – double indictments

Another practice of concern by the Attorney-General's department is the filing of identical indictments in two different courts against the same person.⁴²⁶ Under international law, notably the ICCPR, a person cannot be tried or punished for an offence of which the person has already been convicted or acquitted.⁴²⁷

The practice of filing duplicate indictments was consistently cited during

421 *Ibid.*

422 *Ibid.*

423 MC Panadura, Case No. 92368. See Asian Human Rights Commission, *SRI LANKA: AG takes over a private plaint in order to help the accused police officer*, accessed at: <http://www.humanrights.asia/news/ahrc-news/AHRC-STM-008-2012>.

424 *Ibid.*

425 *Ibid.*

426 *Ibid.*, Also see LST Position Paper, *supra* fn. 399, pp 10-11.

427 Article 14(7) ICCPR.

consultations held with lawyers from the North and East who complained that this practice violated the basic rights of their clients

*Imagine the plight of a Tamil person living in Vavuniya against whom indictments have been filed on substantially the same charges both in Vavuniya and Colombo? He has to employ lawyers to appear for him in both cases and often, such a person cannot even afford to maintain himself and his family. Where is the humane element in this?*⁴²⁸

This practice is not confined in its application to detainees held under emergency laws. In a recent judgment, High Court judge Sunil Rajapaksa acquitted Army Commander General Sarath Fonseka from the *Hi-Corp* case on the ground that the prosecution had made use of the same components to indict Fonseka in a previous court-martial. The Court held that it was unjust to indict an accused twice on the same charges.⁴²⁹ Although the two indictments were under two separate laws i.e. the Army Act No. 17 of 1949 and the Offences against Public Property Act, No. 12 of 1982, the substance of the charges was identical.

The UN Human Rights Committee affirms that Article 14 of the ICCPR 'prohibits bringing a person, once convicted or acquitted of a certain offence, either before the same court again or before another tribunal again for the same offence; thus someone acquitted by a civilian court cannot be tried again for the same offence by a military or special tribunal.'⁴³⁰

It was notable that Former Attorney-General Eva Wanasundara chose not to appeal the decision in the Sarath Fonseka case in the *High-Corp* case.

4. The Role of the Attorney-General in prolonging detention under the PTA and Emergency Regulations

In some cases, it can take years before the Attorney-General's Department concludes that there is no evidence on which to proceed with an indictment, leaving a suspect to languish in detention. In such cases, the Department is responsible for the prolonged detention of the suspect. This problem is exacerbated by the role played by the Attorney-General in consenting to bail

428 LST Position Paper, *Supra* fn. 399, pp 10-11.

429 See 'SF acquitted in Hi-Corp case', *The Daily Mirror*, 15 March 2012, accessed at: <http://www.dailymirror.lk/top-story/17474-sf-acquitted-in-hi-corp-case.html>

430 UNHRC General Comment 32, *supra* fn. 74, para 54.

under the PTA and the Emergency Regulations. Section 7 (1) of the PTA provides:

Any person arrested under subsection (1) of section 6 may be kept in custody for a period not exceeding seventy-two hours and shall, unless a detention order under section 9 has been made in respect of such person, be produced before a Magistrate before the expiry of such period and the Magistrate shall, on an application made in writing in that behalf by a police officer not below the rank of Superintendent, make order that such person be remanded until the conclusion of the trial of such person :

Provided that, where the Attorney-General consents to the release[,] of such person from custody before the conclusion of the trial, the Magistrate shall release such person from custody.

Similarly, Regulation 21(1) of the 2005 ERs provides that 'the Magistrate shall not release any person on bail unless the prior written approval of the Attorney-General has been obtained.'

In its 2003 Concluding Observations on Sri Lanka, the UN Human Rights Committee expressed its concern that the provisions relating to bail under the PTA were not compliant with Article 9 of the ICCPR.⁴³¹ Under international law, persons awaiting trial should be afforded the right to bail.⁴³² The Human Rights Committee has observed that pre-trial detention should be an exception only resorted to when there is a real risk the accuse will abscond, destroy or interfere with evidence, influence witnesses or commit further offences.⁴³³ As demonstrated in the cases, the Attorney-General is often times directly responsible for the prolonged detention of suspects. Courts have generally failed to curb the abuse of this role.

431 UN Human Rights Committee, *Concluding Observations on Sri Lanka*, UN Doc. CCPR/CO/79/LKA, 1 December 2003, para 13.

432 Article 9(3) of the ICCPR.

433 UN Human Rights Committee, cases of *Hill v. Spain*, UN Doc. CCPR 52/99 and *W.B.E. v. The Netherlands*, UN Doc. CCPR 432/90.

4.1 Arbitrary arrest and detention – The role of the Attorney-General

As observed by one senior lawyer:

In August 2011 the High Court of Vavuniya held that the confession of the accused was inadmissible following the voir dire inquiry. Yet the Attorney-General's Department made an application to keep the accused in remand custody while further evidence was gathered. It is interesting that the over-reliance on the confession had initially caused the prosecution to neglect to gather any evidence pointing to the commission of the offence. However, even after the confession was rejected by the court, the prosecution sought further time to gather fresh evidence. In the meantime, the accused was placed in remand for further time. The accused continues to be in remand, even 8 months after the confession was declared inadmissible and no other evidence of his guilt remained. There are more cases of this nature which are indicative of a strong preference to keep suspects and those accused under the PTA in remand custody indefinitely.⁴³⁴

In 1999, the Supreme Court in *Padmanathan v Paranagama*⁴³⁵ held that the arrest and detention of the petitioner violated Articles 13(1) and 13(2) of the Constitution. This case involved the arrest and detention of a driver employed by the Vavuniya District Branch of the Sri Lanka Red Cross Society. The petitioner was responsible for driving certain State officials to Madhu in a Red Cross vehicle to negotiate the release of a Sinhalese soldier from LTTE custody. On 7 June 1990, the first respondent, who was the Superintendent of Police, Vavuniya, arrested the petitioner under the PTA allegedly for having discussions with LTTE leaders and concealing information relating to the unlawful killing of police officers and the collection of explosives.⁴³⁶ The petitioner was brought to the Criminal Investigation Department (CID) office in Colombo and interrogated regarding his trip to Madhu. After three days in police custody, the petitioner was produced before the Magistrate and remanded indefinitely. On 28 December 1998, the Attorney-General advised the Police that there was insufficient evidence to initiate proceedings. The accused, however, was only released from remand on 13 January 1999.

⁴³⁴ Name kept confidential on request.

⁴³⁵ [1999] 2 Sri.L.R. 225.

⁴³⁶ *Ibid.* p 233.

The Police told the Magistrate's Court that the documents for the victim's release had been given to the Attorney-General in early August 1998. In other words, but for the delay of the Attorney-General, the suspect would have been released five months earlier.

The Supreme Court was somewhat critical of the Attorney-General's Department: 'the human resources available to the State to detect, investigate and prosecute crime are scarce and they should have been devoted to that purpose rather than to the harassment of the petitioner.'⁴³⁷

In the case of *Peter Peodson*,⁴³⁸ the suspect, a 25-year-old citizen from Jaffna, was arrested by the CID on 17 June 2006 in Pamunugama while he was travelling towards the bus halt. The suspect had been arrested on suspicion of having explosives to use in an attack against the Navy. He was arrested alongside several other suspects and detained under Regulation 19(1) of the 2005 ERs. The suspect alleged that he was subjected to torture;⁴³⁹ hung upside down, with a polythene bag soaked in petrol put over his head; and beaten severely with a wooden pole. Gruesome accounts of his torture included references to sexual abuse.⁴⁴⁰ He was allegedly coerced into confessing that he was a member of the LTTE. The suspect now suffers from chronic blackouts, loss of memory, piles, blood loss and extreme pain in his reproductive organs.

The suspect was produced before the Wattala Magistrate's Court in July 2006—a month after his arrest. After several months in preventive detention in the custody of the CID, the suspect was transferred to the New Magazine Prison on 30 April 2007. He was later transferred to the Kalutara Prison where he is currently being detained.

The suspect has been detained for five years and seven months without indictment. As mentioned above, the Attorney-General's consent is specifically required for the purpose of granting bail to such suspects; however, there has been no attempt on the Attorney-General's part to secure the suspect's bail.

In the case of *Mahalingam Baskaran*⁴⁴¹ a 34-year-old driver from Jaffna was hired to transport food items to Vavuniya and Kilinochchi. While loading food items

437 [1999] 2 Sri.L.R., p 240.

438 MC (Wattala) Case No. B/900/2006.

439 S.C. (F.R.) Application No. 51/2012, Petition filed on 8 February 2012.

440 *Ibid.* It was alleged that an iron rod was inserted into the suspect's rectum and that his penis was burned with cigarettes.

441 MC (Vavuniya) Case No. B/1138/08.

in Vavuniya at a UN warehouse on 30 September 2008, the Army arrested the suspect and detained him at the Air Force Camp, Vavuniya, for 20 days. He was later taken to the Vavuniya Police Station and detained until being transferred to Anuradhapura Remand Prison on 13 January 2009. The suspect was arrested on the grounds that he had helped the LTTE transport illegal items and was detained under the 2005 ERs.

The suspect made a statement before the Magistrate on 19 January 2009, alleging that he was subjected to torture in detention.⁴⁴² While he was at the Air Force Camp, he was blindfolded for four days with his hands tied as the CID severely assaulted him. He further alleged that at the Vavuniya Police Station, the CID assaulted him again and applied green chillies to his eyes and reproductive organs. The Magistrate ordered an immediate investigation into the matter and to file a report with the Deputy Inspector General (DIG). The Magistrate also directed the Superintendent in charge of Anuradhapura Prison to hold an inquiry into the matter and submit a report to the Magistrate. He further ordered the detainee to be produced before a Judicial Medical Officer. No remedial action or follow-up was reported to the Magistrate thereafter.

The suspect later filed a fundamental rights application naming Lt. M.D. Niroshan Gunatilake of the Thekawatte Army Camp, who was the arresting officer, as the first Respondent.⁴⁴³ After the fundamental rights application was filed—and over two years after the initial arrest—the suspect was indicted in the High Court of Vavuniya under the 2005 ERs and is presently standing trial.⁴⁴⁴

In the case of *Ravi*⁴⁴⁵ a 41-year-old suspect was arrested on 8 July 2009 by the Army in Omanthai and detained under the PTA for allegedly being a member of the LTTE. He was taken to the Boossa Detention Camp on 4 January 2010 and held for approximately six months before being transferred to the Anuradhapura Prison.

In consultations with his attorneys, the suspect alleged he was severely assaulted, hung from his hands, forced to lick the shoes of the military and CID officials and sexually abused. The suspect suffers from a disability caused by a previous shell attack, which has caused paralysis to the right side of his body.

442 *Ibid.* Proceedings dated 19 January 2009.

443 S.C. (F.R) 602/2010, Petition filed on 6 October 2010.

444 H.C. (Vavuniya) Case No. 2170/2010. See 2005 ERs, Regulations 36(1) and 36(5).

445 Name changed to protect identity. Details of case record also withheld due to same reason.

The Attorney-General's Department filed an indictment against the suspect in the Vavuniya High Court on 16 February 2012. This indictment came more than two and a half years since the arrest of the suspect. Given the fact that the suspect is now indicted under the PTA, it is extremely unlikely that he would be released on bail. Thus it is not unreasonable to speculate that he would be incarcerated for a further prolonged period of time, owing to further delays during the trial.

In the high profile case of *Ragupathy Sharma*,⁴⁴⁶ the Chief Priest at the *Shri Muniyappan Swamy Shri Maha Kali Amman* Hindu Kovil was arrested by the Terrorist Investigation Division (TID) on 9 February 2000 at his temple residence. The suspect was implicated in the Town Hall bomb blast, which was an assassination attempt against President Chandrika Bandaranaike Kumaratunga. The suspect was taken to the TID office on the sixth floor of Police Head Quarters. He was later produced before the Chief Magistrate of Colombo on 18 February 2000 and handed over to the CID on 21 February 2000. Incidentally, he was held at the Fourth Floor of the CID office. The suspect's wife, Vasanthi Ragupathy Sharma was arrested on 24 February 2000 and was also held at the Fourth Floor. The Magistrate ordered under Section 7(2) PTA that both suspects be remanded until the conclusion of the trial.⁴⁴⁷ Accordingly, Ragupathy Sharma was detained at Kalutara Prison, and his wife was detained in Welikada Female Prison. The children of the couple were thereafter sent to a Hindu orphanage in Batticaloa. Both suspects were subsequently indicted on 30 May 2002 under the PTA and the then prevailing ERs. Yet after nearly a decade, the prosecution has failed to complete its work. These suspects have now been incarcerated without conviction for more than twelve years.⁴⁴⁸

The above-mentioned cases are illustrative of compound human rights violations often experienced by detainees. First, the failure of the Attorney-General to consent to pre-trial release or take reasonable steps to secure the release of suspects is a violation of Article 9(3) of the ICCPR and a violation of the right to bail under Article 9(5) of the ICCPR.

446 High Court (Colombo) Case No. 891/02.

447 Section 7(2) of the PTA provides: 'Where any person connected with or concerned in or reasonably suspected to be connected with or concerned in the commission of any offence under this Act appears or is produced before any court other than in the manner referred to in subsection (1), such court shall order the remand of such person until the conclusion of the trial. Provided that, if an application is made under the hand of a police officer not below the rank of Superintendent to keep such person in police custody for a period not exceeding seventy-two hours, the Magistrate shall authorize such custody and thereupon the order of remand made by the Magistrate shall remain suspended for the period during which such person is in police custody.'

448 Interview with lawyers – names kept confidential.

Second, if the Attorney-General knew or had reasonable grounds to believe that suspects would endure torture or ill-treatment, he was under duty to take steps to either secure the suspect's release as soon as possible or to transfer the suspect to a safe facility.⁴⁴⁹ The Committee against Torture indicates that 'if a person is to be transferred or sent to the custody or control of an individual or institution known to have engaged in torture or ill-treatment...the State is responsible and its officials subject to punishment for ordering, permitting or participating in this transfer.'⁴⁵⁰ In such a case, the State is in violation of the obligation to prevent torture or ill-treatment under Article 2 of the CAT as well as Article 7 of the ICCPR.

Third, in more than one of the above cases, the reason for detention was not discernible or based on lawful grounds. In the first example, when the Attorney-General no longer had a basis for detention, instead of seeking the release of the suspect, the Attorney-General sought an additional remand in order to find further evidence to justify the detention. A person may only be detained on such grounds as established by law. Detaining a person without clear reason is arbitrary detention, violating Article 9(1) of the ICCPR to detain a person without a basis grounded in law.

There have, of course, been instances where the Attorney-General has undertaken efforts to secure the release of suspects and uphold their rights.

In the case of *Suntharalingam Sritharan*,⁴⁵¹ the 48-year-old suspect was arrested on 25 July 2009. The suspect was held under a detention order and only produced before the Mount Lavinia Magistrate on 12 August 2009. He was thereafter transferred to the New Magazine Prison. The suspect was accused of failing to give information to the Police, as required under Regulation 23 of the 2005 ERs.⁴⁵² In a subsequent fundamental rights application, the suspect alleged that he was physically assaulted at the Wellawatta Police Station and subjected to torture that left him impotent.⁴⁵³

449 Committee against Torture, General Comment 2, *supra* fn. 63, para 19; see also *United States v. Ernst von Weizsaecker et al.*, Trials of War Criminals Before the Nuremberg Military Tribunals.

450 Committee against Torture, General Comment 2, *supra* fn. 63, para 19.

451 MC (Mount Lavinia) Case No. B/2514/2009.

452 Regulation 23 provides: 'Every householder within any area shall furnish the Office-in-charge of the Police Station of his area when required so to do by a Police Officer not below the rank of Assistant superintendent of Police, with a list of all the inmates of his house, distinguishing the members of his family from the servants or other residents therein; and he shall also if it shall be so directed in the order of the aforesaid Police Officer, report any increase or diminution or change in the same; and he shall not, having received such notice under such order, harbour a stranger without giving such notice thereof to the Officer-in-Charge of the Police station of his area, and every person failing in any duty imposed upon him by this regulation shall be guilty of an offence.'

453 S.C. (F.R.) 310/2010, Petition filed on 21 April 2010.

Unlike previous cases, the Attorney-General made some efforts to expedite the processing of this case, and informed the Magistrate that the evidence was insufficient to indict the suspect under the ERs. The Attorney-General directed the Magistrate to conduct a preliminary inquiry to assess whether there was a cognizable offence under Section 196 of the Penal Code.⁴⁵⁴ This inquiry is still pending. However, the transfer of the case to the ordinary legal regime removed bars on the granting of bail. The Attorney-General consented to the granting of bail, which resulted in the release of the suspect on 5 August 2010.

5. Review or Revision of Prosecutorial Decisions

For decades, the Supreme Court largely did not interfere in the Attorney-General's discretion, holding that it is not the province of the Court to enter into save for the gravest causes.⁴⁵⁵

In 1998, however, the Supreme Court held in *Victor Ivan v. Sarath N. Silva, Attorney-General* that the Attorney-General's power to file (or not to file) an indictment is a discretionary power that is neither absolute nor unfettered: where such a power or discretion is exercised in violation of a fundamental right, it can be reviewed in proceedings under Article 126.⁴⁵⁶ This judgment was 'useful in terms of the general principles that the judges laid down, which remain applicable to instances, where for example, the Attorney-General unjustifiably refuses to indict police officers accused of torture and [cruel inhuman and degrading treatment or punishment].'⁴⁵⁷

The Court set a high threshold for review requiring a *prima facie* case that the indictments were discriminatory, arbitrary or unreasonable. However, the Court preferred to apply the 'exceptional circumstances' test in actually intervening to set aside the decision of the Attorney-General. Moreover, the Court's treatment of the defective investigations was unsatisfactory given the fact that 'in cases involving violations of fundamental rights, the liability would be that of the State,

454 Section 196 of the Penal Code states: 'Whoever, in any declaration made or subscribed by him, which declaration any Court of Justice, or any public servant or other person, is bound or authorized by law to receive, makes any statement which is false, and which he either knows or believes to be false or does not believe to be true, touching any point material to the object for which the declaration is made or used, shall be punished in the same manner as if he gave false evidence.'

455 See *King v. Noordeen*, (1910) 13 NLR 115; *Attorney-General v. Kanagaratnam* (1950) 52 NLR 121; *Attorney-General v. Don Sirisena* (1968) 70 NLR 347; *The Queen v. D.F.T. Abeysinghe* [1965] 68 NLR 386; *Velu v. Velu* (1968) 76 NLR 21, p 23.

456 [1998] 1 Sri.L.R., pp 342-343.

457 *Pinto-Jayawardena, The Rule of Law in Decline*, *supra* fn. 164, p 101.

regardless of whether blame could be laid at the door of the investigating officers or the prosecuting officers.⁴⁵⁸ The Court instead laid down an extremely high standard of 'culpable ignorance or negligence' on the part of the Attorney-General in order to justify its intervention. This perhaps unreasonably high standard is clearly reflected by the following view of the Court:

*It does not appear, prima facie, that the lapse on the part of State counsel in not calling for further material has caused any prejudice whatsoever in regard to two of the three allegations. Errors and omissions do occur, and by themselves are not proof that the impugned decision was arbitrary, capricious, perverse or unreasonable, or intended to interfere with the petitioner's freedom of speech.*⁴⁵⁹

Such high standards may not necessarily be desirable 'where the accountability of the Attorney-General is concerned in Sri Lanka.'⁴⁶⁰ This apprehension was clearly endorsed when the matter was later brought to the attention of the UN Human Rights Committee.⁴⁶¹

6. Criticism of the Attorney-General – UN Treaty Bodies

6.1 Committee against Torture

*The Committee remains concerned about the prevailing climate of impunity in the State party and the apparent failure to investigate promptly and impartially wherever there is reasonable ground to believe that an act of torture has been committed. It also notes the absence of an effective independent monitoring mechanism to investigate complaints of torture. The Committee expresses concern over reports that **the Attorney-General's office has stopped referring cases to the Special Investigations Unit (SUP) of the police and the large proportion of pending cases still outstanding** [emphasis added].⁴⁶²*

The government has indicated on more than one occasion that prosecution of

458 *Rule of Law in Decline*, supra fn. 160, p 101.

