

MASS GRAVES AND
FAILED EXHUMATIONS
IN SRI LANKA

JUNE 2023



INTERNATIONAL
TRUTH
AND JUSTICE
PROJECT

“When the news about Matale mass grave hit the headlines, we thought all the victims, including my younger brother, will get some sort of justice. We hoped at least we would be able to know what actually happened to them. My mother is old and still alive. But she never recovered from the pain and trauma she has been living through since the day she lost her son. We went to the police and provided statements stating that we suspect my brother might have also been buried at the same site. Many years have passed since then, but nothing has happened. Political parties and media conveniently abandoned the dead after capitalising on the collective grief of the victims’ families. Those who were accused of being responsible for these crimes now hold high positions in the upper echelons of power without facing the slightest challenge. But those who were tortured and slaughtered still remain buried and forgotten. It is only we who feel the pain, and no one else.”

Bandula Idamegama, brother of Ananda Idamegama who disappeared in 1989, interview 3 May 2023.

“In Mannar, the first mass grave was found in 2013, and 83 skeletal remains were found. The second one was found in 2018, and more than 350 skeletal remains were found there. Ten years have elapsed since 2013. The cases are ongoing in court and still justice is not delivered to the victims’ families. Day by day, mothers of the enforced disappeared from our movement have died due to old age or decease. We have lost 178 mothers till today. Therefore, the witnesses to the crimes are gradually vanishing from our midst. If we also die, the evidence also will be erased. We protest and fight for justice on the road without closure, not knowing when we will get justice. We have accessed the Courts of Justice and even international fora looking for justice which still evades us. We are frustrated and tired now. The Office of Missing Persons (OMP) was established to divert the issue and safeguard the government. OMP also participated in these two mass grave cases, and there are not many benefits from that. We ask from the courts: Where are our children who surrendered to the Sri Lankan Military? If our children are alive, then whose remains were found in the mass graves? Give us justice: Do not delay justice postponing the case dates. Hereafter, whom can we approach to demand justice?”

Mrs Manuvel Uthayachandra, President of the Mannar Families of Enforced Disappeared, interview 30 May 2023

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SUMMARY

“When I’ve been digging and I’m tired and don’t want to do any more, I think how it could be me in the grave I’m working on. I wouldn’t want someone to stop digging for me.”

Anil Tissera in *Anil’s Ghost*, Michael Ondaatje’s novel, 2000

This joint report examines Sri Lanka’s record of dealing with mass graves from multiple periods of conflict. All over the island, tens of thousands of bodies lie undiscovered in mass graves. Over the last three decades, around 20 mass graves have been partially exhumed; to date, hardly any family has had the remains of their loved ones returned.

None of Sri Lanka’s numerous Commissions of Inquiry were mandated to look into mass

graves. Instead, efforts to uncover the truth have been stymied. Magistrates and forensic experts have been transferred abruptly, police have delayed carrying out judicial orders, families’ lawyers have been denied access to sites, no effort has been made to find living witnesses, no ante mortem data was collected and, in the very rare cases where someone was convicted, they were then pardoned. It is a story of a lack of political will – an inadequate legal framework, a lack of a coherent policy and of insufficient resources. For the families of the disappeared it is a story of unresolved tragedy; the bereaved are forced to live – and die – without ever finding their loved ones.

Most of the exhumations carried out to date were forced upon the authorities after the locations of the mass graves were accidentally revealed during construction work or – exceptionally – on the basis of information provided by members of the security forces, such as in

Chemmani, Jaffna district, in 1999. This report analyses the shortcomings in the exhumations, and draws particularly on the experience at Matale in 2013, when 155 bodies were exhumed, and in Mannar, where 81 and then 318 (including 28 children’s) skeletons were exhumed at two different locations in 2013 and 2018 respectively. A list of other exhumations known to CHRDR, FOD, JDS and ITJP can be found in the Annex to this report.

This report highlights the failures associated with exhumations conducted with reference to international standards and good practice, drawing chiefly on the 2016 Revised UN Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (also known as the Minnesota Protocol, which includes guidelines for the excavation of graves), the International Committee of the Red Cross (ICRC)’s guidance, and the International Commission on Missing Persons’ (ICMP)

2020 Bournemouth Protocol on Mass Grave Protection and Investigation. Lack of involvement of the families is one of the main shortcomings of exhumations in Sri Lanka. Even in those cases where criminal investigations, often unsatisfactory, have been conducted, families were mostly ignored.

To date, very few exhumations have led to the identification of victims, or any clarification of circumstances of their death, let alone the prosecution and conviction of those responsible for the disappearance and murder of the people whose bodies were recovered.

There is no system, procedure or indeed practice in Sri Lanka for the collection of ante-mortem data from relatives of the disappeared living in the area where a mass grave has been discovered and is being exhumed. The purpose of such a collection is to assist with the identification of remains and their return to relatives. No such ante-mortem data were collected in Mannar or Matale, for instance. In Chemmani in 1999, families identified two of the remains as garage workers who had disappeared after they were arrested by army personnel on 19 August 1996, based on their clothing. One of the victims found in the grave was blindfolded with his shirt; the other had his hands tied behind his back with

his vest. Even then, these remains were apparently never returned to the families.

As repeatedly pointed out by various presidential Commissions of Inquiry, as well as United Nations (UN) special procedures, such as the Working Group on Enforced or Involuntary Disappearances and the Special Rapporteur on truth, justice, reparation and guarantees of non-recurrence, Sri Lanka’s legal framework is not adequate. The 2016 Interim Report of the Consultation Task Force on Reconciliation Mechanisms, for instance, highlighted ‘arbitrary procedures, lack of coordination between actors and lack of mandatory involvement of a consultant JMO’ as deficiencies in past investigations into suspected gravesites.

While a draft inquest law and Standard Operation Procedures have been under development since 2015, they have not been finalised, nor have their drafts been made public or opened for consultation with relevant stakeholders. The Office of Missing Persons (OMP, set up by law in 2016) has been involved in this process, as it was given powers to observe exhumations. It initiated discussions with the Ministry of Justice and Prison Reforms in this regard in 2018. However, neither CHRDR, FOD, JDS nor ITJP have been able to obtain a copy. This despite FOD requesting a copy through a Right to Information request in April 2023.

Even though the establishment of the OMP raised some hope, the organisation has failed to deliver on its mandate and gain the trust and confidence of victims’ families. The OMP’s latest Annual Report (2021) contains minimal information regarding its role in respect of mass graves, and despite a formal request no further details have been provided.

Another major problem with exhumations is political interference aimed at undermining the process if a politician or others close to them is implicated in the crimes committed. This has been a factor at all stages of the exhumation process. The investigation of the Kaluwanchikudy site in Batticaloa district in 2014 was rushed, initially, on the assumption that the remains concerned victims of the Liberation Tigers of Tamil Eelam. But then investigations stalled; some say after the state came to realise that investigations on this particular mass gravesite implicated Vinayagamoorthy Muralitharan (Colonel Karuna), who in 2004 had switched sides from the LTTE to work with the military and in 2008 officially joined the Mahinda Rajapaksa regime. Despite nearly ten years having passed since the original complaint to the Magistrate, exhumations have yet to be undertaken.

In the exhumations at Matale the role of Gotabaya Rajapaksa, then Secretary to the Ministry of Defence (who had been Military

Coordinating Officer of Matale district July 1989–January 1990, and later President of Sri Lanka) is a prime example of political interference. Gotabaya Rajapaksa was said to have ordered the destruction of all police registers and records older than 5 years at police stations in the Central Province, including Matale. According to Article 12(4) of the International Convention on the Protection of People from Enforced Disappearances, to which Sri Lanka is party, the Sri Lankan state should take action against Gotabaya Rajapaksa and the senior police officers allegedly involved for their role in hindering the process of investigations. The then President, Mahinda Rajapaksa (and brother of Gotabaya), set up a presidential commission of inquiry which functioned in parallel to the magistrate’s inquiry at Matale. The Commission of Inquiry arranged for samples of the remains to be sent abroad for carbon dating, only for the results to contradict the findings of the Sri Lankan forensic experts, with the former dating the remains to before 1950 (though they also reported that the remains showed evidence of torture and murder) and the latter to the late 1980s. In January 2023, four UN special procedures bodies, including the UN Working Group on Enforced Disappearances, wrote to the Government of Sri Lanka regarding its failure to hold accountable officials in charge of Matale District in the late 1980s.

Sri Lanka’s actual forensic capacity remains limited, and the results of any exhumations have had to be sent abroad for testing. There have also been significant delays, compared to other countries, among Sri Lankan forensic experts submitting their reports to the magistrates. For example, the forensic report on the exhumations at the Sathosa building in Mannar, which was due to be submitted by 30 June 2019, was still awaited as of May 2023. This delay has been attributed to the fact that certain artefacts recovered from the exhumation site had not been provided to the investigation team. However, sources closely monitoring these exhumations were sceptical and have doubts about the reasons given for the delay.

In the context of exhumations, in the rare event that suspects are arrested, the Attorney General’s Office (AGO) has been central to decisions to drop cases, allowing suspects to be released on bail, or failing to prioritise pending procedures. For example, in 1998 with the mass graves exhumed at Chemmani, Jaffna district, a five-member committee identified members of the forces responsible for 15 disappearances, and four army officers were arrested. But the committee’s report was never published. Instead, under the orders of the AGO, the suspects were released on bail in July 2000. All four were subsequently promoted.

