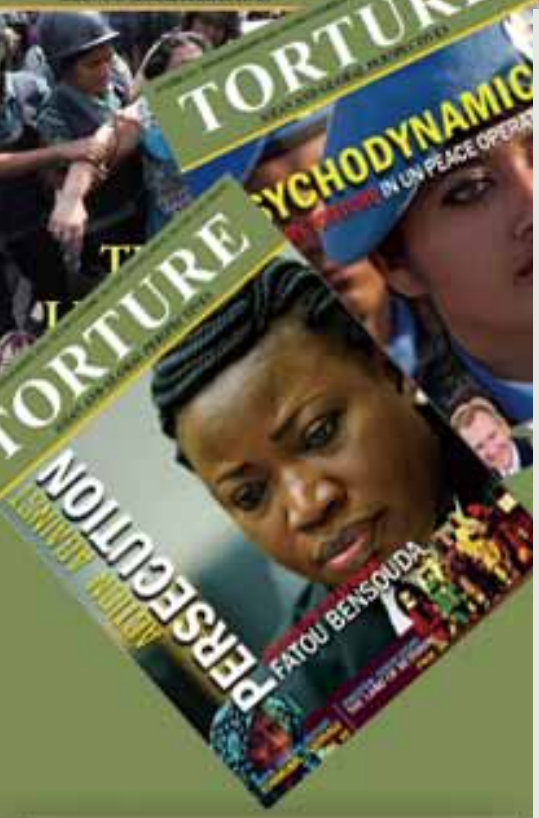
FEB-APR 2014 WWW.HUMANRIGHTS.ASIA VOLUME 03 NUMBER 1 & 2 ISSN 2304-134X (PRINT) ISSN 2304 -1358 (ONLINE)

TORTURE

ASIAN AND GLOBAL PERSPECTIVES

EXCLUSIVE REVELATIONS OF A WOEBEGONE HISTORY

THE ISLAND OF MASS GRAVES



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Cover photo

File Photo: Human skull is seen at a construction site in the former war zone in Mannar, Sri Lanka

Back Cover photo

Members of the Association of Indonesia Migrant Workers in Hong Kong (ATKI-HK) during the May Day rally in Hong Kong in 2014. ATKI-HK has been existing and empowering migrant. Through this activity, hoping to promoting migrants' rights and culture of Indonesia as well strengthen unity among Indonesian migrant's community in Hong Kong. *Photograph by Nilantha Ilangamuwa.*

PUBLISHED BY

ASIAN HUMAN RIGHTS COMMISSION

DIGNITY
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AGAINST TORTURE

Letter to the editor

All letters to the editor must include name and location. Letters may be edited for space and clarity, and may appear in online version of *Torture: Asian and Global Perspectives*

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ASIAN AND GLOBAL PERSPECTIVES

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CHEMMANI
unearthed yet untold

File Photo: Skeletal remains exhumed in a mass grave in Chemmani Jaffna.

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EDITORIAL BY NILANTHA ILANGAMUWA

Quote of the issue:

"Under torture you are as if under the dominion of those grasses that produce visions. Everything you have heard told, everything you have read returns to your mind, as if you were being transported, not toward heaven, but toward hell. Under torture you say not only what the inquisitor wants, but also what you imagine might please him, because a bond (this, truly, diabolical) is established between you and him ... These things I know, Ubertino; I also have belonged to those groups of men who believe they can produce the truth with white-hot iron. Well, let me tell you, the white heat of truth comes from another flame."

— Umberto Eco, The Name of the Rose

SRI LANKA
THE ISLAND OF
MASS GRAVES

SRI LANKA is once again on the edge of a political crucible in terms of its international relations as well as in domestic politics. The country is ignoring calls for an independent and credible investigation into alleged wartime atrocities while at the same time carrying out atrocities against its own people.

None of the elected or appointed officials have been able to fulfill even the basic requirements of their offices, but instead put all their efforts into finding loopholes to escape the situation and to justify what they have done.

Mass Graves are not a new phenomenon in Sri Lanka as over 30 - 40 mass graves, including potential sites, were found in Sri Lanka in last two decades. In addition to the mass graves of atrocities by the state there are also many mass graves in Sri Lanka for the victims of the Asian Tsunami which happened in December 2004, and claimed over 38,000 lives in the island nation. However, the ruling alliance engages in an *ad hoc* based solution to avoid justice, ignoring the concerns that mass graves give rise to. Consequently, some of relatives of the victims' family were intimidated by the government security forces when they were approached the court accepting inquiries into the mass graves.

Since the early 1970s, hundreds of thousands of people have been killed by the government and by the non-state actors who led insurrections against the neo-feudal governmental apparatus in an attempt to reform society. However, the government was able to crackdown on the challenges to their rule while picking up those who were engaged the cause and, sadly, some of those who had nothing to do with the insurrections. To eliminate the insurrections the government ordered mass killings of those who were picked up by the military forces and its paramilitary allies, and later dumped some of their bodies around the country while others were burnt to death on the country streets. This horrible truth has come to light with the discovery of the mass graves of the victims of extrajudicial killings. During the last two years the country has learned of two newly discovered mass graves. One is in Matale, in the Central province; and the second is in Mannar in North province of the country. In the latter case, where well over hundred human skeletons were discovered, the government may have influenced the excavation and investigations by impeding the work of the professional forensic investigators. It is widely believed that the military commander of a certain regiment is responsible for this crime against humanity.

The latest result of the government's denial of the right to life was the third resolution on Sri Lanka adopted at the United Nations Human Rights Commission in March 2014, in which the government was urged to accept international assistance to conduct an independent investigation on the crimes reported during the last phase of the battle between the security forces and the Liberation Tigers of Tamil Eelam (LTTE). The LTTE, which was fighting for a separate state within the island, was classified as a terrorist origination by many countries, including neighbouring India. Their struggle ended in May 2009 when its leaders were killed by government security forces.

Despite all the other crimes that were reported in the country's recent history, the third resolution adopted by the UN human rights council drew its serious concern about the crimes reported during the last phase of the war, which is indeed a necessary development. Most of the well-balanced critiques on the resolution come across as the end of sleep walking on the part of the international community regarding the grave destruction in Sri Lanka. In other words, this is an attempt to counter the well-established policy known as trying of catch a fly in a dark room.

However, challenges remain in the domestic political arena, especially regarding the arbitrariness of government policy which tends to avoid fulfilling the basic requirements for justice. Instead of totally destroying the system of the institutions

of justice, they simply distorted them and appointed close allies to manipulate the process. This makes for a greater confusion among the people as well as the international community. Through all this the people still believe that they have the ability to achieve democratic rule, justice, and freedom, which they believe will be able to protect their basic rights. But in reality this is an illusion. Perhaps this deliberate paralyzation of the country's criminal justice system and other state institutions was a well-designed plan by the to keep their power and prevent the people from obtaining justice by undermining the basic rights of the people.

Melanie Klinkner, senior lecturer in Law at Bournemouth University, has briefly outlined the mass graves investigations for International criminal proceedings. She has conducted investigations on mass graves and her research publications to date focus on the interplay of international criminal law and forensic science.

"Mass grave excavations have also the potential to fulfil important humanitarian goals that go well beyond prosecutorial needs. In the aftermath of gross human rights violations, evidence from the field suggests that information as to what happened and how is happened, fulfils a very important need of families and survivors. In fact, this need to know the truth is vital and may have primacy over wanting justice; the desire for justice may follow on from knowing the truth. Though it should also be noted, that learning and knowing the truth can have complex and unpredictable effects on the individual and may exacerbate strains between the individual, the past and society. In any event, mass grave investigation need to be mindful of the psycho-social ramification they have on the survivor population and on relatives of the missing. Investigations of mass graves for criminal purposes need to ensure that they form the first step in a continued effort to provide families with information, identification and return the human remains," Klinker pointed out in an article written for our magazine.

It is time for the Government of Sri Lanka to take up this issue as one of their priorities to help the relatives of the victims find justice. We appreciate the government's recent announcement addressing the conduct of the investigation, but it should not be a part of the same hide and seek game which the government has engaged in during last few decades to cover-up their crimes against humanity. There are local forensic officials who are able conduct independent investigations if the government or the international community is willing to arrange the required facilities.

Sri Lanka is indeed an Island of mass graves. And today, Sri Lanka is undergoing tremendous upheaval and chaotic social disorder, where the basic requirements of justice have been denied and replaced with political vulgarism and religious intolerance with the help of the ruling party and military. This continues to be a major challenge to overcome in conducting an authentic investigation procedure on not only the mass graves, but the crimes reported in the country's recent past as well. The very reason the government wishes to avoid the investigation is because those who committed the crimes are now key members of the government. In this dire situation, the people in general, as well as the international community, have a role to play and a responsibility to find justice for those who were buried en masse throughout the history of the island nation.

OPINION: TORTURE

Abu Ghraib's Ghosts

Ten years later, the United States still hasn't come clean on its torture record.

by JUAN E. MÉNDEZ

TEN years ago today, "60 Minutes II" broadcast infamous pictures of detainee abuse at Abu Ghraib, the Iraqi prison then controlled by the United States. The photographs were heartbreaking. Naked men stacked up on top of each other in human pyramids. Prisoners forcibly staged in humiliating positions to mimic sex acts. Bags placed over men's heads, denying their humanity. The most memorable image — a hooded man standing on a box, contorted Crucifixion-like with wires protruding from his hands — remains an indelible reminder that a country that long abhorred torture practiced it after the Sept. 11 attacks.

Those pictures shattered my belief that well-established democracies do not torture. I am a survivor of torture who owes his release from the Argentine junta's notorious Unit 9 prison in part to U.S. pressure in the 1970s. If U.S. citizens and certain members of Congress had not written letters to the Argentine government inquiring about my situation, I might have become one of the thousands of people "disappeared" by the Argentine military in its Dirty War against political activists like me. I owe my life to the solidarity those Americans showed and their principled opposition to the military's machinery of death and torture.

Unfortunately, the U.S. government that stood up to my torturers has been compromised — by both the Bush administration, which adopted torture as policy, and the Obama administration, which has kept evidence of U.S. torture hidden for years. It also is being compromised by the Central Intelligence Agency itself.

Here's how. The Senate Intelligence Committee's massive 6,600-page report on the CIA's post- Sept. 11 torture program remains secret, although the committee recently voted to send the report's executive summary, findings and conclusions to the White House for a declassification review. To be clear, the whole report should be public, not just pieces — but there's a more urgent matter that must be dealt with immediately. According to the White House, President Barack Obama will allow the CIA to review and redact the report summary — a preposterous conflict of interest. Once again, the torturers will have the opportunity to censor what the public can know.

Already, leaked portions of the documents, obtained by McClatchy, show that CIA officers used torture methods that went beyond those approved by the Bush-era Justice Department

and CIA headquarters, and that the agency evaded congressional, White House and public oversight. This isn't surprising. Torture, you see, is a cancer that corrodes the morality of the perpetrators. It is so horrific that even its practitioners must lie to themselves and others to justify their actions, which shock not only the conscience of the world but their own. The CIA does this by rationalizing its brutality with the false argument that torture was necessary to save lives, or by simply relabeling the horrors of torture as the banal "enhanced interrogation techniques."

This leaves an obvious question: How will the whole truth come out when the perpetrators are the ones holding the black marker? The answer is obvious, too: It will not. That not only violates solemn obligations of the United States under international law but has real consequences for human rights. As many countries with sordid histories of abuse know, those societies that reckon with their brutal pasts — Argentina, Chile and Peru, for instance — go on to have better records of protecting human rights, as well as defending their citizens from terrorists and other violent criminals. But societies that try to bury the past — including many former Soviet bloc countries — are more likely to continue their human rights violations and harm both their national and domestic security in the process.

While there are hugely important distinctions between the previously mentioned countries and the United States, the lesson still applies: The United States has a moral and legal obligation to discover and disclose the entire truth about torture committed by its agents, as a reminder to future administrations and to the world that torture is the very negation of human rights.

"

The United States can once again become a full partner in the global movement for human rights, but only if it faces up to its dark side and atones for its torturous transgressions.

"

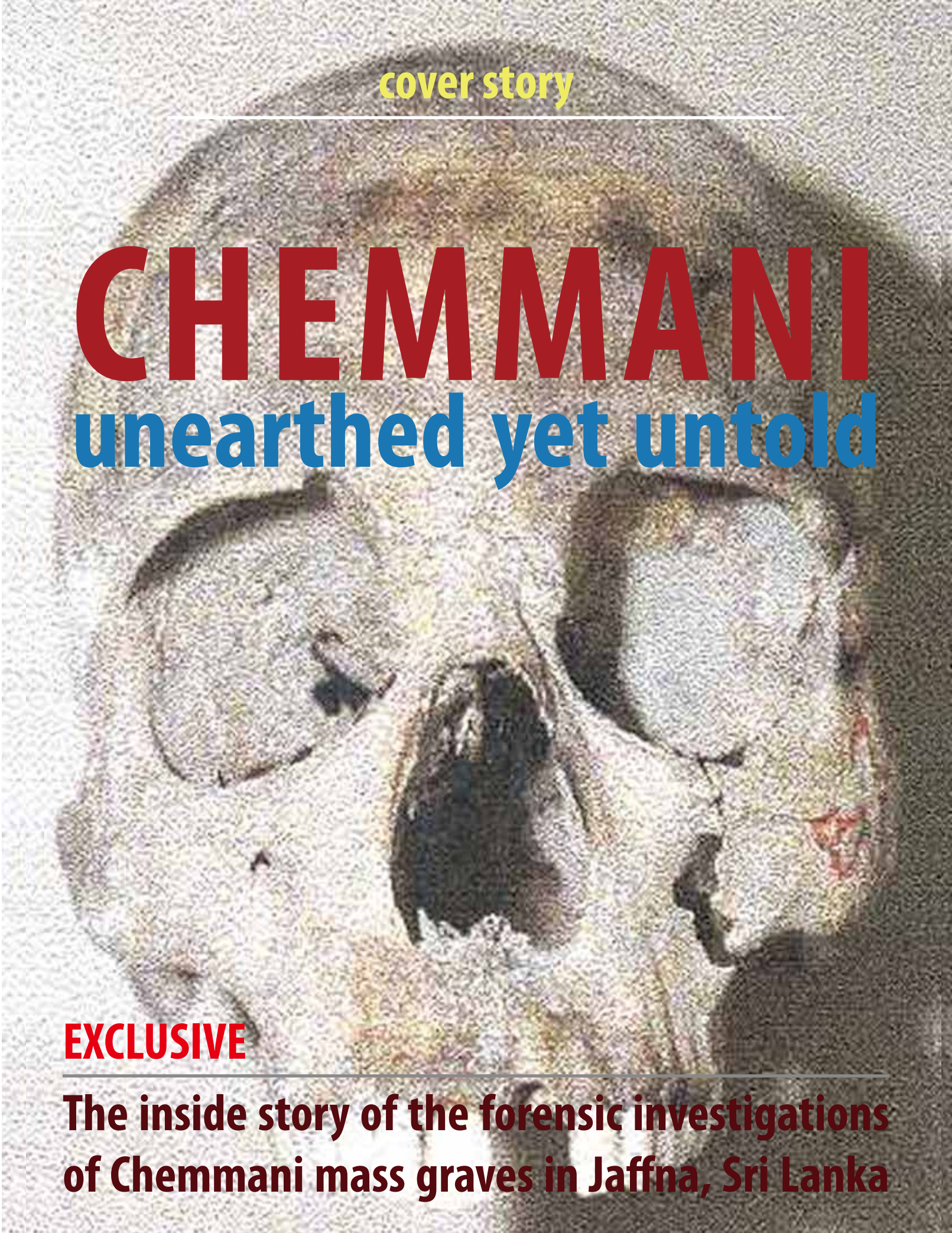
Just days after Obama took office in 2009, he did the right thing and immediately banned torture. But the 10th anniversary of the release of the Abu Ghraib photos, plus a still-secret report on the U.S. torture program under George W. Bush, serve as a reminder that Obama must do more before we can be confident that torture was an aberration that will never be repeated. He must take responsibility and lead the nation forward. The president — and not the CIA — must decide what is made public about the agency's torture program. And he should release the Senate's torture report in full.

The United States can once again become a full partner in the global movement for human rights, but only if it faces up to its dark side and atones for its torturous transgressions.

Juan E. Méndez *is the United Nations special rapporteur on torture and other cruel, inhuman and degrading treatment or punishment. This article originally was printed by the POLITICO, a bi monthly magazine and reprinted with the special permission from the author.*

cover story

CHEMMANI
unearthed yet untold



EXCLUSIVE

The inside story of the forensic investigations of Chemmani mass graves in Jaffna, Sri Lanka

MASS GRAVES IN SRI LANKA: SPECIAL REPORT BY THE UTHR (J)

Disappearances & Accountability

The Government has nothing to gain by trying to limit and minimise the damage from an investigation into mass-graves left behind by the State forces. It would be far better for everyone if the offer of help from the UN High Commission for Human Rights and other interested organisations with experience is accepted. ALL mass graves, both known and those whose existence will be revealed, must be investigated without leaving any room for criticism or bias. There are then bound to be some healthy and interesting developments.

TORTURE and extra-judicial killing became endemic among the Sri Lankan Armed Forces with their politicisation from 1979 to a degree unknown previously. This was when the Armed Forces were used as a substitute for a political process which the situation demanded. The 1979 operation in Jaffna to clean the North of terrorism was undertaken against the better judgement of the Army Commander and other senior officers. The 'Weli Oya' operation in 1984 to change the ethnic character of an area by third degree methods was a blatantly political operation. There were rewards for individual officers who pandered to the vanity of the rulers by undertaking to do the imprudent, the immoral and the unlawful. The Armed Forces suffered, created virulent rebels after their own image, and created in turn a rationale for their own prodigious expansion. In time expressions like 'crush the eggs' and 'grind to powder' became well understood jargon within the Army.

From about 1992 in the wake of international pressure and sections of the Armed Forces who felt the need, there were attempts to straighten out their image with regard to Human Rights. An important event was the dialogue between the Government and

Amnesty International in late 1991. Among the undertakings given by the Government was to issue receipts for arrest as a safeguard against disappearance. Although this undertaking was generally honoured in the East during 1993, the serious shortcomings were also evident. The failure to issue a receipt was not punishable. It was also about the same time, in 1992, that the Human Rights Task Force (HRTF) was established as a monitoring body. Its two reports prepared by Justice J.F.A.Soza covering the period August 1992 to August 1994 bear testimony to the competent and dedicated work that was done.

With the election of the PA Government in 1994 there was a new emphasis on Human Rights, and an optimism that we had turned the corner. The new government signed the Convention Against Torture and in 1996, the Optional Protocol to the International Covenant on Civil and Political Rights. But the optimism received a serious setback with the onset of disappearances in Jaffna during 1996, following a suicide bomb attack which killed Jaffna's Town Commandant. When paranoia took over, the individual civilian had no safeguards that worked.

The rape and murder of Miss.Krishanthy Kumarasamy and the murder of those who went in search of her, by its very horrifying nature, created a demand for its investigation and trial. On 3rd July 1998 death sentences were passed on six service personnel, who in turn made disclosures of mass graves in Jaffna. While the trial does credit to the Government by being the first of its kind leading to a conviction, many glaring aspects of the case did not receive attention.

While we were about the first to sound the public alert on disappearances in Jaffna, we had subsequently said little on the Krishanthy Kumarasamy case as the facts were brought out by various organisations and activist groups and were widely written about.

In this report however, we explore leads in the trial that were not followed up, the relation of the crime to disappearances in Jaffna, and how well our structures are geared to fight the abuse of human rights.

There were several fault-lines in Jaffna. Everything was controlled by the Defence Ministry, including the transport of journalists to Jaffna. There was too much complacency. The newly promoted generals in charge of 51 and 52 divisions controlling Jaffna had earned notoriety for the role they played from 1988-1990 which was the worst period of extra judicial killing.

The suicide bomb attack in Jaffna on 4th July 1996, though not in the least unexpected, resulted mainly from complacency. The system went into a panic and Jaffna was blacked out to journalists. The Defence Ministry ran the show. The safeguard of receipts for arrest remained a dead letter. The HRTF was virtually told to stay out of Jaffna until things improved.

The Krishanthy Kumarasamy murder took place in the context of indiscipline and lawlessness sanctioned during that period by the Army top brass. The complicity of the Defence establishment could hardly be gainsaid. By artificially isolating the convicted men from the system, the case against them has been made weak and unconvincing. It again strengthens the argument against capital punishment: Those who are sentenced to death are too often scapegoats from the humbler orders of society.

Take what we reliably understand was the context in which Krishanthy's murder took place on 7th September 1996. Pungankulam army camp was a main camp east of Jaffna City that controlled Chemmani point where the murder took place. Persons detained over a large area were first brought to Pungankulam camp, where a decision was taken what to do with them. Many were then sent to the Intelligence Camp in Ariyalai East, which is quite near Chemmani, the whole comprising a largely uninhabited area. Here the prisoners were tortured, and we are yet to hear of survivors. On regular occasions the men at Chemmani point would be alerted during the night. The naked corpses of detainees tortured and killed at the Intelligence Camp were then taken to Chemmani in a vehicle, for the men at that point to assist in the burial. This context behind the Krishanthy Kumarasamy murder trial was staring at us from behind a thin veil which no one dared to rend. The defence attorneys prevented the men on trial from testifying, forcing them to wait till the end.

It for example came out during the trial that a complaint had been lodged at Pungankulam camp the very next morning after Krishanthy's abduction. On 16th September, just after the matter was raised in Parliament, the Brigadier commanding Jaffna Town had asked the Police to investigate, surely, suggesting a cover-up. There was indeed more than this particular crime involved. To those who knew the operation at Pungankulam, everything was plain.

In November 1996 President Kumaratunge appointed a Board of Inquiry chaired by a senior Defence official with other senior armed forces officers to inquire into complaints about missing persons in Jaffna. About the only concrete matter for which they claimed credit was to ensure the issue of receipts for arrest in Jaffna - a standing obligation from 1991! As to what they really discovered, and what they told the President that her chiefs had hidden from her, was not revealed.

The revelations about the Chemmani graves were made in Court on 3rd July '98. The investigation into the mass graves was handed over to the Human Rights Commission (successor to the HRTF) by press notice from the Presidential Secretariat about two weeks afterwards. The HRC wrote to Mrs. Mary Robinson, UN High Commissioner for Human Rights, seeking the help of her office (OHCHR) in the investigations. A reply was received from the OHCHR with an offer to help, provided the Government would agree to the basic technical requirements for them to do the work. This was communicated to the President's office in September and reminders have been sent. We understand that there has been no response.

While the OHCHR has been kept in suspense along with the HRC, it looked as though from March the matter was being handled by the AG's department and the Police. There is ample reason to believe that both these institutions are politicised, and the most one could expect from them is a damage limitation exercise. One only needs to look at the catalogue of cases where the evidence was misled, bungled or simply not proceeded with. In his second HRTF report, Justice Soza drew attention to two important cases - the disappearances of 158 refugees from Eastern University and the massacre of 184 persons including 68 children at Sathurukondan - both inquired into by him and the findings recorded in his first report; where no action had been forthcoming from

the AG's department or the Police. That was now more than five years ago.

We need also to face the fact that we have no real deterrents against the worst human rights abuses. What we have, do not work when they are most needed. The HRTF could not establish an office in Jaffna in 1996. The ICRC could be ignored when needed. Despite all the Commissions no senior officer has been punished. The President asks the Human Rights Commission through the Press to investigate the Chemmani graves and then sends it into limbo by failing to reply to their letter for months.

As to what influence the appointment of the Board of Inquiry in November 1996 had on the Army in Jaffna, we have given a fairly routine torture case that took place in Manipay, another intelligence camp, in January 1997. The victim was among other things drilled through the toes, hooks were inserted by which he was hung, and beaten. A nail was inserted into his hand (removed 20 months later), and was beaten on a heel with a spiked board. Probably owing to the ICRC finding out, he was handed over to the Police, was taken to Anuradhapura court hardly able to walk, issued a detention order for 3 months, and was produced in court in Colombo, where he was granted bail. He was completely innocent.

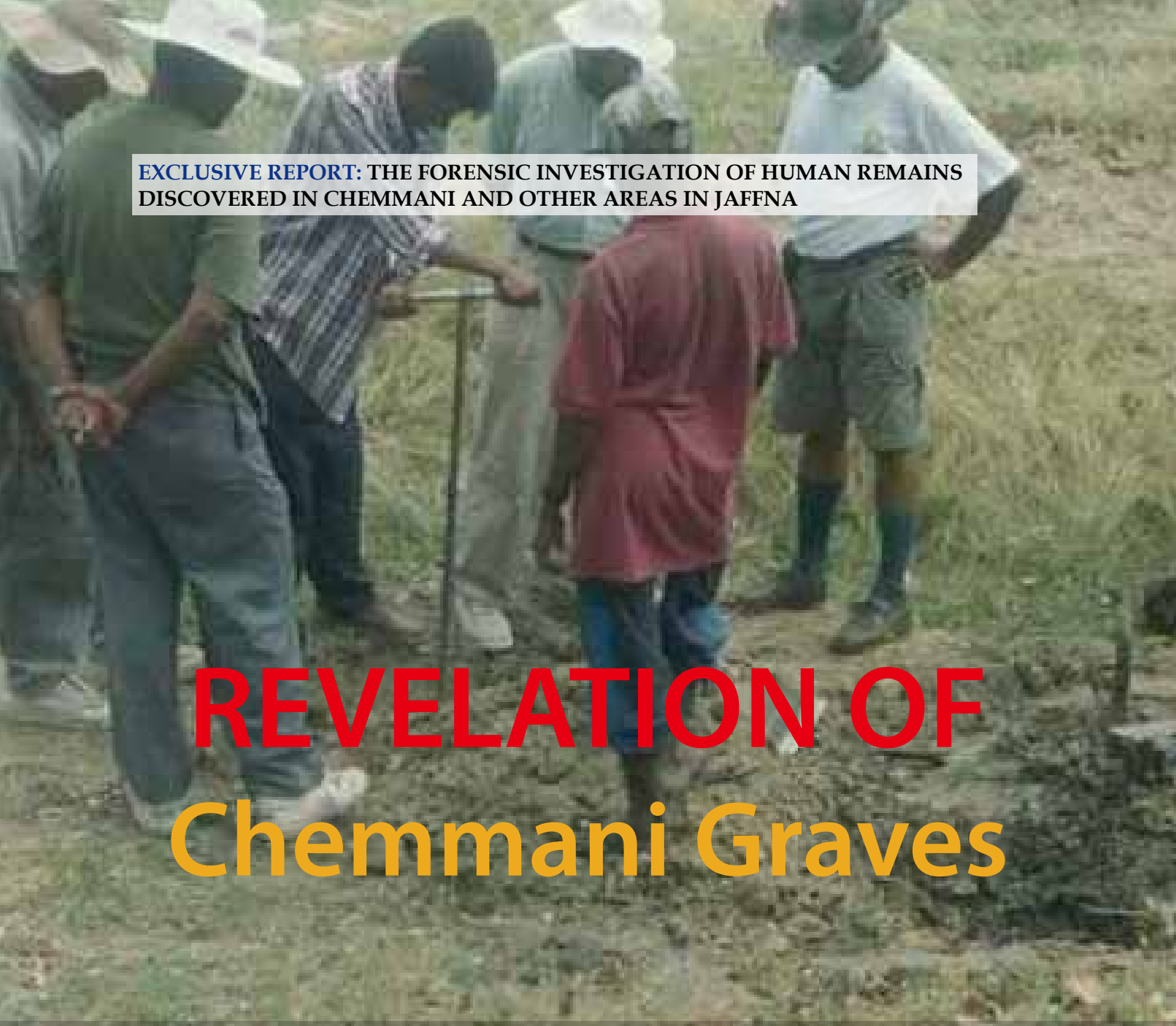
At no point was a move made by the Police, the Courts or the Prisons to ensure that he had appropriate medical care. All lent their complicity to covering up a victim of grievous torture. The system nullifies any benefit to the citizens from Sri Lanka becoming a signatory to the Convention Against Torture.

This will remain the case until, at least as a temporary measure, legislation is introduced to give a body such as the Human Rights Commission, the power to impose penalties and place it on an offender's record.

There is not much point in an investigation of the Chemmani graves where its credibility becomes a subject of contention. For the Tamils themselves there are other issues at stake. There are several mass graves in the North-East that are the result of internal repression. An investigation into these is morally and politically essential for the Tamils in order that they could find their feet. These are graves not left behind by a brutalised state-army, but are monuments revealing the nature of their so-called liberators. If the credibility of the investigation into mass graves left behind by the state-forces becomes suspect, the investigation into the other graves would also become impaired for all time.

The Government has nothing to gain by trying to limit and minimise the damage from an investigation into mass-graves left behind by the State forces. It would be far better for everyone if the offer of help from the UN High Commission for Human Rights and other interested organisations with experience is accepted. ALL mass graves, both known and those whose existence will be revealed, must be investigated without leaving any room for criticism or bias. There are then bound to be some healthy and interesting developments.

(Executive Summary of the Special Report No 12, issued by the University Teachers For Human Rights (Jaffna), Sri Lanka. Full text of the report can be access at our online version of the magazine at www.humanrights.asia/resources/journals-magazines/torturemag)



EXCLUSIVE REPORT: THE FORENSIC INVESTIGATION OF HUMAN REMAINS DISCOVERED IN CHEMMANI AND OTHER AREAS IN JAFFNA

REVELATION OF Chemmani Graves

REVELATIONS about Chemmani graves were made in High Court of Colombo on July 3rd 1998 by Somaratna Rajapakse, the first accused in the Krishanthy Kumaraswamy rape and murder trial. According to Rajapakse's revelations there were several mass graves containing about 300 bodies in Chemmani and in surrounding areas in Jaffna Peninsula. These were the bodies of Tamil civilians who were arrested on suspicion for terrorist involvement, tortured and killed by the security forces following Riviresa operation in April 1996. According to the information divulged by the convicted prisoner Rajapakse, along with a few other soldiers stationed at the Chemmani check point, they were alerted quite regularly in the camps such as Pungamkulam army camp, intelligence camp in Ariyalai East which was quite close to the Chemmani check point. Those arrested Tamil civilians have also been tortured at a building called Sivaneri

Institute, which is next to Kanagaratnam MMV (Stanley College). These corpses have been brought to the Chemmani check point in a tractor. The Tamil civilians were also said to have been tortured in the Charlie camp situated on the Colombuthurai road which runs parallel to and away from the Colombo Jaffna railway.

The Medico-legal investigations of alleged mass graves in Chemmani is an unique event, because it was the first occasion where such a complex investigation was undertaken in Jaffna peninsula of Sri Lanka where there was an ongoing civil war. This decision has been hailed as a courageous step by the United States government and has commended Sri Lankan government for investigating the human rights violations committed by its own security forces. The objectives of the Chemmani investigation were to identification of the graves, exhumation of the bodies, ascertainment of the cause and manner of death, establishment of identity of the dead and institution of criminal proceedings against those responsible.

When questioned by the officers of the Criminal Investigations Department (CID), the other convicted prisoners of the Krishanthi Kumaraswamy rape murder trial, DM Jayasinghe, ASP Perera, Pradeep Priyadarshana and DM Jayathilaka confirmed what Rajapakse said in High Court after his conviction and informed CID that they are willing to show the graves only to the Magistrate at the commencement of excavation.

Chemmani is a largely uninhabited flat paddy land lying along the Kandy-Jaffna A9 trunk road to the east of Ariyalai village. The Chemmani checkpoint is located away from Jaffna town board and about 50m towards Jaffna from a concrete arch across the Kandy-Jaffna A9 trunk road. The road to Nallur commences to the North-West of the checkpoint. About 200m from the checkpoint towards North-East from the Nallur road is a gravel road leading to a saltern. Along the Kandy- Jaffna road, towards Jaffna is a two storied building called Jaya building in which the prisoners were said to have been tortured. From the Kandy-Jaffna road the Navalar road starts at the Mampalam junction.

All the members of the investigating team were flown from Ratmalana airport in Russian made A 26/32 Antonoff aircrafts. The risk of a missile attack was ever present. There were some who backed out due to fear psychosis.

Role of Human Rights Commission (HRC) of Sri Lanka

Since the disclosure by the convicted prisoners, a press release from the Presidential Secretariat said that the investigations of the alleged mass graves were handed over to the Human Rights Commission (HRC) of Sri Lanka. The HRC sought the help of the United Nations Commission for Human Rights (UNCHR) for these investigations. However according to the section 373 (2) of the Criminal Procedure Code Act No. 15 of 1979 investigation of any criminal matter where the suspects are to be tried in a Criminal Court of Sri Lanka, the post mortem examination has to be performed by a medical officer registered in Sri Lanka Medical Council and there is no provision for foreign experts to give evidence for the prosecution in the examination –in-chief. However foreign experts may be summoned during the trial either by the prosecution or the defense. Having realized this the Attorney General took over the investigations and ordered CID to take detail statements from Somaratna Rajapakse and other convicted prisoners to inquire into the

possibility of indicting those responsible in a court of law in Sri Lanka for abduction, torture and murder.

Dr. William D Haglund, Director of the International Forensic Programme of the Physicians for Human Rights, Boston, USA visited Sri Lanka from Dec 3 to 6, 1998 under the patronage of the Asia Foundation and the Human Rights Commission of Sri Lanka. Dr. Haglund conducted a one-day Forensic seminar to the members of the Human Rights Commission of Sri Lanka, officers of the Attorney General Department of Sri Lanka, Police and the Forensic Specialists of Sri Lanka. The purpose of this seminar was to address potential future development of investigating human rights abuses in Jaffna and Northern peninsula of Sri Lanka.

Role of Attorney General

Photo: Late- Professor Niriella and Dr. Kevin Lee, a forensic pathologist from Australia during the exhumation process

It is necessary to appoint a senior administrative officer[2] to co-ordinate the services of several experts and state departments, such as the departments of the Police, Government Analyst, Archeology, Health, Surveyors, the Sri Lanka Army and the Universities in view of enormous complexity of the investigation and the necessity to obtain the support of these departments. The Attorney General (AG) appointed state counsel Mr. Yasantha Kodagoda (presently senior state counsel) to co-ordinate the activities. In view of the experience of Professor Niriellage Chandrasiri in mass grave examinations in Bosnia the AG recommended to the Courts that Dr. Niriellage Chandrasiri, Senior Professor of Forensic Medicine, University of Ruhuna to be in charge of excavation of mass graves, laboratory examination of skeletal remains and submission of the final report to the courts.

Role of Magistrate

According to Criminal Justice Law in Sri Lanka an exhumation can only be done on the orders of a Magistrate as laid down in the Section 373 (2) of the Code of Criminal Procedure Act No. 15 of 1979. Hon SAE Ehanathan, the Chief Magistrate of Jaffna refused to conduct the preliminary judicial proceedings of Chemmani investigations. The judicial Services Commission (JSC) thereafter appointed Hon M. Arulsagaran as additional magistrate, Jaffna for the same purpose in March 1999.Hon M. Arulsagaran disappeared after a preliminary hearing and participating in the reconnaissance trip to Chemmani area. The JSC then appointed Hon M. Elancheliyan, permanent Magistrate of Mannar as Additional Magistrate Jaffna. Thereafter Hon. M. Elancheliya was the presiding Jude throughout the investigation.

Hon M. Elancheliyan supervised the field excavation procedures on all days from the beginning to the end of the investigations. The summary of the work done and the findings were reported by State Counsel Mr. Yasantha Kodagoda and the Chief Forensic Pathologist to the Hon Magistrate at the conclusion of each day and they were recorded as court proceedings.

Role of the Criminal Investigations Department

The role of the CID was to obtain evidence in order institute criminal proceedings against any officers of the security forces who were responsible for abduction, torture and extra judicial executions of Tamil civilians in Jaffna. In order to achieve this, CID obtained detailed statements from five aforementioned convicted prisoners while they were in the maximum-security section of Welikada prison, to find out the gravesites and identify the alleged assailants. Somaratna Rajapaksa and all other convicted prisoners gave detail statements describing the incidents of torture and named the officers and other soldiers responsible. In addition they vividly described the methods of torture, where torture was done, how the bodies were brought to Chemmani and other areas at night, the names of higher army officers who gave orders to bury the dead and how and by whom they were buried either in bunkers made by the LTTE or in freshly dug shallow graves. All of them vehemently refused to mention the grave sites to CID for fear that the information would leak out and security forces in Jaffna would remove the bodies from graves. All of them said that they would only show the sites when excavations are commenced and only to Magistrate. The CID reported these facts to the permanent Magistrate of Jaffna Hon Ehanathan.

Multi-disciplinary approach

Forensic investigation of alleged mass graves should be conducted by experts in several disciplines[3] such as Forensic Pathology, Archaeology (preferably Forensic Archaeology) Forensic Anthropology, Soil Science, Botany, Surveying, Forensic Science, Photography and Videography. Forensic archaeological techniques provide the most effective and efficient methods by which data are collected from mass graves and as such have an important role to play in the forensic investigation involving decomposing or decomposed human remains. The anthropologist should become involved prior to excavation investigation. In order to actively and effectively participate in the multidisciplinary field of modern forensic investigation, forensic anthropology must encompass not only the laboratory analysis of completely or partially skeletonized human remains, but also requires the collection and analysis of contextual information routinely obtained through standard archaeological techniques.

There were several discussions among Chief Forensic Pathologist, State Counsel, Officers of CID, SSP Jaffna and Engineers of Army from Jaffna in order to work out the necessary plan to obtain heavy equipment such as bachoe machine, water bousars, cranes, mammoties, crowbars, tents etc. The security of the members of the investigating team and their stay in Jaffna was co-ordinated by Mr. Nimal Mediwaka, SSP Jaffna. Daily travelling from "Tal Sevana" where the investigators stayed, to the grave site was handled by officers of the Army. It took 45 minutes to travel in fast moving vehicles from Chemmani area to Kankasanthurai where the team resided.

Preparatory work

Careful detail planning is an essential pre-requisite for the successful performance of mass grave exhumations and examination of skeletal remains. In view of this there were number of discussions extending over several months, between the Chief Forensic Pathologist, officers of the Criminal Investigation Department (CID), Mr. Nimal Mediwaka, SSP Jaffna, Colonel Janaka Walgama of the Sri Lanka

Army, Archaeologists and officers in the Department of the Attorney general of Sri Lanka with the Chairmanship of Senior State Counsel, Mr. Yasantha Kodagoda, the co-ordinator of the investigations. The details regarding transport, security of personnel and informant prisoners, security of graves, logistic requirements for the field excavation, lodging for the team were discussed at these meetings. The success of the excavation was due to this detail planning.