459 [1998] 1 Sri.L.R., pp 349-350.

460 Pinto-Jayawardena, *The Rule of Law in Decline*, supra fn. 164 p 101.

461 See *Case of Victor Ivan*, Communication No. 909/2000: Sri Lanka, 26 August 2004, CCPR/C/81/D/909/2000.

462 Committee against Torture, *Concluding Observations on Sri Lanka* supra fn. 18 para.18.

torture cases are handled by a special team of State law officers comprising the Prosecution of Torture Perpetrators Unit (PTP Unit) headed by a Deputy Solicitor General.⁴⁶³

*On the completion of the criminal investigation, the CID submits to the PTP unit the corresponding notes of investigations. The initial duty of the Unit is to consider the institution of criminal proceedings against the alleged perpetrators of torture. In doing so, consideration is given to the availability of material disclosing the commission of offences, adequacy of such material, their reliability and admissibility in court. Consequent to a decision being taken to indict the alleged perpetrators of torture, the CID is advised to cause the arrest of the suspect(s) and produce the suspect(s) before a Magistrate. Thereafter, the indictment is prepared and forwarded to the relevant High Court. It is customary that a State Counsel representing the Attorney-General leads the prosecution of such a case.*⁴⁶⁴

No separate Unit dealing with torture cases, however, actually exists in the Department.⁴⁶⁵ Contrary to government accounts, officers of the Department do not regularly monitor investigations conducted by the Police. State counsel will often request the CID or the Special Investigation Unit (SIU) to conduct further investigations on an *ad hoc* basis (i.e. record statements or obtain ancillary documents).⁴⁶⁶

Sri Lanka indicated in its latest periodic report to the Committee against Torture that a special branch of the Police, i.e. the SIU and Disappearances Investigation Unit, is trained to handle investigations into torture.⁴⁶⁷ The introduction of Scene of the Crime Officers (SOCO) and the education of police officers on various other

463 See UN Human Rights Committee, *Fourth Periodic Report of Sri Lanka*, UN Doc CCPR/C/LKA/2002/4, 18/10/2002, para 175.

464 *Ibid.*

465 Pinto-Jayawardena, *The Rule of Law in Decline*, *supra* fn. 164 p 102. It is observed: 'Instead, the 'PTPU' is only an administrative convenience (or international convenience) with neither specially assigned staff nor separate premises. There is only a separate file category called 'AGT files' for torture cases, which come within the scope of the Criminal Branch under the Solicitor General. The torture cases are distributed among a few State Counsel, who also handle other criminal cases.'

466 Pinto-Jayawardena, *The Rule of Law in Decline*, *supra* fn. 164, p 102.

467 See Committee against Torture, *Consideration of reports submitted by States parties under Article 19 of the Convention: Combined third and fourth periodic reports of States parties due in 2007 – Sri Lanka*, 17 August 2009, UN Doc CAT/C/LKA/3-4 ('Sri Lankan report to CAT Committee'), para 42.

investigative techniques has facilitated prompt and impartial investigations that are subject to 'judicial supervision'.⁴⁶⁸ It is unclear what is meant by 'judicial supervision.' The Magistrate is not required to supervise investigations under the Torture Act No. 22 of 1994. The Attorney-General's Department, through its so-called PTP Unit, is supposed to monitor the progress and direction of investigations into torture or ill-treatment. However, given the incredible workload of most State counsel, 'personal monitoring' of investigations has not been consistent.

The Lesson Learnt Reconciliation Commission recommended establishing units of the Attorney-General's Department in the provinces to 'guide and advise the Police regarding criminal investigations, prosecutions and other matters touching upon the criminal justice system'.⁴⁶⁹ Such an initiative, however, could lead to tension between the Department and the Police as the responsibility for police investigation would be divided between the Police and the units of the Attorney-General's Department.⁴⁷⁰ Also, depoliticizing police investigations through the Department 'is not a convincing proposition, given that instances of *nolle prosequi*...at the hands of the [Attorney-General]'.⁴⁷¹ Finally, conflicts of interest could arise if the Attorney-General's Department is involved in police investigations. Guidance and assistance from the provincial units of the Attorney-General's Department is already 'fraught with problems, where such assistance and guidance can be a matter of evidence in courts'.⁴⁷²

Failure to monitor investigations into torture or ill-treatment interferes with the State's duty to promptly and impartially investigate torture or ill-treatment under Article 12 and the overall duty to prevent torture or ill-treatment under Article 2.

6.2 The UN Human Rights Committee

In the *Case of Vadivel Sathasivam and Parathesi Saraswathi*, the Committee concluded that Sri Lanka 'failed in its procedural obligation to properly investigate the victim's death and incidents of torture, and to take appropriate investigative and remedial measures'.⁴⁷³ In that case, the victim, aged 18, had

468 *Ibid*, para 43.

469 LLRC Report, *supra* fn. 3 para 8.191.

470 See Frank de Silva, 'Attorney-General - Units to advise the Police', *The Sunday Island*, 28 April 2012, accessed at: http://www.island.lk/index.php?page_cat=Article-details&page=Article-details&code_title=50654. The writer is a retired Inspector General of Police.

471 *Ibid*.

472 *Ibid*.

473 UN Human Rights Committee, views of 31 July 2008, *Case of Vadivel Sathasivam and Parathesi Saraswathi* Communication No. 1436/2005, UN Doc. CCPR/C/93/D/1436/2005, para.6.4.

been arrested and detained at the Kalmunai Police Station in October 1998. The victim had been subjected to torture and was 'unable to walk and eat, his right ear swollen and oozing blood.'⁴⁷⁴ The victim died in police custody. At the magisterial inquest, the Police claimed the victim died in an attack by the LTTE during transport from Kalmunai to the Amparai Police Station.⁴⁷⁵ Instead of criminal proceedings, the Attorney-General instituted disciplinary action against the police officers for the alleged torture and ill-treatment causing the death of the victim.⁴⁷⁶ The Committee concluded that 'the Attorney-General's decision to initiate disciplinary proceedings instead of criminal proceedings was clearly arbitrary and amounted to a denial of justice.'⁴⁷⁷

In the *Case of S. Jegatheeswara Sarma*,⁴⁷⁸ the Committee indicated:

*...the State party is under an obligation to provide the author and his family with an effective remedy, including a thorough and effective investigation into the enforced disappearance and fate of the author's son, his immediate release if he is still alive, adequate information resulting from its investigation, and adequate compensation for the violations suffered by the author's son, the author and his family.*⁴⁷⁹

The Committee further reiterated that the State party is under an obligation to 'expedite the current criminal proceedings and ensure the prompt trial of all persons responsible for the enforced disappearance of the author's son under section 356 of the Sri Lankan Penal Code and to bring to justice any other person who has been implicated in the enforced disappearance.'⁴⁸⁰

On 23 June 1990, army personnel abducted the author, his son, and three others from their residence in Anpuvalipuram, handing them over to other members of the military, including Corporal Sarath.⁴⁸¹ The author was released, but his son – suspected of being an LTTE member – was subjected to torture

474 *Ibid.*, para 2.1.

475 *Ibid.*, para 2.4.

476 *Ibid.*

477 *Ibid.*

478 UN Human Rights Committee, views of 31 July 2003, *Case of S. Jegatheeswara Sarma*, Communication No. 950/2000, UN Doc. CCPR/C/78/D/950/2000.

479 *Ibid.*, para 11.

480 *Ibid.*

481 *Ibid.*, para 2.1.

and later taken to the Plaintain Point Army Camp.⁴⁸² In July 1995, the author gave evidence on the disappearance of his son before the 1994 Presidential Commission of Inquiry into Involuntary Removals and Disappearances in the Northern and Eastern Provinces without any result.⁴⁸³ In July 1998, the author wrote to the President, and in February 1999, the Army advised that no such person had been taken into military custody.⁴⁸⁴

The State party submitted that the Attorney-General received two letters from the author on 24 July and 30 October 2000 seeking 'inquiry and release' of his son from the Army.⁴⁸⁵ The Attorney-General's Department made inquiries with the Army, and it was allegedly revealed that no State authority had arrested or detained the author's son. The State party, however, also claimed that the author's requests were forwarded to the Missing Persons Unit (MPU) of the Attorney-General's Department and on 12 December 2000, the MPU coordinator informed that suitable action, including criminal investigations into the enforced disappearance, would be taken.⁴⁸⁶

Criminal investigations revealed that on 23 June 1990, Corporal Ratnamala Mudiyansele Sarath Jayasinghe Perera (i.e. Corporal Sarath) and two other unidentified persons had 'involuntarily removed (abducted)' the author's son,⁴⁸⁷ but the State party claimed that officers responsible for search and cordon operations during the time were unaware of Corporal Sarath's conduct and the author's son's enforced disappearance. It was also alleged that the investigation failed to prove that the author's son had been detained and the whereabouts of the author's son could not be ascertained.⁴⁸⁸

On 5 March 2002, Corporal Sarath was indicted for abducting the author's son, an offence punishable under Section 365 of the Penal Code,⁴⁸⁹ and the indictment was forwarded to the High Court of Trincomalee. According to the author, however, the Attorney-General failed to include key evidence in the case. The Committee made the following observations:

482 *Ibid.*

483 *Ibid.*, para 2.6.

484 *Ibid.*

485 *Ibid.*, para 7.2.

486 *Ibid.*

487 *Ibid.*, para 7.4.

488 *Ibid.*

489 *Ibid.*, para 7.8.

*The records of the ongoing military operations in this area in 1990 have indeed not been accessed or produced and no detention records or information relating to the cordon and search operation have been adduced. It also does not appear that the State party has made investigations into the vehicle bearing registration number 35 SRI 1919 in which the author's son was last seen. **The Attorney-General who filed the indictment against Corporal Sarath has not included key individuals as witnesses for the prosecution, despite the fact that they had already provided statements to the authorities and may provide crucial testimony material to this case...** Moreover, there is no indication of any evidence having been gathered as to the role of those in the higher echelons of the Army as such officers may themselves be criminally responsible either directly for what they ordered or instigated or indirectly by dint of their failure to prevent or punish their subordinates [emphasis added].⁴⁹⁰*

7. The Representational Policy of the Attorney-General

There is no specific provision requiring the Attorney-General to defend a person accused of a crime or a human rights violation merely because he or she happens to be a public servant. In the context of fundamental rights applications,⁴⁹¹ the Attorney-General is required to be made a party; however, the Attorney-General's Department is not explicitly required to represent the respondent in such proceedings. The Department's recent policy of representing public servants accused of human rights violations not only fails to uphold the duty of prosecutors to give due attention to the prosecution of crimes committed by public officials - notably abuse of power and grave human rights violations -⁴⁹² but also interferes with Sri Lanka's duty under international law to provide an effective legal remedy to victims and victims' families for human rights violations.

7.1 Habeas corpus applications

In *Seetha v. Sharvananda*,⁴⁹³ the Court of Appeal dealt with the right of the

⁴⁹⁰ *Ibid*, para 8.12.

⁴⁹¹ See Article 134 of the Constitution and Rule 44(1)(b) of the Supreme Court Rules, 1990.

⁴⁹² Guideline 15 of the *UN Guidelines on the Role of Prosecutors*, *supra* fn. 86.

⁴⁹³ [1989] 1 Sri L.R. 94. The case in discussed extensively in Pinto-Jayawardena, K. & de Almeida Guneratne, J., *Habeas Corpus in Sri Lanka supra* fn. 127, p 84.

Attorney-General to appear for respondents in *habeas corpus* applications. The petitioner in this case alleged that the Officer-in-Charge (OIC) along with two other police officers had abducted her husband. Both the OIC and the Inspector General of Police (IGP) were cited as respondents. A senior State counsel appeared for both respondents and objected to the application. The Court of Appeal directed a magisterial inquiry, dismissing the application. The matter was then appealed to the Supreme Court, which quashed the order of the Court of Appeal as well as the inquiry and findings of the Magistrate. The Supreme Court observed that the IGP should give all assistance to the Magistrate to arrive at a finding in this matter.⁴⁹⁴ During the fresh inquiry, an objection was raised in respect of the Attorney-General's representative appearing for the OIC on the following grounds:

1) That in terms of the order of the Supreme Court, the I.G.P. has to give all assistance to the Court to help the Magistrate to arrive at a finding in this matter. It was submitted that a conflict of interest would arise in the Senior State Counsel appearing for the I.G.P. and the first Respondent. The role of the I.G.P. is to assist Court whereas the first Respondent has to defend himself in respect of the allegations made against him by the Petitioner.

*2) That the Attorney-General has to act in the public interest considering the extensive statutory power vested in him in the administration of justice especially in the area of criminal matters. Therefore, from a broader perspective, there is a conflict of duty in the Attorney-General representing the purely, partisan interests of the first Respondent whose sole concern is to defend himself against the allegation made by the Petitioner.*⁴⁹⁵

When the matter was taken up before the Court of Appeal, the Court rejected the objection on the basis that under Sri Lankan law, the Attorney-General is empowered to defend public officers in civil actions and to secure the acquittal of public officers in criminal prosecutions.⁴⁹⁶ Moreover, it was held that the possibility that the proceedings may result in a public officer being prosecuted and punished could not debar the Attorney-General from appearing for that officer.⁴⁹⁷

494 *Ibid.* p 85.

495 *Ibid.* p 86.

496 *Ibid.*

497 *Ibid.*

During consultations with lawyers from the provinces⁴⁹⁸ lawyers in Amparai and Jaffna noted that the Attorney-General often filed for an indictment while a *habeas corpus* application was pending, at the same time also retaining an administrative detention order to be shown to Court during the *habeas corpus* proceedings. Filing for an indictment during a *habeas corpus* application means that if the outcome of the hearing calls for the release of the suspect, the Attorney-General could still continue the detention under the newly issued indictment. Such practices demonstrate a concerted effort on the part of the Attorney-General to obstruct and prevent the release of the detainee and violate victims' general right to liberty under Article 9(1), the right to bail under Article 9(4), and the right to be released without delay where the detention is unlawful under Article 9(5) of the ICCPR.⁴⁹⁹ Where the detention results in torture or ill-treatment, the State also violates the duty to prevent torture and ill-treatment under Article 7 of the ICCPR and Article 2 of the CAT.

7.2 Fundamental rights applications

The Attorney-General is mandatorily required to be noticed as a respondent in all fundamental rights applications, including applications where torture in terms of Article 11 is alleged.⁵⁰⁰ This rule does not require the Attorney-General to appear on behalf of the respondents. In recent practice, however, the Attorney-General's Department has begun to routinely appear on behalf of State officials in fundamental rights applications. Counsel for the Attorney-General appears before the Court at the threshold stage, often objecting to leave to proceed and generally withdrawing following the granting of leave by the Court. Many of these cases involve arbitrary arrest, detention, torture or ill-treatment. According to one State counsel consulted confidentially for the purposes of this Study, the strategy is usually to get these cases dismissed *in limine* to avoid having to defend the officials in the substantive matter.

In past years, the Attorney-General's Department had adopted an unofficial policy of refusing to defend public servants accused of torture in fundamental rights applications before the Supreme Court.⁵⁰¹ However, recently, the Department

498 See LST Position Paper, *supra* fn. 399, pp 9-10. See in particular, views during consultations with lawyers from Galle, Matara, Trincomalee and in Jaffna.

499 *Ibid.* See in particular, views expressed during consultations with lawyers from Galle, Matara, Trincomalee and in Jaffna.

500 See Rule 44(1)(b) of the Supreme Court Rules of 1990.

501 Pinto-Jayawardena, K. & de Almeida Guneratne, J., *Habeas Corpus in Sri Lanka* *supra* fn. 127, p 87.

had resorted to objecting to leave to proceed in petitions relating to torture.⁵⁰² There is also a tacit policy of objecting to fundamental rights applications involving arbitrary arrest and detention of Tamil citizens accused of terrorism. In such cases, the Department represents public officials named as respondents, often times delaying proceedings by requesting further time to complete investigations or to file an indictment.⁵⁰³

Many of those consulted for the purpose of this Study strongly believed that the decision to represent specific public officials in fundamental rights applications is driven by an intention to obstruct and prevent petitioners from establishing a *prima facie* case against such officials.⁵⁰⁴ Such conduct would violate the duty of the Attorney-General to prosecute crimes committed by public officials, particularly gross violations of human rights.⁵⁰⁵ In doing so, Sri Lanka violates its obligations under international law to guarantee victims practical and effective access to justice with a real opportunity to challenge violations before a court of law.⁵⁰⁶

8. Commissions of Inquiry and the Role of the Attorney-General

8.1 A critique of the role of the Attorney-General in COIs

Sri Lanka has an obligation under international law to conduct prompt, thorough, independent and impartial investigations of credible allegations of human rights

502 See for example, S.C. (F.R.) Application No. 398/2008, Supreme Court Minutes of 9 June 2009. In this case, the petitioner alleged *inter alia* that her husband had been subjected to torture in violation of Article 11 of the Constitution by the respondent police officers. State Counsel appearing on behalf of the Attorney-General objected to leave to proceed being granted in respect of the application. Eventually, the Supreme Court granted leave to proceed with respect to Articles 12(1), 13(1) and 13(4) of the Constitution but not in respect of Article 11. Thereafter, the Attorney-General's Department appeared for all the respondents in the case. Also see the case of *Edward Sivalingam v. Jayasekara S.C.* (F.R.) Application No. 326/2008, decided on 10 November 2010.

503 See Centre for Human Rights & Development, *Challenges and Issues*, accessed at <http://www.chrdsrilanka.org/PAGES/activitiesLAP.html>.

504 Views expressed by lawyers and retired judges interviewed for the Study. Names kept confidential upon request.

505 Guideline 15 of the *UN Guidelines on the role of Prosecutors supra* fn. 86.

506 EctHR: *Case Airey v. Ireland*, Judgment of 9 October 1979, Series A No 32, para 24; I/ActHR: Advisory Opinion OC-9/87, Judicial Guarantees in States of Emergency, 6 October 1987, Series A No 9, para 24; Case Silver v. the United Kingdom, Judgment of 25 March 1983m Series A No 61, para 113.