Similarly, in 1995 when the AGO failed to appear in

court, the Colombo Chief Magistrate dismissed the case against three Special Task Force officers charged with suspected murder in relation to 21 bodies found floating in Bolgoda lake and other waterways near Colombo. The magistrate said that the absence of the AGO was ‘an obstruction of justice’. Later, the AGO decided there was insufficient evidence against them and recommended disciplinary action instead.

The UN Special Rapporteur on truth, justice, reparations and guarantees of non-recurrence in 2019 concluded after a visit to Sri Lanka:

“It is unusual for middle-income countries like Sri Lanka to have such problems.”

He added:

“Sri Lanka urgently needs to improve its scant expertise on the investigation and prosecution of ‘system crimes’, in other words crimes that involve the systematic and coordinated use of state organs and that result in large-scale violations and abuses of

international human rights or international humanitarian law. This would include specialized expertise on investigations, forensics and the design of prosecutorial strategies. Improving judicial capacities regarding system crimes is as necessary as it is urgent.”

BELOW ARE THE KEY RECOMMENDATIONS BY THE ORGANISATIONS WHO AUTHORED THIS REPORT TO THE GOVERNMENT OF SRI LANKA:

1. Enact a specific law and policy on the management of mass graves, and exhumations, which includes their identification, preservation and investigation over time. Preservation should include the safe storage of skeletal remains removed from graves or the soil and ensure that the chain of custody remains intact;
2. Conduct a transparent process of consultation on the proposed legal framework, policy and Standard Operating Procedures on Mass

Graves (SOPs), including with the UN and other international experts, and ensure that any framework or policy, including SOPs, fully incorporates relevant provisions of the Minnesota and Bournemouth Protocols;

3. Strengthen forensic capacity in the country, including in respect of mass graves, implement the recommendations of the All-Island Presidential Commission of Inquiry into Disappearances to refrain from exhumations until ‘requisite skills exist’, and establish a Human Identification Centre to train pathologists and other scientists, including on DNA profiling, computerised facial reconstruction and recognition, video superimposition and anthropometric analysis;
4. Restructure the Attorney General’s Office and create an independent public prosecution service to ensure that prosecutions resulting from the exhumations are conducted in an independent and impartial way.

THE ORGANISATIONS ALSO CALL UPON THE OMP AND INTERNATIONAL COMMUNITY (PARTICULARLY THE ICRC AND THE ICMP) TO TAKE ACTION, MORE SPECIFICALLY TO:

1. Establish a professionally skilled specialist unit to probe into the locations of other possible mass graves, reinforce their forensic capacity and ensure that the

unit has adequate resources, including for DNA testing;

2. Examine, without undue delay, all locations of potential mass graves, and create a database to ensure their protection, in line with the measures set out in the Bournemouth Protocol;

3. Strengthen judicial independence, including in respect of security of tenure, conditions of service, personnel administration and disciplinary matters in the judiciary, including promotions and dismissals, as well as training on international crimes.

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INTRODUCTION

In all probability hundreds, if not thousands, of mass graves are dotted around Sri Lanka, containing the bodies of tens of thousands of victims of enforced disappearance between 1983 and 2009. Only around twenty have been exhumed to date.² Those exhumed in the south of the country reveal widespread violations, notably enforced disappearances by government forces against armed insurgents of the Janatha Vimukthi Peramuna (JVP, People's Liberation Front) between 1987 and 1990, when the JVP was brutally crushed. Others exhumed in the north and east are a stark reminder of the widespread and systematic human rights violations committed by the security forces during the 1983-2009 armed conflict with the Liberation Tigers of Tamil Eelam (LTTE). Other mass graves, like one in Kaluwanchikudy, Batticaloa district, contain as yet unexhumed skeletal remains of people killed by the LTTE.

To date, most of the exhumations carried out have been forced upon the

authorities, after the locations of the mass graves were accidentally revealed during building work, such as in Matale in 2013³ or in Mannar in 2018, or exceptionally on the basis of information provided by members of the security forces, such as in Chemmani, Jaffna district in 1999.⁴ Each excavation has raised the hopes of the families of the disappeared that loved ones would be found. However, to date the Sri Lankan State's approach has ensured that very few remains have been identified, let alone that those responsible for their disappearance are brought to justice.

This report analyses the shortcomings in the exhumations, including at Matale, where 155 bodies were exhumed, and at Mannar, where 81 and 318 (including those of 28 children) skeletons were exhumed at two different locations in 2013 and 2018 respectively. A list of all exhumations to date known to CHRD, FOD, JDS and ITJP can be found in the Annex to this report.

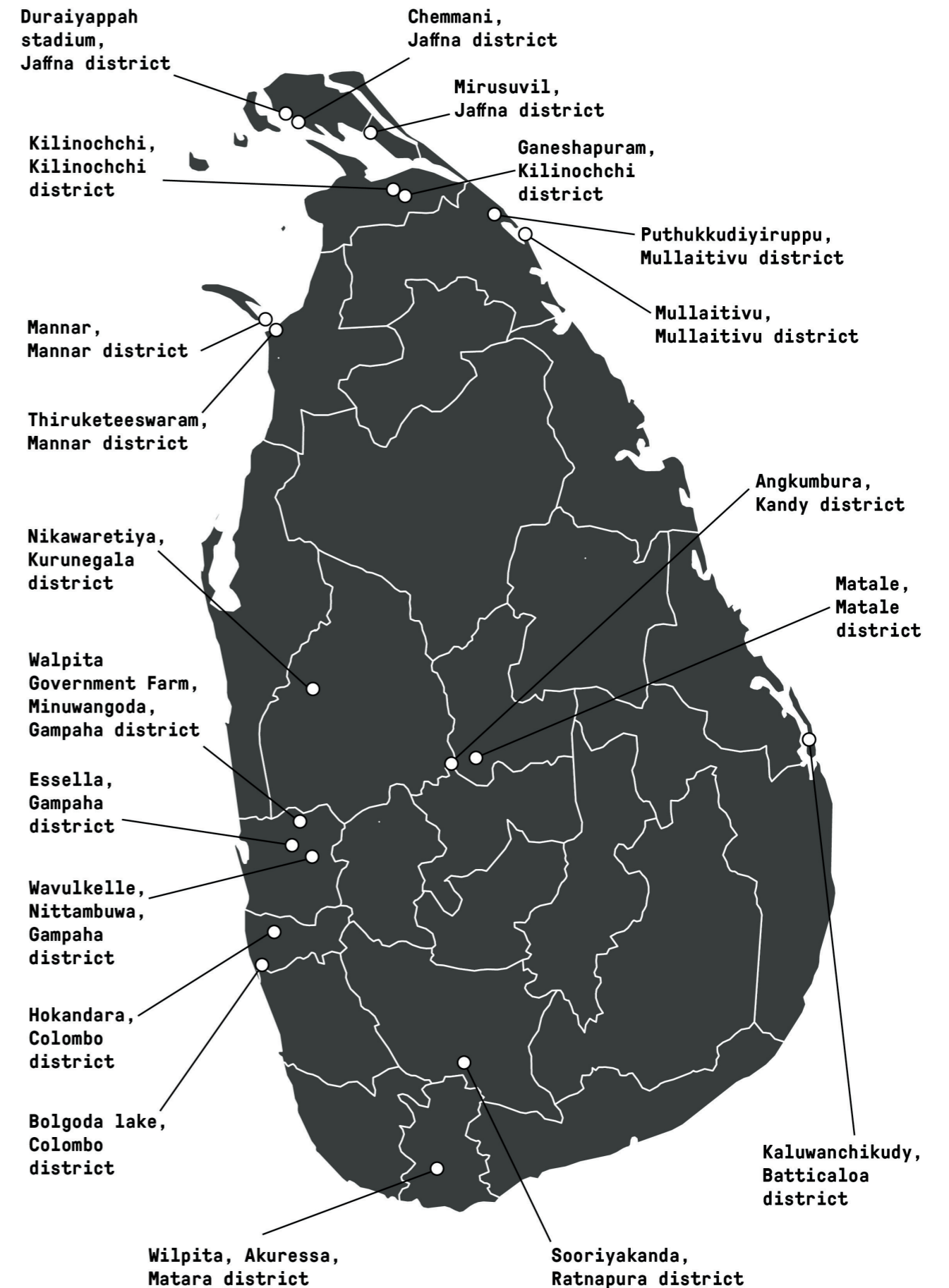
They include exhumations and forensic examinations of illegal burial sites (such as Chemmani), open mass graves (such as Hokandara), bodies recovered from lakes and rivers (such as Bolgoda), as well as mass graves with skeletal remains.⁵

The multiple failures in exhumations provide further evidence that the Government of Sri Lanka is unable or unwilling to ensure accountability for the alleged commission of core international crimes and other serious human rights violations, regardless of when they were committed or during which conflict.