As required for a field excavation of this nature three wooden crates measuring 2 ½ feet x 2 ½ feet x2 feet and weighing about 500kg were air lifted to Jaffna by air force planes. The crates contained al the light items such as stationary, body bags, trowels, pegs, polythene bags, dental picks, bamboo picks, graph paper for mapping, polythene rolls, flags, short handled sharpened shovels, pick axes, 18" square 1/8" mesh screen, 24" square 1/4" mesh screen, compasses, levels, 50 feet long measuring tapes, plumb bob , line levels, string, labels, directional arrow marked in inches or centimeters, and all other consumable items. All light equipment and consumables were purchased by the Chief Forensic Pathologist. Bags to collect human remains were specially made according to specific standards by the Chief Forensic Pathologist.

Necessity of foreign observers

Tamil politicians and various non-governmental organizations (NGOO) interested in Human Rights violations strongly urged that there should be foreign experts observing the entire Chemmani investigations. This was a reasonable request as forensic investigation of this nature has not been conducted by any Forensic Pathologist in Sri Lanka up to then. The Attorney General's Department agreed to this suggestion and recommended to Magistrate that any interested party could bring such forensic experts. Accordingly Dr. W.D. Haglund, Forensic Anthropologist and Director of International Forensic Medicine Programme of Physicians for Human Rights (PHR) in United States of America, Ms. Melissa M Conners, Forensic Archaeologist of PHR, Mr. R.D. Stair from the Coroner's Forensic Identification Unit of Ministry of Attorney General of British Colombia, Canada. Drs. Kevin P. Lee Forensic Pathologist from Australia and Ms. Tal Simmons, Forensic Anthropologist from USA participated as foreign observers. Their travel and stay in Sri Lanka was funded by facilitator Mr. Mark McKenna Reid, Director Asia Foundation, Colombo.

A memorandum of understanding (MOU) was signed on behalf of the foreign experts by Mr. Mark McKenna Reade and by Hon Attorney General of Sri Lanka on behalf of the government of Sri Lanka. According to MOU the foreign observers could suggest any methods or criticize any procedure adopted by the Chief Forensic Pathologist regarding the investigations at any stage. The scientific procedures could be altered during excavations with bilateral agreement, but the ultimate decision on the technical procedures was in the hands of the Chief Forensic Pathologist.

Task of foreign observers

Dr. W.D. Haglund (Forensic anthropologist), Ms. Mellissa M Conners (Forensic archaeologist) from Physicians for Human Rights of United States of America, Mr. R.D. Stair from the Coroner's Forensic Identification Unit of the Ministry of Attorney General of British Colombia, Canada and Dr. Kevin P Lee (Forensic Pathologist) from Australia participated as observers in this excavation procedure. Dr. Haglund and Mr. Stair did not stay throughout and Dr. Lee

joined the observers' team half way. However Ms. Mellissa M. Conners participated as an observer throughout the excavation from August 30 to September 22, 1999.

In accordance with the MOU after the commencement of the field work, discussions were held between foreign observers, Chief Forensic Pathologist, the state counsel Mr. Yasantha Kodagoda and Mr. Mark McKenna Reade of the Asia Foundation. An agreement was reached to discuss the procedures to be adopted at the beginning of each day regarding excavation of human remains. The foreign observers agreed to submit a written report of their observations regarding the daily excavation procedures to the Chief Forensic Pathologist and the State Counsel. The submission of feedback was started on Sepetember7, 1999 and continued until 21.09.99. The foreign observers were meticulously watching the day's proceedings of the excavation. The feedback on day's proceedings of 22.09.99 was not submitted by the foreign observers. The foreign observers submitted written comments on the day's excavation procedure to the Chief Forensic Pathologist from September 7th to 21st highlighting the positive and negative aspects of the excavation procedures. The comments of these reports were discussed with the state counsel and wherever possible appropriate corrective actions were taken. The foreign observers are expected to submit their final report regarding the investigation directly to the Attorney General of Sri Lanka.

Composition of the local scientific team Medical and other experts

The scientific team comprised of Professor Niriellage Chandrasiri (Chief Forensic Pathologist), Drs. P.R. Ruwanpura (Medico-legal Consultant) Teaching Hospital Karapitiya Galle, D.L. Waidyaratne (Medico-legal Consultant) General Hospital Anuradhapura, HTK Wijayaweera (Assistant Judicial Medical Officer), UCP Perera (Assistant Judicial Medical Officer), M. Vidanapathirana (Assistant Judicial Medical Officer) and DD Samaraweera (Grade Medical Officer) and Messrs Nimal Perera and LVA de Mel (Archaeological Officers) and Dr. K.A. Nandasena (Soil Scientist) from the Faculty of Agriculture, University of Peradeniya. Except doctors M. Vidanapathirana and DD Smarawera all others participated almost throughout in the field excavations. Doctors PR Ruwanpura, UCP Perera and HTK Wijayaweera were not available for a few days. Mr. Yasantha Kodagoda was responsible for proceedings in the Magistrate Court of Jaffna and the legal procedures during the field excavation; particularly in reporting the daily proceedings of the excavation and results to Hon Magistrate Elancheliyan.

Dr. K. Nandasena of Department of Agriculture of University of Peradeniya collected and analysed soil samples. Messers. Nimal Perera and Alfred de Mel, Archaeological officers helped in the identification of graves and exposure of bodies. They were assisted by seven skilled archaeological excavators. The photography and videography were done by technical officers of CID. Mr. MAJ Mendis, Senior Assistant Government Analyst took part in pilot phase of the investigation in collecting artefacts and clothes. The activities of Police Department was coordinated and supervised by Mr. Nandana Munasinghe, Senior Superintendent of Police of CID.

Non-medical personnel

There were 7 skilled archaeological field excavators who participated throughout in the excavation process in addition to the services of 10 unskilled labourers participated in the excavation from 15.09.99 to 22.09.99.

These labourers were obtained by the efforts of Dr. D.L. Waidyaratna and the courtesy of Provincial Director of Health Services, North Central Province. The scientific team worked continuously from August 30th to September 22, 1999 except on Sundays.

The Chief Forensic Pathologist was in charge of supervision of manual excavation, use of bachoe machine, identification of the grave patch pedastelling bodies photography, video recording, removal of skeletons and artefacts, inventorising and packing of body parts into specially made locally produced body bags, documentation of topography and vegetations grave sites, sketching of graves and the position of the bodies in the graves.

Logistic support

High standard of logistic support, such as provision of bachoe machine, crane and demining facilities were provided by Colonel Janaka Walgama of the Army engineers division based at Palali. Water supply and all other supportive services such as transportation and security for the team were provided by the Jaffna Police station. Jaffna Police also provided four unskilled labourers who worked tirelessly during excavation.

Reconnaissance visit

Reconnaissance or a preliminary visit to the suspected grave sites is essential prior to examination of alleged mass graves. The objectives of the reconnaissance visit are to obtain an idea regarding the possible sites of the graves, nature of the soil to be excavated, select the type of heavy machinery required to conduct the excavation, the sites where the temporary sheds to be constructed, and where temporary wells and toilets to be constructed for use of the persons working at site. The reconnaissance visit was done in March 5th 1999. Unfortunately by this time the forensic investigators were not aware of the exact site of burial but only had a rough idea where the graves could be. The Forensic Pathologist examined the ground behind the check point and did not notice any human remains or stripping or damage to bark of trees, any unusual mounds or depressions and fresh localized vegetations in the soil indicating previous burials. This was because the burial was 3 years before. As proposed site was a bare uninhabited land the investigators decided that all light and heavy equipment necessary for excavation and packing of human remains and artefacts had to be brought to the site in sufficient quantity. The sites to build the temporary tents were selected after prisoners showed the grave sites. There were no human remains recovered from the proposed site during the reconnaissance visit. Searching trenches 2" wide x 4" deep should have been dug in the proposed site during reconnaissance visit but it was not done as the grave sites were not known. If skeletal parts are seen when searching trenches are done, they should not be removed during this process, but kept is situ, photographed and video recorded, reported to the Magistrate, a flag buried at the site and the site should be handed over to the police for 24 hour guarding. The soil scientist obtained specimens of soil from several places, tested them for compaction, mixing and examined for foreign materials such as dead plants indicating fresh digging and reburial. The soil scientists report was in conclusive. However blind probing, sniffing the odour on the tip of the probe for smell of sulphur and observing for decomposed flesh was done using an auger (a 15 feet long one inch diameter metal probe) in the ground suspected to have graves. The results were negative.

Pilot phase

The forensic team decided to do a pilot excavation as the team needed a direct experience in excavating mass graves. The pilot excavation was done from June 15 to 18, 1999 and was observed by foreign experts Drs. Haglund, Kevin Lee and Melissa M Connors. The convicted prisoners Rajapakse was brought to Chemmani check point and was asked to show a grave site to the magistrate. He showed an area of ground with shrubs adjacent to a metal pillar buried in the soil at the junction where the road to the saltern commenced from the Nallur road. Prisoner Rajapakse also informed the Magistrate that the bodies of the two persons buried in this grave were that of one Mahendran Uthaskaran, age 23 years, and Rasaiah Sathiskumar, age 28 years and both of them had been working as mechanics at a workshop in Ariyalai. De miners of the army bomb disposal squad examined the surface of the land shown by Rajapakse's declared that there were no land mines. The tree in this area was removed and surface soil skimmed by labourers using mammoties. Blind probing was not done as Rajapakse's testimony was available which is a reliable method of locating the grave. After this, the soil in this area was removed in 6 inches thick layers. At a depth of around 4 feet from the ground level a rectangular patch measuring 9 feet x 3.5 feet was visible. The soil on this area was dryer and lighter in colour than surrounding soil. A trench I foot broad and 2 feet deep was made at one end of this patch and the soil was removed from this patch using trovels. Two skeltonised bodies covered in mud were recovered under this patch at a depth of 5 feet. The soil under the patch was muddy and it was not possible to pedestal these two bodies. The two bodies were fully clothes. They were photographed and video recorded in situ. Different depths of the anatomical positions of the bodies were recorded and the bones of the two bodies were removed and packed in two bags. Body no B1 and B2 were designated to these bodies. The clothes were removed, washed and packed separately in other bags. The clothes from the bodies disinterred were shown on 17th July 1999 to likely relations in order to make a provisional identification. A temporary tent was constructed in the premises of police station of Jaffna. One body was identified as of Rasaiah Sathis Kumar by his wife and second body was identified as of Mahendran Uthaskaran by his sister. Identification was made by inspecting banions, shirt and the trousers. The identification also confirmed by employer of the two dead persons, who also identify the clothes. The clothes were handed over to CID for safe custody and to be produced at trial if necessary. The two bodies B1 and B2 were put in two body bags, handed over to the CID and they were brought to the General Hospital (Teaching) Karapitiya for further examination. They were examined on June 22 to 25 in the laboratory of the Department of Forensic Medicine in the presence of Drs. Haglund, Lee and Ms. Conners. Initially the two bodies were x-rayed to find out whether there were pellets or bullets or metallic shadows like pins, plates, wires and dental fillings which may be useful in identification. There were no artificial shadows in x-ray films taken from bodies B1 and B2. The two bodies were cleaned with fine brushes using running water in the mortuary of General Hospital, Karapitiya. The wet bones were arranged on tables in the anatomical position with the hands supinated and allowed to dry on tissue paper.

Final excavation

The final excavation of all the graves was conducted from 1st to 22nd September 1999. Representations were made to the Magistrate Hon Elancheliyan by the Attorneys on behalf

of the missing persons, to be present when the prisoners show the grave sites. This request was allowed. All the prisoners were brought to Chemmani on August 30th and were asked to show grave sites in the presence of Magistrate Hon Elancheliyan, Forensic Pathologist and other officers of CID. In order to prevent a prisoner showing the same grave site shown by the previous prisoners, they were brought one by one and were asked to show the grave sites. There were 27 graves shown by the prisoners in the 8 grave sites, shown by them. **The letters of A to H of the alphabet were given to those grave sites**.

One of the grave suspicions that were raised by the nongovernmental organizations interested in human rights and the Tamil community in Jaffna was whether the bodies were removed from the graves after the revelations of Chemmani graves by Somaratna Rajapakse. The team used the stratification principle of soil3 in archaeological excavation to see whether the bodies have been removed. Stratification of soil is the sequential laying of soil deposits. Stratification obeys the law of superimposition, original horizontality and intersecting relationship. None of the vertical walls of the graves showed discontinuity in stratification indicating that the graves have been disturbed.

Identification of graves

Identification of the graves were done between August 30th and September 1st 1999 in the presence of Hon Magistrate M Ellancheliyan, foreign observers, local forensic experts, attorneys looking after the interests of the missing persons and the local press. Somaratna Rajapakse showed 14 graves, DM Jayasinghe showed 4 graves, AS Priyashantha Perera showed 5 graves, Pradeep Priyadharshana showed 2 graves and DM Jayathilake showed 2 graves. A total of 27 graves were shown by all five prisoners. The spread of the graves were: an area behind a small Kovil opposite Chemmani check point, area immediately behind the Chemmani check point, the saltern in Chemmani area, area around Kottukinaru pulleyar Kovil in Ariyale, unused well in the land next to premises number 815, Jaffna-Kandy A9 trunk road, behind Jaya building, behind the Sivaneri institute situated at 839, Navalar Road, Jaffna and behind Charlie camp at Colomputhurai.

While showing the graves the prisoners also informed the Magistrate, the number of bodies in each grave, identification, sex and place of residence of the deceased, how the bodies were brought to the grave site and by whom the bodies were buried.

The prisoners were asked to show the grave sites individually and the sites were video graphed and photographed by keeping four persons at the four corners of each grave site shown by each prisoner. This was to ensure that each prisoner was prevented noticing the grave shown by another prisoner. After that the Govt. Surveyors Mr. Balasundaram and Mr. Sivapalasekeran placed pegs at the four corner of each grave site and identified their positions from immovable object such as borders of the roads, buildings and trees etc. Each grave was surveyed and marked in separate maps according to the grave sites as indicated by letters A, B, C, D, F, G and H. The positions of the graves were then marked in a large map prepared by the division of the Survey Department, Jaffna. The map provided by the surveyor was used throughout the excavations to identify graves. The pegs were kept in position until the excavation commenced.

Excavation procedure

The procedure adopted in the excavation consisted of several stages. Each stage was photographed and video recorded by photographic technicians of the CID. The stages consisted of, de-mining by the army bomb disposal squad, demarcating the grave areas with wooden pegs and coir ropes, searching the surface of the site for clothes, foot wear, cartridge cases, bullets, human bones, and unusual artifacts, removing the trees and all plants, skimming the surface soil with a bachoe or manually, removing the soil in 6 inches thick layers until a patch of soil is obtained. The soil is gradually removed from the patch using small trowels until human remains are discovered.

The initial skimming of surface soil using a bachoe machine was done to a depth of three feet in the area behind the Chemmani check point (site A) and in saltern (site C) which had hard surface soil. A medical officers was kept to watch the contents of the bucket while bachoeing. This medical officer was instructed to notice whether any human remains were lifted with the soil and bachoeing was terminated immediately if such an instance occurred. In fact such a incident occurred when the bachoe was used in site behind Chemmani check point. Later skimming of surface soil was done using labourer until a patch of the grave was identified.

Blind probing 4 of the grave sites shown by the prisoners were conducted using an auger after skimming of the site using the bachoe. Decomposing flesh was only discovered in a grave site (A) opposite the small Kovil and in the grave site (D) around the Kottukinaru Pulleyar Kovil. The excavation of the grave sites was conducted by skilled archaeological technicians under the supervision of the Chief Forensic Pathologist.

An extra grave was, detected by the forensic team while "skimming" (removing thin layers of soil) of the surface soil in site A. The area of each grave excavated was at least 25% more than the area pegged out. In the site opposite the Chemmani check point, the area excavated was about 20 times the area of graves shown by the prisoners. Two to three inch thick layers of surface soil were removed at a time from the supposed grave with mammoties by several labourers. This process was continued in the entire area of the grave until a patch of filled earth was observed. The patch of filled earth was identified with the help of archaeologists and soil scientist by the difference of colour and consistency and by comparing with adjacent soil. Manual scraping using small trowels was continued until the patch was well defined. The archaeologists then took over the excavation and started pedestalling the patch. A trench 2 feet broad and 2 feet deep was cut around the patch wherever possible. The skilled archaeological excavators continued pedestalling until human remains were observed. Complete pedestalling was carried out by these skilled archaeological workers until 50% of the human remains were exposed above the earth.

The excavation was done by trained archaeological assistants. Once human remains were discovered soil adjacent to the body was removed using small brushes, chopsticks and fingers exposing 50% of the body. This process is called pedestalling and indicates how the body was placed in the grave. Once a body was satisfactorily pedestalling and exposed the chief Forensic Pathologist obtained depths of the various anatomical landmarks using a plumb and recorded in the note book. Once the position of a body was recorded in the note book by the chief Pathologist, depths obtained, the position of a body recorded and video-graphed, the chief Forensic Pathologist

carefully removed the bones, recorded the bones removed and put them in to the body gabs which were labeled accurately with indelible ink. The video cassette is in the custody of the CID.

Surveying and mapping of the graves

The Govt Surveyors Mr. S. Balasundaram and S. Siyapalasekaran identified the four corners of the grave with short wooden pegs. The number of the grave was written with indelible ink on these wooden pegs. The boundaries of the grave were demarcated by connecting the four pegs with coir ropes. Letters of the alphabet A to H were given to grave sites. There were several graves in each grave site except in grave site E which was a discarded well. Suspected grave site E was a well.

Photographing, video recording and recording of skeletal remains

Once a body was completely pedestalled its position was sketched by the Chief Forensic Pathologist in a record book. The archaeological assistants recorded the position of the body in the grave on graph paper using archaeological techniques. The position of the skeletal remains was video recorded and still photographs were obtained placing a label designated as J.C/ SITE -- ---- / Body No. -------- indicating the date and an arrow indicating the North-South direction. The grave sites were designated using capital letters A to H and bodies were given numerical numbers from 3 to 15, numbers 1 and 2 being given to the two bodies recovered in the pilot phase in the grave located at the junction between the road to Nallur Kovil and the side road to the saltern.

Obtaining depths of anatomical positions

The medical officers then obtained the depths of the different anatomical positions of the skeleton from the ground level using a plumb bob and a measuring tape. The levels were recorded in the register by the Chief Forensic Pathologist.

Mapping and removal of skeletal remains

Once the measurements were completed archaeological workers mapped the body on a graph paper. Mapping was done only in some of the bodies due to lack of time. Also annexed are the maps of the skeleton prepared by the Assistant Archaeologist showing the positions inside the graves of bodies B5 from grave site A, B6 & B7 from grave site B, B8 from grave site B and B9 from grave site B, B11 from grave site b, B12 from grave site D, B14 from grave site D and B15 grave site D at the graves. Mapping was not done in skeletons of B3, B4, B10 and B13 due to lack of time.

After completion of mapping under the guidance and supervision of the Chief Forensic Pathologist the medical officers then removed the skeletal remains in a sequential manner and inventorized them in a register. The skull with mandible containing teeth was taken together en-masse, wrapped in paper, labeled, secured and put into a body bag which was labeled with site, grave number, body number and date of removal.

Similarly the bones of right and left hands and feet were removed en-masse, carefully cleaned and put into separate polythene bags which were similarly labeled and finally put into body bags containing the rest of the bones of the same skeleton. The body bags were secured and handed over to the police officer of CID for safe custody. The body bags were in custody of Jaffna Police station

until they were brought to the mortuary of the General Hospital, Karapitiya and handed over to the Chief Forensic Pathologist.

Confirmation of natural bed of soil

Once the bodies were removed the soil beneath the body was screened for artefacts and other small bones. Dry screening was used with sandy soil and wet screening was used with wet soil. Several hundred weights of soil were screened in this manner. Few bones obtained by screening the soil were put into respective body bags.

The opinion of the soil scientist was obtained to decide whether the bed of natural soil has been reached. The soil scientist performed his task by digging test pits, scooping the soil bed and comparing it with adjacent natural soil. Even though the Chief Forensic Pathologist declared that natural bed of soil had been visualized and there was no justifiable scientific reason for excavation Hon Magistrate insisted that the bed of the grave should be excavated using the small bucket of the bachoe in order to satisfy public interest. Foreign observers also backed the Magistrate in this regard. Therefore the Chief Forensic Pathologist with reluctance agreed for said procedure in all graves except in grave E (unused well) and H (behind Charli camp) once the soil scientists and the Chief Forensic Pathologist declared that the natural bed had been reached and there is no reasons for continuing excavation any further. It is noteworthy to mention that any bones or artefacts were not found when bachoeing was done after reaching the bed of natural soil.

Screening soil from graves

The soil immediately above the body and beneath the body was screened carefully. Dry screening and wet screening were carried out accordingly. Several hundreds of kilograms of soil were screened using two metal screens using unskilled labourers under the supervision of a medical officer and few bones of the hand and feet were recovered. These bones were put into an extra body bag which was labeled as miscellaneous. The artefacts obtained were put into polythene bags and handed over to the officers of CID who were present at field procedures.

Excavation of well (Site E)

On the advice of local forensic experts a controlled explosion using 50 grams of C4 plastic explosive was conducted in the well in site E. This is to ensure that the well was not mined. There were no secondary explosions indicating that there were no unexploded mines/ grenades at the bottom of the said well. The water, soil and rubble were removed from the well using an empty oil barrel and a crane. Excavation was conducted using unskilled labourers under the supervision of a medical officer. The sludge and soil removed from the well were screened by a medical officer using a water obtained from a bowser. There were no human remains/ bones discovered in the soil.

Recalling of prisoner RD Somaratna Rajapakse

As there were far less bodies disinterred when compared to the information given by prisoner Rajapakse (P1), he was brought again to Chemmani and grave sites A,B, and C were shown to him on September 21, 1999. The Magistrate inquired from prisoner Rajapakse whether excavation has been done on the areas which were originally shown by him. Prisoner Rajapakse responded to this query in the affirmative.

Summary of findings

All five prisoners showed a total of 27 graves including the one shown in the pilot phase. The two new grave sites were shown by informants but there were no bodies in them and one grave was discovered by the forensic experts during excavation. A total of 13 bodies (B3- B15) were recovered from September 6 -22, 1999 and two bodies (B1 & B2) were discovered in the pilot phase.

The bodies designated as B1 and B2 discovered in the pilot phase were fully clothed and the balance 13 bodies had no clothes except for underwear in some of them. Some of the bodies were totally nude. Some bodies had injuries caused just before death (peri mortem injuries) produced by blunt trauma which could account for death. Body B6 had a "poona noola" and underwear with elastic bands. Body B7 had a blue coloured skirt, intra uterine contraceptive coil, gold nose stud, a toe ring and a black thick cord around left wrist, body B13 had a rope around left humerus. Body B15 had a Kharky shirt, remnants of a nylon underwear and a ligature around the right forearm. The artefacts and personal items were handed over to officers of the CID for safe custody. The artefacts such as personal items will be used for provisional identification in the future in Jaffna. It is envisaged that the artefacts/ personal items will be shown in the near future to the relations and friends of the missing persons in Jaffna so that the numbers of people identifying will be reduced so that profiles of mitochondrial DNA analysis could be done in a limited number of relations.

The positions of the skeletons in the graves showed the original position of the bodies when they were laid inside the graves. These positions conclusively exclude the possibility of legal and/or ritual burial/s. This is important because there is a cemetery fairly close to the Chemmani check point.

Objectives of the laboratory examination

The objectives of the laboratory examination were to,

- make provisional identification of the deceased
- establish the age of the deceased
- establish the sex of the deceased
- establish the stature of the deceased
- ascertain cause of death
- ascertain whether such cause of death is homicide or not.

The foreign observers, Forensic Anthropologist Drs. Tal Simmons and Forensic Pathologist Kevin Lee jointly examined the 15 skeletons and discussed the findings with the Chief Forensic Pathologist. They will submit their report to the Attorney General of Sri Lanka.

The steps in the laboratory examination consisted of cleaning the bones free of dirt, drying, laying them in the anatomical distribution, inventorising the bones, recording injuries such a fractures and cuts etc., caused just before death (peri mortem), recording pathological conditions congenital deformities etc., as stated above present during life, recording injuries caused during excavation and changes produced by burial.

Laboratory Examination

The laboratory examination of skeletons was conducted individually by Professor Niriellage Chandrasiri with the assistance of other medical officers Drs. PR Ruwanpura, DL Waidyaratna, HTK Wijayaweera, UCP Perera, M Vidanapathirana and DD Samaraweera from October 18th to October 22nd, 1999 in the Department of Forensic Medicine, University of Ruhuna. The foreign

observers Dr. Tal Simmons and Dr. Kevin Lee made their own observations and will be submitting their reports on the laboratory examinations of the skeletal remains to the Attorney General of Sri Lanka.

Cleaning and examination of skeletal remains

The skeletons were cleaned by removing mud with small and large brushes using running water. The bones were inventorised, ante mortem injuries and status of the bones and post mortem trauma and peri-mortem trauma identified and recorded by the chief forensic pathologist on protocol forms. The age, sex and stature was determined by performing examination of skeletal remains in the presence of Drs. Tal Simmons and Kevin Lee who participated as foreign observers from October 18 to 22, 1999 in the mortuary of General Hospital (Teaching) Karapitiya and laboratory of the Department of Forensic Medicine, Ruhuna, Galle.

Bones of each skeleton were cleaned in running water using larger and fine brushes in the mortuary of General Hospital, (Teaching) Karapitiya, Galle. No detergents were used in the process. The bones of the 15 skeletons were then arranged on tables in the anatomical distribution in the prone position with the hands supinated (Thumbs placed outwards). The bones were allowed to dry in the said position. All the bones were marked with indelible ink with the respective body number (B----). Once the bones were dry an inventory of bones were recorded on previously prepared protocol forms.

Recording of skeletal data

The sex, age of the bones present, whether bones are complete, fragmentary or absent, the stature of the body, pathological conditions such as osteophytes, myositis ossificans, infectious process, osteoma, other neoplasm, spondylolysis, spina bifida occulta, scoliosis, kyphosis, cleft palate, other congenital abnormalities and healed fracture, healing fracture, displaced healed fracture, healed fracture with shortening, healed depressed fracture, compression fracture, pseudarthrosis, dislocation, slipped epiphysis, osteoarthritis and the bones present, evidence of peri-mortem trauma such as sharp force trauma, blunt force trauma, gunshot wound, projectile fragment wound, whole bullet embedded, projectile fragment embedded, bullet jacket embedded, evidence of post mortem changes such as staining, erosion, bleaching, excavation damage, root etching and post mortem fracture, dental evidence such as caries, restoration, crown work, ante mortem extractions, post mortem falling of teeth, unerupted teeth, rotations, extra cusps, discolouring of teeth, pegging of teeth, rotation of teeth presence of supernumerary teeth were all recorded in a prepared protocol type of autopsy report 4 .

Analysis

Establishment of provisional identification

Provisional identification was made by identifying healed fractures, displaced fractures, shortening of long bones, healed depressed fractures, compression fractures, dislocation of joints etc., osteoarthritis, osteophytes, infectious processes, osteomas, spina bifida occulta, scoliosis, kyphosis, cleft palates and other congenital abnormalities etc. and dental data such as caries, overcrowding, fractures, presence of dentures, restoration with amalgam, gold, silver, porcelain, wire, plastic, etc., rotation of teeth, presence of supernumerary teeth, enamel hypoplasia, extra cusps, peg teeth and mulberry teeth etc.

Establishment of age

The ages of the bodies were determined by matching the casts [5,6,7 & 8] of the nine phases (0-8) casts developed by Ischan with those of the sternal end of the fourth rib of the bodies and by matching the 12 casts of public symphysis developed by Suchey and Brooks with the public symphyses of the bodies, identifying the changes of the auricular surface of the pelvic bone and by observing the features of suture fusion in skull and fusion of epiphysis of vertebrae, sacrum, ischium, pubis, ilium, long bones and metatarsal.

Establishment of sex

The sex was determined by examining the sexual characteristics [7 & 9] such as the nature of the sub public angle, presence of the ventral arc and nature of the greater sciatic notch of the innominate bones, nature of the supra orbital region, supra orbital margin, mastoid process and the nuchal region of the cranium and nature of the mental eminence and the gonial angle of the mandible.

Establishment of stature

The stature was determined by measuring the length of femur in the osteometric board and by applying the formula established by Kodagoda [10].

Ascertainment of cause of death

The cause of death was ascertained by identifying pathological conditions and trauma occurring during life (ante mortem trauma), peri-mortem (occurring at the time around death) such as cut injuries and linear, depressed and comminuted fractures and beveled officers and fractures caused by bullets and pellets and post-mortem trauma caused after death by animals, weather, soil conditions, excavations etc. in the bones of skeletons. These were recorded in line diagrams of the protocol forms. All the data mentioned above were recorded in preset protocol from of 16 pages.

Photography and video recording

Overall view of the 15 disarticulated skeletons and relevant per-mortem injuries were photographed and video graphed by the technicians of the CID.

Opinion and Conclusions

Relevant data are given in annexed tables 9 and 10.

Summary and conclusions

There were 15 bodies disinterred including the two bodies exhumed in the pilot phase on June 16, 17 and 18, 1999. One was a female and the rest were males. Body numbers 3 to 15 are to be identified later, by comparing the available clothes and other artefacts in the skeletons after studying ante-mortem data base obtained by the statements taken by the CID from the complainants and by showing these clothes and available artefacts to the relevant complainants at a future date in Jaffna. Two bodies were identified provisionally in the pilot phase conducted on June 15th & 16th, with clothes as body number one (B1) to be that of Rasaiah Sathis Kumar and body number two (B2) to be that of Mahendran Uthaskaran. The graves have not been disturbed since burial.

Rasaiah Sathis Kumar (B1) was a male, age between 25-30 years with a height of 5 feet 8 inches. Rasaiah Sathiskumar had died of severe brain injury resulting from skull fracture resulting from assaulting the head with a club like weapon. This is a case of homicide.

Mahendran Uthaskaran (B2) was a male aged 20-25 years with a height of 5 feet 3 inches. Mahendran Uthaskaran had died from injury to brain and lungs resulting from fractures of skull and ribs resulting from assaulting with clubs on the face and chest. This is a case of homicide.

Body number three (B3) is a male, aged 25-40 years with a height of 5 feet 6 inches. The cause of death of B3 was unascertainable. Body number four (B4) is a male, aged 18-23 years with a height of 5 feet 7 inches. This person has died of a cut injury of neck resulting from cutting the neck with a sharp knife. This is a case of homicide.

Body number five (B5) was a male, aged 20-23 years with a height of 5 feet 7 inches. This person has died from injury to chest organs resulting from fractures of ribs and thoracic vertebrae resulting from assaulting on the trunk with clubs. This is a case of homicide.

Body number six (B6) was a male aged 20-23 years with height of 5 feet 5 inches. The cause of death in this body was unascertainable but possible assault with clubs on the chest cannot be excluded. This is also a case of possible homicide.

Body number seven (B7) was a female of 20-25 years with height of 5 feet 5 inches. This person has died from brain injury and chest injury resulting from assaulting with clubs on the head and chest. This is a case of homicide.

Body number eight (B8) was a male aged 25-35 years with a height of 5 feet 5 inches. This person has died from injury to lung and rib fractures resulting from assaulting with clubs on chest. This is a case of homicide.

Body number nine (B9) was a male of 14-17 years. The height and cause of death of the person could not be determined.

Body number ten (B10) was a male aged 20-30 years with a height of 5 feet 8 inches. This person has died from injuries to lungs and fractures of ribs, breast bone, shoulder blades resulting from assaulting with cubs on the chest and trunk. This is a case of homicide.

Body number eleven (B11) was a male of 20-25 years with a height of 5 feet 6 inches. This person has died from injury to lungs and fractures of ribs resulting from assaulting with clubs on the chest. This is a case of homicide.

Body number twelve (B12) was a male of 20-28 years of age with a height of 5 feet 7 inches. This person has died from injury to lungs and fracture of ribs resulting from assaulting with clubs on the chest. This is a case of homicide.

Body number thirteen (B13) was a male aged 20-25 years with a height of 5 feet 4 inches. This person has died from injury to lungs with fracture of ribs and breast bone resulting from assaulting with clubs on chest. This is a case of homicide

Body number fourteen (B14) was male aged 25-35 years with a height of 5 feet 9 inches. This person has died from injury to brain and lungs with fractures of skull, breast bone, ribs and shoulder blades resulting from assaulting with clubs on head and chest. This is a case of homicide.

Body number 15 (B15) was a male aged 13-17 years. The height of this person could not be determined. This person has died from injury to lungs with fractures of ribs resulting from assaulting with clubs on chest. This is a case of homicide.

Only body numbers 4 had cut injuries. The rest of the bodies had injuries due to assault with clubs except B3 and B9. None of the

bodies had fire-arm injuries. B1 and B2 had clothes and other skeletons were nude or seminude.

There was agreement regarding the findings of the Chief Forensic Pathologist and the international observers except in body 9 (B9) where the foreign experts are of the view that there is evidence of tuberculosis of spine. The local Chief Forensic Pathologist agreed that the deceased to which the skeleton B9 belongs had tuberculosis.

Determination of individual specific identify

Specific identification of bodies from mass graves could only be done by comparing nuclear or mitochondrial DNA profiles from relations, since the bodies have been buried about three years prior to exhumation. The most successful results would be by studying mitochondrial DNA profiles. Identification of clothes and artefacts may rarely be helpful in specific identity. Clothes were available only in the two bodies (B1 and B2) recovered in the pilot phase. The perpetrators have deliberately removed the clothes from the rest of the bodies except in B15, where there was a kharky shirt.

The mitochondrial DNA profiles of the relations should be matched with the mitochondrial DNA profiles obtained from the bone and teeth of the skeletons after provisional identification.

Identification of male victims by mitochondrial DNA profiles

Venous blood and buccal scrapings will be obtained at later date in Jaffna from the maternal relations such as victims brothers, victim's sister and her children, victim's mother and her sisters and brothers and if living, victims' grand mother and her brothers and sisters in male victims for mitochondrial DNA profiling.

The DNA profiles of all the medical officers and the foreign observers who took part in the excavation and laboratory examination should also be done if the identification is to be established accurately according to international standards.

Identification of female victims by mitochondrial DNA profiles

Venous blood and buccal scrapings will be obtained at a later date in Jaffna from the maternal relations such as victim's children, victim's mother and her brothers and sisters, victim's grandmother.

The DNA profiles of all the medical officers and the foreign observers who took part in the excavation and laboratory examination should also be done if the identification is to be established accurately according to international standards.

I recommend that the DNA profiling should be done in my presence in the Department of Forensic Medicine and Science in the University of Glasgow, Scotland, United Kingdom under the supervision of Dr. Will Goodwin. The skeletons should be handed over to the relatives once the specific identity is established.

Acknowledgement

I wish to thank Lt General Lohan Gunawardena, Security Forces Commander of Jaffna, Col Janaka Walgama, Major Sarath Dissanayake, Capt Kamal Herath, Capt Dhammika Thilakaratne, Superintendent of Police Mr. Nandana Munasinghe, Inspectors Mr. Linton Ratnayake and Mr. RM Rifard, Sub Inspectors Mr. Chanaka de Silva and Mr. MLP Premasiri of CID, Senior Superintendent

of Police Jaffna Mr. Nimal Mediwaka, Sub Inspector Mr. LB Molagoda of Kankasanturai Police Station for their logistic support, videographers, photographers and all the medical officers, archaeological officers who participated in Chemmani investigations, Senior State Counsel Mr. Yasantha Kodagoda who rendered valuable guidance during the excavations.

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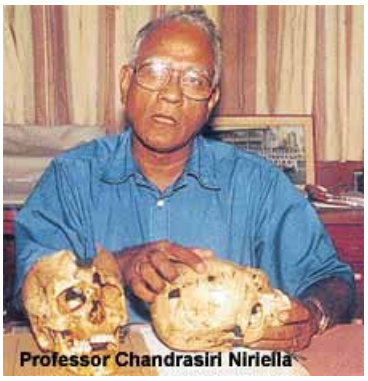

Professor Chandrasiri Niriella

(This exclusive report was prepared by Professor Niriellage Chandrasiri, the late Senior Professor of Forensic Medicine University of Ruhuna Sri Lanka and a Senior Medico-Legal Consultant. He was the first forensic pathologist from Sri Lanka who had the privilege to be involved with international forensic investigations of mass graves in former Yugoslavia in 1996. He passed away in 2006 without being able to witness the positive identification of Chemmani deceased. He finally oversaw the bony samples of Chemmani skeletal remains being sent first to India and then to United Kingdom for DNA Identification. However the local case drops halfway during the last decade and its fate is unknown since then.)