UNHRC General Comment 31 *supra* fn. 46, para 15; EctHR: *Case Keen an v. the United Kingdom*, Judgment of 3 April 2001, Reports 2001-III, para 122; I/ActHR: Advisory Opinion OC-9/87, Judicial Guarantees in States of Emergency, 6 October 1987, Series A No 9, para 24; Case *F. Birindwaci Bithashwiwa and E. Tshisekedi wa Mulumba v. Zaire*, Views of 29 November 1989, UN Doc. CCPR/C/37/D/241/1987, para 14.

violations.⁵⁰⁷ A commission of inquiry is an extraordinary *ad hoc* measure to assist States investigating specific human rights violations or certain politically-charged incidents when it does not appear that ordinary organs of law enforcement are able to independently and impartially investigate the matter.⁵⁰⁸

For an investigation to be independent, it must be carried out by authorities not involved in the alleged human rights violations.⁵⁰⁹ In a commission of inquiry, Commissioners should be selected on the basis of their impartiality, competence and independence as individuals. Members of a commission of inquiry must be independent of any institution, agency or person that may be subject of the inquiry.⁵¹⁰

The Attorney-General's Department has been criticised for playing a significant role both in the functioning of Commissions of Inquiry and the implementation of Commissions' recommendations. In the words of an internationally recognized group of experts, appointed in the *Udalagama commission*:

*The fundamental conflict of interest...arises out of the position of the Attorney-General as the first law officer of Sri Lanka and chief legal adviser to the Government. The Attorney-General is legal adviser to all levels of the national Government, including the armed and security forces, and the police. In a Commission whose tasks include an inquiry into the efficacy of the original investigations into certain cases, including investigations and inquiry into certain incidents involving the armed and security forces and the police, the Attorney-General's staff is thus potentially in the position of being a subject of the inquiry, and is, in any event, not an independent authority.*⁵¹¹

There was consensus amongst those consulted for this Study that the Attorney-General's actions and inactions have obstructed and at times deliberately blocked the work of Commissions of Inquiry. According to one senior lawyer and human

507 International Commission of Jurists, *Remedies and Reparations*, *supra* fn. 50, p 65.

508 See Pinto-Jayawardena, *Still seeking Justice in Sri Lanka*, *supra* fn. 345, pp iv – vii.

509 Principle 2, *UN Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Annex I, Manual on the Effective Investigation and Documentation of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol), 2004, UN High Commissioner for Human Rights.

510 See Principles 6 and 7 of the *Updated Set of Principles to Combat Impunity*, *supra* fn. 1.

511 *International Independent Group of Eminent Persons*, The Final Report of the IIGEP (April 2008) (*The Final Report of the IIGEP*)

rights activist, the Attorney-General did little to assist the Commission of Inquiry to Investigate and Inquire into Alleged Serious Violations of Human Rights Occurring since 1 August 2005, investigating the *Action Contre la Faim Case*.⁵¹²

8.1.1. Commissions of Inquiry into Serious Human Rights Violations from 1977-2001

The role of the Attorney-General in Commissions of Inquiry varied depending on the nature and mandate of the commission, and the adversarial or inquisitorial model adopted.

(i) Sansoni Commission

The Sansoni Commission⁵¹³ adopted a quasi-adversarial model with counsel from the Attorney-General's Department assisting the Commission in the examination of witnesses. Deputy Solicitor General G.P.S. de Silva—a well-respected senior officer of the Department who later became the Chief Justice of the country—assisted the Commission but later withdrew unexpectedly from his role. The precise reasons for G.P.S. de Silva's departure remain murky.

*The police hierarchy supported by key political figures of the day, made known its displeasure with the efforts of then Deputy Solicitor General (DSG) G.P.S. de Silva to lead evidence fairly, which meant that the actions of certain police officers were liable to get exposed. It is confirmed on the most impeccable of testimony that (then) DSG de Silva's withdrawal from the Commission sittings was not as had been portrayed for personal reasons.*⁵¹⁴

The withdrawal cast a shadow on the Commission's credibility. A.D.T.M.P. Tennekoon, G.P.S. de Silva's replacement, was severely criticized for his manner of leading police witnesses and evidence recording was tainted with accusations of bias and bad faith. Commissioner Sansoni, however, dismissed these criticisms

⁵¹² Name kept confidential on request.

⁵¹³ The mandate of this Commission related to the incidents that took place between 13 August and 15 September 1977, which resulted in death or injury to persons, the destruction of or damage to property of any person or state property. The most notable of such incidents was the Police crackdown of the fourth conference of the International Association of Tamil Research (IATR) in Jaffna, which had resulted in the death and injury of civilians. The Commission was also tasked with recommending measures to rehabilitate or assist such affected persons and to ensure the safety of the public and prevent a recurrence of such incidents.

⁵¹⁴ Pinto-Jayawardena, *Still Seeking Justice in Sri Lanka*, *supra* fn. 345, pp 61-66.

as unjustified.⁵¹⁵ After the Sansoni Commission Report was published, the Attorney-General took no action against the police officers⁵¹⁶ found culpable in the 1977 violence.⁵¹⁷

(ii) Kokkadicholai Commission

The Attorney-General did not prosecute any persons in relation to the findings of the Kokkadicholai Commission Report.⁵¹⁸ The offenders were tried before a Military Court, which acquitted seventeen of the eighteen Sinhalese Army personnel implicated in the killings of Tamil civilians. The Officer-in-Charge, Captain Kudaligama, was convicted on two counts—failure to control his subordinates and the improper disposal of dead bodies⁵¹⁹—and was dismissed in December 1992.⁵²⁰

(iii) Bindunewewa Commission

In the Bindunewewa Commission, none of the information obtained in the inquiry was ever used in criminal proceedings. Independent of the Commission, the Attorney-General prosecuted the officers-in-charge and obtained convictions in the High Court. The convictions, however, were overturned on appeal in the Supreme Court.⁵²¹

(iv) Disappearances Commissions

The Disappearances Commissions of 1994 and 1998⁵²² were confined to recording

515 *The Sansoni Commission report*, Sessional Paper No. VII, July 1980, pp 19-20.

516 Pinto-Jayawardena, *Still Seeking Justice in Sri Lanka*, *supra* fn. 345, pp 68-71.

517 Some of the names that emerged from the inquiry were, SP GW Liyanage, TD Gunewardene, PC 5920 and Cyril Fernando of Wattegama. See Pinto-Jayawardena, *Still Seeking Justice in Sri Lanka*, *supra* fn. 345, pp 99-100.

518 *Ibid.* On 12 June 1991, the explosion of a device on the Kokkadicholai-Manmunai Ferry Road in Batticaloa resulted in the deaths of two soldiers and the serious injury of a third soldier. Shortly after the incident, enraged Army personnel allegedly killed sixty-seven civilian inhabitants of the villages of Makiladitivu, Muthalaikuda and Munaikaidu in retaliation. The Kokkadicholai Commission was essentially tasked with investigating the incident.

519 *Ibid.*

520 *Ibid.* See Charles Abeysekera, *Human Rights 1992 - A Dismal Record*, Social Scientists Association (1993).

521 S.C. Appeal 20.2003 (TAB), Supreme Court Minutes, 21 May 2005.

522 These Commissions were appointed by President Chandrika Bandaranaike Kumaratunga to investigate primarily whether any persons had been involuntarily removed or had 'disappeared' from their places of residence in the Central, North Western, North Central, Uva, Northern, Eastern, Western, Southern and the Sabaragamuwa Provinces, at any time after first January 1988. The Commissions were hence appointed according to geographical area: (1) Western, Southern and Sabaragamuwa Provinces ('the 1994 Western, Southern and Sabaragamuwa Disappearances Commission'); (2) Central, North Western, North Central and Uva Provinces ('the 1994 Central, North Western, North Central and Uva Disappearances Commission'); and (3) Northern and Eastern Provinces ('the 1994 Northern and Eastern Disappearances Commission'). A later 'mopping up' Commission was appointed in 1998.

testimony, leaving further investigation and prosecution to Police and the Attorney-General. The Department's response to this mandate was somewhat disappointing, and one Commission noted with regret the inadequate follow-up investigations and prosecutions:

The distortion of the investigations to conceal more than to reveal and mechanically labelling as 'subversive act' without investigation, were some of the practices of avoidance used in the rare instances where the authorities could not refrain from semblance of an investigation.⁵²³

The Western, Southern and Sabaragamuwa Disappearances Commission were tasked with inquiring into egregious violations of human rights including the killing of Richard de Zoysa; the killing of Sarath Sepala Ratnayake; and the Hokandara mass graves case, where a bomb crater on a public highway was transformed into an open grave containing several charred corpses. The Commission observed that instances of failure to investigate were not 'isolated departures from practice' or 'excesses', but rather reflected a 'generalised practice, which in its turn warrants the reasonable inference that this practice denotes a generalised direction *not* to investigate such incident.'⁵²⁴ Similar observations were made with respect to the absence of prosecutions. The Commission observed:

In the few cases where evidence regarding removals of persons existed and those responsible were revealed, not only was there even failure to take further action (prosecution, disciplinary action) but some of them had even received promotions and medals.⁵²⁵

The track record of the Attorney-General's Department with respect to prosecutions has had some limited success. A Missing Persons Unit (MPU) of the Attorney-General's Department was established to initiate prosecutions on enforced disappearances after receiving information from the Disappearances Investigation Unit (DIU) of the Police Department. As of 31 December 2000, according to the Government, the DIU had conducted criminal investigations into 1,175 of these cases. By 31 December 2001, 262 of these cases had led to

523 *Ibid.* p 84. See *Final report of the 1994 Western, Southern and Sabaragamuwa Disappearances Commission*, Sessional Paper No V, 1997, p 53.

524 See *Final report of the 1994 Western, Southern and Sabaragamuwa Disappearances Commission*, Sessional Paper No. V, 1997, p 55.

525 *Ibid.* p 65.

indictments in the High Court and non-summary proceedings had commenced in 86 cases in the Magistrate's Court.⁵²⁶

The prosecutorial record following from the report of the 1994/1998 Disappearances Commissions is unsatisfactory. The number of indictments amounted to only 30 percent of the total number of cases investigated during the period. The total number of 'disappeared' persons from the period 1988-90 was estimated to be approximately 27,200 persons.⁵²⁷ Hence, even a decade after the reported enforced disappearances, only four percent of cases had been investigated.

A marginal improvement may be observed with respect to the period after 2000. Between 2004 and 2008, the Attorney-General forwarded over 200 indictments to the High Court in respect of approximately 600 members of the armed services and Police.⁵²⁸ These prosecutions mainly arose out of the investigations of the 1994 COIs and the 1998 COI.

The new Section 24 of the COI Act of 1948 - introduced by the Commissions of Inquiry (Amendment) Act No. 16 of 2008 - conferred powers on the Attorney-General to: 'institute criminal proceedings in a court of law in respect of any offence based on material collected in the course of an investigation or inquiry, as the case may be, by a Commission of Inquiry' appointed under the Act.

The 2008 Amendment has been critiqued on the basis that 'merely conferring powers of indictment upon the Attorney-General in this regard poses a certain element of risk given the politicized nature of this office.'⁵²⁹ Similar concerns were raised during the Parliamentary debates on this Amendment. For instance, a leader of the Sri Lanka Muslim Congress (SLMC), Rauf Hakeem, questioned the propriety of vesting discretion of this nature in the office of the Attorney-General. He referred in particular to past cases such as the *Richard de Zoysa Case* where 'the politicisation of state law officers in controversial prosecutions had been credibly documented.'⁵³⁰

526 Pinto-Jayawardena, *Still Seeking Justice in Sri Lanka*, supra fn. 345, pp 99-102.

527 UN Human Rights Committee, *Fourth Periodic Report of Sri Lanka*, CCPR/C/LKA/2002/4, 18 October 2002, para 161.

528 *National Report Submitted in Accordance with Paragraph 15(A) of the Annex to Human Rights Council Resolution 5/1: Sri Lanka*, UN Doc. A/HRC/WG.6/2/LKA/1, 2 May 2008 ['National Report to Human Rights Council'], para 68.

529 See Kishali Pinto Jayawardena, 'Discussing mock turtles and commissions of inquiry, in *Focus on Rights*', The Sunday Times, 28 October 2007; 'Further Reflections on Commission Inquiries and Rights Violations, Part I', in *Focus on Rights*, The Sunday Times, 3 February 2008; 'Further Reflections on Commission Inquiries and Rights Violations, Part II', in *Focus on Rights*, The Sunday Times, 10 February 2008.

530 See Parliamentary Debates (Hansard) dated 7 February 2008, pp 850-852, cited in Pinto-Jayawardena, *Still Seeking Justice in Sri Lanka in Sri Lanka*, supra fn. 345, p 116.

The lack of political will to investigate offences involving senior politicians and police officers resulted in a steady deterioration of the investigative prowess of the DIU.⁵³¹ The Attorney-General's Department appeared to have done little to improve the situation. For instance, the MPU did not ensure supervision over investigations, but 'merely accepted notes of investigations sent to the Attorney-General by the DIU on face value.'⁵³² This practice resulted in the serious undermining of prosecutions. Even the efforts of conscientious prosecutors were essentially negated due to the prevailing attitudes within the justice system. The pervasiveness of impunity within the system is best reflected in the sentiments of a former senior State council:

*The attitude of counsel, courts and the accused sometimes make our work difficult. The attitude seems to be that if the police/army had not resorted with such force against subversives at that time, our society will not have survived that era. Hence what is done is believed to be justified. Some believe that the police officers were only doing their job. Some judges are also biased by the personal experiences that they have had to undergo during this period.*⁵³³

From the perspective of the witnesses, two factors in particular have been instrumental in preventing successful prosecution of cases involving human rights violations.⁵³⁴ First, fear has prevented many witnesses from making complaints to the Police and in the many instances where attempts were made to lodge complaints, police officers have refused to record them. This phenomenon has only served to discredit the testimony of witnesses, as some COIs have drawn adverse inferences from belated reporting.⁵³⁵ Second, witnesses have remained apprehensive about disclosing the names of the alleged perpetrators. For instance, in the official government forms that have to be signed to claim compensation, complainants often state that the perpetrators were subversives or 'unknown persons.'⁵³⁶ This practice has had an adverse impact on proceedings before courts and COIs, as the earlier statements of witnesses are often used against them by defence counsel to impugn their credibility.⁵³⁷

531 Pinto-Jayawardena, *Still Seeking Justice in Sri Lanka*, supra fn. 345, p 101.

532 *Ibid.*

533 *Ibid.* p 104. The sentiments were expressed during an interview conducted on 11 June 2009.

534 Pinto-Jayawardena, *Still Seeking Justice in Sri Lanka*, supra fn. 345, p 102.

535 *Ibid.*

536 *Ibid.*

537 *Ibid.*

From the perspective of the Attorney-General's Department, a further factor has contributed to its poor prosecution record: an inherent conflict of interest emanating from the role of the Attorney-General in COIs. The 1998 All-Island Disappearances Commission observed the following in respect of the MPU of the Attorney-General's Department:

The establishment of this Unit while underlining the special problems of prosecuting cases of disappearances suffers from drawbacks, in that the prosecutor is the Attorney-General who invariably is the representative of the State, either as prosecutor or as respondent in judicial proceedings. In this instance, the present arrangement makes the Attorney-General the representative of the victim and prosecutions are conducted on the basis that the crimes were the acts of errant officials. This again highlights a problem of the public perception of a Conflict of Interest, in that the victims are very much affected by the awareness that State officers are investigating into complaints against officers of State.⁵³⁸

Even in the rare instances where the Department has sought to prosecute alleged perpetrators with some vigour, the judiciary has nullified such efforts. For instance, in the *Bindunuwewa Case*, successful prosecutions in the High Court were overturned in the Supreme Court.⁵³⁹ These experiences inevitably have a demoralizing impact on the Attorney-General's Department, making it wary of filing indictments against senior state or military officials.⁵⁴⁰

8.1.2. *The Udalagama Commission*

The Attorney-General's Department was criticized heavily during and after the proceedings of the Commission of Inquiry to Investigate and Inquire into Alleged Serious Violations of Human Rights Occurring since 1 August 2005 (the Udalagama Commission). On 3 November 2006, the President appointed this Commission, chaired by retired Supreme Court judge Nissanka Udalagama, to investigate into sixteen cases dating from 1 August 2005 until 16 October 2006.⁵⁴¹

538 Report of the 1998 All-Island Disappearances Commission, Sessional Paper No. 1, 2001, p 16.

539 S.C. Appeal 20/2003 (TAB), Supreme Court Minutes, 21 May 2005.

540 Pinto-Jayawardena, *Still Seeking Justice in Sri Lanka*, supra fn. 345, p 127.

541 The cases are: The assassination of former Foreign Minister Lakshman Kadiragamar; the assassination of Member of Parliament Mr. Joseph Prarajasingham; the killing of five youths in Trincomalee on 2 January 2006; the killing of 17 workers of Action Contre La Faim in early August; the assassination of Deputy Director General of the Peace Secretariat Mr. Ketheesh Loganathan on 12 August 2006; the killing of 13 persons in Kayts on 13 May 2006; the disappearance of Rev. Nihal Jim Brown on 28 August 2006; the Death of 51 persons in Sencholai in August 2006; the killing of 68 persons in Kebithigollewa; the killing of 98 security forces personnel in Digampathana on 16 October 2006; and the assassination of Nadaraja Raviraj MP on 10 November 2006.

An International Independent Group of Eminent Persons (IIGEP) was established in February 2007 to observe the work of the Commission of Inquiry. The IIGEP's final report is perhaps the most authoritative narrative of the shortcomings of the Commission, and in particular, the shortcomings of the Attorney-General's Department's response to impunity.

The IIGEP presented a compelling critique of the Attorney-General's Department, observing that the Department played 'an inappropriate and impermissible role in the proceedings of the Commission and in advising the Commission on the conduct of its proceedings.'⁵⁴² Six of the eight-member Panel of Counsel—intended to assist the COI and provide legal advice—consisted of officers from the Attorney-General's Department. Moreover, it was pointed out that the Attorney-General's function as legal adviser to the government and his essential responsibility to protect the interests of the government 'when actions by its organs, including the Police and the Armed Forces, are called into question', resulted in a serious conflict of interest.⁵⁴³ The IIGEP succinctly explained this conflict in the following terms:

*The fundamental conflict of interest...arises out of the position of the Attorney-General as the first law officer of Sri Lanka and chief legal adviser to the Government. The Attorney-General is legal adviser to all levels of the national Government, including the armed and security forces, and the police. In a Commission whose tasks include an inquiry into the efficacy of the original investigations into certain cases, including investigations and inquiry into certain incidents involving the armed and security forces and the police, the Attorney-General's staff is thus potentially in the position of being a subject of the inquiry, and is, in any event, not an independent authority.*⁵⁴⁴

The Attorney-General took the view that there was no apparent conflict, as his officers played no role in the investigations of the cases before the Commission. Yet, the IIGEP had raised concerns in particular over the involvement of a Deputy Solicitor-General in the questioning of the witnesses in two of the four cases before the Commission.⁵⁴⁵ The Attorney-General offered to remove himself

⁵⁴² *The Final Report of the IIGEP, supra* fn. 511.

⁵⁴³ *Ibid.* As early as 27 February 2007, Justice Bhagwati, Chairman of the IIGEP recommended that members of the Attorney-General's Department be removed from the internal workings of the Commission by reason of their apparent conflict of interest.

⁵⁴⁴ *Ibid.*

⁵⁴⁵ *Ibid.*

and his officers from the proceedings before the Commission, provided that an official request was made by the Commission. Such a request was never made.

In a letter to Justice Bhagwati dated 18 June 2007, the Attorney-General contended that officers of the Department do not 'manage, direct, supervise or take part in investigations, the conduct of criminal investigations remains the sole responsibility of the law enforcement agencies, such as the police.'⁵⁴⁶ The Chairman of the COI further stated that 'the professional function of the AG's department commences only upon the completion of criminal investigations.'⁵⁴⁷ These statements appear to be ambiguous and create confusion with respect to the precise role of the Attorney-General's Department. Both the Attorney-General and the Chairman concede that the officers of the Department provided legal advice to the COI.⁵⁴⁸ However, providing legal advice to the Commission and thereafter appearing as counsel to cross-examine witnesses during the proceedings appears to be deeply problematic. As pointed out in one analysis, the same counsel who provided legal advice in the investigations subsequently being involved in legal proceedings resulted in a conflict of interest and the undermining of the independence of counsel.⁵⁴⁹

The IIGEP observed that not all previous COIs had afforded such an overarching role to the Attorney-General.⁵⁵⁰ The precise need for such a role was not evident, as financial constraints did not appear to have hindered the Commission from appointing independent counsel in some cases falling within its purview. For example, it appointed private counsel to assist it in the case involving the killing of five youth in Trincomalee. According to the IIGEP, '[t] he Attorney-General's Department did not play a leading role in these cases.'⁵⁵¹

The presidential communiqué sent to the Commission in November 2007 was perhaps the most 'astonishing' event that took place within the relationship between the 2006 Commission and the Attorney-General's Department.⁵⁵² The communiqué plainly stated: 'The President did not require the Commission to in any way consider, scrutinize, monitor, investigate or inquire into the conduct of the Attorney-General or any of his officers with regard to or in relation to any

546 The Centre for Policy Alternatives, *Discussion Paper: The Commission of Inquiry and the International Independent Group of Eminent Persons*, presented at a discussion organized by Centre for Policy Alternatives on 20 August 2007, p 2.