Looking forward, it is likely there are many more mass graves to exhume, including those of people disappeared and killed at the end of the war in the north and east in 2009. It is time that the flaws in past exhumations are rectified and that any further exhumations fully uphold the right of the families to truth, justice and reparations.⁶

“NO ONE HAD SPOKEN WITH THE FAMILIES OF THE DISAPPEARED IN MATALE AND THE EXHUMATIONS RAISED THEIR EXPECTATIONS ONLY FOR THOSE TO BE DASHED AGAIN BECAUSE THE CASE IS NOW ‘FROZEN’ AGAIN. WE HAVE SEEN THIS ELSEWHERE TOO.”¹

MASS GRAVES IN SRI LANKA



1. INTERNATIONAL AND NATIONAL LEGAL FRAMEWORK

1.1 INTERNATIONAL STANDARDS

One of the challenges in dealing with mass graves is that there is no international definition of a mass grave; nor is there any legal consensus on a mass grave's characteristics, including the minimum number of individuals interred. To some, a mass grave is constituted if six or more individuals are buried together.⁷ To others, it is simply more than one.⁸ Forensic experts have, however, defined a mass grave as a 'burial site containing the remains, often commingled, of numerous persons'⁹ with highly varied geometries taking 'the forms of a trench, pit, organized or sectioned and with variable body densities'.¹⁰ The Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Agnes Callamard¹¹, drawing on the work of the 2016 Revised UN Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (also known as the Minnesota Protocol on the Investigation of

Potentially Unlawful Deaths, (Minnesota Protocol)¹², which includes guidelines for the excavation of graves) and the International Commission on Missing Persons' 2020 Bournemouth Protocol on Mass Grave Protection and Investigation Bournemouth University (Bournemouth Protocol)¹³, has suggested the following definition: a mass grave is a burial site where the 'circumstances surrounding the death and/or the body-disposal method warrant an investigation as to their lawfulness'¹⁴. This definition allows for the inclusion of mass graves established in response to a natural disaster, such as an earthquake or tsunami, or in response to a pandemic, both of which trigger the responsibilities of the state and/or of non-state actors.¹⁵ According to Callamard, this definition provides that, independent of the causes and circumstances of death, what distinguishes mass graves from other mass burial sites are violations of 'last rights' and of last rites.¹⁶ The distinguishing factor is the treatment of

bodies in and after death, in particular the manner of the handling of remains, including whether and how the remains are concealed.

The term 'victim' refers to 'persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative in the State or as a result of acts which constitute gross violations of international human rights law or serious violations of international humanitarian law'.¹⁷ In accordance with international law, the definition of victim includes not only individuals located in a mass grave ('primary' or 'direct' victims), but also their families and, where relevant, communities ('secondary' or 'indirect' victims). This distinction is grounded in the varied legal protection flowing from a person's victimhood in relation to a particular mass grave.

Several legal frameworks offer complementary protection to direct and indirect victims of mass graves and related gross human rights violations, including possible international crimes. To this extent, international law, international human rights law, international humanitarian law and international criminal law safeguard in distinct and partly overlapping ways the protection of mass graves as well as their investigation. Most critically, international law imposes obligations on the Sri Lankan state to not tamper with mass graves, the human remains and possible evidence contained therein. Moreover, there is the obligation to exhume the bodies, identify them and return them to their families, where possible. In addition, in theory the Sri Lankan domestic legal framework provides legal protection.

APPLICABLE INTERNATIONAL HUMAN RIGHTS LAW

Under international human rights law, victims and survivors of gross human rights violations are entitled to exercise their right to truth. While the right to truth in the past was initially linked to enforced disappearance,¹⁸ the right to truth has expanded across other areas of gross human rights violations, including torture and extrajudicial killings, and is hugely significant for

victims' rights pertaining to mass graves, as it offers a legal avenue for victims and survivors to find out what happened to a loved one.¹⁹ The Joinet/Orentlicher Principles to Combat Impunity²⁰ and the UN's 2006 Basic Principles²¹ are critical to the legal remedies for victims of gross violations.²² The state is therefore obliged to develop measures to fulfil the rights of individuals seeking information on the reasons for and circumstances of the abuse suffered – this includes investigations of gross human rights abuses resulting in mass graves. An obligation exists on the state to address mass graves and requires positive and affirmative action to undertake continued and systematic efforts to investigate the abuses and to gather the evidence in an attempt to answer questions about what happened, why it happened, to identify those responsible, directly and indirectly, and to understand the patterns of abuse.²³ If a state lacks the political will or is unable to fulfil these obligations, the international community has a responsibility to assist.

The right to truth can also be found in Article 24(4) of the International Convention for the Protection of All Persons from Enforced Disappearances (ICPED), which grants each victim 'the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the

investigation and the fate of the disappeared person. Each State Party shall take appropriate measures in this regard'.²⁴ Sri Lanka ratified the CED in 2016.²⁵ Under the CED, the government has an obligation to guarantee the right to truth of any victim, including the relatives of the disappeared,²⁶ has a duty to search for the disappeared and, in the event of death, a duty to locate, respect and return the remains,²⁷ and to ensure the identification of those killed as means of satisfaction.

Furthermore, the UN Working Group on Enforced or Involuntary Disappearances (WGEID) in its General Comment on the right to truth has made it clear that 'the right of the relatives to know the truth of the fate and whereabouts of the disappeared persons is an absolute right, not subject to any limitation or derogation'.²⁸

States have a duty to enable the participation of families in investigations into unlawful deaths, to ensure they obtain available information on the circumstances, events and causes of death, and the location and condition of the remains insofar as these have been or can be determined.²⁹

Against this backdrop, international law experts have noted that states have an implicit duty to ensure that the existence

of mass graves is not denied or covered up. In addition, sites must not be damaged or destroyed, and those searching for, or speaking out about, mass graves should not face threats, imprisonment, or be silenced. These acts amount to multiple human rights violations, including of the prohibition against enforced disappearances, the obligation to investigate extrajudicial killings, the right to truth, the suppression or annihilation of individual identity, as well as of collective cultural, racial, ethnic, religious, political or other identity in death.³⁰

Governments are duty-bound to ensure that mass graves are preserved and protected until, based on an inclusive consultative process, decisions have been made as to their treatment and management. When mass graves are initially reported or uncovered, there are serious risks that they may be damaged, either intentionally by state or non-state actors seeking to disguise their implications, or unintentionally by family members wishing to hold on to some evidence of their loved ones' remains. That damage can render the fulfilment of rights and obligations enumerated above impossible. Governments should take immediate measures to protect mass grave sites from erosion, destruction manipulation and looting.³¹

Sri Lanka's obligations therefore towards the respectful and lawful handling of mass graves include the duty to investigate, to search and identify the disappeared and missing, and to return any remains to the family members.

An investigation is not dependent on a formal complaint or request from a next of kin, rather it should be automatically triggered.³² Furthermore, the state has an obligation to respect religious and cultural rights, and ensure non-discrimination. This includes for the deceased to be buried in accordance with the rites of the religion to which they belonged when circumstances permit under the laws of war,³³ and at all times otherwise.³⁴ This pertains also to 'the darker side of humanity, the memory of which also needs to be transmitted to future generations'.³⁵

To date, the human rights perspective on mass graves has centred largely on exhumations and on identification of remains. Arguably such an approach, while understandable, is too narrow. Restorative justice demands more than formal retributive justice, which may be delivered in the absence of an exhumation, and requires many additional considerations and steps, including in relation to memory.

The Special Rapporteur, has noted that:³⁶

- Mass graves evidence the commission of massive human rights and humanitarian law violations, conveying a failure of the State to protect the right to life, including by failing to act with due diligence to prevent or mitigate the effects of a natural disaster, such as a tsunami, or of a pandemic;
- Mass graves may amount to violations of 'last rights', including last and burial rites, and the respectful handling of remains, they conceal the individual identities of those whose remains they contain, violating the right of each victim to an identity in death, and the rights too of victims' families, who are left not knowing the fate of their loved ones;
- Mass graves themselves are often concealed, and may later be destroyed and desecrated, and their mere mention be made a potential crime or source of harassment, with all these acts violating the prohibition against enforced disappearances, the obligation to investigate extrajudicial killings, and the right to truth;
- Mass graves warrant investigations into the

circumstances of unlawful death, the causes of death, as well as the manner of disposal of the bodies.

The Special Rapporteur also notes in her report that when mass graves are discovered, there are competing objectives, that of the state, the victims and their families and society, since it involves individuation and identification, requiring exhumations, an investigation of the crime scene and the collection of evidence. It also includes memorialisation and ultimately (re)burial.³⁷

The discovery of mass graves raises the issue of exhumations. When the conditions for effective and respectful exhumations are met, that process, if properly carried out, can make a powerful contribution to realising a state's human rights obligations. However, there are other ways to pursue justice independent of disrupting grave sites, notably when perpetrators and witnesses are alive and alleged perpetrators are already detained. Exhumations should therefore not take place unless the capacity exists for the safekeeping of individual information and dignified reburial, ie a state should not exhume if there is no capacity for storage of human remains, preserving the chain of custody and the conduct of appropriate forensic examinations.

A state's duties regarding the rights of victims and their families and the management of mass graves on its territory, besides those related to investigations and enforced disappearances, also include the effective realisation of the following rights:³⁸

THE RIGHT TO LIFE,

- Rights linked to enforced disappearances: the right to recognition as a person before the law, the right to liberty and security of the person, the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment,
- 'Last rights' linked to the dignified treatments of the body in death, largely attached to the family of the deceased, and [are] the product of civil, cultural and religious rights.³⁹

VICTIMS' AND THEIR FAMILIES AND SOCIETY AT LARGE, ARE ENTITLED THEREFORE TO:

- The right to an investigation
- The right to a remedy and reparation⁴⁰
- The right to humane treatment
- The right to enjoy freedom of religion and belief
- The right to freedom of

association and expression

- The right to participate in cultural life⁴¹

The cumulative effect of these rights constitutes the right to truth, which is owed to families and to society, and includes an 'inalienable right' to know the truth about past events, a duty to preserve memory, and a victim's right to know.⁴² A core component of the right to reparation also includes '[v]erification of the facts and full and public disclosure of the truth'.⁴³

The CED also requires states to hold criminally responsible any person who commits, orders, solicits or induces the commission of, or attempts to commit, or is an accomplice to or participates in an enforced disappearance, or any 'superior who knew, or consciously disregarded information which clearly indicated, that subordinates under his or her effective authority and control were committing or about to commit a crime of enforced disappearance'.⁴⁴