COVER STORY: MASS GRAVES IN SRI LANKA

Facts & Figures: Chemmani Mass Graves

Table I – Number of graves shown by informant prisoners

Total number of graves – 26

Name of prisoner (P)	Number of graves shown	Numbers of graves identified (Please refer to annexure I)
R.D. Somaratna Rajapakse (P1)	13	G2, G3, G4, G5, G6, G20, G21, G21A, G22, G22A, G23, G24 & G25
D.M. Jayasinghe (P2)	04	G7, G8, G9, G10
A.S. Priyashantha Perera (P3)	05	G11, G12, G13, G14, G15
Pradeep Priyadharsana (P4)	02	G16 & G17
D.M. Jayatileke (P5)	02	G18 & G19

Table II – Location of grave sites as shown by prisoners

Designated letter given to grave site	Location of area of grave
A	Area behind the small kovil opposite Chemmani check point. This is a large of bare land on left side of Kandy-Jaffna, A9 trunk road when approaching Jaffna
B	Area immediately behind Chemmani check point
C	The saltern in Chemmani Area
D	The area around Kottukinaru Pulleyar kovil in Ariyale-Jaffna
E	The unused well next to the dispensary at 815 Jaffna-Kandy A9 trunk road
F	Behind Jeya Building
G	Behind Sivaneri Institute No. 839, Navalar Road, Jaffna
H	Behind Charli Camp, Colombuthuari

Table III – Graves shown by informants other than prisoners

Grave site (see Table II)	Designated grave No.	Place of grave	Number of bodies received
B	N3	A disused and dilapidated cement well behind Chemmani check point	Nil
C	N2	In the bare area of open land in front of saltern	Nil

Table IV – Artefacts

Grave No.	Description of artefact	Related Body number
G2	Nil	B8, B9, B11
G3	Nil	-
G4	Nil	B5
G6	Nil	-
G7	Nil	-
G8	Nil	-
G9	Nil	-
G10	Nil	-
G11	A thread ("poona nula") and elastic bands of underwear	B6
	Blue coloured skirt, IUCD, gold nose stud, toe ring, black thick cord	B7
G12	Nil	-
G13	Nil	B12
G14	Kharky shirt and remnants	B15
G15	Nil	-
G16	Nil	B5
G17	Nil	B10
G18	Nil	-
G19	Nil	B13, B14
G20	Nil	-
G21	Nil	-
G21A	Nil	-
G22	Nil	-
G22A	Nil	-
G23	Nil	-
G24	Nil	-
G25	Nil	-
N1	Nil	B3, B4

Table V – Comparison of information given by prisoners and the actual number of bodies recovered (please also refer to Table VII)

Name of Prisoner (See table I)	Number of bodies said to be present	Number of bodies recovered after excavation	% accuracy
P1 R.D. Somaratna Rajapakse	59-67	4	5.9%-6.7%
P2 D.M. Jayasinghe	11	0	Zero
P3 A.S. Priyashantha Perera	16-17	4	23% - 25%
P4 Pradeep Priyadarshana	3	2	66.6%
P5 D.M. Jayathilake	7	2	28.5%

Table VI – Tabulated detail information obtained from the five prisoners from August 30 – September 1, 1999 in Connection with graves

M = Male F = Female

Grave Number, Location & Important	Number of Bodies	Gender	Identification	Nature of the grave	Bodies brought by	Bodies buried by	Other relevant information
P1, G2, Behind Chemmani check point S. Rajapakse	10-15	1F rest M	Couple from 48/1, Nelumkulam Rd & others unknown	Former LTTE bunker	Lalith Hewa, Thudugala & Wijesiriwardena	Rajapakse, ASP Perera, Jayasinghe Pradeep Priyadarshana and others	Attack that killed the victims occurred near grave 1
P1 G3 On the saltern (two suspected sites), S. Rajapakse	20	All M	Not known	Former LTTE Bunker	Thudugala Wijesiriwardena Upul & Perera	Rajapakse Perera & Upul	2 sleepers may be found
P1 G4, Near the admin tent S Rajapakse	3-4	All M	Not known	Former LTTE Bunker	Thudugala Udaya Kumara & Wijesiriwardena	Rajapakse, Perera	Killed at head-quarters
P1 G5, Behind the small kovil S. Rajapakse	3-4	All M	Not known	Dug for this purpose by private Perera	Thudugala	Rajapakse, Perera	(bodies brought in a tractor)
P1 G6, In front of the admin tent S. Rajapakse	2	Both M	Kaithadi area Poosari's son. Other person unknown	Dug for this purpose	Thudugala Upatissa & Perera	Perera & Others	Challey cycle also buried in this grave

P2 G7, Behind the Chemmani check point, D.M. Jayasinghe	1	M	Not known	Dug for this purpose	Udayakumara, Wijesiriwardena, Lalith Hewa	Rajapakse, Jayasinghe Alwis & Widyananda	Bodies were brought from the Head quarters
P2, G8, Behind Chemmani check point D.M. Jayasinghe	2	One M One F	Not known	Former LTTE trench	Lalithhewa, Thudugala & Udayakumara	Widyananda, Alwis, Rajapakse, Jayasinghe	
P2, G9 Behind Chemmani check point D.M. Jayasinghe	1	All M	Not known	Dug for this purpose	Wijesiriwardena & Thudugala		
P2 G 10, Behind the small Kovil, D.M. Jayasinghe	8	All M	Not known	Dug for this purpose	Thudugala Lalithhewa, Wijesiriwardena & Udaya Kumara	Rajapakse, Wijayananda, Alwis, Nishantha, Jayasinghe	Inquire from Ilangarani & Kabalani
P3, G11, Behind Chemmani check point A.S. Priyashantha Perera	2-3	All M	Not known	Further dug an existing trench for this purpose	Thudugala Lalithhewa, Wijesiriwardena & Udaya Kumara	Rajapakse, Wijayananda, Alwis, Nishantha Jayasinghe	Inquire from Ilangarani & Kabalani
P3, G12 Behind Chemmani check point, A.S. Priyashantha Perera	2	One M One F	Not known	Dug for this purpose	Lalithhewa, Thudugala Nazar	Rajapakse ASP Perera	At the scene male victim hit on the head with the body of a mamoty blade by Nazar. Female assaulted by
P3 G13, In the compound of the main ariyalai Kovil (in front) A.S. Priyashantha Perera	1	M	Not known	Dug for this purpose	Thudugala & others unknown	AS Priyashantha Perera	Lalithhewa Thudugala killed the victim near the grave. The victim had been detained in a LTTE underground bunker
P3 G14, Inside the compound of the Ariyalai main kovil (in the rear) A.S. Priyashantha Perera	1	M	Not known	Dug for this purpose	Thudugala	Perera & Alwis	Thudugala killed the victim from a LTTE underground bunker and killed at the grave

P3, G15, A well near the dispensary (No. 815, Kandy Road, Ariyalai) Priyashantha Perera	10	Not known	Not known	A well			Prisoner had been instructed by Thudugala to fill the well. However, a metal sheet had been put into the well. Hence, he placed soil on top of it.
P4 G16, Near the admin tent Pradeep Priyadarshana	2	Unknown	Unknown	Dug for this purpose	Thudugala	Pradeep Priyadarshana, Thudugala & Jayasinghe	
P4, G 17 Behind the Chemmani check point Pradeep Priyadarshana	1	M	Not known	Dug for this purpose	Thudugala	Pradeep Priyadarshana & Others	
P 5, G 18, Close to the bunker line and next to the main kovil Jayathilake	1	M	Not known	Further dug for this purpose	Capt. Perera		Hands had been tide, behind the body
P5, G19 Close to the bunker line and next to the main kovil Jayathilake	6	M	Not known	There was a pit	Capt. Perera of the Alfa Camp, Lalithhewa		There may be more bodies
P1, G20 Behind Jaya building S. Rajapakse	5 - (could be more)	M	Three persons who were (at the time of the arrest) employees of the CWE (initially 5 emp. Had been arrested 2 had been released)	Dug for this purpose	Lalithhewa Udayakumara & Bogahapitiya	Upatissa, Keethiratne	
P1 G 21 (P1 G21A), Behind Jaya building or inside the compound of the timber mill, S. Rajapakse	2-3	M	Several persons from Achchuweli	Dug for this purpose	Corp. Upatissa, Keerthiratne	Keerthiratne & Upatissa	The victims had been detained at the Jeya building prior ro being killed. Burial had been on the instruction of Lalithhewa

P1 G22 (P1 G22A), Behind Siveneri Institute, 432, Navalar Rd, Ariyalai (Former LTTE Camp) S. Rajapakse	8	M	(1) Rana (Living on a road situated in front of the dispensary in Ariyalai) (2) Poosari (Living near Rana's house) (3) A person living in a house on Colombuthurai Rd; Others unknown	Dug for this purpose	Lalithhewa & Persons of the Intelligence Unit	Corporal Keerthiratne & others	The victims had been apprehended by personnel manning a check point in front the camp, had been detained and later killed (Rana had been dressed in longs)
P1 G23, Rear compound of the C Camp of the 7th CLI, in Colombuthurai S Rajapakse	Not kmown	Not known	Not known	Dug for this purpose		Jayawardena Ariyasena	The victims had been apprehended from Ariyalai and detained in the camp, prior to being killed
P1 G 24 Rear compound of the C camp of the 7th CLI in Colombuthurai (near the toilet), S Rajapakse	4 or more	3 M	Not known (1) Selvaratnam from Ariyalai (2) Pathivam (Labourer) from Ariyalai (3) Sudakaran (Labourer) from Ariyalai	Dug for this purpose	Jayawardena Ariyasena	Ariyasena and others not known	Complains that, the surface of the pit has changed. Has shown the three houses of the victims to the CID
P1 G25, East Ariyalai forward of the bunker line, in front of a dilapidated house, S. Rajapakse	2	M	Logeswaran from Ariyalai other not known		Wijesiriwardena	Pallepola, Bogahapitiya	Victims detained in the house situated in the same compound. House of the victims shown to the CID

Table VII – Details showing dates of excavation of graves

Grave site (Please refer Table II)	Location	Constituent graves	Date of commencement of excavation	Date of termination of excavation	No of bodies found in each grave	Identification number of body	Total number of bodies
A	Area behind the small kovil opposite the Chemmani Check point	P1 G4 (P4 G16) P1 G5 (P2 G10) P1 G6 (suspected to have the challey) P5 G18 (directly behind the kovil) N1	07.09.99 06.09.99 08.09.99 06.09.99 07.09.99	09.09.99 09.09.99 09.09.99 09.09.99 09.09.99	01 00 00 00 02	B5 - - - B3 & B4	03
B	Area behind the Chemmani check point	P1 G2 (P2 G8) (P3 G11) P2 G7 (P4 G17) P2 G9 P3 G12 N2	 20.09.99	 20.09.99	-	B8, B9 & B10 B6 & B7 B11	06
C	The saltern at Chemmani	P1 G3 P1 G3 A N3	11.09.99 22.09.99	13.09.99 22.09.99	00 00	- -	00
D	Area around the Kottukinaru Pulleyar kovil Ariyale	P1 G25 P3 G14 P3 G13 P5 G19	17.09.99 18.09.99 16.09.99 14.09.99	17.09.99 18.09.99 17.09.99 18.09.99	00 (skeleton of a bull found) 01 01 02	- B15 B12 B13 & B14	04
E	The well next to the dispensary No. 815 along Jaffna Kandy road	P3 G15	20.09.99	21.09.99	00	-	00
F	Behind the Jeya building	P1 G 20 P1 G21 P1 G21A	20.09.99	21.09.99	00	-	00
G	Behind the Sivanarle Institute No. 839, Navalar Road	P1 G22 P1 G22A	121.09.99	21.09.99	00	-	00
H	Behind the Chardi camp Colombuthurai	P1 G 23 P1 G24	21.09.99	22.09.99	00	-	00

Abbreviations: The letter "P" refer to the prisoner
The numerical refer to the identity of the prisoner
The letter "G" refers to the grave
The numerical refers to the grave shown by the prisoner
The letter "B" refers to the body
The letter "N" refers to the new graves identifies by the expert team other than the prisoners

N1 - a new grave identified while excavating site A
N2 - a new area shown by an informant
N3 - a new area shown by an informant who is an employee of the saltern

Table VIII – Relationship of graves to bodies discovered and the artefacts found in the bodies

No.	Site	Grave No.	Date of recovery	Number of bodies alleged by the Prisoners	Number of bodies actually found & position	Body number & crown heel length	Presence /Absence of clothes	Artifacts
1	Pilot, At the junction between Nallur road and the road to Saltern	G1	16.06.99	2	2	B1 B2	Present Present	None None
2	A	N 1 (near)	07.09.99	Not shown by prisoners	2, lying side by side in opposite direction	B3 B4	No clothing No clothing	None None
3	A	P1 G4 /P4 G16	08.09.99	3-4/2	1, lying face upwards	B5 180 cm	No clothing	None
4	B	P3 G11 (inside)	09.09.99	2-3	2 (B7) lying in the lithotomy position	B6 Skull shattered while bachoeing B7	(B6) Poona, Nula and Under wear elastic bands (b7) blue coloured skirt	(B7) Intrauterine Contraceptive Coil, Gold Nose Stud, Metal toering, Black colour thick cord around left wrist
5	B	P1 G2	10.09.99	10-15	1, lying on a side	B8	No clothing	None
6	B	P1 G2	11.09.99	10-15	1, lying face downwards	B9	No clothing	None

7	B	P4 G17	11.09.99		1, lying on a side	B10 176 cm	No clothing	None
8	B	P1 G2	13.09.99		1, lying on a side with legs one over the other	B11 158 cm	No clothing	None
9	D	P3 G13	16.09.99	1	1, lying on a side	B12	No clothing	None
10	D	P5 G19	18.09.99	6	2, both lying on a side	B13 B14	No Clothing No Clothing	(B13) Rope around left humerous
11	D	P3 G14	18.09.99		Lying on a side	B15	Kharky shirt and remnant of a nylone underwear	Ligature around right forearm bone

Table IX – Relationship of skeletal remains to peri-mortem injuries and clothes

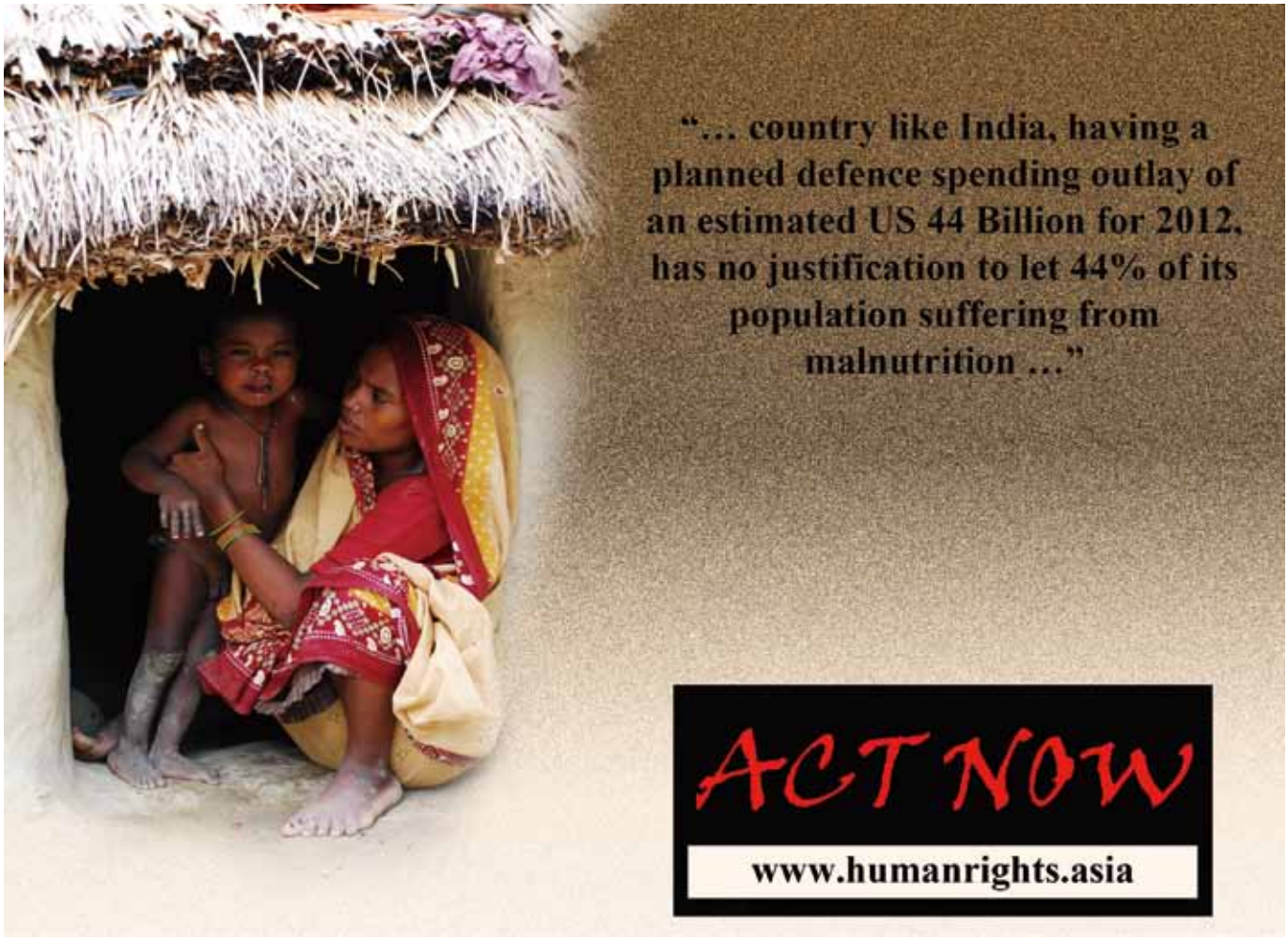
Body no. and estimated age and sex	**Injuries and photographs taken**	**Whether clothes present or not**
B1 25-30 years Male	1. Communicated fracture of left parietal area 2. Maxillary and mandibular dentition 3. Overall view	Present
B2 20-25 years Male	1. Fracture left zygomatic arch 2. Fracture left side ribs 6,7,8 3. Maxillary and mandibular dentition 4. Overall view	Present
B3 25-40 years Male	1. No peri-mortem injuries 2. Maxillary and mandibular dentition 3. Overall view	Absent
B4 18-23 years Male	1. Peri-mortem fracture sternum 2. Peri-mortem cut 3rd cervical vertebrae 3. Maxillary and mandibular dentition 4. Overall view	Absent
B5 20-30 years Male	1. Peri-mortem fracture sternum body 2. Peri-mortem fracture right side ribs 1,2,3,6,7,8 3. Peri-mortem fracture left side ribs 5,6,7,8,9,10 4. Maxillary and mandibular dentition 5. Overall view	Absent

B6 25-30 years Male	1. Peri-mortem fracture right ulna 2. Peri-mortem fracture left side ribs 10 3. Peri-mortem fracture right side ribs 2 4. Maxillary and mandibular dentition 5. Overall view	Present – 'Poona' thread and elastic bands of underwear
B7 20-35 years Female	1. Peri-mortem fracture skull 2. Peri-mortem fracture right side ribs 2,3,4,7,8,9,10 3. Maxillary and mandibular dentition 4. Overall view	Absent – IUCD, Gold nose stud, toe ring
B8 25-35 years Male	1. Peri-mortem fracture left side rib 8 2. Peri-mortem fracture right side ribs 2,3,4,10 3. Peri-mortem fracture sternum 4. Maxillary and mandibular dentition 5. Overall view	Absent
B9 14-17 years Male	1. No fractures, facial asymmetry, septum deviated to left and a cervical rib 2. Maxillary and mandibular dentition 3. Overall view	Absent
B10 20-30 years Male	1. Peri-mortem fracture right scapula 2. Peri-mortem fracture left 4th metacarpal 3. Peri-mortem fracture left side ribs 2,10,11 4. Peri-mortem fracture right side ribs 5,6,7,8,9,10 5. Peri-mortem fracture sternum 6. Peri-mortem fracture thoracic vertebrae 5,6,7, 8,9,12 7. Peri-mortem fracture lumbar vertebrae 1 8. Maxillary and mandibular dentition 9. Overall view	Absent
B11 20-25 years Male	1. Peri-mortem fracture right side ribs 9,10,11 2. Maxillary and mandibular dentition 3. Overall view	Absent
B12 20-28 years Male	1. Peri-mortem fracture right side ribs ribs 4,5,6,8,9 2. Cut left side rib 3 3. Peri-mortem fracture left side ribs 5,6 4. Peri-mortem fracture sternum 5. Peri-mortem fracture 1st left metacarpal 6. Peri-mortem fracture thoracic vertebrae 11 7. Maxillary and mandibular dentition 8. Overall view	Absent

Table X Chemmani – Bodies

Body Number	Recovered from	Date of exhumation (grave)	Identity	Gender, Age and Height	Manner and cause of death
B1	G1	June 15 & 16, 1999	Provisionally established as Rassaiya Sathis Kumar	Male 25-30 years 5′ 8″	1a. Brain injury 1b. Skull fracture 1c. Blunt weapon assault - homicide
B2	G1	June 15 & 16, 1999	Provisionally established Mahendran Uthaskaran	Male 20-25 years 5′ 3″	1a. Brain injury and lung injury 1b. Skull fracture and rib fracture 1c. Blunt force trauma to face and chest - homicide
B3	N1	Sept 7-9, 1999	To be identified	Male 25-40 years 5′ 6″	Unascertainable
B4	N1	Sept 7-9, 1999	To be identified	Male 18-23 years 5 ′7″	1a. Cut injury of cervical vertebrae 1b. Sharp force trauma to neck-homicide
B5	G4	Sept 7-9, 1999	To be identified	Male 2-23 years 5′ 7″	1a. Fractures of ribs and thoracic vertebrae 1b. Blunt force trauma to chest - homicide
B6	G11	Sept 20, 1999	To be identified	Male 20-23 years 5′ 5″	Unascertainable. Possible blunt force trauma to chest
B7	G11	Sept 20, 1999	To be identified	Female 20-25 years 5′ 2″	1a. Cranio cerebral injury and chest injury 1b. Blunt force trauma to head and chest-homicide
B8	G2	Sept 20, 1999	To be identified	Male 25-35 years 5′ 5″	1a. fractures of ribs and lung injury 1b. Blunt force trauma to chest – homicide
B9	G2	Sept 20, 1999	To be identified	Male 14-17 years undetermined	Unascertainable
B10	G17	Sept 20, 1999	To be identified	Male 20-30 years 5′ 8″	1a. Fractures of thoracic vertebrae, ribs, sternum and scapula

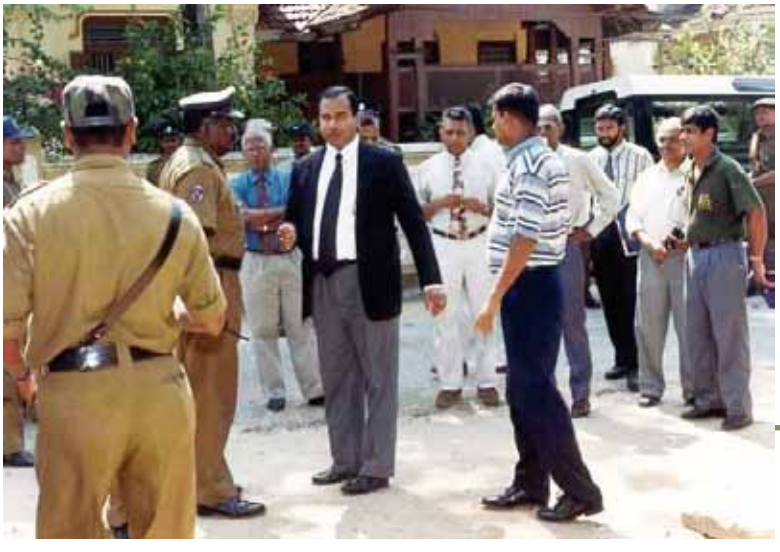
					1b. Blunt force trauma to chest-homicide
B11	G2	Sept 20, 1999	To be identified	Male 20-25 years 6′ 6″	1a. Fracture of ribs 1b. Blunt force trauma to chest- homicide
B12	G13	Sept 16-17,1999	To be identified	Male 20-28 years 5′ 7″	1a. Fracture ribs and vertebrae 1b. Blunt force trauma to chest-homicide
B13	G19	Sep 14- 18, 1999	To be identified	Male 20-25 years 5′ 4″	1a. Fractures of ribs and sternum 1b.Blunt force trauma to chest-homicide
B14	G19	Sept 14-18, 1999	To be identified	Male 25-35 years 5′ 9″	1a. Fracture skull, sternum ribs and scapula 1b. Blunt force trauma to head and chest- homicide
B15	G14	Sept 18,1999	To be identified	Male 13-17 years Undetermined	1a. Fracture of ribs 1b. blunt force trauma to chest- homicide



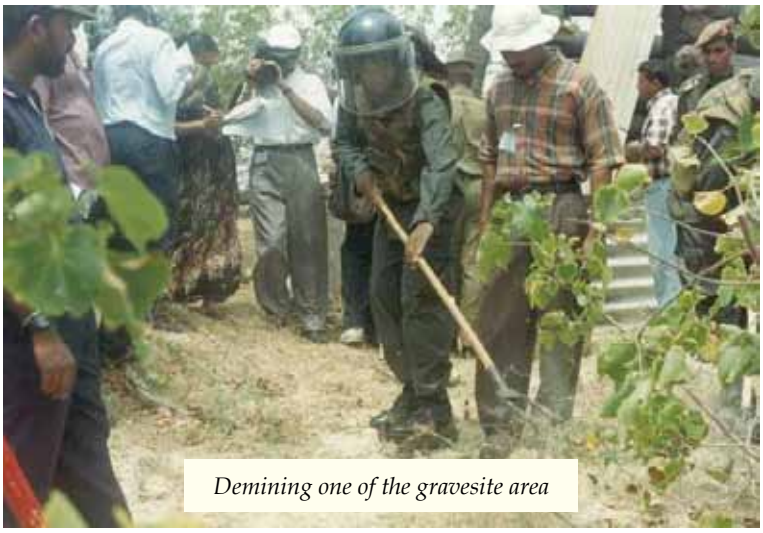
Boundaries of Chemmani exhumation site

THIS EXCLUSIVE PHOTO ESSAY is based on the Mass Graves in Chemmani. "What we reliably understand was the context, in which Krishanthy's murder took place on 7th September, 1996. Pungankulam army camp was a main camp east of Jaffna City that controlled Chemmani point where the murder took place. Persons detained over a large area were first brought to Pungankulam camp, where a decision was taken what to do with them. Many were then sent to the Intelligence Camp in Ariyalai East, which is quite near Chemmani, the whole comprising a largely uninhabited area. Here the prisoners were tortured, and we are yet to hear of survivors. On regular occasions the men at Chemmani point would be alerted during the night. The naked corpses of detainees tortured and killed at the Intelligence Camp were then taken to Chemmani in a vehicle, for the men at the point to assist in burial," pointed in its special report by the UTHR(J).

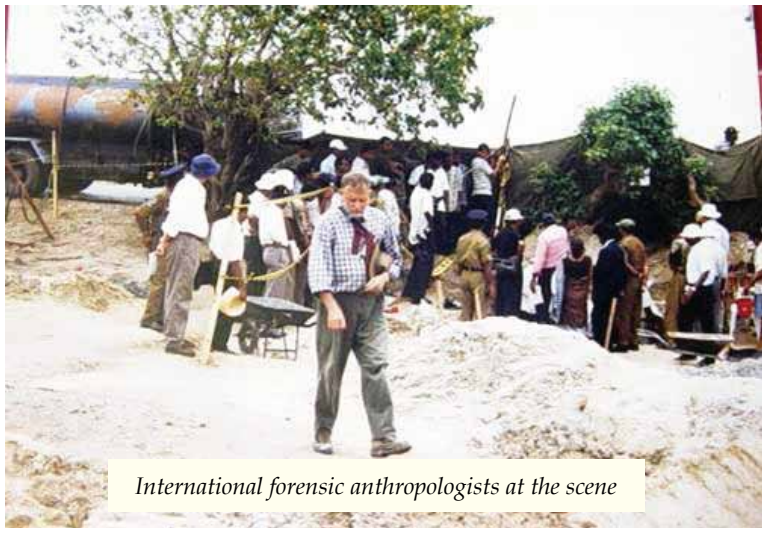
AG's Dept. staff represented in Jaffna and Surveyors mapping the area



Chief informant: Somaratna Rajapaksha



Demining one of the gravesite area



International forensic anthropologists at the scene

One of the exhumation sites

Recovery of soil patch indicative of human remains

Trenching one of the gravesites

Exhumation in progress

Exhumation in progress

Skeletal remains unearthed

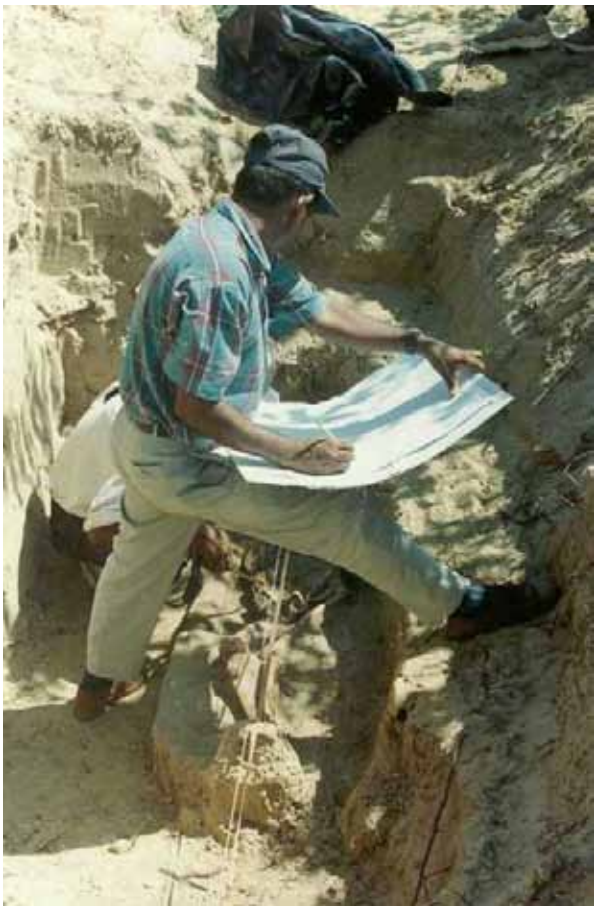
Exhumation in progress

Skeletal remains unearthed

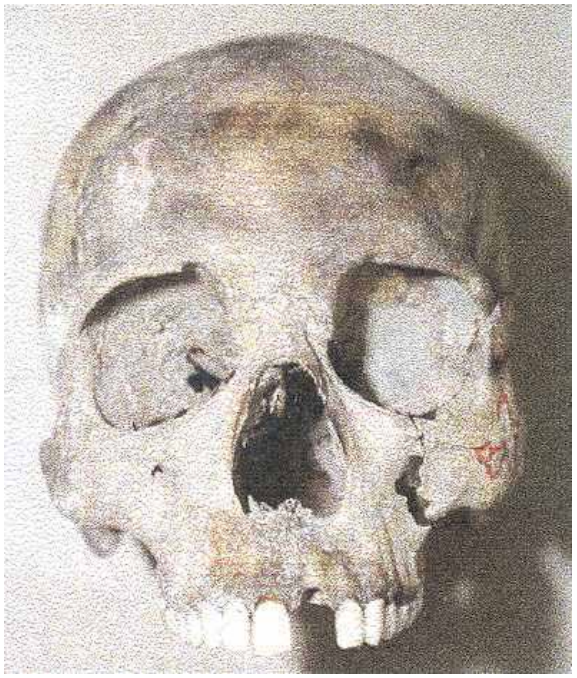
File Photograph of Krishanthi Kumaraswamy

The brutal gang rape and gruesome murder of Krishanthi Kumaraswamy and her mother, brother and a neighbour on September 7, 1996 by the Sri Lankan army soldiers and policemen shocked the conscience of the civilized world. Although crimes like sexual assaults and murder committed against unarmed defenseless civilians have become common place in throughout the country, the naked barbarism displayed by the rapists and killers in this instance surpassed all previous crime records.

Skeletal remains unearthed

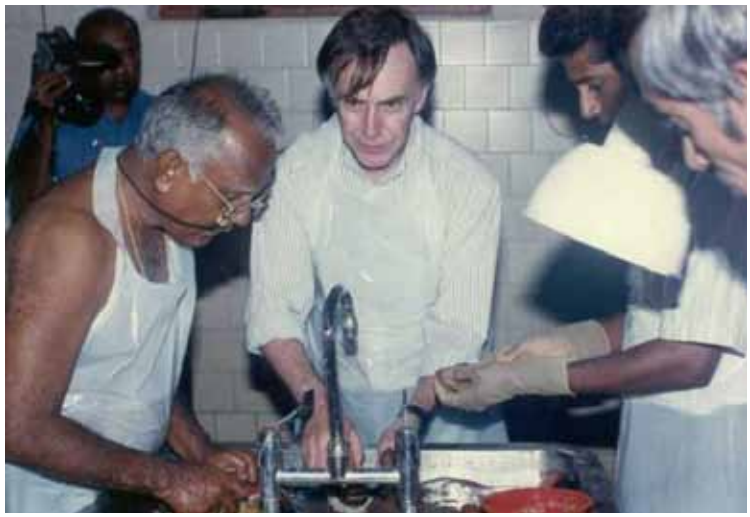


Sketching the distribution of skeletal remains in a grave



Injuries in Skulls

Sieving the unearthed soil for hidden skeletal remains



Prof. Niriella and other experts at the morgue

Chemmani investigation team at the conclusion of the exhumation process

THE ISLAND OF MASS GRAVES

MASS GRAVES IN SRI LANKA

THE EXISTENCE OF TWENTY EIGHT MASS GRAVES HAVE BEEN REPORTED IN SRI LANKA

1. The Hokandara Mass Grave
2. The Essella School Mass Grave
3. The Wavulkale Mass Grave
4. The Walpita Government Farm Mass Grave
   (2 to 4 are in the Gampaha District)
5. Ambagahahenakanda Mass Grave
6. Bemmulla Mass Grave
7. Kottawakale, Yakkalumulla Mass Grave - Galle District
8. The Dickwella Mass Grave at Heendeliya
9. Diyadawakale, Deniyaya, Mass Grave
10. Wilpita Akuressa Mass Grave
    (8 to 10 are in the Matara District)
11. Angkumbura Mass Grave - Matale District
12. Suriyakanda Mass Grave - Ratnapura District
13. Chemmani Mass Grave - Jaffna District
14. Matale Hospital Mass Grave – Malate District
15. Mannar Mass Grave – Mannar District
16. Jaffna Mass Grave - Jaffna District
17. Mirusuvil - Jaffna District
18. Kilinochchi - Kilinochchi District
19. Puthukudirippu-Mullaitivu District
20. Pooneryn - Kilinochchi District
    (It was a potential site but no remains found after excavation)
21. Mamadala mass grave in Ambalantota - Hambantota district
22. Batticaloa Mass Grave - Batticaloa District

TSUNAMI MASS GRAVE SITES

01. Batapola
02. Kuruduwatta-Galle
03.Hambantota
04.Tissamaharama
05.Kirinda
06.Kalmunai

Graphic designed by Nilanthe Elangamuwa
TORTURE: Asian and Global Perspectives

Mass graves in post-independence Sri Lanka were first reported following the 1971 youth uprising led by the Peoples Liberation Front (known locally as JVP) which was brutally terminated by the then government. However the locations of these post 1971 mass graves are hidden from the public knowledge and hence they are not represented in the above map. Numerous mass graves have been clandestinely created by the Sri Lankan government during the second youth uprising led by the same political party in the 1987-1990 period and locations of these gravesites are illustrated in the map. Virtually all mass graves reported in the northern and eastern provinces of the country were resulted from the thirty year long civil war between the LTTE and the ruling governments which ended in 2009 and said to have contained the remains of minority Tamil speaking people died during the war.

MASS GRAVE INVESTIGATIONS FOR INTERNATIONAL CRIMINAL PROCEEDINGS

Mass grave excavations have also the potential to fulfil important humanitarian goals that go well beyond prosecutorial needs.

by MELANIE KLINKNER

Photograph by Stuart Humpage

MASS graves may, in some cases, be linked to offences under international law as they can be the result of gross human rights abuses or violations of the law of armed conflict. Over the past two decades, a number of international tribunals and courts have been created to help bring international human rights and humanitarian law violators to justice, complementing the role of domestic courts. Understandably, these international criminal prosecutions are often remarkably complex and expert witness testimonies can help through offering specialist knowledge and contextual information; forensic evidence from mass graves may form part of such specialist evidence presentation. Forensic mass grave investigations can help to corroborate witness testimony, clarify the context surrounding the crimes and contributes towards proving what crimes were committed and how they were perpetrated.

During forensic excavations and examinations of mass graves, detailed documentation of the crimes and biological facts associated with the victims are obtained. In general, forensic scientists, recover, record, examine and interpret material to provide relevant, previously unknown information; typically they collate the results in a report for the prosecution, the defence, or the court and for presentation at trial; and the experts may be called to provide verbal evidence as expert witnesses during trials.

Once the prosecution has identified that forensic evidence is required to present a particular case, the services of the forensic expert may be sought. The professions usually involved in mass grave investigations, apart from investigators and scene of crime officers, are the forensic archaeologists, anthropologists and pathologists: The forensic archaeologists apply their survey and excavation skills to the site; they are experienced in identifying, excavating and recording complex features, and recovering human remains and artefacts. They are also experts in recognizing taphonomic alteration to soils, human remains and other materials recovered which helps elucidate what happened to the victims at the point of death and thereafter. The forensic pathologist's main role is to perform the post-mortem examination of bodies and human remains to establish the cause of death and identity of the victims. Criminal aspects of death tend to leave physical traces and the pathologist has experience in recognizing torture and/ or starvation prior to death, trauma, entrance and exit wounds from firearms, etc. He or she works closely with the anthropologists, odontologists and radiographers. Forensic anthropologists are specialists in analysing skeletal and dental remains as well as taphonomic alterations - that is how organisms decay over time. Critically, they are able to distinguish between bones' state during an individual's lifetime, at the time of death and after death and can thus contribute towards establishing ancestry, sex, age at death, stature, handedness, etc. They reconstruct fragmented and disarticulated skeletons to facilitate the calculation of the minimum number of individuals and to aid the identification process through providing samples for DNA analysis.

Forensic professionals are usefully involved in the initial planning phase for a mass grave investigation. Once a grave location has been confirmed, the experts will conduct a site assessment as this will generate information for the planning of the mission. The accessibility of the site impacts on the amount of logistics required; the condition of the remains and the time needed for excavations are further key variables to be considered. This type of information

will influence the decision as to what sites are to be excavated and which fit the cases best. From their preliminary investigations, the prosecutor and his investigation team should have an understanding of what evidence may be found in the grave before proposing its excavation. Furthermore, the decision when to excavate a particular grave may also be influenced by the trial schedule. Naturally the urgency of the task impacts upon the number of forensic staff required to complete the work.

Excellent planning is paramount: In addition to the organising of logistics, resources, and equipment, medical, travel and accident insurance as well as a risk assessment with appropriate health and safety mitigation provisions need to be put in place. In fact, hostilities may be on-going whilst investigations are conducted. Sites need to be examined for unexplored ordnance, military escorts to and from the site may need to be organised and often simple provisions such as fresh drinking water or power supplies at the mortuary need to be thought about.

Furthermore, the families' and survivor population's needs must form part of planning considerations and a value assessment of the usefulness of mass grave investigations taking into account the psycho-social ramification these have on the survivor population is essential. Families of those that went missing have a vested interest in mass grave investigation. Even if the investigations are carried out for evidentiary purposes, the humanitarian effects of such work cannot be ignored and plans need to be in place to cater for those needs. Therefore a planning requirement should be that, once the investigative purpose is fulfilled, other organisations take over the work of excavation, examination and identification. This will allow the prosecution and forensic experts to walk away from investigations, safe in the knowledge that other organisations take care of the human remains once they leave a court's custody. It will help ensure the importance of forensic evidence not just for the effectiveness of international criminal proceedings, but also for fulfilling humanitarian needs.