547 *Ibid.*

548 *Ibid.*

549 *Ibid.* p 3.

550 *The Final Report of the IIGEP supra* fn. 511.

551 *Ibid.*

552 *Ibid.*

investigation already conducted by the relevant authorities.’ This communiqué was evidently a ‘directive from the highest level, rather than as a suggestion to the Commission to be taken as an advice.’⁵⁵³ The IIGEP interpreted the communiqué as a direct means of granting immunity to the officers of the Attorney-General’s Department who might legitimately be called to give evidence.⁵⁵⁴ This assumption could be made on the basis of strong documentary evidence which the IIGEP was privy to. For instance, documents transmitted to the Commission by the CID clearly demonstrated that the Deputy Solicitor General, who served as lead counsel on the Commission’s Panel of Counsel, had advised the CID on the original investigation into the *ACF Case*. Hence officers of the Attorney-General’s Department were ‘material witnesses to the failure of the original investigations.’⁵⁵⁵ The IIGEP reached the following conclusion:

*[The communiqué] fundamentally undermine[d] the ability of the Commission to discharge its mandated goal of ensuring that the original criminal investigation was carried out properly and effectively, and in case of its failure, clarifying what led to such failure, which was a central purpose of the establishment of the Commission.*⁵⁵⁶

According to the IIGEP, the communiqué was ‘the single most important event prompting the IIGEP to decide shortly thereafter that it should bring its presence in Sri Lanka to an end.’⁵⁵⁷ Prior to announcing its departure, the IIGEP solicited the opinion of two eminent Sri Lankan jurists on the question of conflict of interest. The two jurists reached the following conclusion:

The COI is required to examine and comment on the adequacy and propriety of investigations already conducted. Necessarily, therefore the COI must scrutinize the role of the Attorney-General and officers of the Attorney-General’s Department who supervised, instructed and/or gave directions to the investigators. Using the Panel of Counsel, consisting of those very same officers and/or their colleagues, will undoubtedly give rise to a public

553 *Ibid.*

554 *Ibid.*

555 Amnesty International, ‘Twenty Years of Make-Believe: Sri Lanka’s Commissions of Inquiry,’ Index: ASA 37/005/2009, pp 16-21, accessed at: http://www.observatori.org/paises/pais_75/documentos/srilanka.pdf (Twenty Years of Make-Believe: Sri Lanka’s Commissions of Inquiry) p 39.

556 *The Final Report of the IIGEP, supra* fn. 511.

557 *Ibid.*

*perception of a conflict of interest and even of an appearance of bias. The public, and especially victims—to use the language of the Disappearances Commission—will be ‘very much affected by the awareness that State Officers are investigating into complaints against Officers of the State.’ Independent counsel are a sine qua non.*⁵⁵⁸

The strong critique by the IIGEP did not dissuade the government from formalizing the role of the Attorney-General in COIs. The 2008 Amendment⁵⁵⁹ to the Commissions of Inquiry Act No. 17 of 1948 goes well beyond the right of the Attorney-General to be present in Commissions of Inquiry; it affords the Attorney-General the right to provide counsel to all inquiries under the Act. The Amendment specifically authorizes the Attorney-General and his or her officers to appear before any Commission, to place any material before the Commission that is determined by the Attorney-General to be relevant to the investigation or inquiry, and to examine any witness summoned by the Commission if ‘it appears to him that the evidence of such witness is material to or has disclosed information relevant to, the investigation or inquiry, as the case may be.’⁵⁶⁰ It has been suggested that this Amendment amounted to ‘an unequivocal rejection by the government, of the IIGEP’s objections’.⁵⁶¹

Apart from the role of the Attorney-General in undermining the processes of the Udagama Commission, it is also noted that the Commission never completed its inquiry with respect to many of the cases specified under its mandate. Moreover, it is not known whether the final report of the Commission has been submitted to the President. Yet, the Lessons Learnt and Reconciliations Commission (LLRC) specifically referred to the existence of such a report and strongly recommended ‘the implementation of the recommendations of the Report of the Presidential Commission of Inquiry Appointed to Investigate and Inquire into Alleged Serious Violations of Human Rights Arising Since August 2005.’⁵⁶² In this context, the onus is on the government to release this so-called report and implement the recommendations contained therein.

558 Opinion dated 20 June 2007, on file with the project.

559 Amending Act No.16 of 2008.

560 See the new Section 26 of the Commissions of Inquiry Act No. 17 of 1948.

561 Pinto-Jayawardena, *Still Seeking Justice in Sri Lanka*, *supra* fn. 345, p 117.

562 LLRC Report, *supra* fn. 3, para 5.163.

9. Conclusion

The Attorney-General is the chief legal advisor to the Government. It is also the head of prosecutions, playing an indispensable role within the criminal justice system. In the post-independence Soulbery Constitution, the Attorney-General was still very much looked upon as an independent institution. The changes made to the separation of powers in the 1972 and 1978 Constitution affected the independence of the judiciary and the role of the Attorney-General.⁵⁶³ The 17th Amendment to the Constitution, which attempted to rectify the situation, was undone by the 18th Amendment to the Constitution. The 18th Amendment eroded the institutional independence of the Attorney-General's office. Political actors who engage in criminal acts were able to influence and manipulate the office charged with the duty of prosecuting such crimes. In the words of one senior academic, the 18th Amendment was essentially a culmination of a process that had begun forty years ago - politicization was now 'constitutionalized'.⁵⁶⁴

The politicization of the Attorney-General's office has thus had a significant impact on state accountability. The Attorney-General has degenerated into a political representative for the government in power. The *UN Report of the Secretary General's Panel of Experts on Accountability* noted with concern the weakening of the Attorney-General's independence over the years.⁵⁶⁵ The Attorney-General has: (1) failed to properly investigate and prosecute state agents involved in human rights violations; (2) defended state agents in *habeas corpus* applications; (3) acted in a partial manner, providing legal advice to the President and government; (4) used its discretion improperly to withdraw and transfer cases; (4) used its powers improperly under the emergency laws to deny bail applications; and (5) played an inappropriate role in Commissions of Inquiry. Each of these actions has had a decisive impact on the culture of impunity in the country.

The effects of a politicized Attorney-General's office were further compounded under the emergency laws where only the Attorney-General could override the wide immunity clauses shielding state officials. Under the Prevention of Terrorism Act, only the Attorney-General can secure a suspect's pre-trial release. An independent and impartial prosecutor is a prerequisite to the effective investigation and prosecution of human rights violations. The improper use of such discretionary powers has had a far-reaching effect on individual rights, the administration of justice and rule of law.

⁵⁶³ *Ibid.*

⁵⁶⁴ Name kept confidential on request.

⁵⁶⁵ *Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka*, *supra* fn. 9.

CHAPTER 4: SRI LANKA'S CRISIS OF IMPUNITY

Impunity arises where there is a failure by public authorities – whether due to legal obstacles or a lack of political will – to bring perpetrators of human rights violations to account.⁵⁶⁶ In so doing, States violate obligations under international law to investigate human rights violations; take appropriate measures to bring those responsible to justice through prosecution and the imposition of penalties commensurate to the offence; provide victims with effective remedies and reparations for their injuries; ensure the inalienable right to know the truth; and take other necessary steps to prevent recurrence of violations.⁵⁶⁷

The failure of the State to provide justice and accountability means that individuals (tens of thousands of individuals) have suffered serious violations of their rights but have received no justice or redress. The final chapter of this Report examines some cases that are emblematic of how these factors have come together to create a crisis of impunity in Sri Lanka. The cases discussed span several decades and implicate several governments. They include: (1) the killing of five students in Trincomalee (2006); (2) the *Action Contre la Faim* massacre in Muttur (2006); (3) the Bindunuwewa massacre (2000); (4) the Mylanthanai massacre (1992); and (5) the Richard de Zoysa case (1990). Other cases focus on improper acquittals of State officials under the Convention against Torture Act, 1994, including: (1) Gerard Perera case (2002); (2) Nandini Herath case (2001); and (3) Lalith Rajapakse case (2002). The third set of cases considers the impact of provisions under the PTA regulations involving the admissibility of statements or confession obtained through torture and ill-treatment in Court: (1) The Singarasa (1993); (2) Edward Sivalingam (2008); and (3) Tissainayagam (2008). The final section examines four successful prosecutions of serious human rights violations: (1) The Krishanthi Kumaraswamy case (1991); (2) The Embilipitiya case (1989); (3) High Court Kandy Case (1999); and (4) High Court Galle Case (2008).

1. Emblematic Cases of Impunity

1.1 Five Students in Trincomalee Case (2006)

On 2 January 2006, five Tamil students were killed and two seriously injured on

⁵⁶⁶ The international standards governing impunity are set forth in the *Updated Set of Principles to Combat Impunity*, *supra* fn. 1.

⁵⁶⁷ Principle 1 of the *General Obligations of States to take Effective Action to Combat Impunity*.

the beach in Trincomalee. The students were socializing in the early evening when a grenade was thrown at them from a passing green rickshaw.⁵⁶⁸ Most of the students fled; however, at least three students were injured. Two uninjured students, Manoharan Raghihar and Yogarajah Hemachandran, remained at the scene trying to persuade, without success, auto rickshaws and other vehicles to take the injured students to the hospital. The Navy in charge of the area immediately closed the check-points, effectively preventing the victims' parents from reaching their children.⁵⁶⁹ After about 15 minutes, a group of 10 to 15 uniformed officers, believed to be from the Special Task Force, arrived in a jeep. The uniformed officers put the injured students in the back of the vehicle and assaulted them with rifle butts. The uniformed officers then pushed the students onto the road and shot them at close range, killing five of them.⁵⁷⁰ The five students were: (1) Gajendran Shanmugarajah, (2) Rohan Lohitharaja, (3) Sivanantha Thangathurai; (4) Hemachandran Yogaraja; and (5) Ragihar Manoharan. The dead and injured were taken to a local hospital.⁵⁷¹ Ragihar Manoharan's father, Dr Manoharan, heard gunshots and went to the hospital. He found the body of his son lying on a stretcher with a large gunshot wound in the back of head. Police told family members of victims that if they wanted the victims' bodies released, they had to sign statements indicating the victims were LTTE members.⁵⁷²

According to a local human rights organization, it was widely known that members of the Special Task Force members, Officer in Charge Inspector Zawahir and Superintendent of Special Forces Kapila Jayasekere were responsible for planning, orchestrating and covering up the incident.⁵⁷³ The security forces and police worked together to subvert the investigation and obfuscate the facts. The Senior Superintendent of Police (SSP) of Trincomalee claimed the victims were LTTE members and had attempted to throw a grenade on security forces.⁵⁷⁴ The Officer in Charge, Inspector Zawahir testified to this effect, claiming he never heard any gunshots and found an undetonated grenade at the scene.⁵⁷⁵ In

568 University Teachers for Human Rights (Jaffna) Sri Lanka, Special Report No. 24, '*The Five Students Case in Trincomalee*' 19 April 2007.

569 *Ibid.*

570 *Ibid.*

571 *Twenty Years of Make-Believe: Sri Lanka's Commissions of Inquiry*, *supra* fn. 555.

572 University Teachers for Human Rights (Jaffna) Sri Lanka, Special Report No. 24, '*The Five Students Case in Trincomalee*' 19 April 2007, accessed at: <http://uthr.org/SpecialReports/spreport24.htm>

573 University Teachers for Human Rights (Jaffna), Special Report No. 30, *Unfinished Business of the Five Students and ACF Cases – A Time to call the Bluff* 1 April 2008, accessed at: <http://uthr.org/SpecialReports/Spreport30.htm>

574 *Twenty Years of Make-Believe: Sri Lanka's Commissions of Inquiry*, *supra* fn. 555, pp 16-21.

575 *The Five Students Case in Trincomalee* 19 April 2007, *supra* fn. 568.

the initial briefing of the Magistrate, none of the other statements from State officials mentioned gunshot injuries or even hearing gunshots fired; instead, they cited the grenade explosion as the cause of the students' deaths.⁵⁷⁶ The Police and Army officials conceded only after the Judicial Medical Officer's report was released to the public, that cause of death was from gunshot wounds.⁵⁷⁷

Witnesses were threatened and pressured to not testify in the case. Dr Manoharan testified before the Magistrate on 10 January 2006.⁵⁷⁸ On the same day, he was threatened and his house was pelted with stones. Dr Manoharan gave evidence the following week before the Magistrate's Court and was again subjected to threats and intimidation.⁵⁷⁹ By the June 2006 Magistrate's Court hearing, Dr Manoharan was the only witness left who was willing to testify. The threats and intimidation intensified with two police officers intimidating his son. As a result of the ongoing threats to himself and his family, Dr Manoharan had to suspend his medical practice, stop sending his children to school and eventually leave Sri Lanka.⁵⁸⁰

Ponnuthurai Yogarajah, the father of Hemachandran Yogarajah, stated that he was never informed of the Magisterial inquiry which took place in January 2006. He was also subject to threats and intimidation by State officials.⁵⁸¹

Under the CAT, Sri Lanka is obligated to take measures to protect complainants and witnesses from intimidation or ill-treatment arising out of testifying or giving evidence. Under the *International Convention for the Protection of All Persons from Enforced Disappearance*, States must take appropriate steps to ensure that complainants and witnesses as well as relatives and defence counsel are protected against ill-treatment or intimidation as a consequence of the complaint or evidence given.⁵⁸² The failure to protect witnesses from threats and intimidation obstructs justice and contravenes the State's obligation to guarantee victims and victims' families access to effective remedy and reparations for human rights violations.

In 2006, the Udalgama Commission was tasked with investigating the *Five Students in Trincomalee* case. The Attorney-General was heavily criticized by

576 *Ibid.*

577 *Ibid.*

578 *Twenty Years of Make-Believe: Sri Lanka's Commissions of Inquiry*, *supra* fn. 555, pp 16-21.

579 *Ibid.*

580 *Ibid.*

581 *Twenty Years of Make-Believe: Sri Lanka's Commissions of Inquiry*, *supra* fn. 555, pp 16-21.

582 Article 12 ICIED.

the International Independent Group of Eminent Persons for its 'inappropriate and impermissible role in the proceedings' which resulted in a serious conflict of interest.⁵⁸³ As already discussed above, the Commission was prematurely wound up and its findings were never disclosed to the public.

No formal indictment has been laid against the persons responsible for the killing of the students.

Sri Lanka's Lessons Learnt and Reconciliation Commission recommended following up on the Udalgama Commission and continuing the investigation and prosecution of offenders involved in the *Five Students in Trincomalee case*, citing that '[s]uch action would send a strong signal in ensuring respect for the Rule of Law.'⁵⁸⁴

1.2 The Action Contre la Faim Case (2006)

In August 2006, seventeen Sri Lankan employees of a French humanitarian NGO, *Action Internationale Contre la Faim* (ACF)⁵⁸⁵, were killed in their office compound in Muttur. Sixteen of the victims were Tamil, four were women and one was Muslim.⁵⁸⁶ The killing took place in the aftermath of a battle between the security forces of the Government of Sri Lanka and the LTTE for control of the town.

The inquest into the killings began in the Muttur Magistrate's Court. However, following a phone call to the relevant Magistrate by the then Secretary of the Ministry of Justice, the matter was transferred to the Anuradhapura Magistrate's Court. A new Magistrate was appointed to hear the case in early September 2006. The newly presiding Magistrate once again ordered a transfer of the matter to Kantale and all subsequent hearings took place in Kantale.⁵⁸⁷

Negative public opinion regarding the transfer of an extraordinarily sensitive case out of the court which would have ordinarily heard the matter to a court in the predominantly Sinhalese North Central Province – and that too by an order of a ministry secretary who had no authority in that regard – was not satisfied by a later confirmation of the transfer by the Judicial Service Commission

583 *The Final Report of the IIGEP supra* fn. 511.

584 LLRC Report *supra* fn. 3, para 5.163.

585 Muthur/Kanthale M.C. Case No. BR 843/06.

586 International Commission of Jurists, *Sri Lanka: ICJ calls for justice as inquest into killing of 17 aid workers concludes*, 9 March 2007.

587 *Ibid.*

(JSC). The transferral of the case out of Muttur amounted to an unwarranted interference with the work of a judicial officer, contrary to Principle 4 of the *UN Basic Principles on the Independence of the Judiciary*.⁵⁸⁸

The criminal investigation was marked by several flaws that went to the root of the integrity of the judicial and legal process. The ICJ appointed two independent observers, Barrister Michael Birnbaum QC and Dr Malcolm Dodd, Forensic Pathologist to evaluate the investigation of the ACF case.⁵⁸⁹ Birnbaum observed that the investigations conducted by the Criminal Investigation Department (CID) lacked impartiality, transparency and effectiveness.⁵⁹⁰ Official police reports indicated that from the outset, prior to any investigation, the Police had 'decided that the LTTE were responsible for the killing.'⁵⁹¹ The observer also criticized the CID for failing to interview any member of the Sri Lankan security forces, or any Tamil, apart from the family members of those killed.⁵⁹² Failure to investigate credible human rights allegations thoroughly, impartially and promptly violates Sri Lanka's duty to provide effective legal remedy and reparations under international law.

The lack of guidance from the Attorney-General's Department also hurt the investigations

*It may also be that the investigators did not receive any guidance and advice from state lawyers. It is common for the Attorney-General to provide counsel to represent the police at inquests. Yet, remarkably, in this most serious and sensitive case the police were never represented by counsel at any of the inquest hearings. In my view the preparation and presentation of the evidence in a case of mass murder should not have been left entirely to the police.*⁵⁹³

588 *Ibid.* See *UN Basic Principles on the Independence of the Judiciary supra* fn. 76. Principle 4 states: 'There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.'

589 International Commission of Jurists, *Sri Lanka: The Investigation and Inquest into the Killing of 17 Aid Workers in Muttur in August 2006*, Report by Michael Birnbaum QC, ICJ inquest observer, April 2007 (International Commission of Jurists, *The Investigation and Inquest into the Killing of 17 Aid Workers*)

590 *Ibid.*

591 *Ibid.*, p 43.

592 *Ibid.*, pp 43-44.

593 *Ibid.*, p 43.

Birnbaum noted that in October 2006, the Sri Lankan Ministry of Foreign Affairs announced that the Australian Government had agreed to provide a team of foreign experts to observe the forensic investigations into the Muttur killings and, if requested by the Attorney-General, to provide technical advice and assistance.⁵⁹⁴ Yet the Attorney-General did not call for this assistance. The CID also did not seek assistance from Australian experts on the ballistics analysis critical to the investigations. The CID explained that such assistance was not sought because they wished to 'expedite' the investigation.⁵⁹⁵

As noted by lawyers following the case:

*Evidentiary procedures were not followed, contamination of the crime scene was not ensured; for example, the crime scene was not cordoned off which is normally an elementary safeguard that is followed. There was clear government intent to subvert the investigation.*⁵⁹⁶

One of Birnbaum's key recommendations was the establishment of a team of investigators independent of the Police and security forces to investigate the crime, identify the perpetrators, and report to the Attorney-General.⁵⁹⁷ However, this recommendation is meaningless, as even the Attorney-General's independence and impartiality is questionable in this case.