APPLICABLE INTERNATIONAL CRIMINAL LAW

Interference with mass graves and the evidence of mass graves and the remains contained in them may constitute acts prohibited under international criminal law. During an internal armed conflict such as in Sri Lanka both war crimes and crimes

against humanity apply. The latter may also occur during peace time. The following underlying acts of crimes against humanity are also relevant in this context:

- Murder
- Torture
- Rape and other forms of sexual violence
- Persecution against an identifiable group or collectivity
- Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or mental or physical health

The following underlying acts of war crimes may be relevant in the context of a non-international armed conflict:

- Murder
- Mutilation
- Cruel treatment
- Torture
- Outrages upon personal dignity

APPLICABLE CUSTOMARY INTERNATIONAL HUMANITARIAN LAW

In terms of Customary International Humanitarian Law, a study conducted in 2006 titled 'The Customary International Humanitarian Law (CIHL) study'⁴⁵ encapsulates comprehensive provisions designed to protect the dead, gravesites and missing persons, which apply during both international and internal armed conflicts.⁴⁶

In addition, the ICRC, in its capacity as the custodian of IHL, has produced detailed standards on the obligations of parties to the Geneva Conventions to search for the dead and to recover their remains.⁴⁷

If a state lacks the political will, or is unable to fulfil these obligations, the international community, including the ICRC or ICMP, has a responsibility to assist. In his September 2015 report to the UNHRC, the then UN High Commissioner for Human Rights Zeid Ra'ad al Hussein emphasised Sri Lanka's need for 'international technical assistance in the forensic field, particularly forensic anthropology and archaeology' to ensure proper preservation and investigation of the mass graves and to help families trace the missing.⁴⁸

This is a very short summary of the main international standards. Chapter 2 will examine the failures in exhumations to date in Sri Lanka with reference to international standards and good practice, chiefly drawing on the Minnesota Protocol, which includes guidelines for the excavation of graves, and the Bournemouth Protocol on Mass Grave Protection and Investigation.⁴⁹

1.2 NATIONAL SRI LANKAN LAWS

Much of the relevant national legal framework came into existence under the so-called Yahapalanaya (good governance) government of President Maithripala Sirisena and Prime Minister Ranil Wickremesinghe, who were in power from 2015 to 2019. At that time, as stated above, it ratified the CED.

Sri Lanka also co-sponsored UN Human Rights Council (HRC) Resolution 30/1 of March 2015,⁵⁰ which built on recommendations in the report of the Office of the High Commission for Human Rights (OHCHR) Investigation on Sri Lanka (OISL) on the judicial and non-judicial measures necessary to advance accountability and reconciliation in Sri Lanka, and on strengthening the protection of human rights, democracy, and the rule of law.⁵¹ In November 2015, the UN Working Group on Enforced or Involuntary Disappearances likewise recommended a 'professionally skilled special unit' to identify new graves and adequate resources for judges overseeing the investigations to retain

experts for 'DNA testing, forensic anthropology and archaeology'.⁵²

The Sri Lankan Parliament in March 2018 enacted the International Convention for the Protection of All Persons from Enforced Disappearance Act, No 5 of 2018 (EDA), which incorporates the provisions of the Convention into domestic law, and specifically prohibits enforced disappearance.⁵³ It imposes a prison sentence of up to 20 years and a fine of one million Sri Lankan rupees (US\$ 3,445) upon any state official and their superior found guilty of involvement in a disappearance, and holds them liable to pay compensation of up to one million rupees to the victim.⁵⁴ As pointed out by both international and national bodies, the criminalisation of enforced disappearances in the EDA is inadequate, including in the way it expressly fails to recognise enforced disappearances as crimes against humanity.⁵⁵

It is notable that enforced disappearances are considered continuing crimes to which amnesties, immunities or statutes of limitations cannot be applied.⁵⁶ Under the Enforced Disappearance Act (EDA), disappearances are recognised as continuing crimes, and therefore people can be held accountable for the ongoing disappearance of persons (who initially disappeared in the 1980s or 1990s, for example) from the point in time when the Act entered into force (March 2018) until today.⁵⁷

Several ongoing exhumations were brought to a halt after Gotabaya Rajapaksa became President in November 2019. Sri Lanka's limited cooperation with the UN in the wider context of the UN Human Rights Council (HRC) Resolution 30/1 also ceased.⁵⁸ The Government of Sri Lanka failed to uphold its obligations in terms of the HRC Resolution 30/1 to address impunity, instead consistently maintaining a narrative of denial, and disparaging the findings of UN bodies.

To date, Sri Lanka has not submitted its initial report to the Committee on Enforced Disappearances, the treaty body set up under the Convention to monitor its implementation in state parties. The report had been due by mid-2018. Sri Lanka has also so far failed to recognise the competence of the ICPED Committee to receive and consider communications regarding disappearances in Sri Lanka.

Under international pressure, the Yahapalanaya government had engaged with the UN Special Procedures, and in December 2015 issued a standing invitation for them to visit the country. The UN Special Rapporteur on the promotion of truth, justice, reparations and guarantees of non-recurrence visited Sri Lanka on five occasions, and made detailed recommendations for a comprehensive transitional justice policy, but many of his suggestions remain outstanding.⁵⁹ The Special Rapporteur pointed out in his report to the Human Rights Council of August 2021 that the government in power at the time had 'shown that it is unwilling or unable to make progress in the effective investigation, prosecution and sanctioning of serious violations of human rights and humanitarian law' and in that context he welcomed the establishment of the OHCHR Sri Lanka Accountability Project (OSLAP)⁶⁰ to collect and

preserve evidence for future accountability processes for gross violations of human rights or serious violations of international humanitarian law in Sri Lanka and to present recommendations to the international community on how justice and accountability can be delivered.⁶¹

The WGEID has also made repeated visits to Sri Lanka in 1991, 1992, 1999 and 2015. In September 2019, it submitted a detailed review of the implementation of the recommendations it made after its 2015 visit, including in respect of exhumations of mass graves.⁶²

As WGEID summarised in 2019:

“With regards to mass graves, the Working Group notes that the excavation of Mannar mass grave site is continuing. However, it is concerned that the reinvestigation of the Matale mass grave has been stalled, that it does not appear that proactive efforts have been made to investigate other suspected mass grave sites and by information that,

in some sites, vital evidence found during construction and other activities is not being reported to the authorities. As these may be key to establishing the fate and whereabouts of some of the disappeared, the Working Group calls for efforts to be stepped up with regard to other possible sites. In this regard it reiterates its recommendation on the creation of a skilled special unit to probe into the locations of other possible mass graves and the further strengthening of forensic capacities.”⁶³

LEGAL FRAMEWORK ENABLING THE COVER-UP OF ENFORCED DISAPPEARANCES

Before analysing failed efforts to establish the fate of the disappeared, we will briefly outline measures adopted in the past to facilitate the cover-up of disappearances, including the secret burial of bodies, and the granting of immunity to those responsible.

In December 1988, the Indemnity (Amendment) Act was passed days before a presidential election. It gave immunity from prosecution to all members of the security forces, members of the government, and government servants involved in enforcing law and order between 1 August 1977 and 16 December 1988, provided that their actions were carried out 'in good faith' and in the public interest. The Act also indemnified any other person able to use the defence that they had acted 'in good faith' under the authority of a government official during this period.⁶⁴

In July 1988, at the height of the JVP uprising, the government issued Emergency Regulation (ER) 55FF, which allowed the security forces to dispose of bodies without post-mortems and without reporting to the local magistrate.⁶⁵ This meant that physical evidence of disappearances and associated killings was destroyed within the framework provided by the emergency law. Furthermore, to the security forces the mere existence of these regulations signalled the state's intention to grant impunity to anyone committing human rights violations. ER 55FF was repealed in March 1990, after the JVP insurrection was crushed.

In addition, ER 71 (which was in force for several years until June 1993) specified that no civil or criminal action could be instituted in any court in respect of anything done 'in good faith' under the provisions of the ER, unless consented to or initiated by the Attorney General.

After June 1993, other ER provisions still made it difficult to conduct proper investigations. For example, under the ERs, the Inspector General of Police could apply to the High Court in Colombo for an inquiry to be held under emergency procedures on the basis of a belief by any security forces officer that a death had resulted from armed confrontation.⁶⁶ The High Court judge could then only record as evidence the post-mortem report and other evidence provided by the police. The findings had only to be forwarded to the Attorney General; there was no provision for the results of the High Court inquiry to be made public. Prior to June 1993, these High Court inquiries were also held in camera. These provisions perpetuated the cover-up of enforced disappearances and extrajudicial executions, with the police and others responsible guaranteed impunity. The narrow terms set for these inquiries impacted on the independence of High Court judges; furthermore, exclusion of evidence from parties other than the police, including that of victims and their family members as well as other independent witnesses, constituted a violation of international law, which centralises the role of victims in investigations based on the right to truth.