During the mass grave investigations themselves, the evidence contained in the graves is excavated and examined in situ as well as in the mortuary by the forensic teams whilst the evidentiary standards and the chain of custody needs to be guaranteed. Logging, packaging and photographing the evidence are crucial to demonstrate the chain of custody in court. Important objectives for a mass grave investigation may include the need to ascertain the number of victims, their cause and time of death, the identification of the victims along with their ethnicity and sex, and to identify disturbances and evidentiary materials that may link the site to other crime scenes and the alleged perpetrator. Such findings from the excavation site and mortuary are summarised in reports prepared by the most senior forensic experts. These reports contain information on the minimum number of individuals, their location in the excavated graves, sex of the deceased, cause of death, clothing, as well as the presence of artefacts such as blindfolds and ligatures, for example.

At the trial, the evidence is then presented in court and sometimes the experts are asked to testify. The expert's report is discussed as well as the photographic evidence relating to crime scene, artefacts and human remains. Through questions and answers the evidence relating to excavations, examinations and autopsies is tested.

So, how may forensic evidence from mass graves assist a criminal court with its fact-finding? Some examples from the

experiences at the International Criminal Tribunal for the Former Yugoslavia (ICTY) are used here to illustrate this: Forensic evidence is most useful if it complement other relevant evidence, such as documentary or eye-witness accounts. If we look at evidence from mass graves as corroboration of testimony, then in the case of the Srebrenica massacre that took place in Bosnia Herzegovina in 1995, for example, evidence derived from execution points and graves matched accounts of the events by those lucky enough to escape. In the case of Dražen Erdemović, one of the first defendants at the ICTY, who pleaded guilty to murder as a crime against humanity, it was the accused himself who led the investigations to execution and burial sites which were not previously known to the Office of the Prosecutor. The location he disclosed is the Branjevo Military Farm. Excavations that took place at the Branjevo Military Farm revealed that there were 132 male victims in the grave, 130 of whom had died from gunshot wounds and 83 ligatures were found in the grave. Furthermore, analysis showed that the Branjevo Military Farm mass grave had been disturbed. Individuals had been removed and placed in secondary graves, indicating belated attempts at concealment. This is vital information for the Prosecution, because corroboration of evidence can assist with witness selection, especially as witnesses' memories may have faded or been affected by Post-Traumatic Stress Disorder and the passage of time.

When investigating and prosecuting war crimes, including cruel treatment, torture and murder, scientific evidence can assist in confirming these charges. Findings presented in *Prosecutor* v *Mrkšić* from forensic examinations of the bodies retrieved from the Ovčara mass grave in Croatia showed that 198 were male and two were female, with an age range from 16 to 72 years. The cause of death in 188 cases was attributable to single or multiple gunshot wounds. Seven individuals were believed to have died from trauma, whilst the cause of death is still unknown for the remaining five victims. Post-mortem examinations revealed that 86 individuals had suffered from injuries prior to their death on 20/21 November 1991.

In 1997 it was possible to identify 192 of the victims buried at Ovčara. With the help of forensic science the ICTY Prosecutor had little difficulty in proving the crimes that had occurred at Vukovar. The Tribunal was also satisfied that the victims who were taken from the Vukovar hospital on the morning of 20 November 1991 were at that time not taking part in hostilities and therefore could not be considered legitimate military targets. And this was important to confirm that they were not combatants and therefore not legitimate military targets!

To constitute the crime of genocide, the accused must have deliberately intended to destroy a protected group in whole or part. Where direct evidence of genocidal intent is absent, the requisite intent may be inferred from the factual circumstances of the crime. Perhaps the most interesting case to date where a defendant was indicted for genocide partly on the basis of scientific evidence is *Krstić* (though this is likely to change once the Mladić and Karadzić cases are completed). Radislav Krstić stood accused for his actions as Deputy Commander of the Bosnian Serb Army during the Srebrenica massacre between 10 and 19 July 1995. The Trial Chamber found that the forensic evidence presented during trial corroborated 'important aspects of the testimony of survivors from the execution sites'[1] and

1 *Prosecutor v. Krstić* (Case No. IT-98-33-T) Judgment, 2 August 2001, §71.

was sufficiently credible and compelling to confirm the *actus reus* of genocide.

The judges found that 'following the take-over of Srebrenica, thousands of Bosnian Muslims were summarily executed and consigned to mass graves'[2]. The investigations suggested that most of the deceased had not been killed in combat, leading the judges to infer that some 7,000 missing persons had been executed and buried in mass graves. The Trial Chamber reasoned that the disappearance of generations of men showed an intent to physically destroy Bosnian Muslims as an ethnic group. The intent to destroy the group, as such, was further substantiated, in the trial judges view, by the well-established pattern of executions. Bodies were not only concealed in mass graves, but were at a later time excavated in an attempt to hide the crimes. Investigations of seven secondary graves found commingled and mutilated body parts rendering identification efforts, repatriation and appropriate burials extremely difficult, thus causing further distress to the families. The fact that all located and examined gravesites associated with the Srebrenica massacre were within the Drina Corps area of responsibility contributed to the Trial Chamber's overall belief that Krstić shared the intention to commit genocide. The Trial Chamber was satisfied that Krstić had participated in the joint criminal enterprise, sharing the genocidal intent to kill Bosnian Muslims, and duly convicted him of genocide. On appeal, however, this verdict was overturned as the Appeals Chamber felt that the necessary intent to commit genocide was not proven beyond reasonable doubt.

Noteworthy here is that in the *Krstić* case, scientific evidence helped to determine that: (i) a specific group was targeted; (ii) the killings and burials were systematic; (iii) many civilians were amongst the dead; (iv) demonstrable attempts had been made to conceal the crimes; and (v) a high level of cooperation was required to undertake such executions and burials.

In addition to war crimes and genocide charges, numerous defendants before the Yugoslav tribunal have been charged with crimes against humanity, mostly in relation to attempted 'ethnic cleansing' of particular regions. With ethnic cleansing being a phrase that was coined during the Yugoslav war. In the *Popović* trial, where five of the defendants stood accused of extermination as a crime against humanity, the defence was keen to clarify whether those found in mass graves had been killed legitimately in combat or whether they were identifiable as civilians whose murder would constitute a crime against humanity. An expert witness was asked whether some victims from mass graves could have died as a result of combat as opposed to execution and whether military clothing was found on the bodies. According to the expert, the evidence suggested that the dead had not been killed in combat as (i) they were not wearing military clothing; (ii) the deceased were of all ages, some with physical disabilities; (iii) blindfolds and ligatures were found in some graves; (iv) many victims had been killed from behind by a single shot to the head; and (v) there was little indication of previous injuries consistent with combatant status. Whilst it could not be fully excluded that some had been killed in combat, the majority of dead could not be accounted for in that way[3].

2 Ibid., §73.

3 *Prosecutor v. Popović et al.* (Case No. IT-05-88-T) Expert Witness Testimony by Dr John Clark, Transcript, 20 February 2007 and Expert Witness

In *Prosecutor* v *Milutinović* the accused were allegedly responsible for deportation, forcible transfer, murder (as a crime against humanity and a violation of the laws or customs of war) and persecution of Kosovo Albanians. Volume two of the judgment reviews the evidence relating to the alleged crimes, relying on much of the forensic evidence gathered from investigations conducted in Kosovo during 1999. In light of these findings, the Trial Chamber concluded that over 700 bodies originally buried throughout Kosovo during the NATO bombing campaign were secretly exhumed and transported to Serbia in an attempt to conceal them from citizens of the former Yugoslavia and from the international community. These clandestine operations led the Trial Chamber to believe 'that the great majority of the corpses moved were victims of crime, as opposed to combatants or people who perished during legitimate combat activities'[4]. Forensic science evidence thus underpinned the Trial Chamber's conclusion that some of the deceased (who included women and children) were victims of crimes against humanity.

Of course, questions of scientific methodology, reliability, and of experts' credibility, objectivity and impartiality, are addressed on a case by case basis through the process of testimony in court and tested through cross-examination. It is then the judges' role to weigh the evidence presented and to arbitrate between reliable and unreliable, as well as scientifically valid and invalid, evidence. If forensic evidence withstands such legal scrutiny in court, then it is seen to contribute important facts that help produce a record of what is likely to have happened.

As pointed out above, mass grave excavations have also the potential to fulfil important humanitarian goals that go well beyond prosecutorial needs. In the aftermath of gross human rights violations, evidence from the field suggests that information as to what happened and how is happened, fulfils a very important need of families and survivors. In fact, this need to know the truth is vital and may have primacy over wanting justice; the desire for justice may follow on from knowing the truth. Though it should also be noted, that learning and knowing the truth can have complex and unpredictable effects on the individual and may exacerbate strains between the individual, the past and society. In any event, mass grave investigation need to be mindful of the psycho-social ramification they have on the survivor population and on relatives of the missing. Investigations of mass graves for criminal purposes need to ensure that they form the first step in a continued effort to provide families with information, identification and return the human remains.

Dr. Melanie Klinkner *is a Senior Lecturer in Law at Bournemouth University. Her research publications to date focus on the interplay of international criminal law and forensic science.*

Testimony by Prof Richard Wright, 21 February 2007.

4 *Prosecutor v Milutinović et al.* (Case No IT-05-87-T) Judgment, 26 February 2009, Vol 2, §1357.

THE NEGLECT OF MASS GRAVES

Twenty fifth session, agenda item 3, general debate of the Human Rights Council

A written submission to the UN Human Rights Council by the Asian Legal Resource Centre

ALRC-CWS-25-06-20
February 21, 2014

A mass grave has been found at Thiruketiswaram, Mannar in January 2014. In 2013 a mass grave was also found at Matale and the investigations are still at early stages regarding the body parts found in this grave. The general condition prevailing, relating to both of these mass graves is that the investigations are not being conducted in terms of modern forensic methodologies which are essential for the proper preservation of the findings as well as the prevention of the destruction of the materials found in the mass graves in the course of excavation. Both at Mannar and Matale the mass graves were dug with bulldozers and naturally such manner of excavation is not conducive to proper handling of the human material remains that are found in such graves. There are no guidelines that have been adopted for proper conduct of excavations, for the preservation of the findings as well as for proper conduct of investigations for the determination of the times at which the burials had taken place and other material elements which are needed for proper identification of the remains of persons which will enable the administration of justice relating to the persons whose remains are found in these mass graves.

At the mass grave in Matale the remains of over 150 persons were discovered. The crucial issue which came up was regarding the timing of the deaths and burials of the persons found in this grave. Initial inquiries conducted by Sri Lankan forensic archaeologist who examined the site said that it was not due to epidemic or any natural causes and a parallel investigation done by a Judicial Medical Officer said that it was not a regular burial site and both concluded that remains belonged to the period 1986-1990.

The period between 1986 and 1990 was marked by a period of armed conflict between the Janatha Vimukthi Peramuna (JVP) and the Sri Lankan government. Later, after a change of government several commissions regarding involuntary disappearances were appointed by the government and these commissions conducted enquiries regarding enforced disappearances in several provinces in Sri Lanka. In their reports they recorded complaints regarding the disappearances of over 20,000 persons. In the Matale area itself there were complaints of hundreds of disappearances and the complainants identified the names of several officers who were responsible for the abductions of large numbers of persons who subsequently

disappeared. A particular army camp was also identified as a place which coordinated such abductions which ended in enforced disappearances. The name of the coordinating officer who was in charge of the camp at the time has also been publically identified. The said coordinating officer and several other identified persons are at present holding high posts in the government.

Under these circumstances the move by the government to have the samples of the remains flown to China for the conduct of inquiries into the timing of the deaths of these persons was objected to by the lawyers who appeared for the families of the disappeared persons. Among other grounds the lawyers stated that the facilities for such inquiries in China were not reliable and also that there were questions about the possible interference into such investigations, thus, creating the doubt about the independence of such inquiries. However, the magistrate allowed the remains to be sent to a facility in China.

As regards the discovery of bodies of Thiruketiswaram, Mannar, the inquiries are still at a rudimentary stage. The existence of the remains came to the notice of the public when workers constructing a highway came across some of the remains. Thereafter, in the course of excavation the parts of many bodies have been discovered.

The problems associated with both of these mass graves as well as some others found earlier point out the absence of clear legal provisions in dealing with excavations and investigations into the findings taken from such mass graves. There are no guidelines, particularly regarding the early stages of excavations and investigations. The methods adopted at present often rely on untrained manual labourers who use pickaxes and other similar tools and also bulldozers for such excavations. These methods are very much prone to the destruction of the remains that are meant to be discovered and preserved for proper scientific investigations. The very methods of excavation need to be scientific. Both from the point of view of the law and procedures as well as the use of equipment and the persons who use such equipment there is much that is not in keeping with the standards required. However, the government has made no attempt to improve the laws relating to these matters and also to provide for the proper methodologies for these purposes.

The United Nations Working Group on Enforced Disappearances need to look into these two mass graves at Matale and Mannar and also consult the forensic experts and judicial medical officers regarding the problems associated with the conduct of these investigations. Without interventions from the United Nations Human Rights agencies it is unlikely that there will be the proper development of laws and procedures and the allocation of resources enabling proper excavations and investigations relating to mass graves.

# # #

About the ALRC: *The Asian Legal Resource Centre is an independent regional non-governmental organisation holding general consultative status with the Economic and Social Council of the United Nations. It is the sister organisation of the Asian Human Rights Commission. The Hong Kong-based group seeks to strengthen and encourage positive action on legal and human rights issues at the local and national levels throughout Asia.*

CHALLENGES AHEAD

An interview with Ms. Urmila Bhoola, the UN Special Rapporteur on Contemporary forms of Slavery

"The situation of women and children is a key challenge which requires immediate and effective action," said Ms. Urmila Bhoola in an exclusive interview just after she was appointed as the Special Rapporteur on contemporary forms of slavery by the Human Rights Council, United Nations. Ms. Bhoola who is a well-known judge from South Africa talked to Anjuman Begum, a human rights defender from India, currently associated with the Asian Human Rights Commission.

In this interview Urmila Bhoola tries to elaborate her past engagement in rule of law issues and her thoughts for her future work as a mandate holder of the UN HRC.

Excerpts from the interview:

Anjuman Begum (AB): Tell us why the exploitation of labour and slavery remains an issue even today?

Urmila Bhoola (UB) : One of the reasons is the lack of compliance with international norms and standards, including the UN Convention on the Abolition of Slavery and the Supplementary Convention, as well as

the ILO Conventions on Forced Labour and the Abolition of Forced Labour. Economic factors (particularly in the Asia Pacific where, according to an ILO report, about 11 million of the 21 million people estimated to be in forced labour are located) also play a role as many vulnerable people are forced to migrate to urban areas or across countries in search of employment and economic opportunities, and end up being trafficked, exploited or subjected to forced labour or other forms of slavery. In many countries in the Asia Pacific region there is little regulation or monitoring of these situations, and corruption, lack of access to justice are also factors which perpetuate exploitation. Global supply chains outsource production to developing countries and there is lack of accountability for compliance with labour standards. There is also exploitation by private employers who subject vulnerable women, men and children to forced labour and other conditions of employment which amount to slavery, for example in domestic work, agriculture and other areas that are hidden and difficult to identify. Recruitment agents have also been identified as key contributors to forced labour and slavery conditions, and migration is often not regulated by MOUs between receiving and sending countries, or where it is there are means of evasion. There are therefore a myriad global political, economic and social factors that drive increased migration and create opportunities for trafficking and labour exploitation.

AB: Under what legal or extra-legal circumstances are labour exploitation permitted?

UB: Very limited circumstances, for instance prison labour, are permitted as acceptable forms of forced labour.

AB: Do you see loopholes in the existing system of international labour laws?

UB: There needs to be greater coherence in the legal framework, and in ensuring accountability by governments and the private sector. More effective remedies for violations need to be created, as well as greater accountability for vigilance and extra territorial application of laws.

AB: How is globalisation contributing in exploitation of labour??

UB: Globalisation has led to the free movement of capital, goods and resources, but has also increased poverty. Rapid urbanisation is occurring, people are displaced from land, agriculture and biodiversity is challenged, decent work is reduced and many people are forced into the informal sector and into precarious conditions of work in order to survive. The factors which drive economic growth and market liberalisation, for instance in the Asia Pacific region, emphasise profit above human rights and permits exploitation of the vulnerable. Global supply chains make it difficult to monitor and hold business accountable for human rights and labour law violations. For instance, the Rana Plaza disaster in Bangladesh occurred because global supply chains outsourced garment manufacturing to entrepreneurs who did not comply with safety and labour standards. There must be a global commitment to scrutinise and eradicate slavery and forced labour..

AB: When you took up the responsibility as a judge in a labour court, what were the prominent issues related to labour in South Africa?

UB: South Africa has a constitutional guarantee of the right to strike and fair labour practices, as well as effective regulation. Strong unions and civil society have always been a feature of our democracy. However, challenges of increasing inequality and poverty, lack of basic services, increased

and new forms of discrimination, violations of human rights, and increased gender based violence have resulted in increased social and political conflict. The Marikana massacre of 39 striking workers in 2012 reflects the decline in the labour relations and the levels of violence against workers. This is increasing rivalry between unions in the mining sector for example, which has led to increased xenophobia as well as a breakdown in systems of collective bargaining.

AB: Tell us about the gender aspects in labour issues in South Africa?

UB: Gender equality remains a key challenge for South Africa. Although there is increased representation of women in employment and occupations, most women continue to be marginalised by poverty and excluded from decent work and limited opportunities to earn a living wage, as well as still bear the burden of unpaid care work. Gender based violence remains a major problem and although there is comprehensive legal protection, law enforcement is a problem which is exacerbated by social and cultural discrimination based on gender.

AB: What were the challenges you faced as a judge?

UB: Applying the labour laws in socio-political and economic systems that are so weighted against workers because of widening gaps between rich and poor, growing inequality, rapid urbanisation and migration, as well as cost of living increases and continued disparities in access to basic needs like housing. The increasing challenges to the rule of law are reflected in many illegal strikes in the mining industry. During the post-apartheid South Africa my law firm was involved in setting up institutional mechanisms for collective bargaining and labour dispute resolution, which have largely been undermined by the current challenges to the labour relations and legal framework.

AB: Moving to Asia, do you see a difference in the trend of labour exploitation than that of South Africa?

UB: There are more challenges in Asia given the economic and political Challenges. South Africa has effective regulation and a coherent labour law framework. In Asia we are dealing with vast numbers of people and open borders with increasing migration and urbanisation, corruption and governance issues, and the lack of regulation which make exploitation very difficult to detect and prosecute.

AB: In India, practices like bonded labour still continue. What would be your suggestion?

UB: This requires investigation and co-operation from the government, as well as the political will and resources to eradicate bonded labour. Government, unions and corporate sector collaboration will lead to effective mechanisms for identification, prosecution and redress.

AB: With your new mandate at the UN, what are your thoughts and how would you contribute to the issues of slavery?

UB: I am committed to continuing the work undertaken my by predecessor, Gulnara Shahinian, to identify practices of contemporary slavery over the world and to ensure their effective eradication with the necessary government, unions and business co-operation. The ILO is developing greater coherence in labour standards with effective remedies and this need to be supported. The recommendations made by my predecessor have to be followed up and monitored, and situations of continued slavery in various countries identified and acted upon. The situation of women and children is a key challenge which requires immediate and effective action and I am committed to doing this.

INTERVIEW: JENS MOBVIG

I AM A STRONG SUPPORTER OF Transparency & Accountability

My time in Kosovo and Serbia has added to this experience – maybe mostly in understanding how a democracy should work and which factors need to be there. For example, the role of civil society as a necessary counterweight to the government.

Dr. Jens Modvig is Director, Prevention of Torture in Detention, Danish Institute against Torture (DIGNITY) and an elected member of the United Nations Committee against Torture. He has carried out missions on human rights and democratisation in 45 countries, including Kosovo and Serbia. **John Stewart Sloan**, on behalf of *Torture: Asian & Global Perspectives*, interviewed Dr. Modvig in order to question him about the prevalence of torture.

John Stewart Sloan (JSS): Dr. Modvig, thank you for speaking with us today. With 20 years of experience as a medical professional, one of your personal areas of interest is monitoring and documentation of torture and inhuman treatment in places of detention. You have published extensively on the issue. Can you tell us why this particular area is of interest to you?

Jens Modvig (JM): Yes, torture is perhaps the most vicious human rights violation – in its worst form aiming to create a life in suffering with severe consequences of torture, so as a medical doctor it is difficult NOT to participate in the fight against torture. As a medical doctor, you may be complicit in torture, you may be indifferent or you may fight torture actively. The last option is very rewarding. Feeling that you can use your education and professional skills in the service of an important cause is in fact a great privilege.

> Medical doctors can play a positive or a negative role in the fight against torture. The negative role is to be involved in torture, either directly or indirectly. Direct involvement may be to advise interrogators on health weaknesses of a detainee, which may be utilized in the interrogation. Indirect involvement might be to omit the reporting of obvious cases of torture encountered to appropriate authorities and just let the practice continue.

Also, the work against torture represents a lot of professional challenges which in themselves are interesting: How can we document torture in the best way, that is, a way that allows us to prove that torture took place, bring perpetrators to justice and provide compensation to the victim. Thus, documentation of torture is maybe the most important pathway to ending impunity and preventing torture, so effective and credible documentation methods are extremely important in this fight.

JSS: In your opinion why do you think that the practice of torturing inmates still prevails in society?

JM: Actually we believe that detainees not yet convicted are those at highest risk of being tortured – much higher than prisoners who have received a sentence. The reason is that when the investigation of a criminal case proceeds, getting a confession from the suspect is the most direct way to conclude the case – and easier than having to prove the guilt of the suspect by means of technical proofs or witnesses. Thus, putting pressure on the suspect by inducing pain or suffering may produce the desired result, which is a confession. This pressure can be applied in many ways. When you deprive a person of his liberty, i.e. to put him in a pre-trial detention, you actually – intentionally or not – apply a pressure. In many countries, pre-trial detention of suspects – who have not yet been proven guilty! – is a standard procedure. This in itself is of course not torture, but it is a threat to the right of being considered innocent until otherwise proven.

Once detained, the suspect may be interrogated at the discretion of the police, which may imply sleep deprivation, harsh interrogations, threats and even physical and psychological violence. In such situations, the acts are clearly intentional and with a purpose – as stated in the torture definition – namely to evoke a confession. Alternatively, the purpose could be to make the suspect pay a bribe to get released or treated a bit better.

So, the reason why torture still prevails is – in my opinion – lack of political will to "clean up" bad practices and also the fact that the criminal justice sector in many countries suffers from lack of resources and standards. Beating a confession out of a suspect is an acceptable modus operandi, and nobody is punished for this. Three basic safeguards – rights in connection with arrest – may protect suspects from torture and ill-treatment: the right to see a lawyer, the right to see a doctor and the right to inform relatives about your arrest. If national systems of criminal justice would ensure these rights and the compliance in practice with these rights, much would be achieved.

The burden of this lies on the shoulders of the parliamentarians: the democratically elected representatives of the people. If they would ensure these legal rights and the full implementation, they would have made a considerable contribution to the prevention of torture.

JSS: In countries that have signed and ratified the Convention against Torture, torture is still carried out by the police and armed forces and in many cases it is done with the blessings of the ruling regimes. If we cannot get the governments to realise the wrong they are permitting, how do you think it is possible to get the officers at street level to realise that what they are doing is wrong?

JM: This is a really good question. I agree that the change has to involve the ruling regimes and – as mentioned above – also the legislative branch: the democratically elected representatives in the parliament. In many places, the government – the executive branch – has too much power compared to the legislative branch – the parliament. In democracies, according to the principle of separation of powers, the parliament has to be able to exercise its parliamentary oversight over the executive branch and assume democratic control over the way the system is managed.

In the case of torture prevention, the parliament should decide legislation that protects the people against torture and ill-treatment, and the government should be held accountable for complying with these laws. In some situations, this does not happen because the government holds the population in an iron grip and uses repression, including torture and ill-treatment, as a political tool. In other situations – probably more common – the government and the parliament know what happens but closes their eyes and do not have the resources to make real changes. They end up balancing between acceding to international legal standards and declarations in order to show a progressive will and acknowledging the reality, which is far from these standards but hard to change.

The solution to this problem is to ensure development funds for true improvement of human rights. As it is now, there is a world of international standards on human rights and mechanisms to assess human rights violations. We have treaty bodies and special rapporteurs and regional commissions and courts, which all contribute to the normative development and assessment of standard violations. On the other hand, there is also a different world of development programmes and development goals, with a huge amount of bilateral and multilateral funds for development. It seems that these two worlds are not very well connected. If a higher proportion of the development funds could be allocated to for instance anti-torture work – police reform and education, technical upgrade, monitoring of places of detention, anti-corruption programmes in the law enforcement, capacity building of the general prosecution in cases of alleged torture, medical documentation

of torture, strengthening parliamentary oversight over the law enforcement – prospects would be better.

JSS: Do you feel that awareness programmes for the general public and human rights programmes for the police and military will have any affect?

JM: Yes, but they cannot stand alone. I believe that interventions to change the practice of torture should make use of synergy from intervening at several points at the same time. For instance, it is necessary to make the general population more aware of their rights including the right not to be tortured. This may influence their vote for the parliament. Elected parliamentarians who are accountable to the people in terms of combatting torture is of course very helpful. However, the effect may be tenfold as high if you, at the same time, work with the ministry of interior and implement international standards for treating suspects and allow them to see a doctor, work with the ministry of health and the medical association on documenting and reporting cases of torture, work with the ministry of justice to create an independent body which may process cases of alleged torture, and you work with the civil society to have them monitor progress in the fight against torture.

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> The reason why torture still prevails is – in my opinion – lack of political will to "clean up" bad practices and also the fact that the criminal justice sector in many countries suffers from lack of resources and standards.
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JSS: To cite an actual example, early last year there was an incident in a Sri Lankan prison where the prison authorities themselves surrendered their duties to the police who sent in a detachment of the Special Task Force. The resulting death toll was horrendous and the government of President Mahinda Rajapaksa has never made good on its promise to make a report open to the public. What message would you send to Rajapaksa over this incident?

JM: I am not in a position to send messages to any Presidents or governments unless I have a thorough insight in the situation. In general, I am a strong supporter of transparency and accountability. This means that places of detention should not be closed institutions without insight, where anything could happen and no information ever gets out. On the contrary, the criminal justice institutions spend taxpayers' money and should be accountable to the people. This may take place by reporting obligations. For instance, any time force is being used by the criminal justice institutions, they should make a report, describing the situation, why the use of force was necessary and what was the legal basis of using force? Such reports should describe any use of batons, handcuffs, shields, isolation cell, pepper-spray and physical force. The reports should be sent to the central authorities and reviewed with a view to legality and to statistical occurrence of use of force in single institutions. This will provide transparency of the institutions and hold them and their managers accountable for any use of force – the smallest and also those where severe human losses are involved.

JSS: Staying in Sri Lanka for the time being, there have been numerous incidents where the doctors and medical professionals have sided with the authorities in covering up,

or attempting to cover up horrific injuries caused by custodial torture. One of your publications covered the issue of 'Helping to stop doctors becoming complicit in torture'. Can you please tell us something of this and how you think it can be applied.

JM: Yes – thank you for the opportunity to address this important issue. As I mentioned, medical doctors can play a positive or a negative role in the fight against torture. The negative role is to be involved in torture, either directly or indirectly. Direct involvement may be to advise interrogators on health weaknesses of a detainee, which may be utilized in the interrogation. Indirect involvement might be to omit the reporting of obvious cases of torture encountered to appropriate authorities and just let the practice continue.

The positive role for doctors is to fight torture by, e.g., documenting and reporting on torture and rehabilitating the torture survivors in the most effective way. Some doctors have job situations where they are at increased risk of being involved in situations which may amount to torture. For instance, doctors employed by the law enforcement agencies (police, prisons, military) often find themselves in situations of dual loyalty, where it may be difficult to decide whether to pursue the interests of your employer (e.g. the prison) or those of your patient – the prisoner. The medical associations have a role to play to support doctors working under these dilemmas – to provide clear ethical guidelines, reporting opportunities and working conditions which reduce the risk of doctors being involved – actively or passively – in torture.

JSS: You have recently spent three years in Kosovo and a further one year in Serbia, can you tell us about your experiences in these countries and how that experience has impacted on your work?

JM: It is always useful to know and understand other settings and cultures than the one you come from. I am lucky in many ways to live in a country – Denmark – where there is a good situation in terms of human rights and torture. This does not mean, however, that we do not have problems. Denmark, like any other country, has a need to constantly prevent torture. And we – my organization DIGNITY – Danish Institute Against Torture – do harvest useful experiences in the prevention of torture through our participation in the Danish National Preventive Mechanism – a prison visiting mechanism under the Optional Protocol to the Convention Against Torture. We visit – together with the Danish ombudsman – places of detention and identify problems which may develop into a breach of international standards, notably the UN Convention against Torture, and therefore should be discontinued.

My time in Kosovo and Serbia has added to this experience – maybe mostly in understanding how a democracy should work and which factors need to be there. For example, the role of civil society as a necessary counterweight to the government. In Kosovo and Serbia, when I was there, like in many other countries, the civil society was not appreciated very much. On the contrary, NGO's might even be suspected of being foreign spies or money laundering agencies hostile to the government. Measures were considered to subject NGO's to harsh audit procedures or legality procedures in order to allow or prohibit them to operate. This, of course, was a way to control civil society and in reality to suppress opposition to the government. This experience obviously highlights the way civil society is treated and considered as a litmus test of the degree of democracy that the government actually wants to support.

JSS: Dr. Modvig, thank you for your time.

ARTICLE: ASIA AND U.S.A.

elimination of torture CHALLENGES REMAIN

When we make a closer examination of the obstructions to the elimination of torture, it is obvious that the major problem lies within the criminal justice systems and the actual ways they function in our countries.

by JACK CLANCEY

AS we begin this second meeting let us start with a short reflection on the overall aims of the project to promote the Convention Against Torture ("UNCAT") and our progress in working to prevent torture in Asia. In this regard, there have been some historically important achievements this year in the Asian region.

The adoption of a law criminalising torture in Bangladesh naturally should receive the pride of place. During our last meeting we learned that there was skepticism about the success of the private member's bill for criminalising torture which was then before the Bangladeshi parliament. However, as we meet now this bill is already a law passed without any opposition. The title of the new law is the Torture and Custodial Death (Prevention) Act, 2013. It was passed on October 24, 2013.

The passing of this law has an interesting background, which is very relevant to us as we are persons who have taken a voluntary interest in the task of eliminating torture from our countries. The initiative for the new law in Bangladesh and all the work that went into promoting this legislation came from voluntary efforts. Mr. Saber Hossain Chowdhury, an MP from Bangladesh, contacted the Asian Human Rights Commission with a request that we assist to draft a bill criminalizing torture that could be placed before parliament. The Asian Human Rights Commission immediately took the initiative to draft the bill and made it available to this enthusiastic parliamentarian. He placed the bill as a private member's bill. He also took numerous steps for internal lobbying, as well as external advocacy to bring the bill to the attention of the government. The prime minister later placed the bill before a select

committee, which thoroughly discussed the issue and after making some amendments recommended that the bill be placed for debate. Meanwhile the Asian Human Rights Commission carried on with parallel promotional work and soon several civil society organizations in Bangladesh joined in. Of these local organizations, Odhikar, which was also represented at our first meeting, deserves special mention for their efforts in promoting this legislation. What comes next for Bangladesh will be discussed later in this speech, together with the challenges faced in other countries. Suffice to say that at the moment, Hong Kong, Sri Lanka, the Philippines, and Bangladesh are the only places in Asia, which have legislation criminalizing torture.

There have also been encouraging developments elsewhere. For example, in Pakistan a prepared bill has now been placed before a former judge for review after which it will be presented to parliament. This initiative in Pakistan also demonstrates what volunteers, including civil society organizations, can achieve in promoting legislation on human rights issues. Within the short period of two years a large number of human rights organisations responded to the call by the Asian Human Rights Commission to draft legislation criminalizing torture. These organisations formed themselves into a lobby and are presently engaged in advocacy to promote the adoption of this law. They were able to convince both of Pakistan's leading political parties to give priority to the passage of this law. Several ministers of the former, as well as the present, government as well as other parliamentarians have supported this call from civil society organizations. The bill is currently being discussed in parliament. We hope that when we meet next year we will be able to report that Pakistan has also adopted a law against torture.

In both Nepal and India bills criminalizing torture have already been placed before their respective parliaments. There are important civil society lobby groups pressing for the adoption of these laws. The Asian Human Rights Commission has contributed to the promotion of these bills in both countries.

While we note these extremely significant achievements, we must also recognize some of the central problems obstructing the efforts to eliminate torture. Some skeptics even go to the extent of saying that while laws are passed, the actual implementation of those laws will never happen. While we would like to dismiss such skepticism, it is quite sensible on our part to take a look at the actual situation and the seeming absence of political will on the part of many governments to take the requisite steps to eliminate torture even though these governments condemn torture and ill-treatment as inhumane practices unbecoming of any decent nation.

When we make a closer examination of the obstructions to the elimination of torture, it is obvious that the major problem lies within the criminal justice systems and the actual ways they function in our countries. As was noted during our meeting last year, the frequent, widespread use of torture in many Asian countries is almost the necessary result of the very primitive and backward nature of the criminal justice systems in these countries. The use of the fist, the boot, and far worse methods of torture and ill-treatment are, in fact, tacitly approved methods of dealing with accused persons. Governments don't invest much in criminal justice. While issuing statements that are pleasing to the ears of the international community, governments do not make the necessary investments to provide modern systems of investigations into crime. Purported investigations rely solely on the torture and ill-treatment of suspects. In fact, a heavy reliance on torture

Children stand inside a cell at the Police Station in Gao, Mali. The cell was used by the jihadists to torture victims during the occupation.28 August 2013. Courtesy: UN Photo

and ill-treatment is considered a convenient and inexpensive method for collecting information. These practices contravene the basic axiom of criminal justice: "it is better for a hundred criminals to go free than to wrongly punish one innocent man" and invert it to: "it is better to torture and ill-treat a hundred persons in order to catch a single criminal." A book published earlier this year, **Narrative of Justice**, narrates 400 stories of torture victims in Sri Lanka, almost all of whom were innocent. The use of torture and ill-treatment reflects an irrational approach to criminal investigations that prevail in many Asian countries. Therefore, perhaps it is important for the legislators attending this meeting to try to address this overall policy problem relating to criminal justice. The sheer irrationality of the prevailing system should be exposed so as to make it possible for legislators and the executive to adopt improved policies, backed by realistic budgetary allocations that would make the system more rational and efficient.

What makes the issue of the backwardness of the criminal justice systems more complicated is the increase in organized crime, as well as the increased use of more sophisticated weapons by criminals.

Experienced organized criminals know how to avoid torture, as they often bribe police officers to remain free. One consequence of this aspect of the system is that large numbers of innocent persons are arrested, tortured, and charged as substitutes for the actual criminals who have carried out serious crimes. A study of torture cases shockingly reveals that officers who have

arrested victims know from the very start quite that these "replacements" have no link whatsoever to the crime in question. However, either because they cannot solve a particular crime, or because they do not want to arrest a person that they think, or know, did commit the crime, officers often decide to implicate an innocent person. Naturally an innocent person who has been arrested and accused of committing a crime would deny his involvement. Therefore, the only way to get that person to confess to committing the crime is by way of torture and ill-treatment. This is happening on a large scale in many Asian countries. Documentary evidence of this reality has already been done in several countries.

A further aspect of organised crime is the police-criminal nexus. In Sri Lanka, for example, a Deputy Inspector of Police has been arrested in regard to the contract killing of a wealthy businessman. It is also alleged that this officer, along with a few subordinate officers and some criminal gangs, had been engaged in a series of crimes over a period of several years. These crimes include murder and the illegal disposal of bodies, as well as various financial transactions that have benefitted some police officers and criminals. The government neglect of the policing system is the actual cause of this degeneration. It is starkly clear that one of the primary needs in many Asian countries is thorough police reform. Such reform is also a primary requirement for economic development. Can there be much incentive to invest in an environment where the police have a reputation for being linked to crime and where corruption is rampant? Is the policing problem not also an economic problem that needs to be addressed by both legislators and the executive? To ignore this issue is to invite a great peril.

One of the frequent questions that is asked about the prevention of torture is: "Who will investigate complaints of torture and ill-treatment?"

Quite naturally, there is a tremendous distrust that the police or army officers could properly investigate or carry out an impartial inquiry into torture perpetrated by their own respective colleagues. Given that some higher ranking officers are complicit in the wrong doings of their subordinates, and given the fact that when some high ranking officers have been called upon to investigate torture and ill-treatment they have attempted to discourage the complainants or even intimidate and threaten them, these officers cannot be trusted to carry out proper investigations .

On the other hand, organisations like the human rights commissions or the national institutions do not have the requisite resources or power needed to properly investigate allegations of torture and ill-treatment. Most of the laws relating to national institutions authorize functions of a civil nature. Further, it is not within the mandate of such organisations to investigate crimes. Besides, the appointments of persons to these institutions, as well their removal, are both quite susceptible to direct political pressures. Thus, these institutions, in terms of establishing a permanent institutional framework for the implementation of laws criminalizing torture, are unsuited to the task.

Who then can investigate complaints of torture and ill-treatment? When the policing institutions reach the proper standard, the police themselves, using modern techniques and procedures, under the ultimate supervision of the judiciary, will be able to properly investigate torture and ill-treatment. In the process of modernization, the policing institution will develop proper

supervision and discipline, as well as the capacity to investigate itself.

The issue is what can now be done about the complaints regarding torture and ill-treatment in countries that have notoriously substandard policing. Unless a practical solution to this problem is found, achievements in related areas, including good legislation, will not be of much value to the public, particularly the victims of torture. Thus, in this "transitional period" before substantial changes have been achieved, ways have to be developed to conduct credible, independent investigations into cases of torture. We may look at some concrete experiences. In about 2006, there was pressure from the United Nations human rights agencies, as well as wide-spread criticism by NGO groups and others, about the prevalence of large scale torture in Sri Lanka. The government responded by investigating complaints of torture; this proved quite effective, as long as these measures were implemented. The method used was that the Inspector General of Police, or the Attorney General, would refer complaints of torture to a Special Unit of Inquiry of the Criminal Investigation Division (CID) for investigation. The special units, called SIUs, usually consisted of officers whose capacity and integrity had been recognized. Within a period two to three years these SIUs investigated a significant number of cases: in about 60 cases, they found that there was adequate evidence to prosecute officers. The files of these cases were presented to the Attorney General's Department with recommendations for prosecution. Thus far, this is the only example in Asia where effective measures were taken for the investigation of torture and ill-treatment. Unfortunately this approach was abandoned due to pressures from the police and the military, which reacted strongly against the investigations and subsequent court proceedings.