In 2006, the Udalagama Commission was tasked with investigating the *ACF* case. As already discussed earlier, the Attorney-General was heavily criticized by an International Independent Group of Eminent Persons (IIGEP) for its serious conflict of interest in the Commission. The Deputy Solicitor General advised the CID in the initial investigation into *ACF* Case, thus making the officers of the Attorney-General's Department 'material witnesses to the failure of the original investigations.'⁵⁹⁸ However, as already discussed above, the President's communiqué sent to the Commission in November 2007 prevented the Attorney-General's Department from being investigated for their conduct in the *ACF* case. The IIGEP noted that the communiqué 'fundamentally undermine[d] the ability of the Commission to discharge its mandate of ensuring that the original criminal investigation was carried out properly and effectively...'⁵⁹⁹

594 *Ibid*, p 26.

595 *Ibid*, p 44.

596 Discussions held with members of the Northern Bar at an undisclosed location in the North on 20th and 21 June 2012. Confidentiality preserved on request.

597 International Commission of Jurists, *Investigation and Inquest into the Killing of 17 Aid Workers*, *supra* fn. 589, p 47.

598 *Twenty Years of Make-Believe: Sri Lanka's Commissions of Inquiry*, *supra* fn. 555, p 39.

599 *The Final Report of the IIGEP*, *supra* fn. 511.

No formal indictment has been laid against the persons responsible for the killing of the 17 aid-workers in the *ACF* case.

Sri Lanka's Lessons Learnt and Reconciliation Commission recommended further investigation and prosecution of offenders involved in the *ACF* case, citing that 'such action would send a strong signal in ensuring respect for the Rule of Law.'⁶⁰⁰

1.3 The Bindunuwewa case (2000)

This case involved the killing of 27 detainees and the injuring of 14 others when police failed to intervene in a mob attack at a detention centre in Bindunuwewa. The issue was whether the accused police officers were criminally responsible in their failure to 'arrest miscreants' and failure to 'take action.' The High Court ruled that the accused police officers on guard duty at that time had the ability and means to control and prevent the situation, and were criminally responsible for illegal omission. The officers were also guilty of aiding and abetting the commission of offences set out in the indictment and of becoming members of an unlawful assembly.⁶⁰¹

The matter was appealed before a Divisional Bench of the Supreme Court,⁶⁰² which held that intentional actions had to be proved on the part of the accused police officers. The Court held that while the police officers are bound under specific provisions of the law to prevent the commission of offences (both Chapter VIII of the Criminal Procedure Code and Section 56 of the Police Ordinance No. 16 of 1865 provide for such a framework), the manner in which the police respond in an emergency situation is left to the discretion of the most senior police officer present.⁶⁰³ The Court examined the prosecution's case, which relied heavily on circumstantial evidence, and held that the evidence in respect of the illegal omissions or illegal acts on the part of the accused police officers was insufficient to find a conviction. The prosecution, led by then Solicitor General C.R. de Silva, relied on the *Lucas principle*⁶⁰⁴ and *Ellenborough dictum*⁶⁰⁵ to

600 LLRC Report supra fn. 3, para 5.163.

601 H.C. Colombo No. 763/2003.

602 S.C. Appeal 20/2003 (TAB), Supreme Court Minutes, 21 May 2005.

603 *Ibid.* p 24. See Police Departmental Order No. A19 Rule 29, which states: 'It will be appreciated that no rules or regulations can be drawn up for every conceivable contingency that may arise. The man on the spot that is the Senior Police Officer at the scene must decide what best he should do and use his judgment and discretion as the situation may seem to dictate.'

604 See *R. v. Lucas* [1981] 2 All E.R. 1008, which held that statements made out of Court which are proved or admitted to be false in certain circumstances amount to corroboration of evidence against the person who made the false statements.

605 See Lord Ellenborough's *dicta* in *R v. Cochrane* 1814 Gurneys Report 499: 'No person accused of a crime is bound to offer any explanation of his conduct or of circumstances of suspicion which attach to him, but, nevertheless, if he refuses to do so, where a strong *prima facie* case has been made out, and when it is in his power to offer evidence, if such exist, in explanation of such suspicious circumstances which would show them to be fallacious and explicable consistent with his innocence, it is a reasonable and justifiable conclusion that he refrains from doing so only from the conviction that the evidence so suppressed or not adduced would operate adversely to his interests.'

argue that the circumstantial evidence surrounding the incident was sufficient to attract culpability. However, the Court overturned the convictions and ordered the acquittal of the accused, holding that:⁶⁰⁶

*[i]f the officer in charge has exercised his discretion bona fide and to the best of his ability, he cannot be faulted for the action he has taken even though it may appear that another course of action could have proved more effective in the circumstances.*⁶⁰⁷

Impartial observers of the case noted the attitude of the justices during the case:⁶⁰⁸

*...[T]he justices were openly hostile to the prosecution, and seemed to have decided beforehand that the accused were unfairly sentenced. One justice publicly reminded the courtroom to remember that the inmates who had died were members of the LTTE, suggesting that this might mitigate the guilt of the accused... The judgment of the Supreme Court calls into question its impartiality in dealing with cases related to the Tamil Tigers. The Court must put aside politics and personal feelings when dealing with criminal offences involving Tamils.*⁶⁰⁹

Under international law, victims must have practical and real access to justice before an independent and impartial authority. Impartiality is defined as an absence of bias, animosity or sympathy towards either of the parties.⁶¹⁰ Not only must the individual judge not harbor preconceptions about the particular case before them, the tribunal must also appear to be impartial to a reasonable observer.⁶¹¹ The judiciary not only harbored biases but also lacked the perception of impartiality to the reasonable observer. As a result of the judiciary's conduct, the State violated its duty to provide an effective legal remedy to the victims and victims' families in the Bindunuwewa case.

While it could be argued that the Attorney-General made a reasonable case to secure convictions before the High Court, the prosecutorial decision not to indict

606 S.C. Appeal 20/2003, pp 20 and 30.

607 *Ibid.* p 24.

608 See Pinto-Jayawardena, *Still Seeking Justice in Sri Lanka*, *supra* fn. 345 p 58.

609 Human Rights Watch, *Sri Lanka: Failure of Justice for Victims of Massacre*, 2 June 2005. See Pinto-Jayawardena, *Still Seeking Justice in Sri Lanka*, *supra* fn. 345 p 58.

610 See International Commission of Jurists, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors* *supra* fn. 15, p 28.

611 UNHRC General Comment 32, *supra* fn. 74.

senior police officers -including Headquarters Inspector, Jayantha Seneviratne and Assistant Superintendent of Police, A.D.W. Dayaratne, who were clearly implicated in their failure to take effective action- is a violation to thoroughly investigate human rights violations.⁶¹² Refusal to indict senior officers is also seen in the *Gerard Perera Case* and the *Krishanthi Kumaraswamy Case* noted below. Consistently, blame is attached to the lower-ranking officers.⁶¹³

1.4 The Mylanthanai Massacre Case (1992)

On 9 August 1992, eighteen Sinhalese soldiers attached to the Poonani Army Camp in Batticaloa were charged with the killing of 35 unarmed Tamil civilians in the village of Mylanthanai. The killings were alleged to have been in retaliation to the unlawful killing of senior army officer Denzil Kobbekaduwa.

A decade after the incident, the accused soldiers were acquitted following a jury trial.⁶¹⁴ One key issue during the trial was its location. The case was initially taken up before the Batticaloa Magistrate's Court, which was close to the village in which the incident occurred and where the witnesses lived. However, on the application of the accused, the matter was transferred to the High Court in Polonnaruwa, which is a Sinhala-majority area. Counsel for the accused argued that conducting the trial in Batticaloa would jeopardize the security of the accused. The Attorney-General, however, supported the transferral⁶¹⁵ and the transfer was granted by the court, compelling witnesses to travel to Polonnaruwa, passing security barriers.⁶¹⁶ The case was again transferred to the Colombo High Court, making it difficult, if not impossible, for many witnesses to attend the hearings.

Under international law, victims and victims' families must be given real access to justice. Providing an effective legal remedy means victims must be able to effectively challenge the violations before a court. Transferring a hearing to a jurisdiction where victims are not able to attend the proceedings denies victims an effective and real legal remedy for the human rights violations. As an impartial prosecutor, the AG should have vigorously objected to the transfer of the case.

612 Pinto-Jayawardena, *Still Seeking Justice in Sri Lanka*, *supra* fn. 345, p 58.

613 This view was consistently taken by all those who were interviewed for this Study.

614 Uniquely, this case remains among the very few instances of mass killings of civilians that resulted in the prosecution of military personnel.

615 Pinto-Jayawardena, *Still Seeking Justice in Sri Lanka*, *supra* fn. 345, p 55.

616 See Centre for Human Rights and Development, *CHRD in 2002: CHRD provides legal assistance to those without help*, Sentinel Special Issue (2002), p 9.

Another issue was the ethnicity of the jury. The High Court judge had to be re-appointed on the basis that the judge needed to be proficient in both Tamil and Sinhala, since the jury was all-Sinhalese.⁶¹⁷ On 25 November 2002, the jury acquitted all the accused, 'despite overwhelming evidence to the contrary as buttressed by the High Court Judge, S. Sriskandarajah's observations urging the jury to reconsider its decision in the light of several factors in the evidence placed before it.'⁶¹⁸ The duty to investigate and bring to trial human rights violations requires the State to ensure that matters are brought before an independent and impartial authority. Allowing an all-Sinhalese jury to be appointed to hear an ethnicity-based crime perpetrated against Tamils violated the State's duty to ensure that matters are heard before impartial authorities.

Despite repeated requests, the Attorney-General refused to appeal the decision citing 'various technical grounds'.⁶¹⁹ The Attorney-General must vigorously prosecute and appeal acquittals where there is real evidence of a human rights violation. The UN Human Rights Committee stresses that failure to bring to justice perpetrators of human rights violations could in and of itself give rise to a breach of the Covenant.

1.5 Richard de Zoysa (1990)

This case involved the extra-judicial killing of Richard de Zoysa, a prominent journalist. The victim was abducted from his home in Rajagiriya on 18 February 1990, and a day later, his body was discovered on a beach in Moratuwa. The victim had been shot twice at close range in the neck and in the head.⁶²⁰

The victim's mother, Dr. Manorani Savaranamuttu, filed an affidavit identifying a Senior Superintendent of Police as having been among those who had abducted her son. The Magistrate ordered the arrest of the named police officer. The police investigation, however, was weak, and 'crucial documents such as the report of the investigations and a summary of witness statements were not filed at the magisterial inquiry despite repeated requests by the magistrate.'⁶²¹ The Attorney-General's Department never pursued the matter with much interest and the suspect was never arrested.

617 Pinto-Jayawardena, *Still Seeking Justice in Sri Lanka*, *supra* fn. 345, p 143.

618 *Ibid*, p 154.

619 *Ibid*, p 136.

620 Pinto-Jayawardena, *Still Seeking Justice in Sri Lanka*, *supra* fn. 345, pp 50-51.

621 *Ibid*.

The 1994 Southern, Western and Sabaragamuwa Disappearances Commission recommended that the case be investigated further,⁶²² but the Police and the Attorney-General's Department disregarded these recommendations.

Batty Weerakoon, the attorney-at-law who appeared for de Zoysa's mother criticized the then Attorney-General for refusing to take steps against the identified police officer⁶²³ and deliberately misleading Parliament by presenting a report to the then Justice Minister downplaying the incident and denying the identification of a key suspect.⁶²⁴

The Liberal Party expressed concern that the *Richard de Zoysa* case reflected the 'obstructionism of the police' and the 'partisanship and lack of commitment to an impartial pursuit of justice by the Attorney-General's Department.'⁶²⁵ The Liberal Party observed:

*The unhelpful attitude adopted in this case by the relevant agencies of the police and by the Attorney-General's Department only serves to confirm the recent deplorable trend in Sri Lankan public affairs that the distinction between the armed forces and the administrators has all but disappeared.*⁶²⁶

The Liberal Party reminded the Attorney-General that he was the law officer of the State, and not the 'partisan counsel of any particular persons in authority.'⁶²⁷ In cases that involve political murder, justice must not only be done but seen to be done to maintain public confidence in the processes of justice and the law.⁶²⁸ The Liberal Party called for an independent commission of inquiry to be appointed into the political killing and stressed that such a commission should be independent of the Attorney-General and the Police.⁶²⁹ The Party thereafter spearheaded a campaign to bring in a parliamentary motion that sought to exclude the Attorney-General from participating in the work of a commission of

622 *Ibid.*

623 Batty Weerakoon, *The Attorney-General's Role in the Extra-Judicial Execution of Richard de Zoysa* (1991), p 13.

624 *Ibid.*, p 17.

625 Chanaka Amaratunge and Rajiva Wijesinha (eds.), *The Liberal Party Replies to the UNP in The Liberal Review*, (February 1991), Statement on the Murder of Richard de Zoysa. (Amaratunge and Rajiva Wijesinha).

626 *Ibid.*, p 30. See Pinto-Jayawardena, *Still Seeking Justice in Sri Lanka*, *supra* fn. 345, p 51.

627 *Ibid.*

628 *Ibid.*

629 Amaratunge and Wijesinghe, *supra* fn. 625.

inquiry to be appointed to inquire into the case.⁶³⁰ The motion, however, was not successful. Even decades later, the *Richard de Zoysa* case remains unresolved.

Under international law, the State must investigate credible allegations of human rights abuses. Any investigation must be conducted with the intention of identifying the persons responsible for the offence⁶³¹ and ensuring all relevant evidence is gathered and documented.⁶³² In the *Richard de Zoysa* case, the Attorney-General and police failed to discharge these obligations. As noted above, 'crucial documents such as the report of the investigations and a summary of witness statements were not filed at the magisterial inquiry despite repeated requests by the magistrate.' The Attorney-General did not pursue the matter, and despite an arrest warrant issued by the Magistrate, the suspect was never arrested. This conduct violated the State's obligation under international law to provide an effective legal remedy and reparations to the family of Richard de Zoysa.

2. Acquittals under the Convention against Torture Act

As of 2009, more than seventeen acquittals had been handed down by the High Courts under the Convention against Torture Act.⁶³³ Although the Attorney-General has filed a significant number of indictments under the Torture Act, only four convictions have resulted since the Act was passed in 1994.⁶³⁴

The successful cases are: *Republic of Sri Lanka v. Madiliyawatte Jayalathge Thilakarathna Jayalath*,⁶³⁵ *Republic of Sri Lanka v. Edirisinghe*⁶³⁶ and *Republic*

630 *Ibid.*

631 *Finucane v. the United Kingdom*, Judgment of 1 July 2003, para 69, European Court of Human Rights; *McCann and other v. the United Kingdom*, Judgment of 27 September 1995, Series A no 324, para 161, European Court of Human Rights; *Kaya v. Turkey*, Judgment of 19 February 1998, Reports 1998-I, para 86; *Assenov v. Bulgaria*, Judgment of 28 October 1998, Reports 1998-VIII, para 102; *Ogur v. Turkey*, Judgment of 20 May 1999, Reports 1999-III, para 88.

632 'The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including *inter alia* eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard.'*Finucane v. the United Kingdom*, Judgment of 1 July 2003, para 69; see also International Commission of Jurists, *Remedies and Reparations*, *supra* fn. 50, p 75.

633 Pinto-Jayawardena, *The Rule of Law in Decline*, *supra* fn. 164, p 92.

634 Statement by Manfred Nowak, Special Rapporteur on Torture at the 62nd Session of the General Assembly Third Committee Item # 70(b) (29 October 2007), p 7.

635 H.C. Case No: H.C 9775/99, Colombo High Court, High Court Minutes, 19 January 2004.

636 H.C. Case No: 1392/2003, Colombo High Court, High Court Minutes 20 August 2004.

of *Sri Lanka v. Selvin Selle and Another*.⁶³⁷ In 2012, an additional conviction was reported.⁶³⁸

Under the Torture Act, the mandatory minimum sentence is 'imprisonment ... for a term not less than seven years...and a fine not less than ten thousand rupees and not exceeding fifty thousand rupees.'⁶³⁹ The Supreme Court however, held that a High Court Judge 'is not inhibited from imposing a sentence that it deems appropriate in the exercise of its judicial discretion not withstanding minimum mandatory sentence.'⁶⁴⁰ The Kurunegala High Court in its recent conviction involving the Officer-in-Charge in the Polpithigama Police Station⁶⁴¹ disregarded the mandatory minimum and sentenced the accused to *two years* rigorous imprisonment. The accused was also ordered to pay Rs. 25,000 in compensation to Sujith Priyantha, the torture victim.⁶⁴² The victim was seven years old at the time of the offence.⁶⁴³

2.1 Nandini Herath (2001)

In the case of *Nandini Herath*, the victim was arrested on 8 March 2001 by police officers attached to the Wariyapola Police Station.⁶⁴⁴ The victim in this case was illegally detained at the Wariyapola Police Station for three days, where she was raped and subjected to torture and other cruel, inhuman and degrading treatment.⁶⁴⁵

In the High Court trial, the accused were released on bail and not suspended from their duties pending the investigation and trial. As a result, the accused were able to influence the witnesses, intimidate the victim's family, her friends and even her attorney.⁶⁴⁶ When the terms of pretrial release were violated, the bail order was not cancelled.⁶⁴⁷ The UN General Assembly in its most recent unanimous resolution on the prohibition of Torture and other Cruel, Inhuman

637 H.C. No: 966/2002, Colombo High Court, High Court Minutes, 20 July 2007.

638 Asian Human Rights Commission, *Sri Lanka: Conviction under the Torture Act*, 30 January 2012, accessed at: <http://www.humanrights.asia/news/forwarded-news/AHRC-FST-005-2012>.

639 Section 2(4) of the Torture Act No. 22 of 1994.

640 S.C. Appeal No. 3 of 2008, judgment delivered on 15 October 2008.

641 Asian Human Rights Commission, *Sri Lanka: Conviction under the Torture Act*, 30 January 2012, at <http://www.humanrights.asia/news/forwarded-news/AHRC-FST-005-2012>.

642 *Ibid.*

643 *Ibid.*

644 Pinto-Jayawardena, K., & Kois, L., *Sri Lanka - The Right Not To Be Tortured: A Critical Analysis of The Judicial Response*, LST Review, Volume 18 Issue 249 July 2008.

645 *Ibid.*, p 61.

646 *Ibid.*

647 *Ibid.*

and Degrading Treatment or Punishment, stressed the obligation on States to protect victims from retribution, intimidation or influence as a result of bringing complaints or giving evidence.⁶⁴⁸ Article 13 of the CAT requires the State to take steps to protect the complainant and witnesses from ill-treatment or intimidation. The *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation* require the State to treat victims with humanity, respect their dignity and protect them from influence, intimidation or violence.⁶⁴⁹

Critical pieces of evidence were either misapplied or totally disregarded by the prosecution. First, the Medical Report by a forensic medical expert was not added to the evidence.⁶⁵⁰ Second, the two towels that had evidentiary value in respect to the allegations of rape and torture were not sent for DNA analysis.⁶⁵¹ And finally, the prison officer who gave evidence of the victim's statement failed to bring the relevant record to Court.⁶⁵² Under the *UN Guidelines on the Role of Prosecutors*, particular attention must be given to the prosecution of crimes or grave human rights violations committed by public officials.