In 2016, under the Yahapalanaya government, an Office of Missing Persons (OMP) was established through the OMP Act.⁶⁷ Its mandate was to protect the rights and interests of missing and disappeared persons and their relatives.⁶⁸ Office holders were appointed in February 2018. In its first three years, the OMP was quite active, raising the hopes of some families of the disappeared and in the international community that it would be able to deliver on its mandate (though others were sceptical from the start). This changed when retired Supreme Court Judge Upali Abeyrathne was appointed chairman of the OMP after Saliya Pieris ended his term at the end of August 2020⁶⁹ and the term of the other original office holders ran out in February 2021. Justice Abeyrathne had previously headed the Commission of Inquiry to Investigate Allegations of Political Victimization from 8 January 2015 to 16 November 2019. This was considered by many to be a kangaroo court, aimed at intimidating victims and witnesses and undermining judicial processes. Abeyrathne reportedly resigned before his tenure was completed, possibly due to a conflict of interest after Gotabaya Rajapaksa, then President, appointed him to head the Right to Information Commission.⁷⁰

At the time of writing, Mahesh Katulanda is the

OMP chairperson.⁷¹ The commissioners are reportedly visiting OMP regional offices and meeting with families who have already made complaints to the OMP in order to verify information the families have provided and to determine if there is new information for the matter to be taken forward or whether it is necessary to close the cases. The families have grown very sceptical about the work of the OMP.⁷² Their scepticism increased further, recently, after the chairperson was quoted in the media as saying that the OMP had established that 50 people reported as disappeared were living abroad.⁷³ The 2021 OMP Annual Report states that after checking with the Department of Immigration and Emigration '93 cases were identified with travel history'.⁷⁴ It is not clear whether this refers to people reported as disappeared by their relatives simply having a record of having travelled abroad at some point in their lives, or to people who are on record as having left Sri Lanka, never to return.

The OMP has the authority to apply to a magistrate's court for a court order to carry out an excavation and/or exhumation of a suspected grave site, and to act as an observer at such an excavation or exhumation.⁷⁵ It exercised this authority in the case of the suspected gravesite located at the Sathosa building in Mannar town (Mannar Magistrate's Court Case No B/232/2018). It

did so in 5 other cases by the end of 2020,⁷⁶ and in a total of 11 cases by the end of 2021.⁷⁷

Investigations into human remains are carried out either as part of an inquest (to establish the cause of death) under Section 9, Chapter XXX (inquests) or Part V (criminal investigations) of the Code of Criminal Procedure Act, 1979 (as amended). Under the code, there is an obligation to report human remains to the nearest magistrate's court, police station, peace officer or head of the relevant village (section 21), in order for the state to establish the cause of death (section 370(1)) and where necessary to carry out a criminal investigation (section 370(3)). However, these provisions provide little guidance on how to carry out investigations into suspected gravesites effectively. For example, there is no procedure set out in law for all unidentified human remains to be identified. An exception exists for deceased victims of enforced disappearances under section 14(4) of the Enforced Disappearances Act, which requires law enforcement authorities to identify and return the remains to the family.⁷⁸ Under the law, a magistrate would normally order an exhumation after a first hearing subsequent to members of the public and/or the police reporting the discovery of a burial

site. The exhumations take place under the magistrates' direction and orders, and Judicial Medical Officers (JMOs) report their findings to the magistrates.⁸⁰

Sometimes more junior Medical Officers from local stations who have little or no adequate training/knowledge also get involved in the excavation.

Whereas Section 373 of the Criminal Procedure Code explicitly provides for disinterment of bodies in order to conduct post-mortem examinations, the provision implies the body of person that was recently buried. There are no separate judicial-medical procedures for the exhumation of mass graves which fall within the same framework of a post-mortem examination, disregarding the complexities involved and the need for a wide range of forensic expertise (including anthropology, but also archaeology and other fields) required in such exhumations.

After Gotabaya Rajapaksa was forced to step down amid widespread protests in July 2022, Parliament appointed Prime Minister Ranil Wickremesinghe as President. President Wickremesinghe has repeatedly spoken about plans to set up a Truth and Reconciliation Commission, referencing the South African Commission of the same name set up in 1995.⁸¹ There is considerable scepticism in Sri Lanka about this plan,

not least among families of the disappeared who recall the work of previous commissions, and their failure to provide truth, justice and reparations.⁸²

It is worth pointing out that the South African TRC did not have a mandate to investigate mass graves, and that none of the various Sri Lankan Commissions of Inquiry into disappearances over the years were mandated to do this.⁸³ The three 'zonal' commissions set up in 1994, and the All-Island Commission set up in 1998 by then President Chandrika Kumaratunga, informed the President of information regarding mass graves shared by witnesses who came before the commissions, and recommended their exhumation. Grave sites at Hokandara, Essella, Wavulkelle, Walpita Farm and Ankumbura were subsequently exhumed.⁸⁴ However, none of these excavations resulted in those responsible being brought to justice.

The above three 'zonal' commissions received 27,526 complaints and determined that - of those they had time to examine - 16,742 amounted to enforced disappearances.⁸⁵ The All-Island Commission, which investigated the remaining complaints, recorded 10,136 more cases of disappearance.⁸⁶ In other words, by the late 1990s official commissions had already confirmed around 27,000 disappearances. As stated above, there are tens of thousands of other people

who have disappeared since, especially in the north and east in the war between the security forces and the LTTE.

In mid-April 2023, the FOD sought clarifications from the OMP though a right to information request, including regarding the number of complaints received and the period they refer to, the number of exhumations the OMP has observed and whether it has been able to access the files and evidence gathered by previous commissions, which are held in the Sri Lanka state archives. In its response of 3 May 2023, the OMP informed FOD that clarifications can be found in its 2021 Annual Report (available for a payment). However, while a review of the 2021 Annual Report provided some figures for the numbers of complaints received and the period and districts they related to, the information was incomplete. For instance, while the report stated that 6,086 out of 14,988 complaints related to the period 2000-2021, there is no breakdown of the periods to which the remaining cases relate.⁸⁷ In terms of the number of exhumations observed, the report provides the number (11), but no further details. FOD is engaging further with the OMP to ensure transparency in respect of its work related to exhumations.⁸⁸ It is also notable that the Auditor General's report of 23 June 2022 reviewing the OMP's

financial statements for 2021
critiqued its work, stating:

“Though 39,473 complaints on missing persons were received by the end of the auditing year, it is observed that there have been only 67 interim reports released to date. Out of such complaints received, only 21,171 complaints are maintained in [the] files and merely 702 families were called for inquiry process which is comparatively reached [sic] the least progressive rate by 3.32% for the files maintained altogether.”⁸⁹

2. FAILURES IN EXHUMATIONS - TIME AND TIME AGAIN

In this chapter, we summarise the failures associated with exhumations conducted to date. This is done with reference to international standards and good practice, chiefly drawing on the 2016 Revised UN Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (also known as the Minnesota Protocol on the Investigation of Potentially Unlawful Deaths [Minnesota Protocol], which includes guidelines for the excavation of graves) and the International Commission on Missing Persons' 2020 Bournemouth Protocol on Mass Grave Protection and Investigation.⁹⁰

To date, very few exhumations have led to the identification of victims or any clarification of the circumstances of their death, let alone the prosecution and conviction of those responsible for the disappearance and murder of people whose bodies were recovered. One exception concerns Somaratne Rajapakse, who was sentenced to death

for the rape and murder of Krishanthi Kumarasamy, and the murder of her mother, brother and neighbour in 1996. Rajapakse claimed during his trial that as many as 400 bodies had been buried at Chemmani, the location where Krishanthi's body was exhumed. This led to the exhumation of 15 bodies at that location. Later, several army personnel were identified as being involved in those disappearances, but none were brought to justice. In fact, many were promoted, deepening impunity among the security forces.⁹¹

Another (partial) exception concerns the trial of Sunil Ratnayake, a member of the military's elite Long Range Reconnaissance Patrol (LRRP), who was sentenced to death in 2015 on charges related to the killing of eight people, including three children, whose bodies were exhumed from a well in Mirusuvil, Jaffna district, in 2000.⁹² Four other accused were acquitted, and while the sentence against Sunil Ratnayake was upheld on appeal, he was pardoned

in 2020 by then President Gotabaya Rajapaksa, again an example of impunity, and in violation of both domestic and international law.

Nearly all other cases never made it to trial, and were formally closed or simply abandoned.⁹³ After 30 years of exhumations, it is clear that the Sri Lankan state is unable and/or unwilling to deliver justice for the victims of enforced disappearances.

2.1 PARTICIPATION AND PROTECTION OF FAMILIES

International standards in respect of the participation and protection of families are set out in a range of sources. The main ones are:

- The International Convention for the Protection of All Persons from Enforced Disappearance (ICPED) which establishes an express right of family members 'to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person'.⁹⁴ That right encompasses the right to equal and effective access to justice; to adequate, effective and prompt reparation; to recognition of the victim's status before the law;⁹⁵ and the right to have access to relevant information concerning violations and accountability mechanisms.⁹⁶
- The Minnesota Protocol

requires investigative processes and outcomes to be transparent, including through openness to scrutiny by the public and by victims' families, while minimising any harm the investigation may cause them.⁹⁷

- The Bournemouth Protocol lists the 'do no harm' principal among the overarching operating principles, as well as the need to ensure clear communication as part of the principles governing the investigation phase of exhumations.⁹⁸
- The Callamard Report to the Human Rights Council⁹⁹ notes that states must enable the participation of families in investigations into unlawful deaths, and ensure they obtain available information on the circumstances, events and causes of death, and the location and condition of the remains insofar as these have been determined.¹⁰⁰

In addition, as highlighted in Chapter 1, the ICRC has produced detailed standards on the obligations of parties to the Geneva Conventions to search for the dead and to recover their remains.¹⁰¹

These are the main corresponding legal provisions in Sri Lankan law:

- Under Sections 25 and 14(1) of the Enforced Disappearances Act, families of the disappeared have a right to truth.
- Under Section 260 of the Code of Criminal Procedure Act, family members of the disappeared are entitled to be represented by a lawyer during magisterial inquiries.
- Under Section 3(h) of the Assistance to and Protection of Victims of Crime and Witnesses Act 2015, family members of the disappeared as victims of crime have a right to participate in criminal and/or forensic investigations.