Although unfortunately it lasted for only a short while, this experiment proved that ways can be found to establish a special group of investigators, with competence and integrity, to conduct investigations into complaints of torture. Whether or not this will happen again will depend on the political will of the government; in turn, the political will of the government, at least to some measure, will depend on the extent of pressure from civil society.

There is an increasing number of civil society organizations committed to the documentation of torture, as well as providing assistance to torture victims by way of legal, medical, and psychological assistance. Committed members of civil society can help to create the local and international pressure necessary to make governments aware of the need to eliminate torture. In this regard conscientious legislators can play an important role by helping to mobilize civil society. I hope that during this meeting this all-important issue will be a subject of your deliberations.

Associated with effective investigations is the need to provide protection for the victims, as well as for those human rights defenders and lawyers who assist victims of torture. A victim who makes a complaint about torture puts himself at risk of being harmed. The particular officers who use torture usually do all that they can to stop victims from pursuing their complaints. The methods adopted vary and include: intimidating and harassing victims and their families; fabricating false charges; as well as offering monetary compensation and other incentives to try to get the victims to withdraw their complaints. If any of this behavior was done in regard to other crimes it would be considered an interference with the administration of justice. However, when the police and military are accused of torture,

this interference with the administration of justice is usually not pursued. There have been examples where the alleged perpetrators of torture have killed the victims who have made the complaint. Thus, this vital issue of witness protection, which is accepted as a necessary part of the administration of the criminal law, should be in the forefront of the minds of legislators and civil society. Is there any justification for delay in passing and implementing witness protection laws?

Another area of great importance is the welfare of the victims. Today we are more aware than ever of the crippling nature of torture and ill-treatment. Conditions such as acute shock and post traumatic disorders, which have become part of our daily vocabulary, are caused not only by accidents, but also torture. The role played by psychologists needs to be better recognized, not only from the point of view of treating and assisting victims with their recovery, but also the role they can play in the process of investigation and prosecution of torture and ill-treatment. Some psychologists are trying to assist victims who are dealing with these problems. Other psychologists have been willing to assist victims by helping them to articulate their psychological condition as testimony. Again, I suggest this is an area that you should discuss, both in terms of the needs of victims, as well as helping to create awareness in our societies. Hopefully this will lead to the allocation of much needed resources.

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> In many Asian countries, there are not yet laws in place that make torture illegal. If torture should never be used by anyone, should not the first step be to pass laws making torture illegal? Once laws making torture illegal, are passed, the requisite structures to ensure a strict implementation of those laws must be put in place.
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All this work will require more alert, and at first more frequent, judicial interventions. Traditionally, the criminal bench of the judiciary has only been used to deal with ordinary criminals. When state officers, particularly police and military officers, are brought as accused before the courts, the judges often feel caught in a very complex dilemma. Some judges who consider police officers as key players in maintaining law and order often take a sympathetic view of these accused officers. Some judges even think that the punishment of these officers might have a chilling effect on other police officers, which might adversely affect the entire criminal justice system. If effective torture prevention is to take place, a very essential component is judicial education: judges need to learn the role they can play, first to prevent torture, and second to demand the development of the kind of police work which meets the highest standards. In most Asian countries, it would not be an understatement to comment that most judges have not played their part in trying to achieve the all-important goal of eliminating torture. Some would even say that the cold-heartedness of judges is a contributory factor to the support of the widespread practice of torture. Judicial education must necessarily include education on basic human rights and modern jurisprudence regarding torture and ill-treatment.

Last week, the USA based Institute on Medicine as a Profession released a report, which stated that medical professionals "helped design, enable and participate in torture and cruel, inhumane and degrading treatment" of detainees. One of the authors of the report stated, "It's clear that in the name of national security, the military trumped (the Hippocratic Oath), and physicians were transformed into agents of the military and performed acts that were contrary to medical ethics and practice." In Asian countries, doctors sometimes stand by when persons are being tortured; more frequently, doctors assist police officers who try to cover up torture, by performing so-called "examinations" of the torture victims and then preparing false medical reports. This is an area that should be more closely examined by the medical profession. Perhaps it should also be a subject that parliamentarians may wish to investigate.

In a very interesting book, *On Killing*, retired U.S. army Lt. Colonel Dave Grossman, who is a psychologist, refers to "compelling data that indicate that this singular lack of enthusiasm for killing one's fellow man has existed throughout military history." (p. 16) A study conducted by S.L.A. Marshall found that in WWII, 80% to 85 % of U.S. soldiers did not fire their weapons at the enemy. Marshall is quoted as noting that when faced with the responsibility of killing another person, if it is possible to turn away, a soldier "at this vital point … becomes a conscientious objector." (p. 1) Grossman concludes, "There is a force within mankind that will cause men to rebel against killing even at the risk of their own lives." (p. 336) Yet, soldiers do kill. Grossman notes that there are sociopaths "who will kill without regret or remorse" but that those individuals only comprise 2% of all veterans. (p. 181). Grossman discusses the increase in murders in the U.S. and discusses how, through the senseless violence depicted in movies and video games, "we, as a society, have become systematically desensitized to the pain and suffering of others." (p. 315) One of Grossman's most interesting footnotes is his note that after the My Lai massacre in Vietnam, the U.S. Army instituted a program of mandatory annual training about the Geneva convention and related law. He notes, "In this training, soldiers are taught which orders are illegal and how to disobey illegal orders" [emphasis added]. He then comments, "This may be the first time in history that soldiers have been taught to disobey orders."

We can discuss how these insights can be applied to torture by police officers, military officers, and intelligence officers. I would guess that, as with soldiers, there are only about 2% of police officers who can torture without any regret or remorse. Should we discuss legislation that requires all police officers to participate in annual training programs that present the clear guidelines set out in the International Convention against Torture, as well as the legislation for those countries who have such laws? Can we also discuss the possibility of passing legislation that will encourage police offices to be "whistle blowers" and reveal specific cases of torture? Can the legislation for the protection of witnesses also offer protection to those police officers who speak up and are prepared to give evidence in Court?

While each country has to pass their own legislation and establish their own institutions to prevent torture, it is also necessary for the international community, including the UN agencies engaged in human rights, to take an active part in the promotion of police reforms. The goal is to transform police agencies into modern institutions that abhor and prevent the use torture and ill-treatment.

There are ongoing activities among NGOs, such as by the Asian Alliance against Torture and Ill-treatment, and groups of lawyers, to document instances of torture, to speak out against the use of torture, and to urge institutional changes that will prevent the wide-spread use of torture.

Allow me to diverge briefly. There are troubling signs around the world that political leaders are increasingly searching for excuses to allow them to torture persons, as well as "justifications" for not investigating or prosecuting those persons who are alleged to have committed torture. The most common rationale is national security.

There are many examples from around the world that can be given. I would cite examples of the U.S.A., which often, usually correctly, condemns specific human rights abuses in other countries.

(This file photograph shows the Author of this article, John Clancey (left), Secretary of the China Human Rights Lawyers Concern Group, and Hong Kong lawyer and legislator Albert Ho Chun-yan, at a hunger strike in support of Chinese human rights lawyer Gao Zhisheng, and other human rights activists. (courtesy: China Human Rights Lawyers Concern Group)

When he was a candidate, Barack Obama condemned waterboarding and other interrogation practices, which he considered amounted to torture. Obama stressed the importance of upholding the rule of law. "No more ignoring the law when it's inconvenient. That is not who we are. We will again set an example for the world that the law is not subject to the whims of stubborn rulers, and that justice is not arbitrary." (Cited in **With Liberty and Justice for Some**, Glenn Greenwald, p. 155. I am indebted to the research and insights of Greenwald for the material I will cite below; giving the page references to the same book)

In a June 2008 speech, Eric Holder, who would become President Obama's Attorney General, stated in unambiguous language: "Our government authorized the use of torture, … and authorized the use of procedures that both violate international law and the United States Constitution." (p. 158)

General Barry McCaffrey, in a 2009 interview, stated, "We tortured people unmercifully. We probably murdered dozens of them during the course of that, both the armed forces and the CIA." (p. 174) Human Rights Watch researcher, John Sifton, claims, "Approximately 100 detainees, including CIA-held detainees, have died during U.S. interrogations, and some are known to have been tortured to death." (p. 174)

However, after he was elected, Obama took up the mantra of recent presidents: "…we need to look forward as opposed to looking backwards… I don't want them

[officials accused of torture] to suddenly feel they've got to spend all of their time looking over their shoulders and lawyering up." (pp. 160-161) As you are aware, the CAT states very clearly: "No exceptional circumstances whatsoever, whether a state of war or threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture. An order from a superior officer or a public authority may not be invoked as a justification of torture." Even for those who are not lawyers, that message is unambiguous.

In January 2009, Manfred Nowak, the UN special rapporteur on torture announced, "Judicially speaking, the United States has a clear obligation to bring proceedings against top government officials who authorized techniques that under international law are considered torture." (p. 166)

In a later interview with Greenwald, Nowak said, "…whoever practices torture shall be brought before an independent criminal court and be held accountable. That is, the torturer, him or herself, but also those who are ordering torture practices, or in any other way participating in the practice of torture. This is a general obligation, and it applies to everybody; there are no exceptions in the Convention." (p. 166)

Greenwald emphasizes, "A criminal investigation of torture allegations is thus mandatory under both the Geneva Conventions and the Convention Against Torture. Refusing to carry out such an investigation is itself a crime, a new violation of the law separate from the original acts of torture." (p. 166)

President Obama, a former constitutional law professor, who clearly knows the law, not only refused to initiate any investigations into the allegations of torture committed or ordered by U.S. government employees and officials, but also took a wide variety of measures to obstruct investigations and even interfered in court proceedings.

A few examples:

1. "Just to be extra certain that Holder would not initiate criminal proceedings against Bush officials, the White House continued to pressure the attorney general even after Obama had publicly acknowledged that such pressure was inappropriate." (p. 177)
2. White House officials made efforts "to forestall any formal inquiry into Bush's torture regime that might be carried out by a congressional committee." (p. 181)
3. When prosecutors in Spain initiated a criminal investigation of former Attorney General Alberto Gonzales and five top associates in regard to the roles they played in the torture of five Spanish citizens held at Guantanamo, not only did Obama speak out against the investigation, but, we know, thanks to WikiLeaks, that "Obama's State Department warned Spanish authorities that any efforts to hold Bush torturers accountable would, as one cable put it, 'not be understood or accepted in the US and would have an enormous impact on the bilateral relationship." (p. 183)
4. Although, in 2009, an Italian court found 22 CIA agents guilty of kidnapping an Islamic cleric in Milan, "the administration has actively protected these CIA agents from any extradition attempts by the Italian authorities." (p. 184)
5. "The Obama administration also undertook extraordinary efforts to prevent courts in Britain from investigating claims of torture by Binyam Mohamed, a British resident who was incarcerated at Guantanamo for six years

without charges. This example deserves a bit more detail. Mohamed's lawyers sought discovery of "notes taken by British agents during discussions with CIA agents who detailed to the Brits what they were doing to Mohamed. A British High Court ruled in his favor, finding that Mohamed was entitled to obtain the documents to prove that he had been tortured in American custody. As part of the ruling, the British High Court prepared a summary of the notes in question. But as the ruling was about to be released – and the world to learn the details of Mohamed's abuse at the hands of his American captors – the British government warned the court that British national security would be severely jeopardized if these details were disclosed." (p. 185) The British government specifically said that if the courts released the information. "U.S. intelligence agencies would no longer pass onto Britain any information about terrorist plots aimed at British citizens." [!!] (p. 185) It would appear then that Obama was not only in breach of CAT and the U.S. Constitution, but, as he was prepared to not disclose information about terrorist plots, he would, in effect, be aiding and abetting terrorists.

Whenever we hear attempts of any kind, by any persons to defend the use of torture, we need to remember the clear message of CAT: torture is never permissible for any reason!

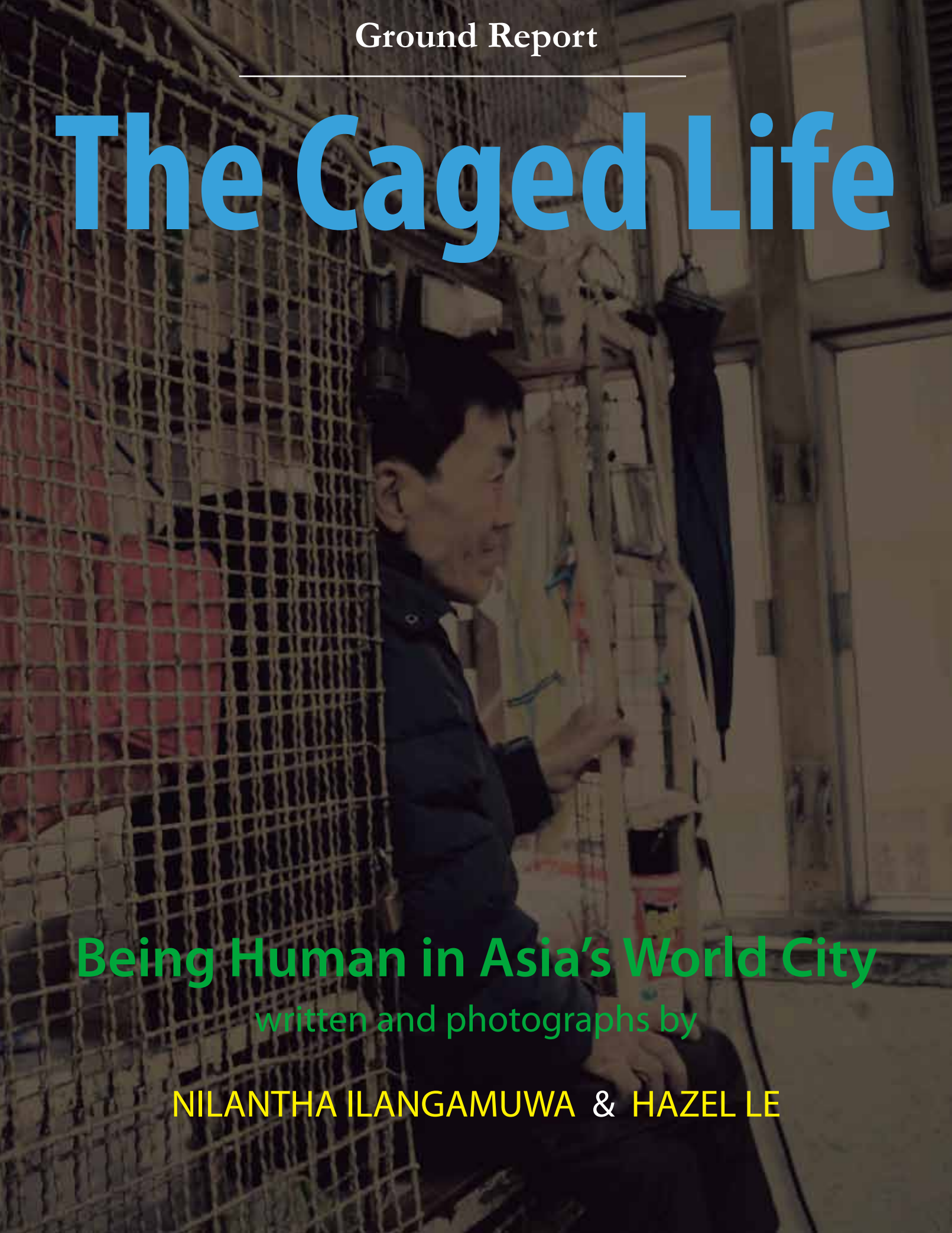
I would like to return to the main theme, namely the use of torture, by police officers in many Asian countries, as an ordinary means to attain the objective they have set. That objective is to force persons to state what the police want those persons to say. The police officers attempt to justify the torture they employ as a means of carrying their investigations. These police officers must learn: first, that it is always wrong to use torture, and second, that proper police investigations do not rely on torturing people. In many Asian countries, there are not yet laws in place that make torture illegal. If torture should never be used by anyone, should not the first step be to pass laws making torture illegal? Once laws making torture illegal, are passed, the requisite structures to ensure a strict implementation of those laws must be put in place.

These are some of the more important challenges facing those concerned about working to eliminate torture.

(The article is based on the speech delivered by the author at the second meeting of Asian Parliamentarians and Human Rights Defenders jointly organized by the Asian Human Rights Commission and the Danish Institute Against Torture in end 2013)

Ground Report

The Caged Life



Being Human in Asia's World City

written and photographs by

NILANTHA ILANGAMUWA & HAZEL LE

GROUND REPORT: CAGED LIVES IN HONG KONG

Everyone needs a life of respect. Those in cages still wait for theirs.

It was almost sunset in Asia's global city, but darkness is a rare experience in a city that stays awake for 24 hours a day, 365 days a year. The city itself might tell many stories, if one cares to listen, as it is a bridge between the past and the present.

But, the purpose of our walk through one of most secure cities, which has contributed so much to modern world history, is to detail a sadistic story some humans face today.

Hong Kong agencies, including immigration, ostensibly work to provide a comfortable life to those who visit and live in the territory. Hong Kong's residents are calm and respectful. They are reserved and appear to tend towards individualist thinking, but they also know how to rise up collectively when their way of life is threatened or when the rights they consider inviolable are under attack.

But, in a place that values freedom and respect, the legacy of "caged homes" creates a stark and chilling contrast.

What is a "Caged Home"?

Here is how the Society for Community Organisation (SCO), a prominent rights group working with the homeless, outlines the history of cage houses in Hong Kong:

> "Caged homes are a miniature of Hong Kong poverty. They arose in 1950s due to an influx of refugees from mainland China who provided Hong Kong industries with cheap labour. Their arrival created a strong demand for low cost bed space apartments as the Hong Kong Government had no housing and labour protection policy for these low paid workers. Before 1985, singletons were not even allowed to apply for public rental housing.
>
> Many single men arrived in Hong Kong with hardly any possessions. They worked as coolies and rented 3 ft. x 6 ft. bedspaces. They needed to share one kitchen and one toilet with tens of households, decade after decade. To make more profit, the apartment operators used iron cages to construct bunk beds (two to three beds stacked on top of each other), and so the name "caged home" was coined.
>
> In 1994, the government proceeded with the enactment of the Bedspace Apartments Ordinance to regulate caged homes, but it only concerned the fire safety and sanitation issues, not the household and living spaces themselves. The ordinance, which came into effect in 1998, defines caged homes as "bedspace apartments" with 12 or above households in any flat.
>
> At its peak, there were over 500 to 600 caged homes in Hong Kong. Today, there are still nearly 100 of them. However, there are thousands of cubicles houses which are similar to caged homes where about 12 households share a flat. According to the Hong Kong Census and Statistic Department, there are about 100,000 people living in inadequate housing, such as caged

homes and cubicle houses."

To put things more simply: a cage home is a cage no bigger than a dog pen with one small entrance through which a person may crawl through to get in and that even more difficult to get out. A cage that these people call home.

"Do these places still exist," is the question that passed through our mind? The fact that Hong Kong, as one of richest territories in the world, might still have these cages for human beings was troubling. And we were surprised to learn that, even this year (2014) hundreds of thousands of people in Hong Kong are still homeless and many use cages as their house.

Busy City: Mong Kok

Universal Suffrage, Not Suffering

"Freedom is the most valuable principle in the territory," Emily Lau, who is the chairwoman of the Democratic Party in Hong Kong and one of key political characters at the Legislative Council (Legco), said when we interviewed her at her Hong Kong office. Though she is not comfortable with the politics of Mainland China and their interference in Hong Kong, she pragmatically prefers the maintenance of political cohabitation, while also accepting that the denial of reality is impossible when one needs concrete solutions to problems.

A former journalist turned politician, Emily Lau has confidence and energy that sustains her fight for universal suffrage. "Hong Kong has unique identity of maintaining democratic values with its true meaning, therefore we need to protect them for our next generation", said Emily.

"Hong Kong people have been fighting for universal suffrage for several decades and are losing patience. Many do not believe Beijing will allow the special administrative region to have democracy as long as China is governed by a one-party dictatorship. Although the Basic Law states that the chief executive shall be selected by consultation or election, Beijing has insisted political development should be by gradual and orderly progress," Emily stated in a recent newspaper column.

"In 2010, the Democratic Party supported political reforms for 2012, which added 10 members to the Legislative Council and 400 members to the Election Committee that selects the chief executive. This was not universal suffrage but because of this step forward, Beijing gave Hong Kong people the understanding that the chief executive will be elected by universal suffrage in 2017, and after that, all Legco members will also be so elected," she added.

"Not only Hong Kong but also other countries in Asia must maintain democratic values. We must help to improve the

Ms. Emily Lau, Chairwomen of the Democratic Party, Hong Kong

governance system", she said while recalling her experiences in Burma/Myanmar and as an election observer in Bangladesh.

Into the Dark Side of the Territory

Time matters in Hong Kong; time seems to fly here. The entire territory looks to see high-rise buildings at mountain level that appear calm and peaceful. But the inner story is completely different for some living in certain locales.

Despite of all its positive developments in the last few decades, many of the city's residents face tremendous difficulties in their lives.

"Crowded with skyscrapers, Hong Kong witnesses a GDP growth of over 2 trillion HKD every year, but some of its citizens end up homeless. What they call "home" is a dim street corner, a ragged chipboard or a second–hand mattress", Ho Hei Wah, Director of SCO noted in the preface to the book, "Homeless", which contains a series of vivid photographs.

With this in mind, we intended to seek and learn more about the people stuck in painful and stressful conditions, waiting for concrete solutions from the government.

Such stories are hardly covered in the mainstream media. And, it is not such an easy task to get access to the areas and information that illustrate this difficulty without special assistance.

We were lucky, therefore, to receive help from Sze Lai Shan, an activist who commenced her work with those living in cages in the early 1990s. She agreed to help us visit areas of the city where people have cages for homes so we could talk with the inhabitants.

Life in the Cage

As soon as we met Sze Lai Shan at the exit of the Mong Kok Mass Transit Railway (MTR) station, we commenced a free-wheeling coversation with her. She shared interesting but painful experiences as we made our way to our destination.

How many people are affected?

According to the government, there are 175,000 people who continue to live on the basis of temporary arrangements or in cages. But, according to independent statistics, our guide offered, there are around 200,000 people across the territory who are homeless. She informed us that while most of them have likely come from mainland China, others have been around their entire life.

The first thing we noticed, as we stepped into Mong Kok, one of the overcrowded sections of the territory, was the smell.

We were finally close to learning about the people who have spent decades with their only home a cage.

We recalled the story of Yau, who was in the cage for decades and we were curious to know about his present situation. The SCO website had this to say:

> "Yau was orphaned at fourteen when his parents starved to death during World War II. He is alone in life and one of Hong Kong's hundred thousand elderly poor. He previously worked in a bookshop and now his only hobby is reading Chinese literature. His only dream is to have an individual public housing unit and a room full of books"

He collected as many books as he could and kept a small space in his cage for them. Later, the SCO helped him to keep his books in a secure place.

However, "he passed away two years ago," Ms. Sze updated us, dashing our hopes of speaking with him; every homeless person has a story to tell and Yau's had been an extraordinary one.

Armed with a basic outline of the cage houses and homeless people in Hong Kong in our heads, we entered the second floor of one of the high-rise buildings in Mong Kok.

Sze Lai Shan, who is also associated with SCO, brought us along as her friends; otherwise neither security personnel nor those who are in the cage will allow us to enter or will speak to us. Literally, cage life is a secret; only landlords/cage owners, certain agents of the government, a few activists, and those who live in the cages are privy to life inside.

An Informative and Rare Meeting

"Here we are, please close the door and come in," our activist guide passed the message to us and we entered accordingly.

Small passages took us through the apartment, letting us see the death of freedom, caged disorder, dirt, filth and the putrid smells that accompanied them.

The strangeness amplified by the fact that just outside the walls was the same city renowned for its freedom and human dignity – a contrast that conjured comparisons of heaven and hell and left us wondering if the walls themselves were another type of cage – a cage to keep misery out of sight and forgotten even with help so close by.

But we refocused on our task and approached the residents.

Despite the difficult and stressful lives they live, the residents of the caged tenement had friendly smiles to share with us. It showed a hope for change.

We sat in front of the cage of a man who has lived in here for around 20 years and who agreed to be interviewed.

Chun Yuk Chap, who is 60 years old, came from mainland China in the early 70's and engaged in several professions here in

Hong Kong. But in 1987, he rented this cage after he decided to leave Mainland China forever.

> "My marriage was an arrangement. We might not have had a legal certificate, but we were living together for a period of time and we had a son too. But then our family was challenged with poverty and other social problems. That was when I decided to migrate to Hong Kong,"

He explained further: "I won't hide the reasons why I came here: China is bad in the truest sense. Freedom was only a day dream".

Ms. Sze Lai Shan

However, he was able to find a cage house in 1987 when he started working as a construction worker in different places in the territory. But with the passage of time his health worsened. Now he suffers from numerous ailments.

"I'm getting tired even after speaking a couple of words, my liver is getting worse. True, the government is helping me by providing health facilities. But the situation in the cage aggravates my illnesses", he said. At the moment, due to his age and poor health, he is able to obtain an allowance from the Government of around HKD $ 3,000 per month, from which he has to pay HKD $ 1,400 of monthly rent for his iron cage.

Notably, he did not apply for public housing at first and he explained the reason for that:

> "Many people were here at that time, we shared our lives together, and everyone has bad and sad stories to share; some as bad a story as mine. So I decided not to leave them for a public house. How can I live alone at a public house with no one?" he asked.

But later he decided to apply for public housing and leave the cage if the government would arrange a public house: "I applied for a public house a couple of years ago, and I am still waiting". The way in which he waits is also telling of the type of life he has lived:

> "I spend my time here and I have many friends with whom I spend my time. But from time to time, and one by one, they passed away, illustrating the reality of life. I know one day I have to go, and now we are only seven people here in different cages but earlier there were around 80-70 people in this whole floor. Most of them died. Now my health is getting weaker, especially due to the hygiene situation here. It worsens daily. During the summer, many fleas appear, which is the most terrible part. The owner of these cages is not concerned about these issues and we have no money to change the environment".

When asked about the meaning of life, his response was uplifting:

A side view of three cages

> "I never really thought about [the meaning of life]. I do understand everyone has meaning in their life. Even people like me who have been, and still live, through tremendous struggles to find happiness and freedom. But I believe difficulties don't matter till you see the difference. Perhaps it's not only seeing but also to having a desire to achieve a difference in life".

He concluded with a philosophical take on how one can deal with the challenges of life and death:

> "When you have difficult situations, the difficulties matter at the beginning. Then you get used to it. Most of incidents that I come across exemplify this known reality. However life is uncertain, no one knows the moment that we are going to have our last breath".

> "It was very difficult for us to move to another cage, leaving Mr. Chun behind, but we still had work to do. We moved to the next cage where Tang Man Wai, who is 64 years old, has spent over 30 years in the same cage. He was born and grew up in Hong Kong, and was only able to study up to primary school level due to family problems."

He remembered how and why he came here and what the cages were like before:

> "I was engaged in many professions, one time I worked as a cook and another time as a labourer, But the monthly income was not enough to have an apartment, and I could have this cage; it was the best solution at that time. That's how I came here in 1983," "There were three blocks in this floor when I was first came, 70-80 people were here and they managed their life in each cage. At some time children and women were also here. But now few of us remain. Some of them passed away but a few were able to get public houses,"

His story also is another horrific narration of life and struggle. He too dreams of having a public house. However, at the moment he is able to get HKD $ 4,000 allowance from the government in which he has to pay HKD $ 1,400 as the monthly rent for the cage.

These are only two stories of thousands of elderly people in Hong Kong. But there are also many women living in such cages without help who support and care for their families. "Many children who are living with

their mothers are attending school, but their lives are as bad as you saw here," Sze Lai Shan explains.

Time to Begin Healing

Living in cages is a great difficulty some residents of the city face; they need more attention from the government and they need help moving from these cages to more suitable homes.

On the surface, Hong Kong is one of most respectful places in the world, no matter who you are. The territory has attracted many people from around the globe and its efficient public services are a large part of what makes Hong Kong so appealing; it is one of the Hong Kong government's finest achievements.

However, there must be urgent and immediate action regarding these inhuman conditions that tarnish the territory's reputation.

Globally, Hong Kong has passed through many difficult situations, from slavery to the modern day struggle for freedom and justice. The cage culture was an available solution at one time, when the region was surviving conflict and post-conflict situations. Hundreds of thousands of people landed here seeking a better life. Hong Kong treated them with equality and did its best to overcome difficulties faced.

The world has changed and it is time for Hong Kong to live up to its reputation.

Everyone needs a respectable life, and those living in cages should not have to wait for it any longer.

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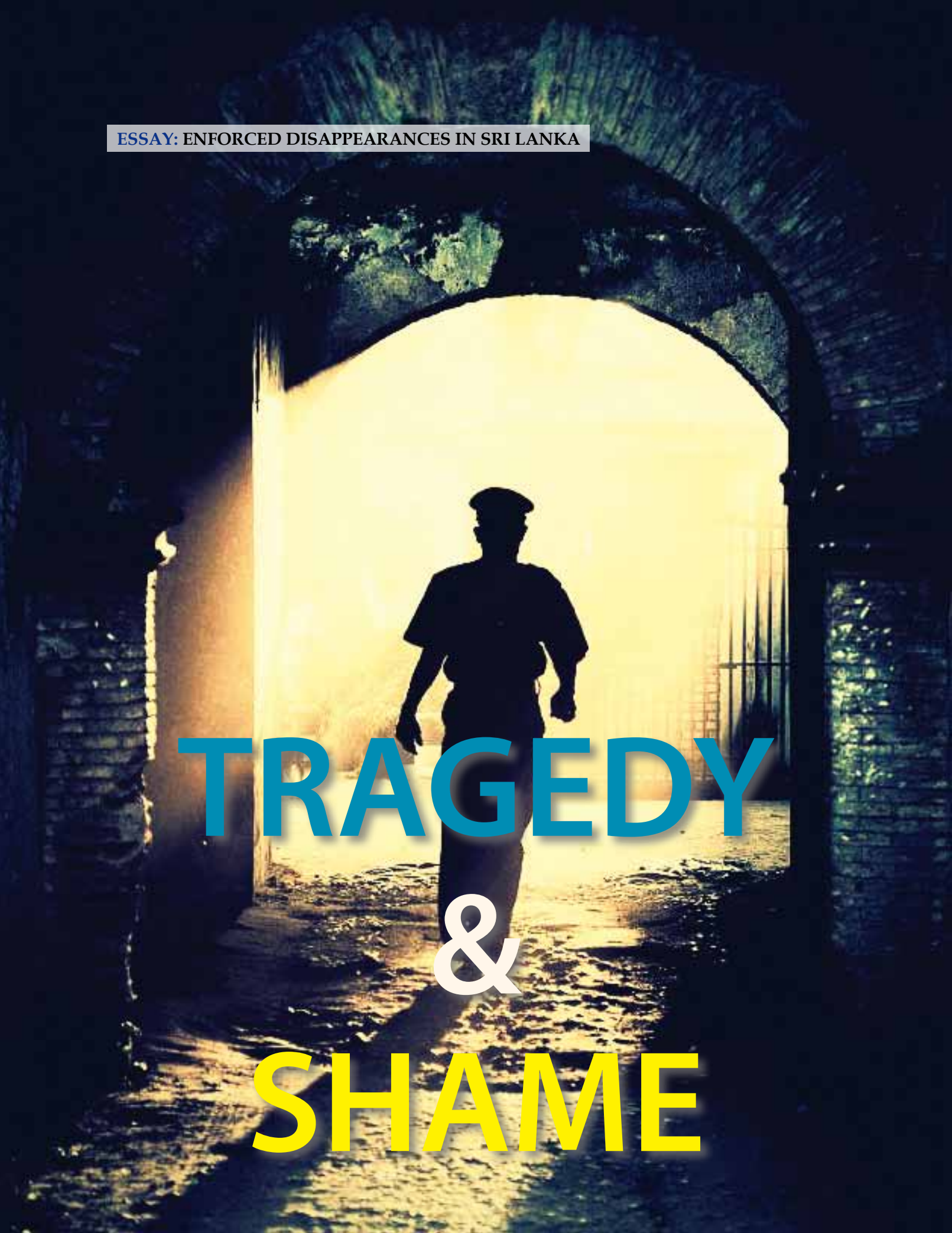
Hazel Le *graduated from the Hong Kong Polytechnic University in Marketing and Public Relations. She is currently part of the administration at the Asian Human Rights Commission. An article about Hazel's childhood in Hong Kong was published in an earlier issue 2.*



TRAGEDY & SHAME

ESSAY: THE CRIME OF ENFORCED DISAPPEARANCES IN SRI LANKA

Sri Lanka should be urged to ratify the Convention against Enforced Disappearances as well as the Optional Protocol to the Convention Against Torture and should be further urged to give domestic effect to the ratification of international conventions and their supervisory mechanisms, particularly the individual communication procedures.

by KISHALI PINTO-JAYAWARDENA

Introductory Reflections

THE recent discovery of graves of unidentified victims subjected to enforced disappearances at various points during Sri Lanka's troubled decades of extrajudicial killings in Mannar, (situated in the Northern war theatre peopled predominantly with inhabitants of minority Tamil ethnicity) and Matale (situated in the Central Province involving people of majority Sinhalese ethnicity), illustrates the commonality of the deficit of justice that faces all citizens in the country.

The fact that the State of Sri Lanka has not been able to sufficiently bring closure to the victims of the Northern ethnic war and the Southern civil insurrection (the most recent discovery of skeletons in Matale are those traceable to the enforced disappearances of Sinhalese villagers in the eighties by a previous administration) and thousands more who faced similar fates in all parts of the country, indicates the gravity of the accountability question.

Needless to say, this question goes beyond the problem of state accountability for deaths of civilians during the last stages of the war in the Wanni between the Liberation Tigers of Tamil Eelam (LTTE) and government troops in 2009. It is a question that concerns the impunity of the State and is not limited to one particular government or one particular political period. It is important that national and international political actors as well as civil society recognize this essential truth.

International law concisely defines the crime of enforced disappearances;

"Enforced disappearance" is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which places such a person outside the protection of the law.[1]

1 Article 2 of the International Convention for the Protection of all Persons against Enforced Disappearances, adopted on 29 June, 2006. The Convention reflected settled international law in this regard. See the assertion that enforced disappearances "constitutes an offence to human dignity, a grave and flagrant violation of human rights and fundamental freedoms […] and a violation of the rules of international law" in Resolution 49/193 of the General Assembly, adopted 23 December 1994 and also resolutions

The definition in the *Rome Statute* has an additional element in that it applies to the acts of a political organisation as well as that of the State.[2] Commenting on this addition, the Working Group (WG) on Disappearances has established that, for purposes of its work, enforced disappearances are only considered as such when the act in question is perpetrated by state actors or by private individuals or organized groups (e.g. paramilitary groups) acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government.[3]

Article 4 (1) "All acts of enforced disappearance shall be offences under criminal law punishable by appropriate penalties which shall take into account their extreme seriousness."[4]

In its General Commentary on Article 4 of the Declaration)[5] the WG has stated that, although States are not bound to follow the definition contained in the Declaration strictly in their criminal codes, they shall ensure that the act of enforced disappearance is defined in a way that clearly distinguishes it from related offences such as abduction and kidnapping.

A further point of interest made by the WG is that under the definition of enforced disappearance contained in the Declaration, the criminal offence in question starts with an arrest, detention or abduction against the will of the victim, which means that the enforced disappearance may be initiated by an illegal detention or by an initially legal arrest or detention. That is to say, the protection of a victim from enforced disappearance must be effective upon the act of deprivation of liberty, whatever form such deprivation of liberty takes, and not be limited to cases of illegitimate deprivations of liberty. The emphasis on the need for disappearances to be recognised as a crime is reflected in other

51/94 of 12 December 1996 and 53/150 of 9 December 1998. See article 1, paragraph 2 of the UN Declaration on the Protection of All Persons from Enforced Disappearances, G.A. res. 47/133, 47 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/47/49 (1992). Adopted by General Assembly resolution 47/133 of 18 December 1992 (hereafter the Declaration) and in particular, the Inter-American Court of Human Rights, decision dated 14 March 2001, in the *Case of Barrios Altos (Chumbipuma Aguirre and others v. Perú)*, paragraph 41.

2 '*Enforced disappearance of persons*" *means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.'* Article 7, paragraph 2 (i) of the Rome Statute of the International Criminal Court (hereafter the Rome Statute). Text of the Rome Statute circulated as document A/CONF.183/9 of 17 July 1998 and corrected by procès-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002. Sri Lanka has yet not ratified the Rome Statute.

3 See General Comment of the WG.

4 Article 2 of the International Convention for the Protection of all Persons against Enforced Disappearances, adopted on 29 June, 2006. The Convention reflected settled international law in this regard. See the assertion that enforced disappearances "constitutes an offence to human dignity, a grave and flagrant violation of human rights and fundamental freedoms […] and a violation of the rules of international law" in Resolution 49/193 of the General Assembly, adopted 23 December 1994 and also resolutions 51/94 of 12 December 1996 and 53/150 of 9 December 1998. See article 1, paragraph 2 of the UN Declaration on the Protection of All Persons from Enforced Disappearances, G.A. res. 47/133, 47 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/47/49 (1992). Adopted by General Assembly resolution 47/133 of 18 December 1992 (hereafter the Declaration) and in particular, the Inter-American Court of Human Rights, decision dated 14 March 2001, in the Case of Barrios Altos (Chumbipuma Aguirre and others v. Perú), paragraph 41.