There were also unreasonable delays: the Attorney-General's Department delayed forwarding the indictments; and the trial itself took over four years.⁶⁵³ As part of its obligation to respect, ensure respect for and implement international human rights law, the State must provide an effective and prompt remedy and reparations to victims of human rights violations. In cases of gross violations of international human rights law, including torture and ill-treatment, remedy and reparations must be prompt, minimizing the inconvenience to victims and their representatives.⁶⁵⁴

2.2 Lalith Rajapakse Case (2002)

In the *Lalith Rajapakse Case*, the victim was arbitrarily arrested on 18 April 2002, beaten and dragged into a jeep.⁶⁵⁵ During the detention the victim was further subjected to torture for the purposes of obtaining a confession. A medical report issued by the National Hospital diagnosed the injuries as traumatic encephalitis.

648 UN G.A. Resolution 66/150, 'Torture and other cruel, inhuman or degrading treatment or punishment,' 27 March 2012, UN Doc. A/RES/66/150, para 20.

649 *UN Basic Principles and Guidelines on the Right to a Remedy and Reparations*, *supra* fn. 2.

650 *Ibid.*

651 *Ibid.*

652 *Ibid.*

653 *Ibid.*

654 Principle 12 of the *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation*, *supra* fn. 2.

655 See Pinto-Jayawardena, *The Rule of Law in Decline*, *supra* fn. 164, p 94.

The Court acquitted the accused on the basis that the victim's evidence lacked credibility. The Attorney-General declined to appeal the judgment.

The victim had previously submitted a complaint to the UN Human Rights Committee,⁶⁵⁶ alleging a violation of his right to an effective remedy under Article 2(3) of the ICCPR. The Committee concluded that the victim was entitled to an effective remedy and the State party was under an obligation to take effective measures to ensure

*(a) The High Court and Supreme Court proceedings are expeditiously completed; (b) The author is protected from threats and/or intimidation with respect to the proceedings; and (c) The author is granted effective reparation.*⁶⁵⁷

The Committee recounted the State's inaction under Article 2(3):

*[N]o criminal investigation was initiated for over three months after the torture, despite the severity of his injuries, and the necessity to hospitalise him for over one month; the alleged perpetrators were neither suspended from their duties nor taken into custody, enabling them to place pressure on and threaten the author; and the investigations are currently at a standstill.*⁶⁵⁸

In failing to appeal the acquittal, the Attorney General violated his duty of impartiality⁶⁵⁹ as well as the duty under the *UN Basic Guidelines on the Role of the Prosecutor* to give due attention to the prosecution of crimes, particularly grave violations of human rights, committed by public officials.⁶⁶⁰

2.3 The Gerard Perera Case (2002)

Gerard Perera was arrested on 3 June 2002. While in police custody, Gerard Perera was subjected to torture and ill-treatment: he was hung with a rope, beaten with an iron rod and wooden poles, and burnt with lighted matches.⁶⁶¹ As a result of the torture and ill-treatment, Gerard Perera sustained 'acute renal

656 UN Human Rights Committee, Decision on admissibility, 31 March 2005, *Case of Sundara Arachchige Lalith Rajapakse*, Communication No. 1250/2004 CCRP/C/83/D/1250/ 2004 -.

657 *Ibid*, para 11.

658 *Ibid*.

659 Committee against Torture, Decision of 10 November 1999, *Khalen Ben M'Barek v. Tunisia*, Communication No. 60/1996, UN Doc. CAT/C/23/D/60/1996, para 11.10.

660 Guideline 15 of the *UN Guidelines on the Role of Prosecutors*, *supra* fn. 86 .

661 *Sanjeewa, Attorney-At-Law (on behalf of Gerald Mervin Perera) v. Suraweera, OIC Wattala Police Station* [2003] 1 Sri.L.R. 317, p 320.

failure, loss of sensation over the eighth cervical and first thoracic vertebrae, damage to the median and ulnar nerves, complete loss of power of both shoulder joint muscles and inability to grasp objects with fingers.⁶⁶² Gerard Perara was released on 4 June 2002 after the Police admitted to mistakenly arresting him, after which he filed a fundamental rights petition before the Supreme Court, alleging *inter alia* a violation of the right to freedom from torture or ill-treatment.

The Supreme Court held that the petitioner's arrest was not made on credible information⁶⁶³ and violated Article 13(1) of the Constitution. The subsequent detention violated Article 13(2) of the Constitution.⁶⁶⁴ The Court also held the petitioner was subjected to torture and to cruel and inhuman treatment by the third, sixth and seventh respondents, with the knowledge and acquiescence of the first respondent—the Officer-in-Charge (OIC) of the police station—in violation of Article 11.⁶⁶⁵ On the issue of command responsibility, the Court held:

*As Officer-in-Charge he had overall responsibility to supervise and control the conduct of his subordinates, and it was he who had the power to release the Petitioner. He is therefore liable if the Petitioner's arrest and/or detention were unlawful, and for any torture that occurred at the Station.*⁶⁶⁶

The Court further held:

The number of credible complaints of torture and cruel, inhuman and degrading treatment whilst in Police custody shows no decline. The duty imposed by article 4(d) to respect, secure and advance fundamental rights, including freedom from torture, extends to all organs of government, and the Head of the Police can claim no exemption. At the least, he may make arrangement for surprise visits by specially appointed Police officers, and/or officers and representatives of the Human Rights Commission, and/or local community leaders who would be authorised to interview and to report on the treatment and conditions of detention of persons in custody. A prolonged failure to give effective directions designed to prevent violations of article 11, and to ensure the proper investigation of those which nevertheless take place followed by

662 *Ibid*, p 317.

663 *Ibid*, p 326-327.

664 *Ibid*, pp 327-328, per Justice Mark Fernando.

665 *Ibid*, p 328.

666 *Ibid*. p 322.

*disciplinary or criminal proceedings, may well justify the inference of acquiescence and condonation (if not also of approval and authorization).*⁶⁶⁷

The Court held that the petitioner was entitled to compensation for infringement of his rights as well as reimbursement of medical expenses attributable to torture.⁶⁶⁸

Following the fundamental rights case, seven police officers were indicted in the Negombo High Court under the Torture Act No. 22 of 1994;⁶⁶⁹ however, none of the accused police officers were suspended from their posts pending the outcome of the case. Even though Gerard Perera himself was the principal witness in the case, State agencies had taken no efforts, despite repeated requests, to guarantee his safety. On the 21 November 2004 - only a few days before the scheduled date of his testimony - Gerard Perera was killed,⁶⁷⁰ and several of the same accused police officers in the torture and ill-treatment case were indicted for their involvement in his death.

Prior to Gerard Perera's death, the Attorney-General decided to withdraw the indictment against the Officer-in-Charge of the police station, Sena Suraweera. The withdrawal came in spite of the Supreme Court's ruling that the OIC was responsible for the torture of Gerard Perera. In delivering its verdict, the High Court noted its surprise over the decision of the Attorney-General to withdraw the indictment.⁶⁷¹

The trial in the torture case proceeded for another five years and the verdict of the High Court was given on 2 April 2008. The High Court acquitted all of the accused. As Gerard Perera was killed before he could testify, there were no eye-witnesses for the prosecution's case. The Court held that that even though it was proven that the victim was taken into custody and subsequently subjected to torture, it had not been proved beyond reasonable doubt that the accused were responsible for the torture.⁶⁷²

667 *Ibid*, pp 328-329.

668 *Ibid*, pp 329-330.

669 *Republic of Sri Lanka v. Suresh Gunasena and Others*, H.C. Case No.326/2003 (Negombo High Court).

670 See Asian Human Rights Commission, *Sri Lanka: Gerald Perera, courageous worker who fought for his rights, slain in attempt to derail justice*, 24 November 2004, accessed at: <http://www.humanrights.asia/news/ahrc-news/AS-52-2004>.

671 *Ibid*. Also see Asian Human Rights Commission, *Sri Lanka: Evolution of the falsifier's role of the Attorney-General's Department*, 17 April 2008, accessed at: <http://www.humanrights.asia/news/ahrc-news/AHRC-STM-097-2008>.

672 H.C. Case No 326/2003, (Negombo High Court), High Court Minutes, 02 April 2008, judgement of High Court Judge J.M.T.M.P.U. Tennakoon, dated 2 April 2008.

The Attorney-General declined to appeal the acquittal. The aggrieved party brought an appeal in the Court of Appeal shortly after the High Court verdict.⁶⁷³ On 18 October 2012, the Court of Appeal quashed the acquittal of four of the accused and ordered a retrial of the case.⁶⁷⁴

Criminal proceedings were launched in respect of Gerard Perera's death. The Sub-Inspector of Police, an accused in the torture case, was the first accused in the murder trial. The second accused was a close associate of the first accused.⁶⁷⁵

One of the principal witnesses in the murder trial, a police officer,⁶⁷⁶ alleged that he had been threatened to change his evidence to deny any involvement of the accused.⁶⁷⁷ The witness feared for his life after seeing what happened to Gerard Perera.⁶⁷⁸ At the time there was no formal legislation protecting witness and complainants:

*Most Asian countries have no effective means of witness protection, without which it is nearly impossible for witnesses and victims to provide testimony, which in turn is a crucial component of the justice process. A major reason for this absence is that witness protection requires a credible policing system. When the policing system itself is used to kill and harass witnesses, there is no possibility of protection.*⁶⁷⁹

Failing to investigate and prosecute credible allegations of torture violates human rights obligations under Articles 2 and 13 of the CAT and Articles 2(3) and 7 of the ICCPR. It also violates the State's general duty under international law to provide effective remedy and reparations for gross human rights violations.⁶⁸⁰

673 The Appeal was brought under Section 331 of the Code of Criminal Procedure Act and Section 14 of the Judicature Act.

674 Asian Human Rights Commission, *Sri Lanka: The Gerard Perera torture case – the accused to face retrial*, 18 October 2012, accessed at: <http://www.humanrights.asia/news/press-releases/AHRC-PRL-045-2012>

675 Asian Human Rights Commission, *Sri Lanka: The Murder trial of Gerald Perera - threat to life of an important witness*, 20 May 2008, accessed at: <http://www.humanrights.asia/news/ahrc-news/AHRC-STM-141-2008>.

676 *Ibid.*

677 *Ibid.*

678 *Ibid.*

679 Basil Fernando, *Sri Lanka: Impunity, Criminal Justice & Human Rights* (2010), chapter on 'Asia: Institutional reforms regarding justice administration must be given primacy to protect human rights in non-rule of law countries'.

680 Principle 3 of the *UN Principles and Guidelines for the Right to Remedy and Reparations*, *supra* fn. 50.

3. Cases involving the use of information obtained by Torture

3.1 *The Singarasa case (1993)*

In this case, the petitioner was indicted on five counts under the State of Emergency (Miscellaneous Provisions and Powers) Regulations No. 1 of 1989 and the PTA, for having allegedly attacked four army camps whilst he was a member of the LTTE. The Court relied on a confession that Singarasa claimed was obtained through torture. Singarasa was sentenced to fifty years of rigorous imprisonment. Singarasa appealed his conviction to the Court of Appeal, which upheld the conviction. Subsequently, he was denied leave to appeal to the Supreme Court.

Singarasa then filed a communication with the UN Human Rights Committee under the Optional Protocol to the ICCPR. The Committee indicated that presumptively admitting a statement with the burden on the accused to establish that a statement was made under duress violated Article 14(2), (3)(g), 2(3) and (7) of the ICCPR.⁶⁸¹ It observed that the State was under an obligation to provide Singarasa 'with an effective and appropriate remedy, including release or retrial and compensation.'⁶⁸² Moreover, it observed that Sri Lanka 'is under an obligation to avoid similar violations in the future and should ensure that the impugned sections of the PTA are made compatible with the provisions of the Covenant.'⁶⁸³

In 2005, Singarasa made an application to the Supreme Court seeking a revision of the conviction and sentence in 1995. The Court rejected the application, declaring that Sri Lanka's accession to the Optional Protocol was unconstitutional because it conferred judicial power on the Human Rights Committee in Geneva without parliamentary sanction.⁶⁸⁴

The lack of post-enactment judicial review of legislation and the failure of the Supreme Court to give effect to the rights of subjects through creative interpretation of statutory and constitutional provisions indicates a bleak future for human rights protection in Sri Lanka, even in the post-war period where the PTA continues to be in operation.⁶⁸⁵

681 *Nallaratnam Singarasa v. Sri Lanka*, Communication No. 1033/2001, decided on 23 August 2004, UN Doc. CCPR/C/81/D/1033/2001.

682 *Ibid.*

683 *Ibid.*

684 *Nallaratnam Singarasa v. The Attorney-General S.C. Spl. (LA) No. 182/99*, decided on 15 September 2006.

685 See Niran Anketell & Gehan Gunatilleke, *Emergency Law in the Context of Terrorism*, South Asians for Human Rights (2012), p 18.

The State is obligated to implement and enforce provisions of ratified international human rights instruments.⁶⁸⁶ Sri Lanka may not invoke provisions of its domestic law to justify non-compliance with treaty obligations.⁶⁸⁷ Where human rights obligations have been elevated to peremptory norms (*jus cogens*), notably the prohibition on torture or ill-treatment and extrajudicial killings, Sri Lanka must guarantee such rights at all times with absolutely no exceptions.

The case of *Singarasa* highlights the failure of the judiciary, notably the Supreme Court, to recognize international law and uphold the human rights of individuals under its jurisdiction. As a result of the Supreme Court ruling, Sri Lanka violated its obligations to provide an effective remedy under Article 2(3) of the ICCPR, to prohibit torture and ill-treatment under Article 7 of the ICCPR, to take measures to prevent torture and ill-treatment under Article 2 of the CAT and, to exclude evidence obtained by torture and ill-treatment under Article 15 of the CAT.

3.2 Edward Sivalingam's case (2008)

The petitioner in this case⁶⁸⁸ was a Methodist clergyman who was serving in LTTE-controlled areas. He was arrested in Vavuniya and subsequently detained in Colombo under a detention order in terms of the 2005 ERs. He claimed he was subjected to torture whilst in custody and forced to sign a confession in Sinhala—a language he was not conversant in. The petitioner filed a fundamental rights application and moved the Supreme Court on two questions: (1) the legality of his arrest and subsequent detention, and (2) the allegations of torture. He sought relief in the form of release from detention and compensation.

The Supreme Court held against the petitioner on both grounds. On the question of the validity of detention, the Court referred to the petitioner's possession of an 'LTTE identity card' as indicating he was 'favoured' by the LTTE, giving rise to a reasonable suspicion that justified the arrest. The Court reached this conclusion notwithstanding the petitioner's claim that the 'LTTE identity card' was in fact a travel pass issued by the LTTE for purposes of entry and exit from the territory controlled by them. The card itself had the words 'travel pass' on its face.

On the question of torture, one of the two medical reports submitted to the Court revealed injuries consistent with beatings and torture. Notwithstanding

686 Article 26, Vienna Convention, *supra* fn. 43.

687 *Ibid*, Article 27.

688 *Edward Sivalingam v. Jayasekara S.C.* (F.R.) Application No. 326/2008, decided on 10 November 2010.

the evidence, the Court held the petitioner's failure to complain of the alleged torture immediately after it occurred undermined the credibility of his testimony. The Court rejected the petitioner's claim that he did not complain before the Magistrate due to fear of reprisals when he returned to the custody of the Police.

Under international law, the judiciary must decide matters before them impartially, on the basis of facts and in accordance with law.⁶⁸⁹ Impartiality is defined as an absence of bias, animosity or sympathy towards either of the parties.⁶⁹⁰ Not only must the individual judge not harbour preconceptions about the particular case before them, but the tribunal must also appear to a reasonable observer to be impartial.⁶⁹¹

An individual is denied his or her right to an effective remedy under Article 2(3) of the ICCPR when a case is not heard before an impartial authority.

Under Article 9(4) of the ICCPR, every person who is detained has a right to go before a court in order for the court to decide without delay on the lawfulness of the detention. It is a necessary prerequisite of Article 9(4) that the court determining the lawfulness of the detention be impartial and independent.

Under the CAT, the Attorney-General violates his duty to be impartial where he fails to appeal the dismissal of a judicial decision where there is evidence of torture or ill-treatment.⁶⁹²

Equally, a State fails in its obligation to prohibit torture and ill-treatment under Article 7 of the ICCPR and Article 2 of the CAT if the judicial body as well as the public prosecutor tasked with upholding the prohibitions are not impartial.

3.3 Tissainayagam's case (2008)

J.S. Tissainayagam, Editor of the North-Eastern Monthly magazine, was arrested in March 2008 by the Terrorism Investigation Division (TID) of the Sri Lanka Police. The journalist was charged *inter alia* with inciting the commission of acts of violence or racial or communal disharmony by publishing certain articles in

689 Principle 1, *UN Basic Principles on the Independence of the Judiciary*, supra fn. 76.

690 International Commission of Jurists, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors* supra fn. 15, p 28.

691 UNHRC General Comment 32, supra fn. 74.

692 Committee against Torture, Decision of 1 November 1999, *Khaled Ben M'Barek v. Tunisia* Communication No. 60/1996, UN Doc. CAT/C/23/D/60/1996, para 11.10.

the North-Eastern Monthly in 2006 and 2007.⁶⁹³ During his trial, Tissainayagam claimed that he had made an involuntary statement to the Police following harassment and threats while in detention.⁶⁹⁴

During the trial, the Court translator who examined the Tamil statement testified in open court that the statement appeared to have been tampered with. Yet in August 2009, the High Court sentenced Tissainayagam to 20 years rigorous imprisonment, accepting Tissainayagam's statement into evidence.

The Attorney-General is obligated under the *UN Guidelines on the Role of the Prosecutor* to reject any evidence obtained through unlawful methods, especially torture or ill-treatment. The Attorney-General must also inform the Court and ensure steps are taken to hold accountable those responsible for such conduct.⁶⁹⁵ The Court is also required to exclude any statement or information obtained through torture or ill-treatment as part of the State's obligation under Article 15 of the CAT and Article 7 of the ICCPR.

Tissainayagam appealed the conviction and was granted bail in January 2010. In May 2010, the government announced that Tissainayagam would be pardoned by President Mahinda Rajapaksa to mark the 2010 World Press Freedom Day. Thereafter, Tissainayagam was permitted by the authorities—presumably under intense international pressure—to leave the country.

4. Four successful prosecutions

It goes without saying that there have been instances where the Attorney-General has successfully prosecuted and Judges properly punished State officials for serious human rights violations. Four of these cases, including *Krishanthi Kumaraswamy's Case*⁶⁹⁶ and the *Embilipitiya Case*⁶⁹⁷ are discussed below. It appears that the prosecution succeeded due to certain key strategies. First, public outrage over the incident motivated the State to seriously investigate and prosecute offenders. Second, the cooperation of Sinhala witnesses brought 'credibility' to the prosecution's case. Third the success of the prosecution was

693 See 'Jail Sentence for Dissident Sri Lankan Reporter Condemned', CNN, accessed at: <http://edition.cnn.com/2009/WORLD/asiapcf/09/01/sri.lanka.journalist>.

694 See Law & Society Trust (LST), *Briefing Note on Tissainayagam Case: 17 September 2009 - Case of J.S. Tissainayagam*, accessed at: www.lawandsocietytrust.org/web/images/PDF/briefing%20note.doc.

695 Principle 16, *UN Guidelines on the Role of Prosecutors* *supra* fn. 86.

696 H.C. Case No. 3718/88, High Court of Colombo, High Court Minutes, 18 March 1991.

697 H.C. Case No. 121/1994 (High Court of Ratnapura), High Court Minutes, 23 February 1999.

ensured by targeting relatively low-ranking personnel. The perhaps deliberate exclusion of high-ranking officials from the list of those indicted may have increased the chance of successful prosecution. These cases thus indicate the very narrow scope in which impunity can be combated within the criminal justice system in Sri Lanka.