BARRING FAMILIES OF THE DISAPPEARED OR THEIR LAWYERS

Despite these legal guarantees, the lack of involvement of families is one of the main shortcomings of exhumations in Sri Lanka.¹⁰² Even in those cases where criminal investigations (albeit unsatisfactory) have been conducted, families were often ignored.

The Minnesota Protocol recommends the appointment of a family liaison person.¹⁰³ To the knowledge of CHR, FOD, JDS and ITJP, this has never been done during Sri Lanka's exhumation processes. At best, families can appoint a lawyer to represent their interests during the magisterial inquiry, but these lawyers are not always kept fully informed. In fact, in 2018, the Magistrate stopped lawyers appearing for the families in the Mannar Magistrate's Court on an application from state counsel representing the Attorney General's Office, after the initial results of the carbon dating showed the origins of the remains to be from around the 15th century (see also below). It was only after successfully appealing to the Provincial High Court of Vavuniya for a revision of the Mannar Magistrate's ruling that the lawyers were again permitted to attend.¹⁰⁴ On several occasions, magistrates have also limited lawyers' participation in the court proceedings and exhumation processes (such as being kept at a long

distance).

DISREGARDING MAGISTERIAL ORDERS FOR PUBLIC OUTREACH – TRANSFERRING THE MAGISTRATE

The Minnesota Protocol also suggests that issuing a 'media appeal may help to identify and locate people and material that could be useful to the investigation. This could include setting up a telephone hotline, an email address and/or a social media web page, which people could use for providing information to investigators confidentially or even anonymously'.¹⁰⁵ Consideration should also be given to offering a reward in return for relevant information. In Matale, Magistrate Chathurika Silva ordered the CID to place notices in all three languages in newspapers to identify families of the missing whose kin might be among the 155 individuals exhumed from the Matale mass grave. The Criminal Investigation Department (CID), the primary investigative arm of the Sri Lankan police, which took over the investigation from the local police, failed to carry out the Magistrate's order.¹⁰⁶ The Magistrate was transferred soon after (see below, 2.5).

INADEQUATE INTERVIEWING OF FAMILIES OR NO INTERVIEWS AT ALL

The families of the disappeared were left behind not only in terms of their participation during the

exhumation but also in the police investigations. In those exhumations where the local police and CID took statements from the relatives of the disappeared, families were left with no clarity on how their statement would be used, and were not kept informed. This was the case, for instance, in Matale. In Mannar, the CID and police did not record the statements of the families of the disappeared in the area, nor they did record statements from government officials and people living in the area, focusing on confirming the existence of an old cemetery. Many of the families who participated in the exhumation process were repeatedly harassed and intimidated by intelligence officers.

NO ANTE-MORTEM DATA, REDUCING THE CHANCES OF IDENTIFYING THE REMAINS

There is no system, procedure or indeed practice in Sri Lanka for the collection of ante-mortem data¹⁰⁷ from relatives of the disappeared living in the area where a mass grave has been discovered and is being exhumed. The purpose of such collection is to assist with the identification of remains. No such ante-mortem data were collected in Mannar or Matale, for instance.¹⁰⁸ As José Pablo Baraybar, Director of the Peruvian Team of Forensic Anthropology (EPAF), explains: 'By exhuming remains without any

information regarding who the exhumed may be, the chances of identifying them becomes negligible... [W]hen there is not a clear notion of who the victims that are being looked for are, identification becomes an incredibly difficult task'.¹⁰⁹

During the Chemmani exhumation in June 1999, families of the disappeared were involved in the initial stage of the exhumation. They were present at the magistrate's court when Somaratne Rajapakse, the soldier who had revealed the existence of the mass graves during his trial (see above), made his statement.¹¹⁰ They were later kept at a distance while exhumations were ongoing. Soon after the exhumations finished, they were given the opportunity to see the bodies and identify any clothing or artefacts.¹¹¹ Based on their clothing, the families identified two of them as garage workers who had disappeared after they had been arrested by army personnel on 19 August 1996. One of the victims found in the grave was blindfolded with his own shirt; the other had his hands tied behind his back with his vest.¹¹² CHR, FOD, JDS and ITJP are not aware of any of the more recent exhumations where relatives were given the opportunity to identify remains through non-forensic evidence, such as clothing or artefacts.

LACK OF PSYCHOSOCIAL SUPPORT

The families whose relatives may be among the bodies exhumed have been left without psychosocial support.¹¹³ The OMP has a mandate to provide psychosocial support¹¹⁴ and its board adopted a strategy in this regard in December 2020. However, according to its 2020 Annual Report, progress in this respect 'was severely hindered due to public health and safety concerns and restrictions' imposed during the COVID-19 pandemic and changes in premises.¹¹⁵ According to the 2021 Annual Report, the strategy has been operationalised, including through hiring of family support officers at head office and in regional offices, and through consultations with families.¹¹⁶

LACK OF IDENTIFICATION AND RETURN OF REMAINS

To date, CHR, FOD, JDS and ITJP are not aware of any bodies exhumed from mass graves having been returned to relatives, apart from those recovered from the well at Mirusuvil, Jaffna district, in 2010. Even the bodies of the two people whose remains were identified on the basis of their clothes at Chemmani were reportedly not returned; nor were those recovered from the Bolgoda lake and subsequently identified through facial reconstruction. This is despite past Commissions of Inquiry and the Consultation

Task Force on Reconciliation Mechanisms consistently stressing that the state must establish the fate of missing and disappeared persons, and in particular that the bodies of the deceased must be returned to their families.¹¹⁷

2.2 LACK OF CLARITY IN THE APPLICABLE LEGAL, POLICY AND OPERATIONAL FRAMEWORK

As set out above, exhumations currently take place either as part of an inquest or a criminal investigation under the Code of Criminal Procedure Act. Most exhumations to date have been carried out under Sections 138 and 416 of the Criminal Procedure Code (CPC), which sets out proceedings for the recording of evidence in criminal cases where the accused is unknown or absent. Notwithstanding these legal provisions in the Criminal Procedure Code as well as the OMP Act and the Assistance to and Protection of Victims of Crime and Witnesses Act (see above, 2.1), there is an overall lack of clarity regarding individual government departments' responsibilities before, during and after exhumations, resulting in a lack of coordination and considerable delays. There have been inconsistent practices in storing the remains. Sometimes they have been left in the custody of the relevant court house, sometimes with a government medical officer, government analyst department/

laboratories, or the police. Sri Lanka also lacks a central database, national policy or any standard procedures to help identify human remains that have no claimants.¹¹⁸ This contrasts with other countries, such as South Africa, which have developed an exhumation policy setting out specific responsibilities for each department.¹¹⁹

The 2016 Interim Report of the Consultation Task Force on Reconciliation Mechanisms highlighted 'arbitrary procedures, lack of coordination between actors and lack of mandatory involvement of a consultant JMO' as deficiencies of past investigations into suspected gravesites.¹²⁰ It recommended that regulated services should be introduced enabling identified human remains, along with items associated with such remains, to be returned to loved ones.¹²¹ It also recommended that amendments be made to the Code of Criminal Procedure Act, and that a new law is enacted to deal specifically with large scale suspected

gravesites. A draft inquest law has been pending before the Ministry of Justice for several years, which sets out the standards and powers required for investigating suspected gravesites, including large scale sites resulting from crimes and natural disasters.¹²² The draft law also provides for the development of Standard Operating Procedures (SOPs) on multiple aspects of investigations, including methods of identifying human remains and procedures to be followed when communicating and returning the remains to families.¹²³

Around 2015, a 10-member committee was established by the Justice Minister to study the existing legal framework, procedures and practices relating to the conduct of inquests into deaths and to recommend amendments. It included senior JMOs and other forensic experts, as well as representatives of the Ministry and the Attorney General's Office.¹²⁴

The OMP has also been involved in this process.¹²⁵

In 2018, it initiated discussions with the Ministry of Justice and Prison Reforms in this regard.¹²⁶ To date, the draft has not been publicly shared or debated, and CHR, FOD, JDS and ITJP have not been able to obtain a copy. This is despite FOD requesting a copy through a Right to Information request in April 2023. The OMP 2021 Annual Report, to which FOD was referred for answers to its questions (see above), does not contain any information regarding the development of SOPs for mass graves. FOD has requested this information as a matter of urgency in its 24 May 2023 appeal against OMP's initial response.

Given the failures observed in exhumations to date, these are the key topics to be incorporated into any SOPs:

- Set out in detail the individual responsibilities of the magistrate, local police, CID, Attorney General's Office, and individual forensic experts (including local JMO, senior JMOs, forensic anthropologists, archaeologists, odontologists and other experts) at each stage of the discovery, exhumation and forensic analysis of remains. Despite the Mannar Magistrate's orders, the Department of Archaeology has not been deployed to date the grave at Sathosa.

- Clarify the requirements for the involvement of the local police versus CID, and their specific roles. In Sooriyakanda in 1994 initially the local police were in charge; the government then appointed a CID team to investigate the finding of the mass graves. CID officers were subsequently present at the site throughout most of the period of excavation. During other exhumations, such as in Mannar in 2018, this also happened. During the initial phase, local police and scene of crime officers (SOCO) are present, under the magistrate's direction. Depending on the evidence which they present to the magistrate (in the B Report), the magistrate orders a crime scene investigation to take place, at which point the CID gets involved. The involvement of the local police then becomes limited, and CID officers get directions from police headquarters.¹²⁷

- Clarify the exact responsibilities and process for the sealing of evidence under the Evidence Ordinance to ensure no tampering is possible.
- In the interests of time, and respecting the feelings of the relatives, allocate sufficient resources for the processing of

recovered remains and preparation of samples for testing overseas. (In Matale, the CID ignored the court order for over six weeks.)