5 See UN.Doc E/CN.4/1996/38, pars 54 to 58 as well as the new General Commentary issued by the WG on the definition of enforced disappearance (March 2007).

international instruments as well.[6]

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Sri Lanka's Obligations under International Law

Sri Lanka's accession to the International Covenant on Civil and Political Rights (ICCPR)[7] has meant that the prohibition imposed by this treaty against enforced disappearances applies directly to state obligations in international law. Enforced disappearances represents a clear breach of various provisions of the Covenant, including the right to liberty and security of person (article 9), the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (article 7), and the right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person (article 10). It also violates or constitutes a grave threat to the right to life (article 6).[8]

According to the jurisprudence of the Committee and that of the Inter-American Court of Human Rights, the State party has a responsibility to investigate the disappearance in a thorough and effective manner, to bring to justice those responsible for disappearances, and to provide compensation for the victims' families.[9]

In one Communication of Views against the Sri Lankan State[10], the principle that the army

6 See Article III (1) "The States Parties undertake to adopt, in accordance with their constitutional procedures, the legislative measures that may be needed to define the forced disappearance of persons as an offense and to impose an appropriate punishment commensurate with its extreme gravity. This offense shall be deemed continuous or permanent as long as the fate or whereabouts of the victim has not been determined." Article IV (1). "The acts constituting the forced disappearance of persons shall be considered offenses in every State Party." The Inter-American Convention on Forced Disappearance of Persons. See also the observation of the Human Rights Committee in Concluding Observations - Honduras" UN Doc CCPR/C/HND/CO/1 of 13 December 2006, paragraph 5 "The State party should amend the Criminal Code in order to include the crime of enforced disappearance. It should also ensure that the cases of enforced disappearance are duly investigated, that those responsible are prosecuted and, where appropriate, punished and that the victims or their relatives receive fair and adequate compensation."

7 Sri Lanka acceded to the International Covenant on Civil and Political Rights (referred to hereafter as the Covenant or 'ICCPR') on 11 June 1980 (entry into force on 11 September 1980) and the First Optional Protocol to the ICCPR on 3 October 1997 (entry into force on 3 January 1998).

8 *Celis Laureano v. Peru*, Case No. 540/1993, Views adopted on 25 March 1996. Also, *Bleier Lewhoff and Valiño de Bleier vs. Uruguay* Case No. 30/1978 Views adopted on 29 March 1982 and the Concluding Observations of the Human Rights Committee - *Burundi*, of 3 August 1994 (United Nations document CCPR/C/79/Add.41, par. 9).

9 *Sanjuan Arevalo v. Colombia*, Case No. 181/1984, Views adopted on 3 November 1989; *Avellanal v. Peru*, Case No. 202/1986, Views adopted on 28 October 1988; *Mabaka Nsusu v. Congo*, Case No. 157/1983, Views adopted on 26 March 1986; and *Vicente et al. v. Colombia*, Case No. 612/1995, Views adopted on 29 July 1997; see also General Comment No. 6, HRI/GEN/1/Rev.1 (1994), para. 6. See also, Concluding Observations of the Human Rights Committee on the third periodic report of Senegal, 28 December 1992, CCPR/C/79/Add.10; see also *Baboeram v. Surinam*, Case No. 146/1983, Views adopted on 4 April 1985 and *Hugo Dermit v. Uruguay*, Case No. 84/1981, Views adopted on 21 October 1982.

10 The Human Rights Committee has, to date, delivered six Communication of Views against the Sri Lankan State, namely *Fernando vs Sri Lanka* Case No 189/2003, Adoption of Views on 31, March, 2005), *Sarma v Sri Lanka* No 950/2000, Adoption of Views on 31 July 2003, *Jayawardene v Sri Lanka*, Case No 916/2000 Adoption of Views on 26 July 2002, *Ivan v Sri Lanka*, Case No 909/2000, Adoption of Views on 26 August 2004, *Sinharasa v Sri Lanka*, Case No. 1033/2004 Adoption of Views on 23 August 2004 and *Rajapakse v Sri Lanka* Case No 1250/2004, Adoption of Views on 26 July 2006. However, there has been no implementation of these Views by the Sri Lankan Government. A recent decision by the Supreme Court (SCM 15.09.2006, judgment of Chief Justice Sarath Silva) on a review petition

is indisputably an organ of that State and an enforced disappearance at the hands of any member of the army is imputable to the State party, was affirmed by the Committee in no uncertain terms.[11] The petitioner argued that that the State party had failed to investigate its responsibility effectively, as well as the individual responsibility of those suspected of the direct commission of the offences. It had given no explanation why an investigation was commenced some ten years after the disappearance was first brought to the attention of the relevant authorities. Moreover, the investigation did not provide information on orders that may have been given to the low ranking officers regarding their role in search operations, nor did it consider the chain of command.

It had not provided information about the systems in place within the military, concerning orders, training, reporting procedures or other processes, to monitor the activity of soldiers which may support or undermine the claim that the superior officers did not order and were not aware of the activities of their subordinates. It was alleged that there were striking omissions in the evidence gathered by the State party. Thus, the records of the ongoing military operations in this area in 1990 had not been accessed or produced and no detention records or information relating to the cordon and search operation were adduced. Even though indictment was filed against the junior army officer found responsible, key individuals were not included as witnesses for the prosecution, despite the fact that they had already provided statements to the authorities and could have provided testimony crucial to the case.

In counter, the government contended that this disappearance was an isolated act initiated solely by a minor officer without the knowledge or complicity of other levels within the military chain of command. This was a position that was rejected by the Committee.[12] Further, it was opined that it is implicit in article 4 (2) of the Optional Protocol that "the State party has the duty to investigate in good faith all allegations of violation of the Covenant made against it and its authorities."[13] The State party

filed in respect to the Sinharasa case, ruling that the presidential act of accession to the Protocol to the ICCPR (which enabled the Committee to receive and consider individual communications from any individual subject to Sri Lanka's jurisdiction) was an unconstitutional exercise of legislative power as well as an equally unconstitutional conferment of judicial power on the Committee, has proved to be extremely inimical to the domestic impact of the Committee's decisions. This decision of the Court has been subjected to severe criticism on the basis that it reduces rights of the individual in favour of an obsolete notion of state sovereignty.

11 *Sarma v Sri Lanka*, Case No 950/2000, Views adopted on 31, July 2003, approving of the *Velasquez Rodriguez Case* (1989), Inter-American Court of Human Rights, Judgment of 29 July 1998, (Ser. C) No. 4 (1988). The case concerned a complaint filed by a father from Trincomalee, whose son had disappeared in army custody in 1990. Facts before the Committee were declared to disclose a violation of Articles 7 and 9 of the ICCPR, with regard to the petitioner's son, and article 7 of the ICCPR, with regard to the petitioner and his wife.

12 Where the violation of Covenant rights is carried out by a soldier or other official who uses his or her position of authority to execute a wrongful act, the violation is imputable to the State, (See *Caballero Delgado and Santana Case*, Inter-American Court of Human Rights, Judgment of 8 December 1995 (Annual Report of the Inter-American Court of Human Rights 1995 OAS/Ser.L/V III.33 Doc.4); *Garrido and Baigorria* Case, Judgment on the merits, 2 February 1996, Inter-American Court of Human Rights) even where the soldier or the other official is acting beyond his authority, if it provided the means or facilities to accomplish the act. Even if, and this is not known in this case, the officials acted in direct contravention of the orders given to them, the State may still be responsible. *Timurtas v. Turkey*, European Court of Human Rights, Application no. 23531/94, Judgment of 13 June 2000; *Ertak v. Turkey*, European Court of Human Rights, Application no. 20764/92, Judgment of 9 May 2000.

13 *Bleier v. Uruguay*, Case No. 30/1978, adopted on 24 March 1980, para 13.3. In regard to the continuing

was directed to expedite current criminal proceedings against individuals implicated in the disappearance and to ensure the prompt trial of all persons responsible for the abduction. It was also put under an obligation to provide the victims with an effective remedy including a thorough and effective investigation into his disappearance and fate, his immediate release if he is still alive, adequate information resulting from its investigation and adequate compensation for the violations suffered by him and his family.

An interesting part of the Committee's decision was the reiteration of an earlier held view that the enforced disappearance in issue amounted to a violation of Article 7, ICCPR, namely the right to freedom from torture or to cruel, inhuman or degrading treatment or punishment.[14]

In addition, the violation of Article 7 of the Covenant, in respect to the parents themselves, centered on the "anguish and stress" that they had suffered as a result of his disappearance and the continuing uncertainty concerning his fate and whereabouts.[15] Concerns have also been expressed in the treaty based periodic reporting procedures regarding the inability of the Sri Lankan State to identify, and/or inaction in identifying, the perpetrators responsible for the large numbers of enforced or involuntary disappearances of persons. Taken together with the reluctance of victims to file or pursue complaints, this was observed '"to create an environment that is conducive to a culture of impunity."[16]

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The Absence of the 'Crime' of Disappearances and Prosecutorial Processes

A notable feature in the criminal process had been the convoluted and often tortuous recourse to ordinary penal provisions relating to the many cases of disappearances in the absence of a specific 'crime' of disappearances.[17]

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nature of the act, it was pointed out in *Sarma* that enforced disappearances "shall be considered a continuing offence as long as the perpetrators continue to conceal the fate and whereabouts of persons who have disappeared and these facts remain unclarified". Article 3 of the Inter-American Convention on the Forced Disappearance of Persons, which states that the offence of forced disappearance "shall be deemed continuous or permanent as long as the fate or whereabouts of the victim has not been determined", was also referred to.

14 *Quinteros v. Uruguay*, Case No. 107/1981, Views adopted on 21 July 1983.

15 ibid. In *Quinteros*, the Committee considered that the family members of the disappeared were also victims of all the violations suffered by the disappeared, including Article 7.

16 In Concluding Observation No 10 of the UN Human Rights Committee (CCPR/CO/79/LKA) Human Rights Committee, seventy ninth session, November 2003. Though the Committee directed that Sri Lanka should respond on this particular question together with three other questions considered to be of overriding importance within one year, namely by October-November 2004, there has been no perceptible adherence by the government to this direction. In this same context, see also Committee Against Torture, Concluding Observations on Sri Lanka in 2005, (CAT/C/LKA/CO/1/CRP.2. 7-25 November 2005) at paragraph 12.

17 Provisions of the Penal Code under which persons may be punished for transgressions of physical security and personal liberty, include for example, culpable homicide (Section 293), murder (Section 294), death by negligence (Section 298), attempt to murder (Section 300), attempt to commit culpable homicide (Section 301), hurt to extort confession (Section 322), wrongful restraint (Section 330), wrongful confinement (Sections 331, 334, 335), and criminal force and assault (Sections 340-9). Provisions commonly utilised in cases of enforced disappearances are 355 (kidnapping or abduction in order to murder), 356 (kidnapping or abduction with intent to cause that person to be secretly and wrongfully confined), 335 (wrongful confinement), 32 (common intention), and conspiracy (Section

In this regard, the Sri Lankan criminal law is a first offender of the international law principle enunciated in the preceding analysis; namely that the act of enforced disappearance must be criminally defined in such a way that is clearly distinguishable from related offences such as abduction and kidnapping. In the recent decades of mass killings, enforced disappearances, and violation of physical life and liberties, only two major criminal prosecutions have been successfully brought to a close at the original and appellate process namely in the *Embilipitiya* Case and the *Krishanthi Kumaraswamy* Case. This startling statistic, by itself, confirms the failure of the criminal law, the prosecutorial process, and indeed, the judicial system in the country.

Notably, however, the question of accountability in terms of the criminal law extends beyond the mere absence of a legal definition in the statute. Even where a statute has been relatively sophisticated in its substance such as the Torture Act, its actual impact upon society has been minimal due to poor prosecutorial processes and the lack of political will to bring about substantive changes. For example, though the Torture Act became part of Sri Lanka's law in 1994, not a single conviction was evidenced in terms of this Act for ten years thereafter. From 2005, there were only two convictions; undeniably not a success rate that prosecutors could be proud of. Defensive reasons have been advanced in this regard, including the perennial problem of the absence of a comprehensive witness protection scheme resulting in witnesses dropping out of protracted trials due to intimidation by the perpetrators, unsympathetic trial processes and even, an argument that the harsh imposition of a minimum sentence of seven years has made judges reluctant to convict. However, the truth is that these arguments only illustrate the essential weakness of the system and consequently, the failure of the State to remedy these lacunae and put into place a working and efficacious trial process.

The above reasoning goes to the argument sought to be made out in this paper that the failure of Sri Lanka's prosecutorial and legal processes cannot be limited to extraordinary crimes during times of emergency; rather, they manifest a pervasive problem with inadequate legal mechanisms that are in force in times of peace as well as (obviously, in a more aggravated manner) in times of war.

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Questions of Investigative and Prosecutorial Capacity & Victims Concerns

Procedures currently in place for commencing investigations into serious human rights violations, is grossly inefficient. For years, instances of forced disappearances had been investigated by the Disappearances Investigation Unit (DIU), a special unit within the Criminal Investigation Department (CID) of the police force. However, since it is predominantly members of the police and security forces that are held responsible for disappearances, investigation by the DIU does not amount to investigation by a competent and independent State authority.

Investigative responsibility in regard to general human rights violations that are of a grave nature are handled by the Special Investigations Unit (SIU) which continue to be understaffed and under resourced.[18]

113(B) and abetment (Section 102). Section 82 of the Police Ordinance makes it an offence for a police officer to knowingly and willfully exceed his powers or to offer any unwarrantable personal violence to any person in custody.

18 When a case is referred to the SIU, a team of about three policemen is required to visit the area in which the alleged offence occurred and begin their

In addition, its officers are not permanently attached to the SIU and may be transferred out at any moment. This results in a problematic situation where a police officer presently attached to the SIU, and who conducts an investigation against a colleague at police station "X", may very well find himself subsequently transferred to "X" to work alongside with the said officer. This may result in the SIU officer being ostracized at his new post and may even endanger his life and job at the hands of angry and vengeful colleagues. Hence not having a permanent team of officers attached to the SIU is a distinct disadvantage that impedes upon the efficiency and diligence in which the SIU carries out investigations.

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> In a fundamental sense, the immunity afforded to the Executive President to flout the law and to commit grave human rights violations needs to be done away with.
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> "

According to information submitted by the Sri Lankan State to international treaty bodies, prosecutorial responsibility for victims of enforced disappearances remained with the Missing Persons' Unit (MPU) which is a separate unit within the Attorney General's department, headed by a Deputy Solicitor General with a team of junior state officers working under him/her. In practice, the functioning of this Unit depended heavily on the investigations by the DIU, which is not an independent investigative body. Such indictments, if filed, have been only against junior officers.[19]

The MPU appeared to have chosen only cases where there is direct evidence of removal or disappearances, and does not look into the large numbers of cases with strong circumstantial evidence. Victims removed involuntarily, detained and tortured, and subsequently released or escaped had often been eyewitnesses to many atrocities in police stations and army detention centres but their information had not been utilized. The MPU has had a poor record of successful prosecutions in cases of forced disappearance, despite the fact that tens of thousands of such cases were documented to have occurred in the past. Since 1998 up to available data in 2004, it had secured convictions in only nine cases of disappearance.

A broader vision of the role of prosecution processes in meeting victim needs for information and reparation, as well specific avenues for victim participation in trial processes is an urgent need presently. A revised trial process in Sri Lanka should give the victims the right to initiate investigations and invoke the jurisdiction of the Court. They should have the right of access to all documents and necessary information including legal documentation at any stage of the trial. Where requested, the trauma of facing in open court, the very persons accused of causing immeasurable agony to themselves and their loved ones should be minimized.

Intimidation of witnesses is not an isolated practice resorted to only on the part of the armed forces during times of emergency. Instead, it is a common practice among law enforcement agencies and is manifested even

investigation. According to current procedure, it is imperative that at least the initial complaint is recorded by an Assistant Superintendent of Police (ASP). But as there are a limited number of ASPs attached to the Unit, there is a considerable delay before proper investigations begin.

19 One reason for this is that the Disappearances Investigation Unit within the Police Department simply does not return files relating to senior officers to the prosecutors, claiming that its investigations are not complete. The Missing Persons Unit of the Attorney General's Department is then helpless to expedite action in those cases.

in normal times, by police officers accused of torture being kept in their positions despite indictment and thus being afforded an opportunity to threaten and even kill witnesses. In Sanjeewa vs Suraweera[20] for example, an employee of the Ceylon dockyard who was arrested by the police mistakenly believing him to be a criminal and then was beaten so badly that he suffered renal failure. His fundamental rights were later declared to be violated by the Supreme Court. However, no disciplinary action was taken against the responsible police officers who continued serving in their posts. A year later, as he was due to testify in the case instituted in the High Court in terms of the Torture Act against the police officers who had tortured him, he was shot and killed at point blank range by some of those very same police officers. The murder trial is ongoing. This is another facet of the continuing argument made in this paper that the basic environment for the committal of grave human rights violations is not limited to times of emergency.

In 2004, the decision taken by the National Police Commission, (then functioning constitutionally), to interdict police officers indicted under the 1994 Anti-Torture Act was one of the most positive steps taken by this body. However, with the deterioration of the legitimacy of this body in its second term with its members being unconstitutionally appointed, it is uncertain as to whether this practice of interdicting officers indicted of torture is being continued. This again illustrates the link between impunity and the general breakdown of the rule of law and constitutional mechanisms.

A witness protection system is meanwhile remains a dire need.

The authorities should diligently enquire into all cases of suspected intimidation of witnesses and establish a witness protection program in order to put an end to the climate of fear that plagues the investigation and prosecution of such cases.[21]

Such a witness protection scheme should address not only immediate security needs but also long term protection, trauma counseling and psychological support, particularly for sexually abused victims. Use of technical means to safeguard identity such as video conferencing and in camera proceedings should be incorporated. A Bill to that effect is currently pending before Sri Lanka's Parliament but is flawed in several respects, most notably in regard to the independence of its Protection Division which the Bill envisaged as being located within the Department of the Police. A revised version of the Bill has not been placed before the public for feedback and comments.

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Reform of the Law and Legal/ Prosecutorial Processes

In a fundamental sense, the immunity

20 2003 [1] SLR, 317

21 Concluding Observation No 9 of the UN Human Rights Committee (CCPR/CO/79/LKA) Human Rights Committee, seventy ninth session, November 2003. This need was recognised by then Attorney General of Sri Lanka, Mr. K.C. Kamlasabayson who made the following observation in an address of December 2, 2003: "Another important feature that requires consideration is the need for an efficient witness protection scheme that would ensure that witnesses are not intimidated and threatened. No doubt this would involve heavy expenses for the State and amendments to the law. I will only pose a simple question. Is it more important in a civilized society to build roads to match with international standards spending literally millions of dollars rather than to have a peaceful and law abiding society where the rule of law prevails?" in remarks made during the 13th Kanchana Abhayapala Memorial Lecture as reported by in *The Right to Speak Loudly*, Asian Legal Resource Centre, 2004.

afforded to the Executive President to flout the law and to commit grave human rights violations needs to be done away with.

The credibility of public oversight bodies in Sri Lanka such as the National Human Rights Commission (NHRC) and the National Police Commission (NPC) must be restored. Currently, the level of public faith in their capacity to work independently from government is non-existence consequent to the enactment of the 18th Amendment to the Constitution which did away with the safeguards of the 17th Amendment and politicized the manner of appointments to the bodies. A decision of the NHRC in 2006 to stop inquiring into the complaints of over 2,000 disappearances of persons which took place in past years is a case in point. The NHRC put forward a completely unacceptable reason for stopping their inquiries "for the time being, unless special directions are received from the government". A verbatim citation from a note of the Secretary to the Human Rights Commission dated 29 June 2006 attributed this to the fact that "the findings will result in payment of compensation, etc."

After intense public criticism, the NHRC retracted to some measure on this position but the efficacy of these investigations remain highly contested. The NHRC has been downgraded in its status from category "A" to category "B" by the International Coordinating Committee (ICC) of National Human Rights Institutions, UN Office of the High Commissioner for Human Rights.

In regard to specific constitutional reform, there is no doubt that the right to life and the prohibition against extra judicial killings/ enforced disappearance should be reflected in the constitutional document. Currently, as discussed in this paper, the Constitution does not include the right to life as a specific fundamental right, though, in some isolated and limited cases, the Supreme Court has brought in an implied right to life.

Sri Lanka should be urged to ratify the Convention against Enforced Disappearances as well as the Optional Protocol to the Convention Against Torture and should be further urged to give domestic effect to the ratification of international conventions and their supervisory mechanisms, particularly the individual communication procedures.

The creation of the crime of disappearances is imperative in this respect. The statutory offence should also incorporate interalia, the doctrine of command responsibility and the impermissibility of the defence of superior orders. The full scope of liability for prosecution should apply. Statutes of limitations should not apply to the offence of enforced disappearances.

Reform of the PSO and the PTA in order to ensure personal liberties is necessary. Provisions relating the placing of the burden of proving the voluntary nature of a confession upon the detainee, incommunicado detention and the taking away judicial discretion to grant bail should be repealed/ amended. Victims' concerns such as the right to initiate an investigation and the right of inclusion at all stages of the trial process should be specifically integrated into the trial process. A Witness Protection system handled by competent officers with security of tenure and completely independent from the normal police structures is crucial in this context.

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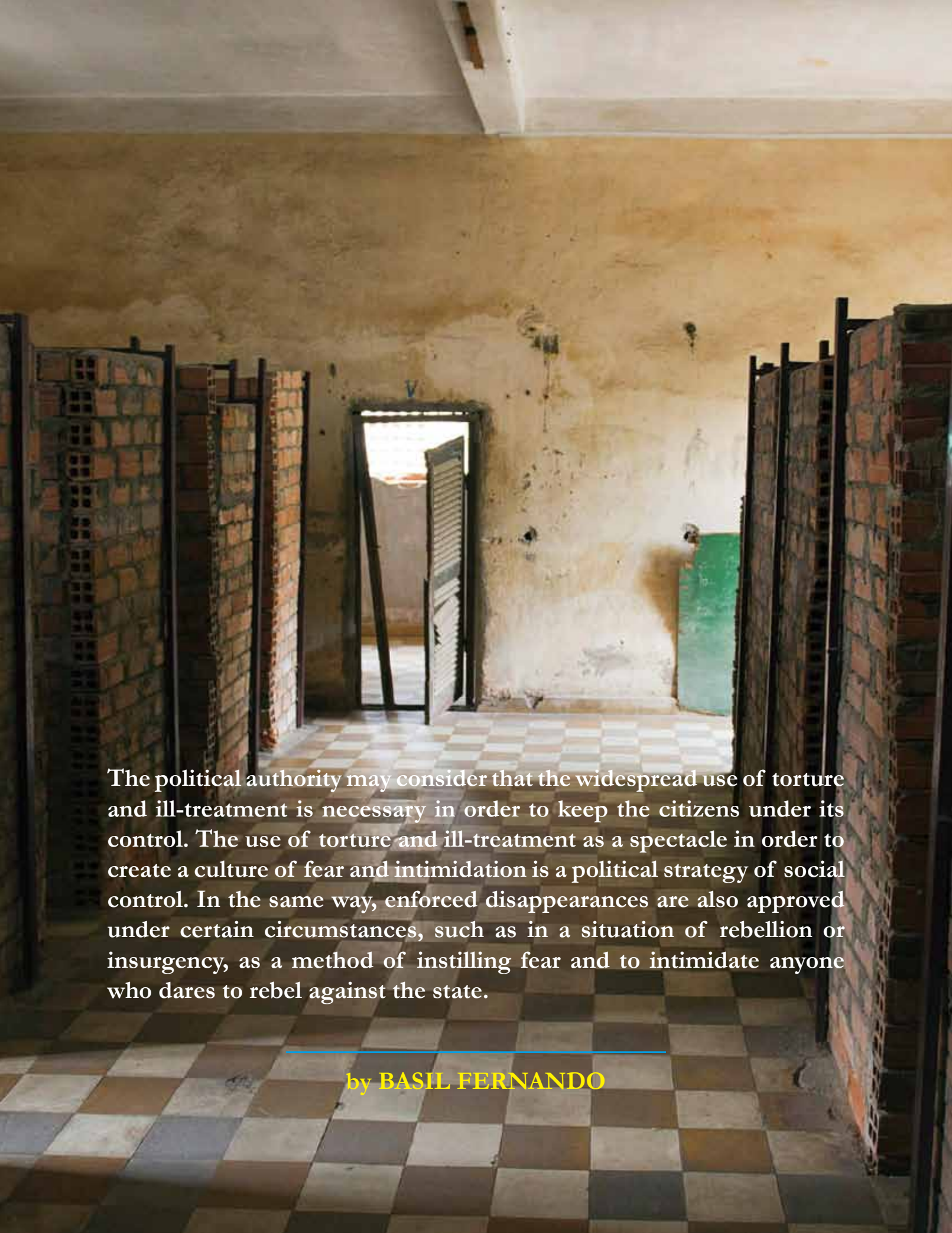

The political authority may consider that the widespread use of torture and ill-treatment is necessary in order to keep the citizens under its control. The use of torture and ill-treatment as a spectacle in order to create a culture of fear and intimidation is a political strategy of social control. In the same way, enforced disappearances are also approved under certain circumstances, such as in a situation of rebellion or insurgency, as a method of instilling fear and to intimidate anyone who dares to rebel against the state.

by **BASIL FERNANDO**

ARTICLE: STRUCTURALISATION THE PROBLEM OF TORTURE

PREVENTING THE IMPROPER USE OF Force & Violence

An examination of the effectiveness of human rights strategies for the prevention of the improper use of force and violence.

THE human rights project is centered on eliminating the improper use of force and violence in the way the state deals with the individual.

In the context of industrialised western countries the struggle to eliminate the improper use of force and violence has a long history. Michel Foucault[1] illustrates how, before the 19th century, physical violence was used as part of a spectacle in the punishment of culprits. In the 19th century this approach was abandoned and replaced by imprisonment as the mode of punishment. Thus, for those who grew up in these western countries, the use of direct force on the body of a human being by an agent of the state has now become unfamiliar.

However, this is not the case in most of the countries in the world. Like elsewhere, in most Asian countries the direct use of force on the body of the alleged culprit is common. Thus, the improper use of force and violence by the agents of the state on alleged culprits follows the old model used in Europe, making the sufferings imposed on the body of a person a spectacle for all to see.

The answer as to why this remains so should be sought, not from officers of the security apparatus (police and military) as the agents of the state, but from the state itself. If not for the approval from the state, the police officers, military and others are unlikely to use such force and violence. In the event that any agent of the state on their own exercises such improper force on anyone, s/he would incur disapproval and consequent punishments by the state. What is usually called 'impunity' following the improper use of force and violence is a demonstration of the state's approval of the use of such methods.

The mere fact that a particular state has ratified UN conventions forbidding such improper use of force and violence does not necessarily indicate actual disapproval of the use of such methods by its agents in dealing with alleged criminals. The same can be said of constitutional provisions outlawing torture and other improper uses of force and violence. The test as to whether the state disapproves of the improper use of force and violence is the practical means by which it ensures that such actions by its agents are prevented.

1 Michel Foucault, Discipline & Punish: The Birth of the Prison.

The prevalence of torture, ill-treatment, and other improper uses of force and violence in many Asian countries has been demonstrated through research and documentation. The following note from The Practice of Torture, published by the Asian Human Rights Commission in 2013, provides a literature review on torture and ill-treatment in Asia:

> In recent years, there have been numerous attempts to document the practice of torture in many Asian countries. The agencies involved in such documentation include human rights organisations and some of the agencies of the United Nations (such as the Rapporteur against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Committee against Torture, and reports presented to the former Human Rights Commission and the present Human Rights Council). Besides these, there are also a few academic foundations.
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> The Asian Human Rights Commission (AHRC) based in Hong Kong has placed a high priority on the documentation of torture. Together with its sister organisation, the Asian Legal Resource Centre (ALRC), it has produced numerous reports and publications in which the problems relating to the implementation of the UN CAT have been very lengthily documented. The AHRC's Urgent Appeals system has concentrated on assisting victims of torture in many Asian countries. As a result, a large body of information has been gathered in the Urgent Appeals archives. These are reports of individual complaints, which give vivid details on the practice of torture, as well as the limitations on the possibilities of the victims obtaining redress.

The following are some of the reports published by the AHRC/ALRC in the bi-monthly publication, Article 2:

AHRC_ALRC Documentation:
ALRC has published following reports of torture through its quarterly publication Article2; On SRI LANKA, Volume 1 no 4,i Volume 3 No 1ii,Volume 4 No 4iii, Volume 4 No 5iv, Volume 6 No 2,v Volume 8 No 4, vi and Volume 10 No.4vii; INDIA Volume 1 No 3viii,Volume 2 No.1ix,Volume 2 No 4 , x Volume 2 No 5,xi Volume 3 No 4xii,Volume 5 No 6xiii,Volume 7 No 2xiv, Volume 9 Nos 3 and 4xv, Volume 10 No 3xvi; BURMA, Volume 2 No 2xvii, Volume 2 No 6xviii, 5Volume 6 nos 5 and 6xix, Volume 7 No 3xx, Volume 11 No.1xxi; THAILAND , Volume 2 No 3xxii, Volume 4 No 2xxiii,Volume 4 No.3xxiv, Volume 5 No 3xxv,Volume 6 No 3xxvi; PHILIPINES Volume 5 No 5xxvii,Volume 6 No 4xxviii, CAMBODIA Volume 1 No 1xxix, Volume 1 No 2xxx, Volume 5 No 1xxxi, BANGLADESH Volume 5 No 4xxxii, Volume 10 No 2xxxiii, NEPAL Volume 3 No 2xxxiv, Volume 3 No 6xxxv, Volume 4 No 1xxxvi, Volume 7 No 1xxxvii; INDONESIA Volume 5 No 2xxxviii,Volume 9 No 1xxxix, PAKISTAN Volume 1 No 5xl, Volume 3 No 3xli, Volume 3 No 5xlii, Volume 8 no 2xliii and Volume 8 No 3xliv.

All these volumes are available at www.article2.org.

The State of Human Rights in Ten Asian Countries, published annually since 2005, devotes a chapter to each of these countries.[2]

2 The Practice of Torture – the Threat to the Rule of Law and Democratisation. AHRC 2103 (A report on Indonesia, Bangladesh, Burma, Sri Lanka, the Philippines, India, Pakistan, Nepal and Thailand).

A Table on the Improper Use of Force and Violence by the States in Asia

Country	Torture and ill-treatment	Enforced disappearances	Illegal arrest and detention	Fabrication of charges	Threats of assassination and other forms of harm	Sexual violence by security officers	Discrimination on the basis of sex, race and caste, religion	Blackmail by state agents
Bangladesh	√	√	√	√	√	√	√	√
Burma	√		√	√			√	√
Hong Kong								
Cambodia	√		√	√	√		√	
China (PRC)	√		√	√	√		√	√
India	√	√	√	√	√	√	√	√
Indonesia	√	√	√	√	√	√	√	√
Nepal	√	√	√	√			√	√
Pakistan	√	√	√	√	√	√	√	√
Philippines	√		√	√	√			
South Korea	√		√	√		√	√	√
Sri Lanka	√	√	√	√	√	√	√	√
Thailand	√	√	√	√		√	√	√

References in this chart are to general practices and not to exceptional incidents.

Approaches to the improper use of force and violence

The general approach to the improper use of force and violence is to attribute such abuse to the security agencies, such as the police, military and intelligence agencies. Some attribute such abusive practices to individual security officers and demand action against these individuals only. This approach has not proved adequate for the prevention of such improper use of force and violence. A more comprehensive approach is required in examining the root causes for the prevalence of such abuses, rather than merely attributing it either to the individual officers, or even to the security apparatus as a whole.

The widespread practice of abuse that prevails indicates that the state, as the ultimate political authority in the country, bears the responsibility for its prevalence. Without the direct or overt approval of the state the individual officers of the security apparatus, or the security apparatus as a whole, cannot engage in such widespread

abuses. State responsibility is two-fold: that is, a positive responsibility, through its approval for the improper use of force and violence; and a negative responsibility, when it fails to take the necessary steps to eliminate such practices.

The general approach is to attribute only responsibility in the negative sense to the state; the failure on the part of the state to take the necessary steps to punish the perpetrators of such abuses, and further the failure to take the necessary steps to ensure internal controls within the security apparatus in order to prevent the individual officers from committing such abuses.

" The political authorities in most of Asian countries have failed to achieve rule by consent. Although in some of these countries processes may exist for the election of governments, this does not imply that the form of governance is democratic; it is not governance by consent. "

However, this negative attribution is inadequate in explaining the widespread nature of such abuses, which are committed all the time. The positive attribution of responsibility to the political authority is justified on the basis that it is the overarching idea of discipline that the political authority holds and insist on enforcing which creates the space for such widespread abuses by individual officers and the security apparatus as a whole.

On that basis, it could justifiably be argued that in committing such abuses individual officers and the security apparatus as a whole are conforming to the expectations of the political authority, which expects the improper use of force and violence as a legitimate means of imposing discipline within society.

The political authority may consider that the widespread use of torture and ill-treatment is necessary in order to keep the citizens under its control. The use of torture and ill-treatment as a spectacle in order to create a culture of fear and intimidation is a political strategy of social control. In the same way, enforced disappearances are also approved under certain circumstances, such as in a situation of rebellion or insurgency, as a method of instilling fear and to intimidate anyone who dares to rebel against the state. In this sense the example given by Michel Foucault in his book, 'Discipline and Punish – the Birth of the Prison' of the case of Damiens the regicide is quite relevant to the Asian context. This chart points to a broader number of factors that create situations where there is widespread abuse of power.

The improper use of force and violence is used by the political authorities in most Asian countries as a mode of social control, so as to achieve obedience by way of instilling fear and intimidation.

The political authorities in these Asian countries have failed to achieve rule by consent. Although in some of these countries processes may exist for the election of governments, this does not imply that the form of governance is democratic; it is not governance by consent. In fact, in many of these countries even the electoral process is manipulated through violence used on political opponents. In any case, day-to-day ruling does not take place in a democratic manner; improper use of force and violence is used to control the population.

This chart points to a broader number of factors that create situations where there is widespread abuse of power.

A particular group within the population more exposed to the improper use of force and violence by the state is the lower income group; that is, the poor. In these countries, they are the overwhelming majority. The affluent middle classes and the rich constitute only a minority. The majority is controlled through the widespread use of force and violence. Thus, such improper use of force and violence is the mode of politics that is prevalent in these societies.

Thus, the following table is more representative of the sources of the improper use of force and violence in Asia.

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The need for a fresh approach to understand the improper use of force and violence in Asia (and, in general, for countries other than developed democracies)

The approach that has become quite common in the human rights field in particular, and in the discourse on state violence generally, is to attribute it either to individual officers or to some of the defects of the security apparatuses in particular countries.

However, in terms of the analysis made above, what is required is a more comprehensive approach that takes into account the ultimate responsibility of the political authorities for the widespread use of force and violence. This approach requires an attempt to understand the nature of the political system in a particular country, in the attempt to comprehend why torture and ill-treatment, enforced disappearances and other forms of the improper use of force and violence remain widespread within a particular context.

A similar distinction made in this paper relating to developed democracies and others is found in a recently published article by Dr. Nick Cheesman who is attached to the Australian National University. It is a useful reference and may be found in: The Hague Journal on the Rule of Law[3] . He makes the distinction between the rule of law and law and order. He further states that the two concepts are asymmetrical. The present paper is also based on that premise.

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3 http://journals.cambridge.org/ORL

The approach needed for prevention

Interventions aimed at the prevention of torture, ill-treatment, and other forms of the improper use of force and violence require a more comprehensive approach than mere condemnation of individual officers who engage in such abusive practices, and also a much wider approach than a mere call for reforms of the institutions that are part of the security apparatus, such as the police, the military and the intelligence agencies. It even requires going beyond reforms of the institutions of the administration of justice, such as the judiciary, prosecution, investigating agencies and prison services.

The most important aspect that needs to be addressed is the responsibility of the political authorities in their overall approach to social control. It is these political authorities that finally condition the behaviour of the individual security officers, the nature of the security apparatus and the independence enjoyed by the institutions of the administration of justice (such as the judiciary, prosecution department, investigating authorities and the prison authorities). It is not within the power of any of these agencies to transgress the parameters set up by the political authorities, directly or covertly. The prevention of torture, ill-treatment and other forms of the improper use of force and violence cannot be left purely to the integrity or heroism of the officers who are managing these activities.

The mere recommendations to investigate abuses and to prosecute them, as often demanded by human rights groups when violations are reported, do not go far enough to address the root causes of these problems. The capacity for investigations requires the freedom and independence to conduct such investigations. They also require the necessary resources, such as professional training, forensic facilities and other material resources for effective transport, communications and the like. Granting such independence and freedom, as well as providing the necessary resources, is in the hands of the political authorities. When the political authorities lay down, directly or indirectly, the parameters within which the person working in these institutions should operate, these parameters ultimately control the manner in which the work of these institutions takes place. In any case, the political authority can determine what these other institutions may be able to achieve by the control of resources. Also, the political authority can also decide who to recruit or dismiss.

Thus, the concept of ***change from inside***, meaning the change from within the institutional framework of the security apparatus, may not be a realistic possibility within a context where a political authority creates limitations on what the security apparatus is allowed to do. Thus, the ***change from inside*** concept must start with the change from within the political authority itself. It is only when the political authority internalises norms and standards of justice that the rules which could operate within a particular society, including the rules governing the security agencies, could come into being. When the internalised conception of the political authority on modes of social control involves suppressing freedoms of individuals, the rules which are formulated by such political authorities will necessarily create a culture of repression. When the political authority creates a culture of repression, it is not within the capacity of the security apparatus to ignore or go against such rules.

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The rule-making function of the political authorities

It is the political authorities that finally decide and shape the rules which operate in a particular society, including the rules under which the institutions of the security apparatus function. What is meant by 'rules' may be described through the following words of John Rawls:

> *In saying that an institution, and therefore the basic structure of society, is a public system of rules, I mean that everyone engaged in it knows that he would know if these rules and his participation in the activity they define were the result of an agreement. A person taking part in an institution knows what the rules demand of him and of the others. He also knows that the others know this and that they know that he knows this and so on.* [4]

It is these rules which, among other things, create the nature and functions of a criminal justice system within a particular country.

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Political authorities as the shapers of criminal justice

When there is the widespread improper use of force and violence followed by impunity in a particular country, it implies that this situation is an integral part of the criminal justice system within that country. Thus, the improper use of force and violence coupled with impunity and the criminal justice system are not two opposites as it is often presupposed in popular discussions. In fact, such abusive practice coupled with impunity is an integral part of the criminal justice system in that particular context.