4.1 Krishanthi Kumaraswamy's Case (1991)

The *Krishanthi Kumaraswamy Case*⁶⁹⁸ involved the gang rape and killing of an 18-year old Tamil girl by eight on-duty soldiers. The victim was stopped at a checkpoint near Kailadi, Jaffna by security personnel on 7 September 1996, detained, gang-raped repeatedly and killed. The victim's mother, brother, and neighbour were also killed when they went in search of her. The bodies of the four victims were discovered in a secret grave near Chemmani.⁶⁹⁹ Following public pressure, an indictment was filed in the High Court against the eight soldiers and one policeman.⁷⁰⁰

What sets this case apart from other similar cases was the public outrage following the incident. The cooperation of Sinhalese witnesses including two suspects also had a major impact on the success of the prosecution.⁷⁰¹ Accordingly, the Trial-at-Bar returned a guilty verdict.

An important feature of the trial was the testimony of the main accused in the case, who 'publicly disclosed details of hundreds of bodies which had been buried in the Jaffna peninsula following extrajudicial executions carried out by, as he alleged, State military forces.'⁷⁰²

The haste in which the case was prosecuted by the Attorney-General—perhaps in reaction to domestic and international pressure—foreclosed further investigation into more complex questions relating to accountability and command responsibility. A study by the University Teachers for Human Rights (Jaffna) indicated 'very definite pointers to culpability at a much higher level.'⁷⁰³ However, no one at the higher levels was prosecuted and no further investigations were

698 H.C. Case No. 3718/88, High Court of Colombo, High Court Minutes, 18 March 1991; S.C. Appeal No.2/2002.

699 Pinto-Jayawardena, *Still Seeking Justice in Sri Lanka*, *supra* fn. 345 p 46.

700 See H.C. Case No. 8778/1997.

701 Pinto-Jayawardena, *Still Seeking Justice in Sri Lanka*, *supra* fn. 345 p 46.

702 *Ibid*, p 47.

703 University Teachers for Human Rights (Jaffna), *Gaps in the Krishanthi Kumaraswamy Case: Disappearances and Accountability*, Special Report (1999).

conducted on issues of command responsibility for human rights violations occurring in Jaffna during the mid-1990s.⁷⁰⁴

4.2 The Embilipitiya Case (1989)

Between September 1989 and January 1990, more than fifty Sinhalese students were subjected to enforced disappearance from Embilipitiya. It was discovered that a school principal had colluded with soldiers at a nearby army camp to abduct children and keep them in custody. Many of the children were never seen again. However, the testimony from a number of abducted students who managed to escape from the camp indicated that the principal had harbored personal enmity against certain students and threatened that 'he could ask the army to take care of them.'⁷⁰⁵

The initial public response to the missing children was negligible, despite appeals by the parents to various authorities including the President. However, a subsequent report by the then Human Rights Task Force (HRTF) established by President R. Premadasa,⁷⁰⁶ alongside international and domestic pressure, led to investigations and prosecutions with respect to some of the enforced disappearances. In fact, the Human Rights Task Force in its 1992 Annual Report made specific findings against a soldier and the school principal as being implicated in the enforced disappearances of the schoolchildren.⁷⁰⁷ Moreover, the 1994 Western, Southern and Sabaragamuwa Disappearances Commission submitted a Special Report on the Embilipitiya incidents to President Chandrika Bandaranaike Kumaratunga.⁷⁰⁸ It is noted that the Commission received complaints regarding the enforced disappearances of 53 schoolboys from Embilipitiya. However, the findings of the Commission 'did not feature prominently in the assessment by the trial judge of the criminal culpability of the accused.'⁷⁰⁹

This case is unique as it reflects three important perspectives: first, the perspective that emerges from the High Court prosecutions; second, from the findings of the magisterial inquiry in the several *habeas corpus* applications; and, finally, those that emerge from the report of the 1994 Western, Southern

704 *Ibid.* p 48.

705 Pinto-Jayawardena, *Still Seeking Justice in Sri Lanka*, *supra* fn. 345 p 48.

706 *Ibid.* See Section 19 of the Sri Lanka Foundation Law No. 31 of 1973 as expanded by Emergency Regulations, Gazette Extraordinary 673/2 of 31 July 1991.

707 See the Human Rights Task Force, *Annual Report*, 10 August 1991 – 10 August 1992, p 27.

708 Pinto-Jayawardena, *Still Seeking Justice in Sri Lanka*, *supra* fn. 345 p 49; See Volume 11 of the Special Report of the 1994 Western, Southern and Sabaragamuwa Disappearances Commission, 'Some Reports of Cases', dated 31 May 1997 (unpublished).

709 Pinto-Jayawardena, *Still Seeking Justice in Sri Lanka*, *supra* fn. 345, p 49.

and Sabaragamuwa Disappearances Commission. Interestingly, the standard of proof applied at each of these fora was distinct. The Disappearances Commission heard evidence of those affected in accordance to established law; the magisterial inquiry sought to establish responsibility for the 'disappearances' on the civil standard of balance of probability; and the High Court applied a criminal standard of proof and decided on the question of whether particular accused had committed—beyond all reasonable doubt—the specific offences contained in the indictment. The High Court accordingly convicted six soldiers as well as the school principal for conspiring to abduct and abducting and kidnapping the students in order to murder and/or with intent to secretly and wrongfully confine them.⁷¹⁰

Similar to the *Krishanthi Kumaraswamy Case*, the officers who were convicted in the *Embilipitiya Case* were fairly junior. The most senior army officer -Lt. Col. R.P. Liyanage, the District Coordinating Secretary for the area- was acquitted on the basis that no evidence could be found linking him to the charges of enforced disappearance with intent to murder.⁷¹¹ The acquittal came despite findings of the 1994 Commission that the schoolchildren had been detained for a long period at the army camp and that Lt. Col. Liyanage, who was in charge of the camp, bore a measure of responsibility. The acquittal of the senior officer was not necessarily a miscarriage of justice; however, it is not uncommon for senior officials to go unprosecuted for human rights violations.

4.3 High Court Kandy Case No.1284/99 (1988)

The accused in this case⁷¹² was a police constable who had, along with unidentified persons, abducted the victim on 30 December 1988 from his house during the JVP insurrection. Following the enforced disappearance, the father of the victim had gone to the police station where he was told that his son would be produced in court the following day. The next day, the father of the victim was once again denied access to his son and told that he had been taken to another police station. The victim's whereabouts were never ascertained, which led to the indictment of the accused before the Kandy High Court.

710 *Ibid.* p 49.

711 *Ibid.* See H.C. Case No. 121/1994, High Court of Ratnapura, High Court Minutes. 23 February 1999.

712 Court of Appeal Minutes, 30 August 2000, per (as he was then) High Court Judge Samith de Silva. The decision was affirmed in appeal by the Court of Appeal in CA No 83/2000, Court of Appeal Minutes, 24 November 2006 and was appealed from to the Supreme Court which matter appears to be pending.

During the trial, witnesses identified the accused as being amongst the abductors.⁷¹³ The Assistant Superintendent of Police, who headed the investigations commencing in January 1996, testified that the accused was attached to the police station in question and that the victim had been taken there though he was not officially entered into the records.

As observed in a recent commentary, the High Court adopted an approach that was wholly inconsistent with the judicial attitudes that prevailed at the time:

*Examination of this judgment reveals the different attitude taken by this trial judge in relation to the very same issues of belated complaint and ostensibly inconsistent testimony that were utilized by different trial judges to acquit the accused in the cases examined earlier. In this instance however, the conviction was entered despite these purported obstacles and on the basis that the case for the prosecution has been established beyond a reasonable doubt.*⁷¹⁴

Examining the evidence - particularly the accused's testimony, in which he admitted to taking the victim into custody - the Court opined: 'If he [the accused] had taken the victim into custody, it was his obligation to produce him in court which [on the evidence before court] he had failed to do.'⁷¹⁵

Consequently, the High Court convicted the accused under Section 356 of the Penal Code.⁷¹⁶ On appeal, the Court of Appeal upheld the High Court's judgment. Reflecting similar sentiments to those expressed by the Court of Criminal Appeal in *Wijesuriya*,⁷¹⁷ discussed earlier, the Court rejected the defence of superior orders.⁷¹⁸

713 See Kishali Pinto-Jayawardena, 'Enforced Disappearances; The Legitimacy of the Law in Deterring Grave Human Rights Violations' in Sri Lanka - State of Human Rights Report - 2008, Law & Society Trust (2009), (Pinto-Jayawardena, *The Legitimacy of the Law in Deterring Grave Human Rights Violations*), p 145.

714 *Ibid.* p 183.

715 Court of Appeal Minutes, 30 August 2000, per High Court Judge Samith de Silva.

716 Section 356 of the Penal Code provides: 'Whoever kidnaps or abducts any person with intent to cause that person to be secretly and wrongfully confined shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.'

717 *Wijesuriya v. The State* (1973) 77 NLR 25 (Court of Criminal Appeal).

718 CA No 83/2000, Court of Appeal Minutes, 24 November 2006, at page 5 of the judgment. It was held: 'That [defence of superior orders] cannot be held as a valid defense. If the policeman breaks the law even under the orders of his superiors, he has to suffer the consequences. Even if [the] accused [acted] on the orders of a superior, the burden would be in him to prove it on a balance of probability.'

4.4 High Court Galle Case No. 1947/2008

In this case,⁷¹⁹ police officers abducted and 'disappeared' three persons. Six defendants were police officers and the seventh defendant was an Officer-in-Charge (OIC). The OIC was convicted for permitting unlawful detention of the victim at the police station in which he was in charge.

The Court encountered a number of discrepancies in the testimony of prosecution witnesses;⁷²⁰ however, it held that such inconsistencies were limited to establishing the identities of the six accused. The Court concluded that the victims had been unlawfully detained at the police station.⁷²¹ The Court further concluded that the OIC must have had knowledge of the unlawful detention, and entered a conviction against the seventh accused. The Court's willingness to impute responsibility on the OIC is a decisive break from past precedent. In the *Gerard Perera Case*,⁷²² the Supreme Court similarly held that the OIC must have been aware of the suspect's unlawful arrest and detention. In that case, Justice Mark Fernando also concluded the OIC was responsible for the unlawful arrest and torture.⁷²³

This judgment of the High Court is important: it establishes the concept of responsibility of a superior officer where he or she keeps a person in wrongful confinement with knowledge that the person has been abducted or kidnapped.⁷²⁴

Such 'judicial ingenuity' is found only in the rarest instances. In discussing apparent judicial reluctance to follow this useful precedent in later years with a retired judicial officer in the Southern Province during this research⁷²⁵, it was observed

It requires a particular judicial mindset to use ordinary statutory provisions so that extraordinary crimes can be caught within their reach. You need judicial capacity, judicial commitment and judicial courage. Where judges of the High Court are concerned, you also need confidence that this thinking will not be overturned

719 Court of Appeal Minutes, 1 August 2003, per the late High Court Judge Sarath Ambepitiya. The judgment is presently under appeal.

720 Pinto-Jayawardena, *The Legitimacy of the Law in Deterring Grave Human Rights Violations*, *supra* fn. 713 p 187.

721 *Ibid*, p 188.

722 *Sanjeewa, Attorney-At-Law (on behalf of Gerald Mervin Perera) v. Suraweera, OIC Wattala Police Station* [2003] 1 Sri.L.R. 317.

723 *Ibid*, p 322.

724 Pinto-Jayawardena, *The Legitimacy of the Law in Deterring Grave Human Rights Violations*, *supra* fn. 713, p 190.

725 Interview conducted during April 2012. Name kept confidential on request.

at the appellate level. These are not easy attributes to find in a judge, particularly in times where the authority of the State has developed to an overpowering extent.⁷²⁶

726 *Ibid.*

CHAPTER 5: REFORMING THE SYSTEM

At the end of the conflict in the North and East of the country, President Mahinda Rajapaksa promised a new beginning – a return to normal administration and a renewed respect for human rights.⁷²⁷ More than three years on, this promise has yet to be delivered. In September 2010, the 18th Amendment was passed in Parliament, reverting to the politically driven appointments process for the superior judiciary and other key public service posts.⁷²⁸ In April 2010, the Attorney-General's office was placed under the direct supervision of the President. In August 2011, the Government of Sri Lanka issued regulations under the Prevention of Terrorism Act, effectively maintaining the state of emergency that had lapsed in July 2011. In October 2012, the Secretary of the Judicial Service Commission was physically attacked after issuing a public statement citing threats and intimidation from the Government. These actions not only fail to deliver on President Rajapaksa's promises, they go further in eroding state accountability, weakening independence of the judiciary and eviscerating the rule of law.

State impunity for serious human rights violations continues unabated in Sri Lanka. Barriers to hold State officials accountable for their conduct pervade all levels of Government from the police investigation to the Office of the President. Institutional breakdown coupled with a lack of political will have paralyzed the justice system, leaving victims with little or no effective remedy and reparations for rights violations. The objective of this Study was to unravel how this culture of impunity evolved in Sri Lanka.

The impact of emergency laws on state accountability has been manifold. Emergency laws restricted, if not eliminated judicial review. Courts were not permitted to challenge a declaration of emergency nor judicially review an order, rule or arrest made pursuant to the emergency laws. While the Courts were willing to override these ouster clauses in certain instances, notably when the matter involved constitutional rights, the general mood of the judiciary was one of deference towards the emergency regime.

727 See 'No extension of emergency regulations – President' News Line, 25 August 2011 accessed at: http://www.prio.gov.lk/news_update/Current_Affairs/ca201108/20110825president_proposes_to_lift_emergency_law.htm

728 The 17th Amendment was unanimously passed by the Parliament of Sri Lanka in October 2001 to remedy the pervasive politicisation of the country's public service, judicial service and the functioning of the police.

Immunity clauses fostered a culture of impunity by shielding the President and State officials from liability for their conduct under the emergency regime, notably under the Public Security Ordinance No. 25 of 1947 (PSO) and the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 (as amended) (PTA). The emergency regime was an exception to the Code of Criminal Procedure Act, displacing the ordinary criminal justice system. The President played a pivotal role within the emergency regime, empowered to: declare states of emergency; order Armed Forces to maintain law and order under the PSO; absorb the role of Minister of Defence and issue detention orders under the PTA. It is not disputed that a certain degree of immunity is needed in order for executive and state authorities to perform their functions. However, in the absence of a robust judiciary and an independent Attorney-General, such immunities can become an avenue for impunity.

In recent years, the Attorney-General has used its discretion for political ends, subverting justice and enabling impunity. The Attorney-General has withdrawn indictments against State officials and politicians notwithstanding evidence supporting a conviction: in the *Gerard Perera* case, the Attorney-General withdrew the indictment against the officer in charge despite a finding of liability for torture from the Supreme Court.

The Attorney-General's Department has also developed a series of questionable practices: filing identical indictments against the same accused simultaneously in multiple jurisdictions; refusing to consent to bail under emergency laws where pre-trial release should be granted; obstructing victims' access to Magistrate reports in *habeas corpus* petitions; failing to appeal acquittals in torture cases where there are clear grounds for such an appeal; transferring the location of *habeas corpus* hearings to a jurisdiction where petitioners or victims cannot attend; seeking adjournments in *habeas corpus hearings* to deliberately delay proceedings where detention is without a legal basis; failing to take action to have suspects released who are detained without legal basis under the emergency laws; challenging fundamental rights claims with the objective of getting the petitions dismissed at the initial stage; and acting in a conflict of interest in Commissions of Inquiry. These practices not only deny victims their right to an effective remedy and reparations for human rights violations, these practices constitute violations in their own right, notably the right to a fair trial.

Police investigations are often conducted with the intention to obfuscate State responsibility in human rights violations. In the *ACF* case, the independent observers commissioned by the ICJ noted a disturbing lack of transparency, impartiality and effectiveness in the investigation. From the outset, prior to

any investigation, the police decided the LTTE were responsible for the killing. The CID did not interview any members of the Sri Lanka security forces or any Tamil, apart from the victims' family members. Evidentiary procedures were not followed, the crime scene was not secured, and forensic analysis of ballistics evidence was not complete. There was clear government intent to subvert the investigation.

In the *Five Students in Trincomalee* case, the police and security forces engaged in a deliberate cover-up. The police investigation was criticized as being negligent and inept, failing to secure crucial physical evidence and obtain statements from witnesses.

The lack of witness protection is a key obstacle to accountability. It is not uncommon for accused police or state officials to continue working pending the investigation. Where accused have breached pre-trial release agreements, Courts have not cancelled bail. In the *Gerard Perera* case, none of the accused police officers were suspended from duty pending the trial. Gerard Perera was killed days before he was to give evidence in his hearing. The suspects in the killing were police officers, including one of the accused in the case. In the *Five Students in Trincomalee* case, Dr Manoharan was intimidated and threatened continually to the point that he eventually had to leave the country, affecting his ability to give evidence. The judiciary has repeatedly failed to take steps to protect witnesses.

Throughout this study, the politicization of the judiciary and the lack of judicial independence have continually resurfaced as barriers to state accountability. The degree to which political actors have been able to strong-arm the judiciary is alarming. Notable international non-governmental organizations have stressed the need for greater judicial independence in Sri Lanka. In 2001, the International Bar Association warned that 'the perception of a lack of independence of the judiciary was in danger of becoming widespread and that it was extremely harmful to respect for the rule of law.'⁷²⁹

The International Bar Association in 2009 cited the 'lack of independent oversight and practice of executive presidential discretion over judicial appointments makes the judiciary vulnerable to executive interference and jeopardises its

729 See International Commission of Jurists, *Sri Lanka: The investigation and inquest into the killing of 17 aid workers in Muttur in August 2006*, Report by Michael Birnbaum, QC, ICJ inquest observer, April 2007, para 35, accessed at: http://icj.concepto.ch/download/database/ICJ_report-2.pdf

independence.⁷³⁰ The 18th Amendment to the Constitution passed in 2010 empowered the President to directly appoint the superior judiciary – the Chief Justice, the President and Judges of the Court of the Appeal and majority of the members of the Judicial Service Commission (the body entrusted with the power to appoint, promote, transfer, exercise disciplinary control and dismiss judicial officers). This politically driven appointments process has resulted in an increase in the proportion of appointees from the Attorney-General's Department to the higher judiciary.⁷³¹

In a recent interview, a retired High Court judge commented that defendants wielding political influence or politicians themselves often directly intervene in a case, either to have the matter transferred or to replace a judge.⁷³² In the *Action Contre la Faim Case*, the Secretary of the Ministry of Justice called the relevant Magistrate and requested that the case be transferred to the Anuradhapura Magistrate's Court. A new Magistrate was then appointed in early September 2006 and the new Magistrate again transferred the case to Kantale.⁷³³ The criminal investigations did not lead to any deterrent convictions, and this crime is as yet unpunished. In the *Bindunuwewa case*, the conduct of the Supreme Court Bench in dismissing the lower court convictions of police officers found guilty in the killing of Tamil detainees at a rehabilitation camp by predominantly Sinhalese villagers, gave rise to 'trenchant criticism.'⁷³⁴ An independent judiciary, free of any interference from the executive and legislative branches, is a necessary and basic precondition for the fair administration of justice and the promotion and protection of human rights.⁷³⁵

Overcoming impunity in Sri Lanka will require more than just pledges to respect a commitment for law reform from the Government. While the barriers to state accountability are systemic and institutionalized, the real issue is the lack of political will. These commitments are meaningless if they are not supported by actions; only when the Government takes concrete steps to bring State officials to account for their conduct will they be able to restore rule of law and public faith in the justice system.