- Ensure exhumations are open to scrutiny of the public and the relatives, without jeopardising the security of the site.

NO LIVING WITNESSES IDENTIFIED

There is a blatant lack of investigation to identify possible witnesses to grave crimes. Witnesses who may want to come forward have also expressed fear for their safety and security. The 2015 Assistance to and Protection of Victims of Crime and Witnesses Act has a provision allowing for confidential statements to be taken.¹²⁸ However, this law has been criticized for being inadequate. Though the government indicated to the UN in 2021 that it had reviewed the 2015 Act and was ready to replace it, to date it has not done so.¹²⁹ The National Authority for the Protection of Victims of Crime and Witnesses set up in January 2016 under the 2015 Act continues to conduct awareness raising and training programmes for judges and police,¹³⁰ but has not published any annual reports since 2019.¹³¹

LACK OF TRANSPARENCY

The Minnesota Protocol stipulates that

investigations have to be transparent, including through openness to the scrutiny of the general public and victims' families.¹³² On occasion, magistrates in Sri Lanka have limited the media's access to information during exhumations. For instance, in 2018 the Mannar Magistrate stopped journalists from visiting, video recording or photographing the site of the exhumation. This was later overturned after journalists successfully petitioned the court. The next magistrate in Mannar also stopped forensic experts and others involved in the exhumation from talking to the media. This ban was later lifted.¹³³

2.3 POLITICAL INTERFERENCE

International law requires investigations into suspicious deaths to be 'prompt, effective and thorough, independent and impartial, and transparent'.¹³⁴ The Minnesota Protocol sets out in detail how to put these requirements into practice.¹³⁵ One key requirement is for investigations to be 'free from undue influence that may arise from institutional hierarchies and chains of command'.¹³⁶

INTERFERENCE BY POLITICIANS INTO THE EXHUMATION PROCESSES IS AT THE HEART OF THE FAILURES IN FINDING THE TRUTH AND PROVIDING JUSTICE TO THE DISAPPEARED TO DATE.

From the time of the exhumation in 1994 in Sooriyakanda, Ratnapura district (see Annex), it was clear that politicians interfere when human remains are discovered and for their own political benefit. In Sooriyakanda, newly-elected President Chandrika Kumaratunga and other politicians hurried to the

site where bodies were found and ordered exhumations, ultimately resulting in a rushed process and evidence being lost.¹³⁷ An eye-witness said:

“Ratnapura [district] had become a hotspot for protests and an area for disappearances. It was well known that bodies were being dumped here as well as in the southern province. The military, police and paramilitary groups were going round. In Sooriyakanda, it was the people who first started digging and found shredded clothes. Chandrika Bandaranaike Kumaratunga and Pavithra

Wanniarachchi, who at the time was in the SLFP, came to the site. Sooriyakanda was instrumentalised for political agendas and to attack political opponents.”¹³⁸

More commonly, there has been political interference aimed at undermining the process if a politician, or others close to them, is implicated in the crimes committed. This has been a factor at all stages of the exhumation process. The investigation of the Kaluwanchikudy site in Batticaloa district in 2014 was initially rushed on the assumption that the remains concerned LTTE victims, though there were postponements due to forensic experts such as the Chief JMO and the Government Analyst based in Colombo not being present at the site. Later investigations stalled; many believe after the state

realised that a continuation of investigations on this mass grave might implicate Vinayagamoorthy Muralitharan (Colonel Karuna), who in July 2004 switched sides from the LTTE to work with the military and in 2008 officially joined the Mahinda Rajapaksa regime.¹³⁹ No exhumations were undertaken, despite nearly ten years having passed since the original complaint.

During the exhumations in Matale in 2013, Gotabaya Rajapaksa, then Secretary to the Ministry of Defence (who had been Military Coordinating Officer of Matale district between July 1989 and January 1990,¹⁴⁰ and who later became President of Sri Lanka) was reported to have ordered the destruction of all police registers and records older than 5 years at police stations in the Central Province including Matale.¹⁴¹ This report was never denied by officials. According to the ICPED, the Sri Lankan state should take action against him and senior police officers allegedly involved, including Senior Superintendent of Police, R D S Medawatte and Central Province Senior Deputy Inspector General of Police, M R B Ambanwala, for hindering the process of investigations.¹⁴² In January 2023, four UN special procedures bodies, including the UN Working Group on Enforced Disappearances, wrote to the Government of Sri Lanka regarding its failure to hold accountable

officials in charge of Matale District during the late 1980s.¹⁴³

There have been other ways in which politicians have interfered with the investigation processes for exhumation. For instance, on 20 June 2013, after families of the suspected victims of enforced disappearance in Matale petitioned the Magistrate to order forensic experts to conduct tests to establish whether DNA from bone samples taken from the remains matched DNA from any of the families of the disappeared, President Mahinda Rajapaksa appointed a commission of inquiry into the Matale mass grave. It was chaired by a retired Supreme Court judge, Justice S I Imam, and included ex-Parliament Secretary General Dhammika Kithulgoda and retired High Court Judge Bandula Atapattu as members.¹⁴⁴ It was given a mandate to identify the period the remains related to, to identify the remains, when and how they had died, and whether they had died through an illegal act. Furthermore, it was mandated to recommend ways to identify those responsible, legal action to be instituted, measures to ensure non-recurrence and any relief to be granted to families.¹⁴⁵ This three-person commission was to conduct its inquiry parallel to the Matale magisterial and police inquiry.

The Magistrate, on the request of the forensic experts, ordered that sample remains from the gravesite be sent to Beta Analytic in Florida, USA, for carbon dating (the first time this was done in Sri Lanka). Based on their findings, the commission concluded that the remains dated from before 1950, though they agreed that the remains showed evidence of torture and murder. Raj Somadeva, the forensic archaeologist who had conducted the Matale exhumations, dated the grave to the late 1980s based on a number of artefacts found at the site disputed the Beta Analytic findings, suggesting there may have been contamination resulting in the carbon dating report contradicting the archaeological dating.¹⁴⁶ The commission submitted its final report to President Sirisena in 2015. The report was never made public, though the Sunday Times claimed to have had access to it, and reported on its findings in May 2015.¹⁴⁷

2.4 WITNESS PROTECTION AND SITE MANAGEMENT

The Minnesota Protocol requires states to ensure that investigators involved in exhumations as well as any lawyers 'whatever their relationship to the investigation' are able to do their work without intimidation, hindrance, harassment or improper interference.¹⁴⁸

There have been reports of those involved in exhumations receiving threats. On 17 January 1995, during the exhumations at Sooriyakanda, the main lawyer for the opposition asked for a postponement of the hearings due to threats received by some witnesses and the fact that he had been shot at on his return home from court on 10 January. Lance Corporal Somaratne Rajapakse, who in 1996 revealed the existence of mass graves at Chemmani, Jaffna (see above), was himself threatened and beaten up. His wife received two letters signed by 'some members of the army', telling her to make sure he retracted his statement to the court.¹⁴⁹

The Minnesota Protocol requires a site to be secured at the earliest possible opportunity and unauthorised personnel not permitted entry.¹⁵⁰ Furthermore, it requires that a record of all personnel entering the scene should be kept, together with the date and time of their visit. Individuals interacting with evidence are required to provide DNA and fingerprints as reference samples.¹⁵¹

In Sooriyakanda, there was strong suspicion that the site had been tampered with.¹⁵² Also at Chemmani there were rumours of evidence being removed before exhumations started.¹⁵³

PARTIAL EXCAVATION

In the absence of a clear policy, it is also a concern that exhumation sites are poorly protected. Police are present during the exhumation, but withdraw once the exhumations are completed, as happened at Matale. In some other cases magistrates have closed the case, despite

suspicious among observers that more bodies remain to be exhumed.¹⁵⁴ This suspicion was there in Mannar both in 2013 and 2018, but the police nevertheless withdrew. This left open the possibility of sites being tampered with.

Melanie Klinkner, a leading authority on the protection of mass graves and co-author of the Bournemouth Protocol, has noted that 'in the event of a human rights breach, an effective investigation is required under international law. This entails safeguarding the integrity of evidence obtained from a site to ensure that a mass grave is not tampered with or disturbed by third parties (including first responders)'.¹⁵⁵

2.5 TRANSFER MERRY-GO-ROUND

Another common tactic by senior government officials attempting to influence exhumation processes is to transfer magistrates, police officers or other officials. As of 2023 in the Mannar exhumation no less than seven magistrates have been involved in hearing the case.¹⁵⁶ A few were transferred as part of the normal roster, but others were reportedly transferred due to political pressure.

In some instances, court cases themselves have been transferred, especially if they concerned incidents in the north and east. In mid-2000, for instance, the Chemmani case was transferred to the Colombo Magistrate's court after army officers argued that they feared for their lives if they had to appear in Jaffna Magistrate's Court.¹⁵⁷ The petitioners feared of travelling to Colombo since in order to secure clearance to travel they had to reveal to the military that the purpose of their journey was to give evidence against the army.¹⁵⁸

The JMO who dealt with the Mannar site in 2018 was transferred to Colombo in 2019. There was no identification of bodies from the mass grave discovered in Mannar in 2018. The JMO who carried out that exhumation in 2013 was moved to Anuradhapura and later to Matale where he could not finalise analysis of the collected remains.