Political authorities create the kind of criminal justice that safeguards the type of political system that they have created. For illustration: under the regime of Joseph Stalin, a criminal justice system was created for safeguarding the absolute power of Stalin himself as the ultimate political authority of the country. This system was based on what was understood to be socialist principles. The state was understood to be the representative of the people and therefore the idea of protecting people's freedoms and rights against intrusion from the state was quite contrary to these principles. Within that setup, the criminal justice system operated to protect the political authorities and the socialist property system. This is in contrast to a liberal democratic political system and a criminal justice system within the liberal democratic framework which is based on the idea of protection of the rights of individuals as duty of the state.

Thus, in understanding a particular criminal justice system in a given country, it is necessary to comprehend the nature of the political system that exists in that country. However, in doing that it would be quite misleading to go by the constitutions, statutes and other declarations only. What is essential is to understand the political system that actually exists within a particular country. The constitutions and other statutes may or may not be in conformity with the actual political system. The political system may use the constitution and other statutes merely as ornaments or things with limited purposes. What the system really is can be found in the actual operative principles that exist within a particular context. This can only be understood by proper observation of the way a system works in practice.

This difference between the system as it is expressed through the constitution and the statutes and the system as it practically operates is essential to understanding systems in the Asian context. Some countries have constitutions which, in fact, have very

4 A Theory of Justice, John Rawls, Harvard University Press, revised edition 1971, Page 48.

little possibility of practical implementation. Cambodia is a case in point. There are countries where what is expressed through the constitutions and what actually operates is vastly different, for example in Thailand, the Philippines and the like. There are yet other countries which use democratic jargon so ambiguously in the constitution and other laws that it is possible for a practically authoritarian system to exist while the constitution may look like a democratic one. Sri Lanka is a case in point. Thus, what is important in understanding a system is to be able to judge the nature of the system by the manner in which it actually and practically works?

" A criminal justice system is related to the political system. Though a particular criminal law and procedure may be expressed in liberal democratic jargon, the actual nature of the criminal justice can be measured only by the manner in which the justice system is allowed to operate by the political system. "

A criminal justice system is related to the political system. Though a particular criminal law and procedure may be expressed in liberal democratic jargon, the actual nature of the criminal justice can be measured only by the manner in which the justice system is allowed to operate by the political system. When the system allows the widespread use of force and violence with impunity, for all practical purposes such practices become an inherent part of the criminal justice within that particular context. Thus, the practice of torture and ill-treatment, enforced disappearances and other improper uses of force and violence exists. It simply means that the liberal democratic norms relating to criminal justice are modified and distorted within those particular circumstances.

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Caution that should be exercised in reading international literature about the prevention of the improper use of force and violence

Particular histories create particular institutions and practices. The literature that is produced from each society is a product that rises from those particular historical circumstances. When applying lessons learned from a particular historical circumstance, it is necessary to examine whether the historical circumstances in the country where these lessons are to be implemented are similar.

This is particularly important in applying systems and rules which emerge in what may be called the developed democracies. Over several centuries, vast political changes have taken place in those countries. Particular types of political control have been uprooted and different forms of control have developed. Both the political system and the criminal justice system have assimilated these principles and the principles are held in common in both the political sphere and the legal sphere. And the people, including those who are functionaries in the security apparatus, have internalised these principles. Thus, a person who is subjected to interrogation has the right to expect that he will be examined under the rules that are commonly held within his society.

This situation does not exist in countries where the norms within the political system are different. What the actual norms are can be understood only by direct observation of the system at work. Before the norms that have been developed in developed

democracies can be applied, there needs to be vast changes brought about within the political system, and the legal system needs to be brought in conformity to these changed political norms.

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A review of some human rights strategies used in the fight against the improper use of force and violence in its many different forms

In light of the root causes of the improper use of force and violence in countries outside developed democracies, some work strategies need to be critically examined from the point of view of how effective they have been, and can be, in dealing with those root causes.

a. Demanding investigations and the prosecution of perpetrators for the improper use of force and violence, with the view to punish individual perpetrators as deterrence to further abuse.

This is the most commonly used strategy to fight violations of human rights. Usually, after reporting on individual cases of human rights violations or even on patterns of such violations, human rights organisations and UN agencies dealing with human rights will demand from the relevant government action to be taken to investigate and bring the perpetrators to justice.

The problem with this approach is that the perpetrators who are required to be investigated act on the basis of the policies and overall strategies designed by the political authorities represented by the government. The investigating authorities are also bound by the same policies and strategies that are authorised by the political authorities regarding the use of force and violence. Besides this, the same political authorities control both the perpetrators and those who are supposed to investigate such abuses.

It is beside the point that, often, the perpetrators and the investigators happen to be more or less the same person or authority. What is important is that, ultimately, the supposed improper use of force and abuse and the responsibility for the investigations into the same emanate from the same source of authority. The constant complaint by the human rights organisations is that, despite much demand for action against the abuses, impunity continues to prevail. This is no surprise as the violations are committed on the basis of direct or indirect assurances of impunity. The source of the violation, as well as the subsequent impunity, is politically conditioned. Mere repetition of the demand for investigations and prosecutions is unable to break the political wall that protects the improper use of force and violence. Much of the frustration within the human rights movement is due to the unwillingness to recognise this political reality; that the ultimate source of the matters that they complain of are not merely the perpetrators, meaning the officers of the security apparatus, but the political authorities themselves.

b. Efforts to educate the police and military on human rights norms and standards as a way to eradicate the improper use of force and violence.

Many human rights education projects are undertaken by different parties, including the governments of developed countries, UN agencies, universities and human rights NGOs. Large sums of money have been allocated for such projects. At the same time there is a general complaint that, despite many such projects being carried out, no tangible improvements have been made as

a result of such education. The reason for such failures and the resulting frustration is not difficult to identify. While this or that individual perpetrator may undergo some conversion as a result of such education, there will be many to take their place; the main reasons for the violations are the policies and strategies that are imbedded in such societies.

Whatever education that the personnel of the security forces may receive, they are duty-bound to carry out the policies and strategies that come from the political authorities who stand above them. When the same political authorities who have conditioned their behaviour also allow human rights agencies to carry out such educational programmes, it only creates cynicism. People from human rights agencies who have worked to impart such education have often heard remarks from security agency participants about how naive such efforts are in light of 'the real situation' in which they have to work.

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> **The problems in the domestic system need to be addressed and resolved if the protests against violations of human rights are to lead to practical outcomes. The essential sphere within which most human rights violations need to be remedied is the domestic legal system. The obstacles to such a system cannot be ignored.**
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> **"**

c. Efforts to improve legislation without reference to problems obstructing the implementation of legislation once passed.

One of the primary areas of human rights work is to lobby for the improvement of legislation to incorporate remedies for violations of human rights. Thus, the campaigns for the criminalisation of torture and enforced disappearances, for example, receive top priority. The same applies about every other aspect of the UN conventions. However, where there has been some success in bringing about such legislation, the problem that has surfaced thereafter is that the law remains in the books and is hardly ever implemented. Any search for reasons for the government's failure to implement the legislation would reveal that if such law is implemented there would be serious political repercussions, including serious conflicts between the security agencies and the government.

The relevant legislation may be passed due to pressure from the international community and local human rights groups. A government which passes such laws expects that the international community will give them credit for doing so. However, if there is also insistence that the law should be implemented, there is likely to be serious friction. Perhaps the international community is also aware of this. Therefore it does not emphasise implementation. However, the net result is that, despite the law being passed, the victims of violations do not get redress. If the human rights community is to go beyond convenient thinking in trying to resolve problems it has to address the overarching hazards that exist in the context of a particular country. This requires a much more comprehensive approach, one which takes into consideration the political causes of human rights violations. When these are ignored, the ultimate result, even after the passing of the relevant law, is general cynicism and frustration.

d. Working for judicial remedies for violations of rights without addressing the fundamental problems affecting the justice system itself, which is unable to deliver justice in any case.

Human rights groups work hard and assign considerable resources to assist victims in order to bring their cases to courts. However, once the cases are brought to court the course of justice is in many ways subverted by various problems, such as extraordinary delays in the adjudication process, insecurity caused by insufficient/ineffective victim protection laws and programmes, bribery at all levels of the adjudication process, and all sorts of manipulations which are allowed to take place to subvert justice. Thus, despite enormous efforts made by the victims and the human rights organisations, the results are some very rare and occasional successes, and an overwhelming amount of failures and losses. With regard to the improper use of force and violence, where this is widespread it is not only the security forces that are responsible; it is the judicial branch as well.

The judicial branch also works within the overarching scheme of policies and strategies of a particular state. They are not in a position to ignore these strategies and schemes without causing serious disturbances to the usual management of the state. Often the human rights community works on the assumption that the separation of powers is a part of the state structure. Superficial observations of the external aspects of the courts are used to try to buttress the idea of the existence of the separation of powers. However, what often exists is well-entrenched unification of power in the hands of the executive, and the executive also manipulates the judiciary. One of the most common forms of manipulation is directly selecting judicial officers that act in compliance with the executive. To ensure compliance, any judge who even slightly deviates from the expectations of the executive is subjected to punishment. On the other hand, those who comply are given many forms of rewards, including the engagement in corrupt practices. Human rights victims who reach court in search of remedies for the violations of their rights also get caught up in this web of manipulation.

The strategy of using judicial remedies as a solution to human rights violations, while not taking into consideration the actual situation of the separation of powers within the country and the obstacles to justice, can cause even more problems to the victims and also to human rights defenders, and the net result is always negative.

e. A further strategy, which has been resorted to recently, is to demand international remedies, such as tribunals for all violations of human rights.

This approach arises from realisations about the impossibility of achieving justice through domestic legal systems. That realisation is again a direct or indirect recognition of the wider web of causes that make such human rights violations possible and impunity inevitable. However, this demand for international remedies for all violations of human rights is not practicably realisable. By their very nature these international remedies for human rights violations are possible only for extremely extraordinary circumstances where the nature of the violations is one of the primary considerations. The day-to-day violations of human rights by way of the abuse of force and violence does not fall within the requirements for such interventions.

Further, the international remedies can come about only through an international process and obtaining the consensus for such actions is extraordinarily difficult. Besides, such international actions are also extremely

costly. What all this means is that although the demand for international remedies can be made easily, the actual possibility of practically realising such demands is quite limited. This implies that beyond creating some protests no practical outcome could be expected from such demands.

The problems in the domestic system need to be addressed and resolved if the protests against violations of human rights are to lead to practical outcomes. The essential sphere within which most human rights violations need to be remedied is the domestic legal system. The obstacles to such a system cannot be ignored. Direct and indirect attempts to ignore the problems that exist within the domestic sphere lead only to peril for all rights of the people subject to such a system.

f. Academic courses on human rights with the view to encourage the protection and promotion of human rights.

There are several graduate and post-graduate courses being introduced in an attempt to create a greater understanding on human rights. However, many of these courses conducted in countries outside developed democracies tend to follow the same syllabus as those followed in the developed democracies. Addressing the specific problems which exist within the framework of a specific context has not been a priority in designing these syllabuses. The result is that the domestic obstructions to the implementation of human rights do not receive any attention. Often the education is more concentrated on international remedies for human rights, such as the International Criminal Court and other international tribunals, and matters such as transitional justice receive top priority in these syllabuses.

The result is that those who are educated in these courses have hardly any opportunity to address their minds to the specificities of their legal systems, which deny the population of their country the possibility of remedies for the abuse of force and violence by the state. Thus, these courses as they are designed at present do not equip students with the capacity to analyse their own domestic systems and thereby to become capable of contributing to much needed changes in their countries and make human rights a practicably achievable goal. Perhaps the reason for the limited perspective within which the syllabuses are made is due to mere limitations relating to study modules from developed countries, or a lack of awareness on the part of those who design such syllabuses of the ground realities of the specific countries from which their students come.

A further comment on the strategies mentioned above

All these and similar strategies have a limited value as forms of protest against injustice. Also, all these actions are expressions of solidarity for the victims of violations of human rights, particularly for those who have become victims of the abusive use of force and violence by the state. All acts of injustice demand immediate reactions and protest. What has been pointed out above is that, given the overall context within which these violations take place, there is no valid reason to expect the achievement of the particular objectives of these strategies. Therefore, in all protests relating to such injustice it is necessary also to bring in a perspective on the basic causes that generate the injustice and make impunity the ultimate outcome. Thus, by making efforts to link all protests to the root causes that makes such injustice possible, the victims and all those who take part in the protests can be educated and empowered through the motivation to

see the meaning of their protests in terms of addressing root causes.

Where no such overall perspective is present the initial protests against injustice may generate greater frustrations about the impossibility of finding redress, and thereby cause demoralisation among the victims, as well as among those who come to their support. In fact, such a state of demoralisation exists due to the limited perspectives within which these objectives are pursued. Such demoralisation itself contributes to the strengthening of the repressive systems and makes the political control of dissent easier. The suppression of all protests is also a part of the overall scheme of the political system, which limits the freedoms of their populations by permitting the improper use of force and violence.

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Theory of change

When studying the improper use of force and violence with the view to work towards the elimination of such abuses, it is necessary to develop a theory of change which is comprehensive enough to take all relevant factors into consideration. A theory of change which takes only individual security officers or the security apparatus into consideration, and leaves out the overarching political system, is unlikely to produce any positive change.

The mere insistence on international norms and their application, without taking into consideration the nature of the political and criminal justice systems, is so superficial that it will not be taken seriously by people who are undergoing serious repression in their countries. A theory of change should look comprehensively into a combination of factors, giving serious consideration to the political system and those who bear political responsibility within the country, if such a theory is to express the reality of a given society. The project for the implementation of international norms relating to human rights, if it is to become capable of eliminating the improper use of force and violence, should be developed by taking into consideration all the complexities that have made such widespread abuses possible.

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The basic concept behind the theory of change could be formulated within the framework of Article 2 of the International Covenant on Civil and Political Rights (ICCPR). Article 2 obligates the state parties to ensure an effective remedy for violations of human rights.

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In developing such a theory of change for human rights violations in countries outside those of the developed democracies, extensive studies about the ground realities of the specific countries is an unavoidable step. A discourse on the historical circumstances of the nature of the state in particular countries and the nature of political control of each country from the point of view of recognition or the lack of recognition of human rights in the practical sphere needs to be brought to the surface and be made a subject of discourse both academically and also in terms of popular discourse. The emphasis on the practical sphere is meant to signify that a mere study of the ratification of UN conventions, constitutional bill of rights, and other statutes needs to be distinguished from the way such provisions are made practically implementable

within each country. The practical scheme of implementation needs to be based on an understanding of the overall political control of all agencies in the legal system, and an attempt to measure the extent to which such institutions enjoy the independence to carry out their functions. Of particular importance is to research the manner in which the functionality or the dysfunctionality of these institutions have been viewed and assessed from the point of view of the actual possibility of the practical realisation of human rights. On this particular point, importance needs to be given to the possibilities of eliminating the improper use of force and violence within each of the countries.

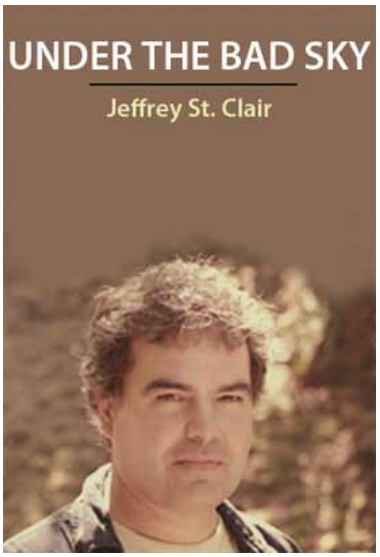
The basic concept behind the theory of change could be formulated within the framework of Article 2 of the International Covenant on Civil and Political Rights (ICCPR). Article 2 obligates the state parties to ensure an effective remedy for violations of human rights. For this purpose, it obligates the governments to take legislative, judicial and administrative measures to ensure an effective remedy. Most commentators on Article 2 concentrate on legislative changes, such as, for example, the criminalization of acts which amount to improper use of force and violence - the criminalization of torture, forced disappearances, sexual abuse, and the like. However, what is often ignored is the obligation of the state to take judicial and administrative measures to ensure an effective remedy. A holistic view of change from the law and order approach to the rule of law approach for the elimination of improper use of force and violence requires legislative, judicial and administrative measures. In short, the legislation must be in terms of the normative framework of the rule of law. The judicial framework should also be within such a normative framework, and the government should also ensure that administrative measures, such as budgetary provisions that enable the proper functioning of the judicial process through ensuring the necessary resources, both by way of personnel and other technical resources, are also within such a framework. The whole approach must conform to the normative framework of the rule of law. Issues such as the training of the security officers and their internal discipline could be satisfactorily addressed only within a legal system which is constructed on the basis of such a normative framework.[5]

The writer, *Sri Lankan jurist, author, poet, and human rights activist. He earned an LLB from the University of Ceylon in 1972,registered as an Attorney-At-Law of the Supreme Court of Sri Lanka in 1980, and practiced law in Sri Lanka till 1989. Subsequently, he became a legal adviser to Vietnamese refugees in a UNHCR-sponsored project in Hong Kong. He joined the United Nations Transitional Authority (UNTAC) in 1992 as a senior human rights officer and later also served as the Chief of Legal Assistance to Cambodia of the UN Centre of Human Rights (now the UN High Commissioner of Human Rights office). He is associated with Asian Human Rights Commission and Asian Legal Resource Centre, based in Hong Kong since 1994, where he is currently Director, Policy & Programmes.*

5 Please see Basil Fernando, "Reflection on article 2 of the ICCPR: The role of human rights activists in diagnosing the lack of effective remedies", Article 2 (Vol 9, 2010) http://www.article2.org/mainfile.php/0902/376/

COLUMN: UNDER THE BAD SKY

The Long-Distance Executioners
Camus in the Time of Drones



LUCIEN rises from bed in the early morning. He dresses quietly, careful not to awaken his wife and infant son. He walks briskly across the city of Algiers in the pre-dawn light to a square that is already thick with people, their gaze fixed on a wooden platform and rising from it the stark outline of a guillotine.

The man has come to watch the execution of a notorious killer of an Algerian farm family. The man is curious and wants to see justice done. The prisoner is brought to the scaffold, blindfolded, then trussed to a plank and slid beneath the grim killing machine. The blade drops, severing the head and unleashing a surge of blood from the quivering torso.

The man rushes back across town. He runs all the way to his house, brushes past his wife to the bathroom. He locks the door and vomits, again and again. He will not go to work this day or the next. Instead he lies in bed, tormented by what he has witnessed. He tells his wife what he has seen and refuses to speak of it again for the remainder of his short life.

The man is Lucien Camus, father of Albert. The story was told to Albert by his mother years later and it haunted the writer all his life. The gruesome scene appears in his novels The Stranger and The First Man and became the centerpiece of his masterful essay "Reflections on the Guillotine," perhaps the most forceful denunciation of the death penalty ever written.

Camus' essay on the barbarity of the death penalty was written in 1956, against the backdrop of the executions of hundreds of dissidents during the Soviet crackdown in Hungary, as well as the execution of Algerian revolutionaries condemned to death by French tribunals. He notes that by 1940 all executions in France and England were shielded from the public. If capital punishment was meant to deter crime, why hold the killings in secret? Why not make them a public spectacle?

Because, Camus argues, deterrence isn't the purpose of state murder. The real objective is vengeance through the exercise of extreme state power. "Let us recognize it for what it is essentially: a revenge. A punishment that penalizes without forestalling is indeed called revenge. It is a quasi-arithmetical replay made by society to whoever breaks its primordial law."

Public executions became a threat to the state, because the dreadful act tends to provoke revulsion in ordinary citizens, like Camus' father, who see it clearly for what it is: a new form of murder "no less repulsive than the crime." A form of murder that is performed, in theory, in the name of the citizens and for which they are complicit.

This kind of state-sanctioned killing, Camus reasoned, leads only to more murder, a vast panorama of murder. "Without the death penalty," Camus writes, "Europe would not be infected by the corpses accumulated for the last twenty years on its soil."

So what would Albert Camus, the great moralist of the 20th century, think about the latest innovation in administrative murder, Obama's drone program, a kind of remote-control gallows, where the killers never see their victims, never hear their screams, smell their burning bodies, touch their mutilated flesh?

The conscience of the killer has been sterilized, the drone operator, fully alienated from the act he is committing, can walk out the door after his shift is over and calmly order an IPA at the local microbrew or play a round of golf under the desert sky. He is left with no blood on his hands, no savagery weighing on his conscience, no degrading images to stalk his dreams.

Drone strikes, Camus would argue, are not just meant to kill. They are programmed to terrorize. In this regard, whether the missile strikes its intended target or incinerates a goat-herder and his flock is incidental. In fact, the occasional killing of civilians may well be a desired outcome since collateral deaths intensify the fear. This is punishment by example, not for any particular crime or impending threat, but merely because of who you are, where you live, what you might believe. These new circuitries of death are meant to humiliate, subdue, and dehumanize.

As more and more evidence of Obama's secret killing operations in Pakistan and Yemen began to leak out, public squeamishness over the deaths, especially of civilians and targeted American citizens, began to mount. Uncomfortable questions were raised, even on the political right. To salvage his program, Obama announced that new guidelines would soon be imposed on his high-tech assassinations.

But Camus would be the first to warn us that such regulations should be viewed with grave suspicion, since they will likely only serve to legitimize and normalize state murder, by making lawless killing legal.

Camus stresses that in the long run such killing regimes can only sustain themselves if they are indulged by a nation's elites: its press, its intellectuals, its political movements. And here we must confront the torpid moral character of the American left, which has been flaccid in the face of the drone killings, insensate to the mangled bodies, suffering and fragmented lives on the far side of the world.

Our task is to shatter this indifference, to condemn and resist the killing done in our names, to reassert the primacy of individual life over state authority. Otherwise, we become accomplices of the long-distance executioners.

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COLUMN: GERMINAL

THE TORTURER AND THE CITIZEN

ADRIANA Rivas was just twenty when she joined Augusto Pinochet's Directorate of Intelligence (DINA). Until 1978, Ms. Rivas worked as a secretary to General Manuel Contreras, the head of DINA, and as an agent of the Lautaro Brigade. Decades later, as a middle-aged woman in bucolic Australia, she would recall that time as the best years of her youth[1].

The DINA and General Contreras were the Chilean equivalents of the Gestapo and Heinrich Himmler. The DINA's purpose was to end dissent through extreme and unmediated repression. The Lautaro brigade, an elite-unit of the DINA, arrested Chileans of all persuasions and tortured them into submission or death.

Catching Victor Diaz Lopez, trade-unionist and Communist leader, was a notable achievement of the Lautaro Brigade. In the next 36 years, Mr. Lopez's wife and daughter received news of him only once. A former prisoner of Villa Grimaldi, the notorious detention-cum-torture centre run by the DINA, brought them a secret message from Marta Ugarte, another incarcerated Communist leader. "Ugarte's wrists had broken after she was strung up from the ceiling and her breasts were burned with a blow-lamp. She wanted them to know that neither she nor Mr Diaz would ever get out alive."[2] Finally, in 2007, a former head of the Lautaro Brigade, known as 'The Elephant', confessed that he murdered Mr. Diaz "at a barracks in Santiago in 1977 by asphyxiating him with a plastic bag while cyanide was injected into his veins"[3].

Adriana Rivas is implicated in that murder. The Chilean Supreme Court has formerly requested the Australian government for her extradition.

1 http://au.ibtimes.com/articles/534884/20140118/chile-australia-adriana-rivas-manuel-contreras-dina.htm#.UydnvKjjVaw

2 http://www.economist.com/node/9017531

3 http://www.economist.com/node/9017531

'The Elephant' reportedly wept when he made his confession; Ms. Rivas, on the contrary, has no regrets. She says she was not involved in actual torture, but defends the use of torture, publicly and vigorously: "They had to break the people - it has happened all over the world, not only in Chile"[4].

Did 'The Elephant' weep because he has seen, heard and smelt torture? Would Ms. Rivas's insouciance have survived if she had her colleague's memories?

American columnist Christopher Hitchens ignited a public debate on torture when he argued that US forces used 'extreme interrogation' methods but did not resort to 'outright torture'. His opponents suggested that he try out water-boarding to see if it is outright torture or not. Mr. Hitchens did just that; he hired several veterans of US Special Forces and got himself water-boarded. His doubts evaporated after less than ten seconds of water-boarding. 'Believe me, its torture'[5], was the telling title of his resultant Vanity Fair essay.

Mr. Hitchens got his encounter with water-boarding videoed[6]. That visual experience would suffice for most people to come to the same conclusion about water-boarding and about torture in general.

Defending/ignoring torture is easier, when it is just an idea, a policy, an unspecified something which happens to an unknown someone, elsewhere. Anti-torture efforts, in order to succeed, must make ordinary citizens understand what torture means and entails. Torture must cease to be an almost anodyne word and become a sight and a sound, if we are to garner the mass support necessary to end torture.

Naked Truths

Many, if not most, Sri Lankans reportedly support the activation of the currently dormant death penalty, especially as a way to contain a growing crime wave.

There is one stumbling block: the authorities cannot find a hangman. Three successful applicants fled when confronted with the reality of the gallows.

Last week, Lankan authorities opened a former prison to the public, before turning it into a museum and a hotel (a new one was built in its stead). The gallows was the absolute favourite destination of the sea of visitors; most of them reportedly supported its reactivation. This public enthusiasm contrasts sharply with the reaction of the country's most recent trainee-hangman. The 40 year old "got shocked and afraid"[7] after seeing the gallows and fled, as his predecessors did.

For Adriana Rivas torture is nothing more than a much hackneyed word; she had never seen it being done, let alone experienced it. But for 'The Elephant', a former practitioner, torture is images, sounds and smells. For the public who saw the gallows and clamoured for its reactivation, hanging is an abstraction. They can support hanging knowing that they will never have to witness a hanging, let alone execute it. But for the trainee hangmen, the sight of the gallows turned hanging from an abstraction into reality. He realised what his job will actually entailed, and the horror of it was more than he could bear.

4 http://www.smh.com.au/national/chile-seeks-extradition-of-pinochetera-torture-murder-suspect-20140117-310db.html

5 http://www.vanityfair.com/politics/features/2008/08/hitchens200808

6 http://www.youtube.com/watch?v=Efh_6_-tHgY

7 http://www.bbc.com/news/world-asia-26542991

Across the world, public indifference has created the enabling environment in which torture flourishes. Once unshielded from the reality of torture and informed in bald terms what tolerating torture entails, many people may feel differently about torture. Sadism, fortunately, is not a human norm.

In the poem, 'An Unwritten Theory of Dreams', Zbigniew Herbert concludes, "The torturers sleep soundly their dreams are rosy…." Historical experience indicates that this is not always the case. There are many torturers who cannot sleep easy; quite a few end up as whistleblowers and dedicated campaigners against torture.

It is those who know torture only as an abstraction who sleep soundly, and have rosy dreams, even as other people are tortured in their name. How many of them would tolerate torture for any reason, however lofty, if they know what an electric prod does to a human body and sensory deprivation does to a human mind?

Tisaranee Gunasekara *is a political commentator based in Colombo.*

(Continued from page 136)

PF: There is no rule of law in Sri Lanka; in fact, the system has been distorted by the political elite to escape from justice.

However, as a human rights defender I have a primary responsible to raise my voice against this. If we raise our voices, then people will start to think about this. Activism is nothing but to raise awareness among the people that no one can believe or trust in a government that systematically engages in mass killings and other form of atrocities. So we have to think and strategize our way of working, which is the most challenging task today.

TM: It was reported that the government is planning to send the skeletons found in the excavations of the mass graves to China for further investigation. What do the relatives of the victims say about this decision?

PF: It has been questioned before the court after the government decided to send those remains to China for investigation. The government did not inform the relatives of the victims. However, now the government is keeping the remains and not allowing any investigation.

TM: What are the obstacles in finding justice for victims when the country's criminal justice system is paralysed?

PF: People have their own responsibilities to play when the ruling government does not follow the basic authentic rule which protect [sic] the basic rights of every citizen in this country. So I believe the majority of the people must responsible for the deterioration of the system in this country as well. So we are in an abyss and have to find a way out. What is need [sic] is creative and independent thinking that can address the hearts and minds of all the citizens in this country.

TM: Tell us what you need to continue your activism on this issue?

PF: I have no personal desires, although I am facing tremendous difficulties in many ways. We all have to play our role, even with the minimum space that remains here. If you do not stand up when your neighbor is getting hurt by unjust and awful atrocities, either by the state or non-state actors, then you may assume that the next target will be you. We have passed through our bitter history where we saw fellow humans being killed for nothing. Now we have to say enough is enough.

Let us continue our fight for justice, let us be stronger that we were yesterday.

COLUMN: ARROW ON THE DOORPOST

Solidarity Requires Sacrifice

IT has been a dismally cold winter across much of North America. In the state of Vermont, USA, where I live, temperatures have been below 0 degrees Celsius for all but four days since January 1, 2014. Most of those days, the temperature has been well below that zero. To illustrate how cold many days are, the tears that stream from my eyes, because of the temperature, freeze on my cheeks. To add to this winters misery, many regions have also experienced floods when ice backed up. If I were a more religious man, I would think the gods were punishing this people for their greed and the blood they have shed to feed that greed. However, not being religious, I forge on, doing what I can to wage battle against the forces thriving from the world's misfortune. Not just thriving, actually, but being responsible for much of it.

Despite nature's relentless assault this winter, it is the ongoing offensive of the superrich against the world that creates the true despair in our world. Anecdotal stories pop up in the news: an elderly couple dead because their heat was shut off when they could not afford to pay their heating bill; propane costs skyrocketing to higher levels than ever before due to manipulation of the propane market; the rich men and women in the US Congress cutting not only heating subsidies to low-income individuals but also the food subsidies (known as food stamps) to these individuals; the list goes on. Meanwhile, funds for war and other machinations of imperial dominance are not just granted, they are increased. Nationally and internationally, whatever resistance exists is ignored, silence or both.

Yet, there are hopeful signs. Across the United States, resistance to the increased transfer of working peoples' wealth to the wealthiest among us – or austerity, if you prefer – is being mounted. Workers, unionized and otherwise, are organizing strikes, demanding wage increases and job guarantees, and even considering socialist candidates in some areas of the ultimate capitalist nation. The victories are few and their permanence is always in question, but the act of resistance itself has revitalized those individuals involved. In Chicago, teachers in the public school system have held one day work stoppages in opposition to the austerity moves of the Chicago mayor and his friends in the charter school business. For those who don't know, charter schools are (with a few exceptions) essentially corporate initiatives designed to privatize public education. University of Illinois faculty struck for one day in support of their part-time colleagues. There have been similar actions around the continent.

The town I live in is Burlington. It is the most populous city in Vermont, which is a mostly rural state. The University of Vermont, which is located in Burlington, faces work actions after its administration announced austerity measures that did not include any cuts to the administration. At a small college administered by a priestly order of the Catholic Church, custodians found themselves at an impasse in their negotiations with the administration. Students, faculty, other staff and local unions have all worked together demanding the administration negotiate a fair contract. I was told that they have finally agreed on a contract which proved acceptable to the workers. One of the primary reasons given by the union was the solidarity shown by the campus and local community.

After months of negotiations between the union representing the bus drivers in the regional public transit system that met only intransigence from management, the union originally set a strike date for March 10, 2014. I began writing this column two days before that date. However, the strike is not necessarily the story here. It is the growing solidarity being expressed by the community served by the transit system that is the story. Bus riders, workers in other fields (restaurant workers to nurses to school teachers and university staff and faculty), have rallied behind the drivers and their position. Everyone understands their call for dignity and a say in their working day. After twenty straight hours of negotiations March 8-9, management presented the union drivers with the exact same contract proposal the drivers already rejected. A ratification vote was held March 12-13, where this contract was unanimously rejected. A strike began March 17, 2014 with a series of solidarity rallies and marches by the community, most of them bus riders who are affected negatively by the strike but see it as a chance to stand for labor rights.

An essential part of the "American Way" is the often pathological reverence for the individual. This reverence is what informs the myths that citizens live by and what they believe draws immigrants to its shores. After the events on September 11, 2001, in Manhattan and at the Pentagon, US residents were told those attacks occurred because of the freedoms guaranteed to every American individual. When this emphasis on the individual is examined historically, one discovers that such freedoms were originally only for those individuals who owned property. Furthermore, since only white men were allowed to own property, it was only white men with property who were

considered individuals worthy of individual liberty. Women, tenants, and other humans without property were not guaranteed much of anything. Furthermore, most humans of African descent in the US and parts of Europe were not even considered human, much less perceived as individuals.

Placing the rights of the individual above all has served US capitalists quite well. Besides the obvious favor the law usually grants property owners in environmental and other such disputes, there are the US Supreme Court decisions granting corporations the same rights as indivdual persons. The world has watched as these rights, once only valid within the borders of the United States, have spread to the rest of the planet through trade agreements and organizations like the World Trade Organization. In addition, the domination of much of the world by US cultural phenomena has created a situation where humanity has internalized the consciousness prevalent in the US that makes the individual supreme. In other words, the element of the human psyche that demands selfishness and disregard for other humans is encouraged not only in the marketplace but also in that part of our lives where thoughtful and even spiritual considerations traditionally dominate.

That is what makes the expressions of solidarity for the Burlington bus drivers even more remarkable. Those riders expressing said support understand quite well that a strike by drivers will inconvenience them in numerous ways. Yet, their support relays an underlying comprehension that solidarity with one's fellow humans often demands some kind of sacrifice. It is this understanding that is present in every strike, boycott, and direct action undertaken against those who would subvert our livelihoods in the name of their freedom. It is this understanding that provides some hope for the human species.

COLUMN: THE CORRECTIONIST

The Free Speech Quandary

Changing Vilification Laws in Australia

In a free country, people do have rights to say things that other people find insulting or offensive or bigoted.
George Brandis, Australian Attorney-General, Mar 24, 2014.

THE CORRECTIONIST

Binoy Kampmark

AUSTRALIA is in a tiff about freedom of speech. The occasion for this are proposed revisions to the Racial Discrimination Act 1975, a Commonwealth law that tends to focus on protecting victims of speech rather than its expressers. Simple reasoning suggests that the Abbott Government has taken the side of the populist Herald Sun columnist Andrew Bolt, who fell afoul of the RDA provisions, notably s. 18C, when he made his now noted remarks about white skinned Aboriginals. Australia's Attorney-General, Senator George Brandis, is now attempting to repeal the section.

The section as it stands makes it "unlawful for a person to do an act, otherwise than in private, if the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and the act is done because of the race, colour or national or ethnic origin of the other person or some or all of the people in the group."

Exemptions are allowed for performances, exhibitions or distributions of artistic work, or views expressed in the context of "genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest". The statement made must be fair and accurate on the matter of public interest, or the comment made must be "an expression of a genuine belief held by the person making the comment."

The wording of s. 18C is hardly exceptional. Countries allow for the punishment of errant words which can harm the dignity and reputation of a race or ethnicity. Holocaust denial lands you a prison sentence in France and Germany. Suggesting that the Armenian genocide was, in fact, genocide will do the same if you are fronting up to Turkish authorities. As noted by the Middle East Forum's Legal Project, the initial intention of such laws, at least in Europe, was to guard against the anti-Semitic and racial propaganda that buttressed the Holocaust.

However, hate speech laws are now being used "to criminalize speech that is merely deemed insulting to one's race, ethnicity, religion, or nationality." Even such important documents as the European Convention on Human Rights stipulate that, while freedom of speech is a right of all, restrictions may be necessary "for the protection of the reputation and rights of others" or in the context of protecting "a democratic society". The International Convention on the Elimination of All Forms of Religious Discrimination insists that signatories pass laws making "all dissemination of ideas based on racial superiority or hatred" a punishable offence. The International Covenant on Civil and Political Rights similarly demands that states outlaw "any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence" (Art. 20).

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> Free speech has nothing to do with tolerating speech you like. Its foundation, ever so often, is based on speech you just might hate. Protecting the speaker, or at the very least avoiding shackling him, is a greater reflection of that society than showing the prison door. So far, many Australians prefer punishing opinions and controlling what others think.
> "

One does not have to agree with the entire scope of the Forum's focus, which has seen an attempt to protect such individuals as Geert Wilders from legal censure, to see problems with such laws. Religious groups are taking advantage of such provisions in targeting opinions deemed insulting. Legal suits are being mounted. One prominent example was the stripping of MP Jesper Langballe's parliamentary immunity in June 2010 by the Danish Parliament. This enabled his prosecution under Article 266B of the Danish penal code for publishing articles about the "Islamisation of Europe" and subordination of women in Islam. Discussion, not all of it of a reprehensible quality, is being stymied; the Langballes are being used as excuses.

Bad ideas make bad people who end of manning death machines. That is the recurring theme for those who would like to see such provisions as s. 18C remains. The image of the Holocaust surfaced in the views of Australian former Labor cabinet minister Graham Richardson, who had an Auschwitz survivor on his mind in rejecting the view of the Attorney-General. "This woman suffered indignities, cruelty and deprivation that have been well documented." Such a premise is typical: you need to punish noxious opinions, because not doing so is bound to propel people to the gas chambers. The problem with such reasoning lies in what is being punished, and by whom.

The first point is important, as it stresses what is being punished. Much targeting of hate-speech lies in nabbing people, not ideas. The problem of doing so is that the boundary between repression and protection becomes a moot point. In taking that approach, the state becomes a police officer, jamming its opinions down the throat of those it disagrees with. The line between a police state and a liberal democratic state that hates some forms of speech blurs. Both operate on the same principle of punishing those with views contrary to their policies.

Then comes the issue of how to determine whether that opinion falls foul of the Racial Discrimination Act. Judges can tip toe around the line of what is desirable or not. The racial vilification case of Bolt serves as a classic on this. In going through the lengthy judgment of Eatock v Bolt, one wonders whether Justice Mordercai Bromberg of the Federal Court was punishing bad views, or simply bad journalism. In doing so, there was almost a sense that the Justice was evoking a line from the Danish philosopher, Søren Kirkegaard: people demand free speech to compensate for the freedom of thought they rarely use.

The current Labor opposition, not exactly very good on free speech issues, is keen to keep the policing provisions in place, arguing that the exemption provisions are more than adequate. This says as much about their stance, for free speech in the Australian context is often about what is acceptable rather than intolerable. The latter deserves punishment and censure; the former is allowed to sail through the regulators.

The immaturity of the polity, officials and the legislators on the subject has proven striking. The thin-lipped conformism that Australia is famous for seems to imply that views, even reprehensible ones, can't be allowed to take root. That way lies doom.