730 International Bar Association, *Justice in Retreat* supra fn. 4, p 7.

731 ICG, *Sri Lanka's Judiciary: Politicized Courts, Compromised Rights* supra fn. 4.

732 See 'This is a country in which even judges do not receive fairness' – an interview with retired High Court Judge W.T.M.P.B. Warawewa, *Mawubima*, 25 March 2012.

733 International Commission of Jurists, *Sri Lanka: ICJ calls for justice as inquest into killing of 17 aid workers concludes*, 9 March 2007.

734 See Pinto-Jayawardena, *Still Seeking Justice in Sri Lanka*, supra fn. 345, p 58.

735 See International Legal Framework, *infra* section 2, pp 16-18.

The ICJ calls on Sri Lanka to comply with its obligations under international law to investigate human rights violations; take appropriate measures in respect of perpetrators of such violations, bringing those responsible to justice through prosecution and the imposition of penalties commensurate to the offence; provide victims with effective remedies and reparations for their injuries; ensure the inalienable right to know the truth; and take other necessary steps to prevent recurrence of violations.⁷³⁶

736 Principle 1, *General Obligations of States to take Effective Action to Combat Impunity*.

CHAPTER 6 : RECOMMENDATIONS

1. Sri Lanka's emergency laws must comply with international law

Under international law, States may take exceptional measures and derogate from certain rights when facing an emergency that threatens the life of the nation.⁷³⁷ Indeed, as reflected in the *ICJ Berlin Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism*, States have the right and duty to protect the security of persons in their jurisdiction.⁷³⁸ However, the State must at all times comply fully with provisions of international human rights law relating to states of emergency, including continuing protection against human rights abuses.⁷³⁹ The judiciary must be permitted at all times to review the basis for declaring a state of emergency as well as the measures taken in response to the crisis or emergency, ensuring State compliance with domestic law and international human rights law and standards.⁷⁴⁰

In this context, the International Commission of Jurists calls on the Government of Sri Lanka to:

- (1) Ensure that all legislation relating to counter-terrorism measures, notably the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 (PTA) and the 2011 Regulations under the PTA, complies with international law pursuant to UN Security Council resolution 1373 (2001) and subsequent resolutions affirming UNSC 1373.⁷⁴¹
- (2) Repeal Section 3 and Section 8 of the Public Security Ordinance No. 25 of 1947 (PSO), removing the formal bar on the Courts to judicially review a Proclamation of emergency and emergency regulations and orders.
- (3) Repeal Section 21(3) of the Public Security Ordinance No. 25 of 1947 (PSO), removing the formal bar on the Courts to judicially review Orders relating to curfews (Section 16), essential services (Section 17) and the calling out of armed forces (Section 12).

737 Article 4, ICCPR; see also International Commission of Jurists, *Briefing Paper on Sri Lanka supra* fn. 162, p 11.

738 International Commission of Jurists, *Legal Commentary to the ICJ Geneva Declaration, supra* fn. 73, p 58.

739 *Ibid.*

740 *Ibid.*

741 UN Security Council Resolution 1373, 28 September 2001, UN Doc. S/RES/1373 (2001); see also UN Security Council Resolution 1624, 14 September 2005 UN Doc. S/RES/1624 (2005); UN Security Council Resolution 1566, 8 October 2004, UN Doc. S/RES/1566 (2004); UN Security Council Resolution 1526, 30 January 2004, UN Doc. S/RES/1526 (2004); UN Security Council Resolution 1455, 17 January 2003, UN Doc. S/RES/1455 (2003).

2. Sri Lanka must take measures to end administrative detention

Detaining a person without a charge (or administrative detention) goes against international human rights law. The *ICJ Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights* recommends that States repeal all 'laws authorizing administrative detention without charge or trial outside a genuine state of emergency.'⁷⁴² Administrative detention on the basis of public security is tolerated only in exceptional circumstances in a lawfully declared state of emergency pursuant to Article 4 of the ICCPR, which allows for derogation of human rights treaty obligations.⁷⁴³ Even in such circumstances, States must guarantee at all times, the rights afforded to persons deprived of their liberty under Article 9 of the ICCPR: (1) the right to be informed of the reasons for arrest (Article 9(2) of ICCPR); (2) the right to be detained only on grounds and procedures established by law (Article 9(1) of ICCPR); (3) court control of the detention at all times (Article 9(4) of ICCPR); and (4) an enforceable right to compensation where the detention is found to be unlawful (Article 9(5) of ICCPR).⁷⁴⁴

Using administrative detention as a counter-terrorism measure is unacceptable under international law.⁷⁴⁵ Detention of persons suspected of terrorist activities must be accompanied with concrete charges.⁷⁴⁶

In this context, the International Commission of Jurists calls on the Government of Sri Lanka:

- (1) Repeal all sections under Regulation No. 4 of 2011 of the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 (PTA), involving the detention of persons without concrete charges.
- (2) Repeal all sections under Regulation No. 5 of 2011 of the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 (PTA) involving the *de facto* detention of persons without a charge for 'fear of terrorist activities' through imposed rehabilitation.

⁷⁴² International Commission of Jurists, *Assessing Damage, Urging Action* *supra* fn. 155, p 19; see also International Commission of Jurists, *Beyond Lawful Constraints* *supra* fn. 154, p 22.

⁷⁴³ International Commission of Jurists, *Legal Commentary to the ICJ Berlin Declaration* *supra* fn. 44, p 55; see also UNHRC *Concluding Observations* on Jordan, *supra* fn. 158, para 226 – 244 *Concluding Observations of the UN Human Rights Committee on Morocco* (UNHRC *Concluding Observations* on Morocco) UN Doc. CCPR/C/79/Add.4, para 21; see International Commission of Jurists, *Beyond Lawful Constraints*, *supra* fn. 154 pp 21-27.

⁷⁴⁴ Article 9, ICCPR; UN Human Rights Committee, General Comment 8, *Article 9* (UNHRC General Comment 8), UN Doc. HRI/GEN/1/Rev.1 at 8 (1994), para 4.

⁷⁴⁵ Report of the *Working Group on Arbitrary Detention*, 2009 *supra* fn. 156, para 54; see also International Commission of Jurists, *Assessing Damage, Urging Action* *supra* fn. 155, p 22.

⁷⁴⁶ *Ibid.*

- (3) Should Sri Lanka seek to derogate from its obligations under the ICCPR, including in respect of detention, pursuant to a proclaimed and duly notified state of emergency, it must do so in a manner that is fully compliant with the terms of Article 4 of the ICCPR, providing all of the guarantees under Article 9 of the ICCPR.
- (4) Repeal all sections under the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 (PTA), permitting the Minister of Defence to order the detention of persons without a charge.
- (5) Limit section 7(1) of the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 (PTA), involving the requirement for consent of the Attorney-General for bail and upholding the right to pre-trial release under Article 9(3) of the ICCPR.

3. Sri Lanka must guarantee the right to effective remedy and reparations for human rights violations and serious violations of international humanitarian law

States must at all times guarantee victims a right to effective remedy and reparations for human rights violations. As part of this obligation, Sri Lanka must put into place effective constitutional remedies for violations and investigate credible allegations of human rights violations and violations of international humanitarian law effectively, promptly, thoroughly and impartially, taking action where appropriate to bring those persons responsible to trial. Sri Lanka must also ensure victims of a human rights or humanitarian law violation have equal and effective access to justice.⁷⁴⁷

Investigations into credible allegations of human rights violations must be carried out by authorities that are not, individually or institutionally, involved in the alleged human rights violations. Human rights violations committed by armed forces should not be investigated by armed forces.⁷⁴⁸ Cases of serious human rights violations should be prosecuted before military courts.⁷⁴⁹

⁷⁴⁷ *UN Basic Principles and Guidelines on the Right to a Remedy, supra* fn. 2, para 3.

⁷⁴⁸ Para 19, 23, 32, 34, *Concluding Observations on Colombia*, UN Doc. CCPR/C/79/Add.76, 5 May 1997; Para 8, *Concluding Observations on Venezuela*, UN Doc. CCPR/CO/71/VEN, 26 April 2001; Para 7, *Concluding Observations on Kyrgyzstan*, UN Doc. CCPR/CO/69/KGZ, 24 July 2000; Para 10, *Concluding Observations on Chile*, UN Doc. CCPR/C/79/Add.104, 30 March 1999; Para 9, *Concluding Observations on Belarus*, UN Doc. CCPR/C/79/Add.86, 19 November 1997; Para 10, *Concluding Observations on Macedonia*, UN Doc. CCPR/C/79/Add.96, 18 August 1998; Para 16, *Concluding Observations on France*, UN Doc. CCPR/C/79/Add.80, 4 August 1997; Para 249, Report of the UN Human Rights Committee to the General Assembly, 35th Period of Session, UN Doc. A/35/40 (1980).

⁷⁴⁹ Emmanuel Decaux, *Administration of Justice, Rule of Law and Democracy: Issue of the administration of justice through military tribunals*, UN Document E/CN.4/Sub.2/2004/7, 14 June 2004, para 19.

States must take steps to ensure victims, victims' families and witnesses are protected from threats, intimidation and violence.⁷⁵⁰ The State must also take steps to ensure that officials implicated in human rights violation are suspended pending the outcome of the investigation or trial.⁷⁵¹ The State must ensure that victims and victims' families are kept abreast of developments in the investigation as well as given access to the final investigation report or transcripts of hearings.

In this context, the International Commission of Jurists calls on the Government of Sri Lanka to:

- (1) Guarantee the right to judicial review of all laws for conformity with the Constitution.
- (2) As part of its obligation under Article 7 of the ICCPR and Article 2 of the CAT, ensure that police officers are suspended from their normal duties pending an investigation of torture or ill-treatment, enforced disappearance, unlawful killing or any other human rights violations.
- (3) As part of its obligation under article 13 of the CAT and Article 2(3) and Article 7 of the ICCPR, enact witness protection legislation to ensure witnesses and victims are not subject to harassment, intimidation, threats of violence, torture or ill-treatment or death pending the investigation and trial of a human rights violations.
- (4) As part of its obligation under article 15 of the CAT, Article 7 of the ICCPR and Article 14(3) of the ICCPR, repeal Section 16 of the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979

750 Article 12(1), 12(4), *International Convention for the Protection of All Persons from Enforced Disappearance*; Article 13(3) *Declaration for the Protection of All Persons from Enforced Disappearance*; para 6, UN General Assembly Resolution, UN Doc. A/RES/42/142, 7 December 1987; UN General Assembly Resolution, UN Doc. A/RES/43/159, 8 December 1988; UN General Assembly Resolution, UN Doc. A/RES/44/160, 15 December 1989; UN General Assembly Resolution, UN Doc. A/RES/45/165, 18 December 1990; UN General Assembly Resolution, UN Doc. A/RES/46/125, 17 December 1991; UN General Assembly Resolution, UN Doc. A/RES/47/132, 18 December 1992; UN General Assembly Resolution, UN Doc. A/RES/49/193, 23 December 1994; UN General Assembly Resolution, UN Doc. A/RES/51/94, 12 December 1994; UN General Assembly Resolution, UN Doc. A/RES/53/150, 9 December 1998; UN General Assembly Resolution, UN Doc. A/RES/55/103, 4 December 2000; UN General Assembly Resolution, UN Doc. A/RES/57/215, 18 December 2002.

751 'Persons alleged to have committed serious violations should be suspended from official duties during the investigation of allegations', *Concluding Observations of the UN Human Rights Committee on Serbia and Montenegro*, UN Doc. CCPR/CO/81/SEMO, 12 August 2004, para 9; see also *Concluding Observations of the UN Human Rights Committee on Brazil*, UN Doc. CCPR/C/79/Add.66, para 20; *Concluding Observations of the UN Human Rights Committee on Colombia*, UN Doc. CCPR/C/79/Add.76, 5 May 1997, para 32 and 34; *Concluding Observations of the Committee against Torture on Bolivia*, 10 May 2001, UN Doc. A/56/44, para 88-89, 97; UN Committee against Torture, *Recommendations of the Special Rapporteur on torture*, UN Doc. E/CN.4/2003/68, 17 December 2002, Recommendation 26(k).

(PTA) which presumptively admits statements or 'confessions' made to police officers of or above the rank of Assistant Superintendent into evidence.

- (5) As part of its obligations under Article 15 of the CAT, enact legislation or include provisions in existing legislation that explicitly exclude information, statements or 'confessions' that were obtained as a result of torture and other ill-treatment or coercion, whether by Sri Lankan officials or third parties in line with Section 24, Section 25(1), Section 25(2), Section 26(1) and Section 26(2) of the Evidence Ordinance No. 14 of 1895 (as amended).
- (6) Enact legislation or include provisions in existing legislation that explicitly prohibit military tribunals from trying serious human rights violations and serious violations of international humanitarian law.
- (7) Allow complainants or interested third-parties the right to appeal against withdrawals made by the Attorney-General's department where there is prima facie evidence of partiality, improper, corrupt or capricious conduct or incompetence.
- (8) Ensure that a private citizen's right to maintain a private prosecution operates as a safeguard in cases where the Attorney General may be shown to be acting in bad faith in taking over a private prosecution and entering a *nolle prosequi* and therefore relevantly amend Chapter XIV and Chapter XVII of the Criminal Procedure Code Act No.15 of 1979 (as amended).
- (9) Amend Section 194(2) of the Code of Criminal Procedure Act No.15 of 1979 (as amended) by adding the words, 'together with reasons therefore' at the end of the section in order to ensure that the Attorney General is formally required to state reasons when exercising the power of entering *nolle prosequi*.
- (10) Amend Section 398(2) of the Criminal Procedure Code No. 15 of 1979 (as amended) in order to permit the Magistrate to take appropriate judicial action to avoid any miscarriage of justice that may be caused by the instructions issued by the Attorney General.
- (11) Enact a witness protection law in consonance with international best practices.
- (12) Enact legislation, following a consultative process involving the public, the media and legal profession that upholds the right to information, in line with the recommendations of the LLRC.

4. Sri Lanka must remove all barriers to State accountability for violations of human rights and humanitarian law

Impunity is the failure or impossibility by State authorities – due to legal obstacles or a lack of political will – to bring perpetrators of human rights violations to account.⁷⁵² Legal obstacles include: statutory provisions conferring immunity to State officials for their conduct; the absence of a criminal offence for the human rights violation (i.e. enforced disappearance); the statutory defence of superior orders; the absence of a criminal offence for command responsibility. These legal obstacles or barriers to accountability foster a climate of impunity, undermining efforts to protect human rights and promote the rule of law.

In this context, the International Commission of Jurists calls on the Government of Sri Lanka to

- (1) Repeal those sections of the Public Security Ordinance No. 25 of 1947 (PSO) and the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 (PTA) that confer immunity on State officials for human rights violations and ensure that where there are credible allegations of human rights violations, including crimes under international law, those responsible are brought to justice.
- (2) Limit the operation of section 100 of the Army Act No. 17 of 1949, ensuring that, in line with applicable Sri Lankan judicial precedent, a military officer is not penalized for respecting the duty to disobey an unlawful order that constitutes a human rights violation, a serious violation of international humanitarian law or a crime under international criminal law.
- (3) Include a provision in the criminal law incorporating the doctrine of command responsibility.
- (4) Create a crime of enforced disappearance under Sri Lankan criminal law, punishable by appropriate penalties which take into account the seriousness of the offence.

⁷⁵² The international standards governing impunity are set forth in the *Updated Set of Principles to Combat Impunity* *supra* fn. 1; see also *UN Basic Principles and Guidelines on the Right to a Remedy*, *supra* fn. 2.

5. Sri Lanka must limit or institute greater accountability over the powers of the President

States must bring perpetrators of human rights violations to justice, irrespective of their designation or role within the government. In Sri Lanka, the President is given immunity under the Public Security Ordinance No. 25 of 1947 and the Constitution.⁷⁵³ The President plays a pivotal role within the emergency regime. With the advent of the 1978 Constitution, the President is empowered to: declare states of emergency, order Armed Forces to maintain law and order under the Public Security Ordinance No. 25 of 1947 (as amended) (PSO); absorb the role of Minister of Defence and issue detention orders under the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 (as amended) (PTA). The 18th Amendment to the Constitution passed in 2010 further enhanced the powers of the President: (1) it removed the Presidential term limit on contesting election; (2) it also abolished the Constitutional Council, empowering the President to directly make appointments to key public service posts as well as members of the superior judiciary.

In this context, the International Commission of Jurists calls on the Government of Sri Lanka to:

- (1) Repeal or amend Article 35(1) – (3) of the Constitution of Sri Lanka conferring immunity upon the President in respect of conduct in his or her private or personal capacity during office, so as to ensure that, as a minimum there is no immunity conferred for conduct constituting gross human rights violations or crimes under international law.
- (2) Ensure that executive and administrative regulations and orders issued by the President relating to emergencies are subject to judicial review.

6. Sri Lanka must take steps to protect judicial independence

It falls on the State to guarantee judicial independence and it is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.⁷⁵⁴ The judiciary as well as individual judges must not be subordinate to the other public powers, including the political branches of government. The judiciary must be kept independent of the executive and the legislature. Judicial institutions must be allowed to function independently, free from interference,

⁷⁵³ See Article 35(1) of the Constitution and Section 8 of the PSO.

⁷⁵⁴ Principle 1 of the *UN Basic Principles on the Independence of the Judiciary*, *supra* fn. 76.

intimidation, threats or violence. Independence of the judiciary is essential in maintaining the rule of law and the notion of a fair trial.

Persons selected for judicial office must be individuals of integrity and ability with appropriate training or qualifications in law. The appointments process for the judiciary must be sufficiently independent to ensure judicial appointments are not made for improper motives.⁷⁵⁵ The nomination of judges should be based on their competence, not their political affiliation.⁷⁵⁶

The International Commission of Jurists calls on the Government of Sri Lanka to:

- (1) Take immediate steps to arrest and bring to justice those persons responsible for the assault on the Secretary of the Judicial Service Commission, Manjula Tillekaratne, on 7 October 2012.
- (2) Amend or repeal the 18th Amendment to the Constitution to restore the independent appointment process of the superior judiciary and other key public service posts, in line with international standards and guidelines.
- (3) Protect members of the judiciary from improper influences, inducements, pressures, threats or interferences – direct or indirect – from any quarter or for any reason.
- (4) Protect judicial institutions, notably the Judicial Service Commission from improper influences, inducements, pressures, threats or interference – direct or indirect – from any quarter or for any reason.

7. Sri Lanka must take steps to strengthen the independence of the Attorney-General

An independent and impartial prosecutor is a prerequisite to the effective investigation and prosecution of human rights violations. The Attorney-General acting as the State prosecutor must perform its duties fairly, consistently and expeditiously, respecting and protecting human dignity and human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.⁷⁵⁷ Due attention must be given to the prosecution of crimes

⁷⁵⁵ *Ibid*, Principle 10.

⁷⁵⁶ *Concluding Observations of the UN Human Rights Committee on Bolivia*, UN Doc. CCPR/C/79/Add.74, para 34.

⁷⁵⁷ Guideline 12 of the *UN Guidelines on the role of Prosecutors supra* fn. 86.

committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law.⁷⁵⁸

In this context, the International Commission of Jurists calls on the Government of Sri Lanka to:

- (1) Reform the recruitment guidelines for the Attorney-General's department, so as to reflect the UN Guidelines on the Role of Prosecutors to ensure that only those persons with appropriate education and training as well as integrity and ability are selected.
- (2) Establish an independent office of the prosecutor that is financed independently (i.e. through the Consolidated Fund) and accountable to Parliament to handle the prosecution of State officials, including those who participate in gross violations of human rights law and crimes under international law.

⁷⁵⁸ *Ibid*, Guideline 15.

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