Brandis is not exactly the Ritz guest on human rights. He is more the slumming type, the confidence man who would like to let you know he cares when he actually is only concerned about rubbing a focus group. The Australia of Tony Abbott is secretive about its policies, a hard Australia and one concerned with revising the code of rights. If you are in the surveillance business or the line of work that detains refugees, you have struck gold. But in terms of free speech, Brandis is right about his reservations: s. 18C need shoring up. For that, he has been accused of drinking "the right-wing Kool-Aid", which is the childish nonsense one has come to expect from those policing opinion.

Free speech has nothing to do with tolerating speech you like. Its foundation, ever so often, is based on speech you just might hate. Protecting the speaker, or at the very least avoiding shackling him, is a greater reflection of that society than showing the prison door. So far, many Australians prefer punishing opinions and controlling what others think. Any victory Brandis achieves is bound to be temporary. Down under, the thought police remain strong.

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FILM REVIEW: **NYMPHOMANIAC**

THE TERROR SEX

Strange though it may sound, considering the preceding, Nymphomaniac is von Trier's funniest film. He's tackling serious subjects while taking the Mickey out of the audience. Much of the humor is achieved through self-referential filmmaking, playing with Joe's story-lined flashbacks as extra-filmic flourishes flitter across the screen, again fusing diegetic storytelling with the audience.

by S. BRENT PLATE

THE final minute of a Lars von Trier movie threatens to make or break every other frame of the preceding spectacle, to justify or condemn all that led up to the punch line. In the case of Breaking the Waves and Dancer in the Dark the finale was a filmic, eye-of-god gesture tacked on to some relentlessly naturalistic filmmaking. In his later films, the endings turn to realism, but are no less unsettling, disrupting our spiritual sensibilities and moral musings alike.

The endings are unsettling not only to the audience but also to the whole narrative that's just been constructed. So, it's no spoiler to say that the threads of the four hours of Nymphomaniac unspool in the final minute. (I'm here commenting on Volumes 1 and 2 that are being released separately but really comprise a whole and are arguably inconceivable as distinct entities.)

The story within the story is Joe's (Charlotte Gainsbourg) life story of nymphomania. That is her term for her drives, and she proudly claims it. She tells her story to the Good Samaritan, Seligman (Stellan Skarsgård) who has found her beaten and left for dead in an alley. He takes her in, gives her tea, with milk, a bed to lie down in, and she begins her tales.

Joes' recountings are not for the squeamish, and whether or not they are sexually arousing to the audience is one of the tricks von Trier is playing with. The world of the storyteller (Joe), the primary diegetic listener (Seligman), and we the audience members are stitched together in the flashbacks so that we all seem to be watching the same thing in the same way. Von Trier would like nothing more than to indict us all.

The simple construction of the present time (an alley that looks like a Broadway musical set; Seligman's spartan, slightly disgusting little flat) contrasts with the robust life of the flashbacks. Props around Seligman's decaying room become chapter headings for Joe's story: a fly fishing lure stuck in

wallpaper, a wall stain, an icon of Mother Mary. There is more than a nod here to Charlotte Perkins Gilman's early feminist story "The Yellow Wallpaper," with similar ambiguous endings.

Joe and Seligman bicker over analogies to her life of "sex addiction" (as her brief stint with a therapy group sterilely calls it). With each retold chapter and scene Seligman points out relations to ancient philosophical or modern psychoanalytical ideas, or quasi-relevant stories in history or myth. He nonchalantly, naively, links Joes' sexual escapades to fly fishing, Freudian fantasies, and Fibonacci numbers. When she tells of a "spontaneous orgasm" at age 12, accompanied by a vision of mystical beings, Seligman interprets one being as the Whore of Babylon and the other as Emperor Claudius's wife, Messalina, historically considered a nymphomaniac. His interpretations mimic and preclude scholarly theoretical takes on the film.

Yet Seligman, who remains mainly non-judgmental through it all, has his limits for what he can believe. After the mystical orgasm account he tells her: "Your story is like a blasphemous retelling of the transfiguration of Jesus."

At the same time, he's not out to defend religion. He's an atheist Jew who keeps a reproduction of an Eastern Orthodox icon of Madonna and Child on his wall. He's equally skeptical of all corporeal accounting of life. "The concept of religion, like the concept of sex, is interesting to me," he says, "But you won't find me on my knees to either." He is gnostic mind to her knowing body.

He is also virgin to her whore. He fails to be aroused by her stories, when so many others have been. He says he can hear her stories because, "I'm a virgin, I'm innocent," as the camera cuts to the Madonna icon on the wall across the room. At times he digresses with his analogies, misses her point, but she brings him back on track and he proves himself a capable listener. Joe responds by going further into her story, ultimately leading to the tale of how she ended up battered in alley, a condition that Seligman and the audience may be more worried about than she is.

Strange though it may sound, considering the preceding, Nymphomaniac is von Trier's funniest film. He's tackling serious subjects while taking the Mickey out of the audience. Much of the humor is achieved through self-referential filmmaking, playing with Joe's story-lined flashbacks as extra-filmic flourishes flitter across the screen, again fusing diegetic storytelling with the audience.

Mrs. H (Uma Thurman) is the most humorous, unsettling though our own laughter may be. (All the extra characters are alphabetic characters: the childhood friend B, the sexual relations are F, G, and K, and Jo's protégé is P.) Mrs. H is a mother and wife grieving the loss of her husband to this young sexually charged woman, and it's certainly a tragic tale, but as she brings her three young boys to Joe's apartment to see the "whoring bed," we know something else is up. The camera follows her for a good five minutes, ranting and ironizing around Joe's flat. Thurman pulls off the simultaneous pathos and self-reflexive humor fluidly.

Von Trier struggles with women, as much as with God. He engages feminist themes head on and Nymphomaniac is not qualitatively different from Thelma and Louise or the feminist films of Sally Potter and Jane Campion. Nymphomaniac has got all the earmarks of a post-Breaking the Waves von Trier film: a woman troubled by some physical or psychic abnormality, a man of

science and rationality (almost always a doctor) trying to normalize the woman. But while the woman in each case goes through degrading and disturbing activities, some of her own volition and some not, the camera's point of view consistently sides with the woman protagonist.

It is her story that is being told, and I think it is arguable that von Trier's films attempt to salvage the story of the woman characters. This one succeeds better than most. As the ever-astute Manohla Dargis says in the New York Times: "Women suffer in Mr. von Trier's films, yet they also dominate, shape and haunt his work." Yes, bad things happen to Joe/Bess/Selma/Grace, but the final minute of each story stands as a filmic redemption.

Which makes von Trier's films little different than The Passion of the Christ and Son of God.

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BOOK REVIEW: BY PATRICIA FARA

SERVING THE REICH

The Struggle for the Soul of Physics under Hitler

IF It had not been for Adolf Hitler, I would not exist — and nor would countless other people scattered around the globe. Although my personal story is unique, it also typifies the extraordinary encounters and opportunities generated by the Second World War. My grandfather, an eminent left-leaning Jewish lawyer, emigrated to Britain from Germany in 1933 with his small son, who later served in the British Army in India. There he met and married my mother, the daughter of an uneducated Midlands factory worker. Like many other baby-boomer children growing up in postwar Britain, I lacked any clear national, religious or social identity. I was puzzled about my allegiances. What if my story had been otherwise? Suppose I had been born an Aryan in Nazi Germany: would I have had the courage to speak out, to take positive action, or would my instincts of self-preservation have persuaded me to keep quiet and go along with my own country's official policies?

As Philip Ball observes in his challenging and thought-provoking new book, Serving the Reich: The Struggle for the Soul of Physics under Hitler, moral decisions are rarely black and white, but entail choosing between categories whose moral valence is ambiguous. Ball investigates the dilemmas physicists faced in Nazi Germany, focusing in particular on three men: the elder statesman of science Max Planck, most famous now for the constant named after him (even though he had introduced it as a mathematical convenience); the originator of the uncertainty principle, Werner Heisenberg; and the Dutch-born Peter Debye, a molecular physicist — less famous than the other two, but a Nobel prize-winner none the less.

One of Britain's top science popularisers, Ball is ideally suited to explaining the niceties of what two Nobel laureates denigrated as "Jewish physics" (notably relativity and quantum mechanics). This said, the only mathematical symbol in his book is X for X-rays. Even e=mc2 is absent.

He does explain the science behind the bomb, but his focus here is on the political crucibles in which modern scientific Europe was forged. This means that, rather than discussing the intrinsic unknowables of fuzzy electron clouds or cats in cages, he analyses the interpretive uncertainties that stem from ambiguous phrases and faulty memories, from unspoken codes of behavior and personal loyalties, from conflicting misapprehensions and deliberate rumors.

To what extent should German scientists be castigated for trying to support their country and protect their families? Should they be condemned as Nazi colluders or pitied as fallible human beings who realized too late that a series of apparently inconsequential steps had led them ineluctably into culpability? Should scientists enjoy special consideration because they are disinterested searchers after truth, or should they be regarded as ordinary citizens who deserve to carry full responsibility for the political outcomes of their research? If such questions have ever troubled you, then you will find Ball's book an excellent guide through the ethical quagmires. And if you've never worried about those topics before, then it's even more important that you should read this lucid, balanced account of an apparently civilized nation's slide into depravity. How confident can you be that your country would have the foresight and courage to forestall anything similar? After all, in 1936, the American Rockefeller Foundation sent over a substantial grant to fund German physics.

The murky confusion Ball describes so eloquently reminded me of the old joke about the man who asks the way to the station. "Ah," comes the reply (from an Irishman if you live in England, but there must be many local variations), "if I were you I wouldn't start from here." But so often you never imagined you could possibly get to "here" in the first place. During the journey from a bearable inconvenience towards an intolerable nightmare, it can be difficult to distinguish any one particular point at which to jump off the track. Take the case of Victor Klemperer, the Jewish literary academic who had long ago converted to Protestantism. In his harrowing war diaries, Klemperer describes without self-pity how the Nazi regime gradually restricted his life in almost imperceptible stages. Day by day, what had started out as relatively minor irritations — losing his typewriter, not being allowed to drive — escalated into increasingly mindless acts of ill-treatment. It was not until 1945, on the night before the bombing of Dresden, that he finally decided to tear off his yellow star and leave the country.

Reciprocally, many Aryan scientists committed themselves proudly to the cause of German science, not appreciating until it was too late that they were being slowly corralled into a morally untenable position, one they would never have dreamt of contemplating in advance. Even the Jewish physicist Lise Meitner initially contemplated Hitler's rise to power with equanimity, reporting that he had spoken "very moderately, tactfully and personally." Like many other Germans, her research collaborator Otto Hahn welcomed Hitler as the strong leader the country needed, accepting at face value explanations that the Jews who had been imprisoned were Communist agitators.

Physics was especially badly hit by the National Socialists' decree in April 1933 that all Jewish civil servants, including university academics, should be "placed in retirement" — management speak for fired. A relatively new discipline, it had previously been less badly affected by long-standing anti-Semitic prejudices, so that a quarter of the nation's physicists were officially deemed to be non-

Aryan. As president of the Kaiser Wilhelm Society (KWG), Planck paid a customary visit to the new head of state, using the opportunity to remonstrate with Hitler about his treatment of Jews. In the absence of any definitive records, nobody knows exactly what happened, although rumors abound — that Hitler threatened Planck with deportation to a concentration camp, or that Planck drew a distinction between valuable and worthless Jews. Whatever passed between them, the upshot was that Planck agreed to keep quiet in return for extra state funding. His detractors accuse him of complacency, of safeguarding his own position by selling out to Nazi oppressors, but Planck was far from alone in putting pragmatism above ideals. His loyalties lay with German science, so it seemed preferable to lie low and accept assurances that persecution would not intensify. Yet although his motives may be understandable, his actions had the same consequences as if he had endorsed Jewish oppression.

Time after time, men in positions of responsibility decided to compromise in the interests not merely of their own careers, but also for the sake of German science. At a public ceremony in 1934, Planck's audience watched in tense anticipation to see if he would follow the latest diktat and raise his hand in a "Heil Hitler" salute. It was only on the third attempt that he managed to do it. As the crystallographer Paul Ewald (who was officially categorized as "quarter-Jewish") put it, "Looking back, it was the only thing you could do if you didn't want to jeopardize the whole KWG." Citing similar justification, Debye sent out a letter to his colleagues that ended "Heil Hitler!" and asked all Jewish members to resign.

But taking the easy route is very different from active persecution. Ball identifies the dangers of critical hindsight: "If we are to pass judgement, it must be on the moral failings of this capitulation to fate rather than with shrill accusations of anti-Semitism or collaboration." The steps Debye took to preserve his institute may seem distasteful, but he certainly did not condone Hitler's policies — indeed, it was thanks to his initiative that Meitner managed to flee in the nick of time. In retrospect, the criterion of honorable behavior might seem to be having actively attempted to overthrow the Nazi regime, but that would mean celebrating people who at the time were condemned as traitors: spies. Paul Rosbaud, for instance, loathed National Socialism so intensely that he worked for British intelligence by infiltrating the German army's upper echelons and passing over military secrets. Not everybody would agree that such betrayal of his own country was commendable.

Under Ball's discerning gaze, many scientists emerge from the shadows not as villains but as moral cowards who blustered arrogantly to conceal their lack of influence. He is not, however, willing to exonerate the guilty. Ball systematically picks apart the convenient postwar myth that, in contrast with their evil American counterparts, German physicists were valiantly obstructing the construction of an atomic bomb by deceiving colleagues and governments alike. In particular, he examines in forensic detail the case against Heisenberg, exposing the inconsistencies in his stories and analyzing why so many people have chosen to ignore the slipperiness of his behavior. Fresh evidence appeared 20 years ago: secret recordings were at last released of conversations between German scientists incarcerated in Farm Hall, a remote English manor house, in 1945. Unaware that the rooms were bugged, they bickered amongst themselves, fretting at the injustice of being held captive and casting blame elsewhere. Their own words undermine their subsequent attempts to massage the

truth. Falsely accusing the Danish Neils Bohr of having helped the Americans, one of them boasted "I thought I would try and save German physics and German physicists, and in that I succeeded." Such deluded self-aggrandizement enabled former Party supporters to salve their consciences and resume their scientific careers after the War by collecting their Persilscheine — whitewash certificates.

Ball's own moral compass points towards the future, not the past, and his arguments are rational as well as passionate. To protect themselves against ever again being manipulated by a corrupt regime, scientists must accept that they are political agents. As illustrated by just two obvious current examples, genetic engineering and nanotechnology, the pursuit of knowledge involves ethical decisions. Doing research entails learning how to play the game of fundraising — and that renders meaningless any attempt to claim intellectual purity or superiority, and thus evade responsibility. By spotlighting the dirt in the soul of Nazi physics, Ball aspires to cleanse our own scientific future.

Patricia Fara *is Senior Tutor, Clare College, Cambridge. Her books include Newton: The Making of a Genius (Pan-MacMillian, 2002) & Science: A Four Thousand Year History (OUP, 2009).*

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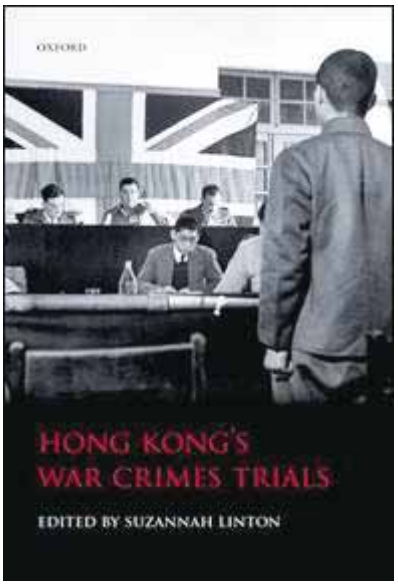
NEW BOOK: HONG KONG'S WAR CRIMES TRIALS

HONG KONG'S WAR CRIMES TRIALS

by SUZANNAH LINTON



The roots of the prosecution of atrocities arising out of World War II can be seen in a 7 October 1942 declaration by US President Roosevelt that "I now declare it to be the intention of this Government that the successful close of the war shall include provision for the surrender to the United Nations of war criminals".

On 17 December 1942, the Governments of Belgium, Czechoslovakia, Greece, Luxemberg, the Netherlands, Norway, Poland, the USA, the UK, the USSR, Yugoslavia, and the French National Committee, issued a declaration condemning German atrocities against the Jews and re-affirming their "solemn resolution to ensure that those responsible for these crimes shall not escape retribution, and to press on with the necessary practical measures to this end". Mr. Anthony Eden, the Secretary of State for Foreign Affairs, explained that "I would certainly say it is the intention that all persons who can properly be held responsible for these crimes, whether they are the ringleaders or the actual perpetrators of the outrages, should be treated alike, and brought to book."

This move towards criminal justice was not uncontested, but was further elaborated on in the 1943 Moscow Declaration, where the United Kingdom, the USA and the USSR declared their policy, that those German officers and men who had been responsible for or had taken a consenting part in these atrocities "will be sent back to the countries in which their abominable deeds were dome in order that they may be judged and punished according to the laws of these liberated countries and of the free governments which will be created therein" . This was "without prejudice to the case of the major criminals, whose offenses have no particular geographical localization and who will be punished by the joint decision of the Governments of the Allies". This extended to the Far East, to cover the Japanese.

In October 1943, a United Nations War Crimes Commission was set up in London to collect lists of criminals, record available supporting proof, and make recommendations as to the tribunals to try and the procedure for trying such criminals. In May 1944, a Sub-Commission for the Far East was set up in Chungking, China, to gather information about Japanese crimes in Asia. It was composed of representatives from Australia, Belgium, China, Czechoslovakia, France, India, Luxembourg, the Netherlands, Poland, the United Kingdom and the United States. The Chinese delegate, Dr. Wang Chung Hui, Secretary-General of the Supreme National Defense Council of China, was elected its first chairman.

As the policy solidified, the Allies settled upon the idea of a military tribunal for the leaders, and for the remaining suspects to be brought before occupation courts or sent back for trial under the provisions of the Moscow Declaration, to the countries where they committed the crimes. By 21 November 1944, the British War Cabinet had determined that "war crimes committed against British subjects or in British territory should be dealt with by military courts set up to try them in Germany (or wherever else was appropriate)". The British attitude towards the essential elements of a criminal trial is revealed in the following comments to the USA, concerning a possible trial of Adolf Hitler: "He, of course, must have in such a trial all the rights properly conceded to an accused person. He must be defended if he wishes, by counsel, and he must call any relevant evidence. According to British ideas, at any rate, his defence could not be forcibly shut down or limited because it involves a great expenditure of time. There is nothing upon which British opinion is more sensitive in the realm of criminal procedure than the suspicion that an accused person-whatever the depths of his crime-has been denied his full defence."

The prosecution of the laws and usages of war, or war crimes, was, by the time of the Second World War, already well-established in British military law. Field General Courts Martial may be convened during wartime to deal with crimes committed against the laws or usages of war. The laws and usages of war were the subject of a lengthy explanatory chapter in the Manual of Military Law 1929, which drew from international law, in particular but not exclusively from, the Regulations annexed to Hague Convention IV of 1907. The direct source of law for all British trials in the aftermath of World War II, including the Hong Kong trials, was the Royal Warrant of 18 June 1945, including the annexed Regulations for the Trials of War Criminals. British military courts had jurisdiction over all suspected war criminals within the command of the particular convening officer, irrespective of where the crimes had been committed. In essence, the procedure for Field General Courts Martial, regulated in the Army Act 1926 and its Rules of Procedure 1926 would apply, to the extent amended by the Regulations annexed to the Royal Warrant and other secondary legislation adopted such as the two Instructions issued by General Headquarters, Allied Land Forces South East Asia (ALFSEA). The basic procedure for general courts martial was explained in the Manual of Military Law 1929 – it was a simplified procedure, with relaxed rules of evidence, compared to what applied in the civilian system.

In relation to the war in Asia, the United Kingdom declared war on Japan on 8 December 1941, the day after it attacked Pearl Harbour and certain Western territories in Asia such as Malaya. After a short conflict lasting some 17 days, Hong

Kong fell to Japan on 25 December 1941. Following the dropping of atomic bombs on Hiroshima and Nagasaki, the Emperor of Japan capitulated on 14 August 1945. An 11 man Japanese delegation signed a formal Instrument of Surrender on 2 September 1945 on board the USS Missouri in Tokyo Bay. In surrendering, the Japanese agreed to the Potsdam Declaration, which included the statement of the Allies that: "We do not intend that the Japanese shall be enslaved as a race or destroyed as a nation, but stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners" (Para. 10). The International Military Tribunal in Tokyo was established on 19 January 1946 by General McArthur, as Supreme Commander of the Allied forces in the Far East. Further to the reassertion of British control over Hong Kong with the arrival of Rear Admiral Harcourt, an interim military administration was established on 1 September 1945, giving the Commander in Chief of the liberating forces full judicial, legislative and executive powers (the Japanese only formally surrendered on 16 September 1945).

In July 1946, of the 10,000 Japanese captured in Hong Kong after the surrender, 239 were held as suspected war criminals. Some were repatriated as there was insufficient evidence, and others were sent to Hong Kong from across Asia (for example, towards the end of 1946, 58 Japanese and Formosans were sent to stand trial in relation to atrocities against Prisoners-of-War in Formosa, and 10 Japanese had been sent from Japan to Hong Kong in relation to crimes committed in Shanghai against British nationals). During 1947, 55 Japanese were located in China and brought to Hong Kong, and 92 detained Japanese were repatriated.

The Commander of Land Forces Hong Kong drew from the Royal Warrant to establish a total of 4 British war crimes courts in Hong Kong, which dealt with cases from across Hong Kong, Kowloon and the New Territories, and also from Formosa (Taiwan), China (Waichow and Shanghai), Japan and on the High Seas. These courts operated under ALFSEA supervision, although the final say in each case lay with the Commander of Land Forces Hong Kong. In him lay the power to confirm, or not to confirm, any convictions and sentences imposed.

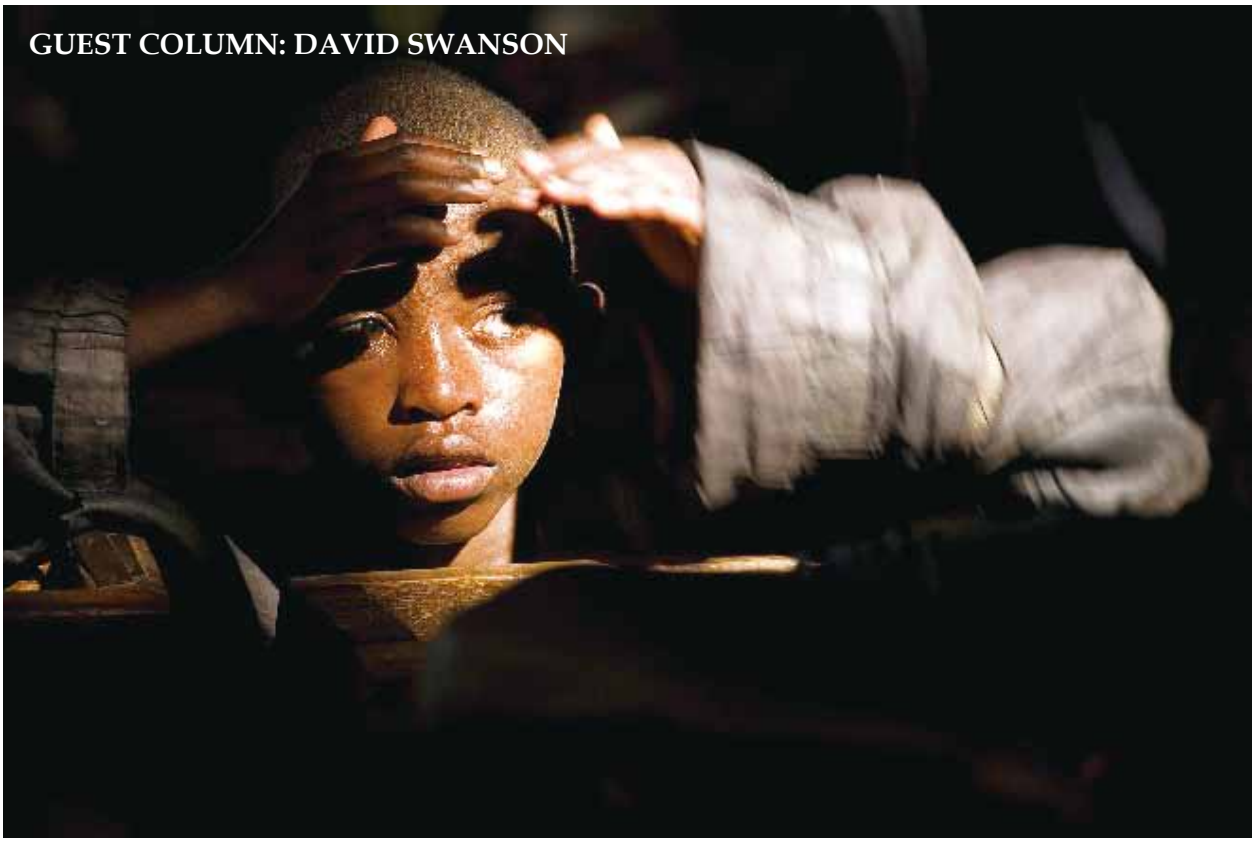
The British War Crimes Courts in Hong Kong exercised jurisdiction over war crimes, meaning "a violation of the laws and usages of war committed during any war in which His Majesty has been or may be engaged at any time since the 2nd September, 1939" (Article 1). The grounds for exercise of personal jurisdiction appear to have been because the crimes were committed against British or Commonwealth citizens (passive personality jurisdiction) or the suspects were captured within the Hong Kong command (universal jurisdiction). The subject matter spanned war crimes committed during the fall of Hong Kong, during the occupation and in the period after the capitulation following the nuclear bombings of Hiroshima and Nagasaki, but before the formal surrender. They included killings of hors de combat, abuses in prisoner-of-war camps, abuse and murder of civilians during the military occupation, forced labour and offences on the High Seas.

The first trial, concerning the Silver Mine Bay Massacre on Lantau Island, began on 28 March 1946. The last judgement, in the matter of detainee abuses in Shanghai, was promulgated on 18 February 1949 having been passed on 20 December 1948. There were a total of 46 British war crimes trials in Hong Kong, of 123 individuals. Of the 46 judgements issued, 44 were confirmed against 108 individuals, with 14 acquittals. 2

judgements were not confirmed: there was one retrial following non-confirmation of the judgement (Ito Juniichi), and one judgement was not confirmed but transferred to the Supreme Court (Innouye Kanao).

S. Linton, 'Hong Kong's War Crimes Trials', at Suzannah Linton & HKU Libraries, Hong Kong's War Crimes Trials Collection Website at hkwctc.lib.hku.hk; for more comprehensive research and analysis, see the book that has emerged from this project: Suzannah Linton (ed), HONG KONG'S WAR CRIMES TRIALS (Oxford University Press, 2013).

Suzannah Linton *is Chair of International Law, Bangor Law School, Bangor University, where she started and developed their International Law programmes. She previously led the programme at the University of Hong Kong's School of Law. Her work has been profiled by the International Committee of the Red Cross, Radio Television Hong Kong, Professor Philip Zimbardo, and by the Crimes of War project. She has been interviewed by the media in several countries, for example about the Western Sahara, East Timor, justice in Bangladesh and war crimes trials in Hong Kong. In 2011, the University of Bangor Law School Journal carried an in-depth profile further to her appointment as Chair Professor of International Law. She is a trustee of the Church Hostel, the Anglican Chaplaincy to Bangor University.*



File Photo: One of the many children in the audience during the screening of a documentary film on the repatriation of former combatants to Rwanda. UN Photo/Marie Frechon

LIES ABOUT RWANDA

by DAVID SWANSON

URGE the ending of war these days and you'll very quickly hear two words: "Hitler" and "Rwanda." While World War II killed some 70 million people, it's the killing of some 6 to 10 million (depending on who's included) that carries the name Holocaust. Never mind that the United States and its allies refused to help those people before the war or to halt the war to save them or to prioritize helping them when the war ended

– or even to refrain from letting the Pentagon hire some of their killers. Never mind that saving the Jews didn't become a purpose for WWII until long after the war was over. Propose eliminating war from the world and your ears will ring with the name that Hillary Clinton calls Vladimir Putin and that John Kerry calls Bashar al Assad.

Get past Hitler, and shouts of "We must prevent another Rwanda!" will stop you in your tracks, unless your education has overcome a nearly universal myth that runs as follows. In 1994, a bunch of irrational Africans in Rwanda developed a plan to eliminate a tribal minority and carried out their plan to the extent of slaughtering over a million people from that tribe – for purely irrational motivations of tribal hatred. The U.S. government had been busy doing good deeds elsewhere and not paying enough attention until it was too late. The United Nations knew what was happening but refused to act, due to its being a large bureaucracy inhabited by weak-willed non-Americans. But, thanks to U.S. efforts, the criminals were prosecuted, refugees were allowed to return, and democracy and European enlightenment were brought belatedly to the dark valleys of Rwanda.

Something like this myth is in the minds of those who shout for attacks on Libya or Syria or the Ukraine under the banner of "Not another Rwanda!" The thinking would be hopelessly sloppy even if based on facts. The idea that SOMETHING was needed in Rwanda morphs into the idea that heavy bombing was needed in Rwanda which slides effortlessly into the idea that heavy bombing is needed in Libya. The result is the destruction of Libya. But the argument is not for those who pay attention to what was happening in and around Rwanda before or since 1994. It's a momentary argument meant to apply only to a moment. Never mind why Gadaffi was transformed from a Western ally into a Western enemy, and never mind what the war left behind. Pay no attention to how World War I was ended and how many wise observers predicted World War II at that time. The point is that a Rwanda was going to happen in Libya (unless you look at the facts too closely) and it did not happen. Case closed. Next victim.

Edward Herman highly recommends a book by Robin Philpot called Rwanda and the New Scramble for Africa: From Tragedy to Useful Imperial Fiction, and so do I. Philpot opens with U.N. Secretary General Boutros Boutros-Ghali's comment that "the genocide in Rwanda was one hundred percent the responsibility of the Americans!" How could that be? Americans are not to blame for how things are in backward parts of the world prior to their "interventions." Surely Mr. double Boutros has got his chronology wrong. Too much time spent in those U.N. offices with foreign bureaucrats no doubt. And yet, the facts – not disputed claims but universally agreed upon facts that are simply deemphasized by many – say otherwise.

The United States backed an invasion of Rwanda on October 1, 1990, by a Ugandan army led by U.S.-trained killers, and supported their attack on Rwanda for three-and-a-half years. The Rwandan government, in response, did not follow the model of the U.S. internment of Japanese during World War II, or of U.S. treatment of Muslims for the past 12 years. Nor did it fabricate the idea of traitors in its midst, as the invading army in fact had 36 active cells of collaborators in Rwanda. But the Rwandan government did arrest 8,000 people and hold them for a few days to six-months. Africa Watch (later Human Rights Watch/Africa) declared this a serious violation of human rights, but had nothing to say about the invasion and war. Alison Des Forges of Africa Watch explained

that good human rights groups "do not examine the issue of who makes war. We see war as an evil and we try to prevent the existence of war from being an excuse for massive human rights violations."

The war killed many people, whether or not those killings qualified as human rights violations. People fled the invaders, creating a huge refugee crisis, ruined agriculture, wrecked economy, and shattered society. The United States and the West armed the war-makers and applied additional pressure through the World Bank, IMF, and USAID. And among the results of the war was increased hostility between Hutus and Tutsis. Eventually the government would topple. First would come the mass slaughter known as the Rwandan Genocide. And before that would come the murder of two presidents. At that point, in April 1994, Rwanda was in chaos almost on the level of post-liberation Iraq or Libya.

One way to have prevented the slaughter would have been to not support the war. Another way to have prevented the slaughter would have been to not support the assassination of the presidents of Rwanda and Burundi on April 6, 1994. The evidence points strongly to the U.S.-backed and U.S.-trained war-maker Paul Kagame – now President of Rwanda – as the guilty party. While there is no dispute that the Presidents' plane was shot down, human rights groups and international bodies have simply referred in passing to a "plane crash" and refused to investigate.

A third way to have prevented the slaughter, which began immediately upon news of the Presidents' assassinations, might have been to send in U.N. peacekeepers (not the same thing as Hellfire missiles, be it noted), but that was not what Washington wanted, and the U.S. government worked against it. What the Clinton administration was after was putting Kagame in power. Thus the resistance to calling the slaughter a "genocide" (and sending in the U.N.) until blaming that crime on the Hutu-dominated government became seen as useful. The evidence assembled by Philpot suggests that the "genocide" was not so much planned as erupted following the shooting down of the plane, was politically motivated rather than simply ethnic, and was not nearly as one-sided as generally assumed.

Moreover, the killing of civilians in Rwanda has continued ever since, although the killing has been much more heavy in neighboring Congo, where Kagame's government took the war – with U.S. aid, weapons, and troops – and bombed refugee camps, killing some million people. The excuse for going into the Congo has been the hunt for Rwandan war criminals. The real motivation has been Western control and profits. War in the Congo has continued to this day, leaving some 6 million dead – the worst killing since the 70 million of WWII. And yet nobody ever says "We must prevent another Congo!"

David Swanson *is an American activist, blogger and author. He served for a year as media coordinator for the International Labor Communications Association. In May 2005, Swanson helped make the Downing Street memo known in the United States and discussed in Congress. Swanson continues to work closely with the peace movement and often leads campaigns to end the Iraq War and punish those involved in launching that war. His Swanson's books include War Is A Lie. He hosts Talk Nation Radio.*

VOICE FROM THE GRASSROOTS

Photo: Mr. Prasanga Fernando, human rights defender based in Colombo, Sri Lanka

ENOUGH IS ENOUGH LET US FIGHT FOR JUSTICE

THIS is a new feature we have introduced with this issue. Voice of the Grassroots is aimed at interviewing activists based in each country to create a space for to shed light on their activities. We spoke to Prasanga Fernando, a human rights defender for NGO, Right 2 Life in Sri Lanka.

Following are experts of the interview:

Torture Magazine (TM): Many mass graves have been found in Sri Lanka within a short space of time. Many human rights organizations assisted in finding them and making the discoveries known both inside and outside the country. You are a human rights defender working on this relevant and crucial issue. How do you become involved?

Prasanga Fernando (PF): No one can deny the bitter history we passed through in the last few decades. The governments we "elected" engaged in mass disappearances and extrajudicial killings since early 70s. Therefore, a large number of mass graves have been found around the country. Those who were killed by the government deserve justice. At least the cause of their deaths should be discovered. These dead souls are asking for justice. We, as the people have a prime responsibility to stand up on their behalf before we too become victims of these atrocities.

We saw a slightly difference [sic] policy implemented during the government of former President Chandrika Bandaranaike. The government was urged to conduct proper investigations on the mass grave found in Suriyakanda, Ratnapura district, where number [sic] of School children were killed and buried. However, very much like other

governments do, they decided to remain idle when the same issues arose in other areas, especially in the north and east of Sri Lanka. So again, the culture of silence was established and no one dared to bring the perpetrators to justice.

I, as a member of Right 2 Life, a human rights group based in Colombo, Sri Lanka, have not only personal but professional responsibilities to stand up to lack [sic] of justice. That is how I started working on the mass grave issue. At the moment I am focusing more on the mass grave found in the hospital yard in Matale. We worked to bring awareness among the relatives of the victims of the area whose remains may well be found in this grave. The court cases are processing and we hope we can have the justice for this.

TM: Many skeletons were founds in the excavation, how are the relatives of the victims in these mass graves helping in the process?

PF: Unfortunately most of parents of those victims in this mass grave have passed away themselves, so other relatives are helping in the court procedures. There are a few parents still alive, and they are extending their serious concern to find justice for their lost children.

I can relate here the story of one father who has been searching for his son since 1989. He told me that he spent everything he earned to search his son and many members of the family became psychotic.

TM: Have you met any relatives who believe those victims belong to their family? Please tell us something of your meetings with them.

PF: This country is so called [sic] Buddhist country, where the majority of the people claim to be followers of the great Lord Buddha. But no one can even imagine crimes of this nature occurring in this country.

There is no secret perhaps, as it is now in public domain, of the number of people who were been killed during the last phase of the war between the state forces and Tamil Tiger rebels known as the LTTE, where hundred thousands [sic] of unarmed innocents perished.

There are many experiences I can related here on those who are victims of mass killings in Sri Lanka. There was a father whose son was believed to be a one of victims in Matale Mass grave. He was a school principle by profession, and he is a father of four. One of his sons, Sanjeewa Kumarasiri, was taken to army custody when he was heading to school on the morning of November 8, 1989. One Army officer called Jayatissa who was responsible for his custody informed the schools that he needed Sanjeewa for taking [sic] a short deposition and that he would bring him back to school before 12 noon. Until now no one knows what happened to him.

Sanjeewa's mother passed away after suffering severe depression.

There was another narrative in which one retired government official lost his brother. This case directly involved Gotabhaya Rajapaksa (the president's brother and Secretary of the Ministry of Defense), who was then one of the army officers who led a team in Matale. As such, he was responsible for mass killings. As one of most powerful key players in the government he was able to have many of the police record books in the area destroyed.

TM: There was a political debate after the revelation of these mass graves in the country. Apparently those who work on these issues are under covert surveillance of the government. Tell us about the political situation in the country due to these excavations?

(Continued to page 113)

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POEM

John the twenty–third -- Now a Saint

So you are now a saint
Do remain human, all the same!

You understood our times
Our need to understand and respond
To change;
To have windows and doors open
For all winds to blow through
Daring to face diversity
As a friend and not a foe;

Talk, talk, you said
And ushered in the great council,
The Vatican two.
A great moment
When a force greater than
The Niagara Falls came down
Untying the spirit of humans,
To rise from their bondages
To rediscover the sisterhood
With all forces of nature;
To break the knots of decadence
Uprooting ourselves from utilitarianism
Which caused
Greatest unhappiness
of the greatest number.

Now it is time for your second miracle
Bring back again the living spirit of
Those great documents
And that great council
And let the people again
Cry out for an open Church
Where love will prevail,
Where fear has no place
Where all embrace all
To end destruction
And make way
For another flowering of
the human spirit.
A resurrection, yes
A resurrection, please!

- Basil Fernando

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ISSN 2304-134X

Published by

Asian Human Rights Commission Ltd.
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Pnn: 1002304764
EAN: 5790000278114
Website: www.dignityinstitute.org

Printed by

Clear Cut Publishing & Printing Co.
A1, 20/F, Fortune Factory Building
40 Lee Chung Street, Chai Wan, Hong Kong, China