In the Matale case, Judge Chathurika Silva was transferred off the case after she ordered the CID to place notices in all three languages in newspapers to identify families of the missing.¹⁵⁹ The new judge refused to accept additional affidavits and referred those affidavits to the presidential Commission of Inquiry (see above).¹⁶⁰ In 1994, the Magistrate of Minuwangoda, Palitha Bandaranayake, who had taken a personal interest in pursuing the Walpita farm mass grave investigation, was transferred, and the case was moved to Negombo and later abandoned.¹⁶¹

Under Sri Lankan law, all JMOs (except the Chief JMO Colombo) are transferable every four years. When a JMO who started an exhumation process is transferred, it is difficult for his or her replacement to take over. To tackle this, a post called JMO Anthropology was created in early 2018 at the Institute of Forensic Medicine and Toxicology. It was anticipated that orders would be directed to this official when mass graves were found and that they would then float a team that included JMOs around the area of discovery. At the time of writing, there are no ongoing exhumations, though there is some sampling of recovered remains being done at the forensic laboratory at Colombo University.



Forensic experts, including Professor Niriella Chandrasiri, at work during the Chemmani exhumations in 1999.



2.6 TECHNICAL KNOW-HOW

In its final report, the All-Island Presidential Commission of Inquiry made wide-ranging general recommendations to strengthen the forensic capacity in the country, including in respect of mass graves. Experts have also recommended that exhumations not be conducted until 'requisite skills exist', and the establishment of a Human Identification Centre to train pathologists and other scientists, including on DNA profiling, computerised facial reconstruction and recognition, video superimposition and anthropometric analysis; and in the interim, for information regarding mass graves to be collected and an appropriate body to be assigned this task.¹⁶²

None of these recommendations has been implemented.¹⁶³ Senior JMOs are aware of the shortcomings, and have been developing Guidelines for the Analysis of Skeletal Remains, with the assistance of the ICRC.¹⁶⁴ It is hoped these guidelines will incorporate

relevant international standards and established best practices.¹⁶⁵

In 2020 the UN Special Rapporteur on truth, justice, reparations and guarantees of non-recurrence pointed to the insufficient technical capacity among the Sri Lankan police, which led to failures at the early stages of an investigation.¹⁶⁶ He stated:

“There is a combination of insufficient investigative capacity in the police force, which leads investigations at the level of non-summary inquiries; dispersed forensic expertise; a lack of accountability among [JMOs], who work as independent consultants without access to centralized

records or document management support; and a limited role played by the Office of the Attorney General in the early stages of an investigation, which thwarts progress. Even basic elements such as the preservation of information is often inadequate, with evidence and documentation on key cases reportedly being lost during natural disasters, something that could be prevented through the digitization and protected custody of those materials.”¹⁶⁷

In terms of the actual exhumations and work by forensic experts, it is

clear that methods have 'improved' from using pickaxes and bulldozers in Sooriyakanda in 1994 to the more professional work in Matale in 2013 and Mannar in 2013 and 2018. To some extent, this is due to the involvement of international experts as observers (such as at Chemmani, Jaffna district, in 1999, when a forensic anthropologist and a forensic pathologist acted as observers for Amnesty International and a forensic archaeologist and a coroner for Physicians for Human Rights¹⁶⁸), training abroad for Sri Lankan forensic experts, and the role of the OMP in its capacity as an observer at mass graves sites, and bringing in forensic experts to provide training.¹⁶⁹

However, Sri Lanka's actual forensic capacity remains limited, and the results of any exhumations have had to be sent abroad for testing. Bone samples from the remains exhumed at Chemmani were sent for DNA testing to the Hyderabad Forensic Laboratory in India and then to the UK for DNA testing. There is no public report available and it is not clear whether any report was ever obtained. In 1996, the Consultant JMO, Colombo sent the skulls of 21 out of 25 bodies recovered from the Bolgoda lake and two nearby rivers (see Annex) to the senior forensic expert at the Department of Forensic Medicine and Science at Glasgow University, UK, which used facial reconstruction

and video superimposition to identify five of the remains.¹⁷⁰ No such advanced forensic techniques are known to have been used since.

One senior international forensic expert noted considerable delays among Sri Lankan forensic experts submitting their reports to magistrates compared to other countries.¹⁷¹ This may be due to demands on their time, or other reasons. For example, the forensic report on the exhumations at the Sathosa building in Mannar were due to be submitted by 30 June 2019, but still awaited as of May 2023. The delay was attributed to the fact that certain artefacts recovered from the exhumation site had not been provided to the investigation team, though sources closely monitoring these exhumations were sceptical and had doubts about the reasons given for the delay.¹⁷²

Delays, coupled with slow coordination among relevant stakeholders, and experts brought into the investigation in an ad hoc manner, are challenges observed in advancing the investigation of mass graves in Sri Lanka.¹⁷³ Scientists and the police have been slow in acting on court orders, though it is not always clear why. It may be because they are overwhelmed, but it also could be due to political pressure. In Mannar, in December 2015, for example, lawyers appearing for the families

requested the magistrate to direct the CID to send the samples of remains exhumed to Argentinian, Peruvian, or Guatemalan forensic anthropology teams. However, the state counsel opposed this, and the magistrate did not formally consider the request. CID on the other hand requested the court to send samples to the USA. In the end, the samples went to the USA. Later, a Guatemalan forensic anthropology team made an unofficial visit to Sri Lanka and provided some training. They did not visit the Mannar grave site, nor did they participate in any exhumations or analysis of remains.

There is no clarity regarding the procedure for the collection, preservation and general process for carbon dating or DNA testing of bone samples. This transpired during the work of the Commission of Inquiry into the Matale mass grave, where the forensic archaeologist and pathologist were not clear on who had which responsibility and where critical written records were missing, instead they had relied on oral communication.¹⁷⁴

In a forensic setting, the type of quality control issues which have arisen in Sri Lanka are resolved by transparent technical, scientific and administrative responses, such as laboratory accreditations.¹⁷⁵ Currently, there is no method for

quality control, partly due to a shortage of specialised staff. There are also no allocated funds for these investigations which are distinct from ordinary criminal investigations.

The investigation of suspected detention sites and mass graves requires an experienced team with complementary skillsets, particularly of forensic anthropology and forensic archaeology. Sri Lanka lacks experienced and specialised professionals in these fields, and this has proved to be a serious obstacle to ascertaining the fate of the disappeared.¹⁷⁶ It is clear that credibility will not come through merely inviting foreign experts to provide a confidential report—or by sending samples abroad with little transparency to ensure a proper chain of custody. Instead, there must be a cohesive approach that engages international and local experts and which takes place under a different procedure than the present magisterial inquiry process, which has proven to be ineffective.¹⁷⁷ Unless there are major changes to the current legal and policy framework, this will not be possible.

2.7 LIMITING RESOURCES

The Minnesota Protocol requires that investigations into suspicious deaths must have sufficient financial and human resources, including qualified investigators and relevant experts.¹⁷⁸ The effort to identify remains through facial reconstruction and video superimposition in 1996, which resulted in the identification of five of the remains recovered from Bolgoda lake and two nearby rivers, remains a one-off.¹⁷⁹

By contrast, the Ministry of Justice has more recently ignored requests to provide funding for exhumations. For instance, the Ministry of Justice ignored a JMO request for a budget to support a team of experts to conduct the exhumations in Kaluwanchikudy.¹⁸⁰ The investigations were abandoned and to date no exhumations have taken place.¹⁸¹

Since the OMP was set up, it has funded some aspects of exhumations. For instance, it paid for samples taken at the Mannar exhumations to be sent to Florida for carbon dating. The OMP also

provided financial support for the excavations and submitted guidelines to the Mannar Magistrate to ensure appropriate steps were adopted to secure public confidence in the investigation process and also to safeguard the chain of custody of the bone and teeth samples extracted from the site. The OMP handed over six representative bone and teeth samples for radio carbon dating to Beta Analytic, a laboratory in Miami, USA. In February 2019, the results of the carbon dating suggested that the remains were from a historical period ranging from 1450 to 1650 AD.¹⁸² The OMP in its submission to the Magistrate recommended that the results of the carbon dating should be considered in light of the analysis of all other available information, and that a determination as to the future course of the investigation should be made following the consideration of a comprehensive report. Following a meeting with the investigation team on 22 March 2019, the Magistrate

extended the temporary order halting the excavations, pending the submission of a comprehensive report by the full investigation team, including the results of the carbon dating and other tests that have been completed pursuant to the orders of the Magistrate.¹⁸³ At the time of writing, this comprehensive report has yet to be submitted.

2.8 THE ROLE OF THE ATTORNEY GENERAL'S OFFICE

There have been longstanding concerns nationally and internationally about the lack of independence of the Attorney General's Office (AGO). In the context of exhumations, in the rare event that suspects are arrested, the AGO has been central to decisions to drop cases, allowing suspects to be released on bail, or failing to prioritise pending procedures. For example, in 1998 with the mass graves exhumed at Chemmani, Jaffna district, a five-member committee identified members of the forces responsible for 15 disappearances, and four army officers were arrested. The committee's report was never published. On the advice of the AGO, the suspects were released on bail in July 2000.¹⁸⁴ All four were subsequently promoted.¹⁸⁵

Similarly, in 1995, when the AGO failed to appear in court, the Colombo Chief Magistrate dismissed the case against three Special Task Force officers charged with suspected murder in relation to 21 bodies found

floating in Bolgoda lake and other waterways near Colombo. The Chief Magistrate said that the absence of the AGO was 'an obstruction of justice'.¹⁸⁶ Later, the AGO decided there was insufficient evidence against them and recommended disciplinary action instead.^{187 188}

In the early stages of proceedings, AGO representatives have repeatedly caused delays. For instance, in the Chemmani investigations, repeated requests for delays caused frustration among the magistrate and lawyers appearing for the families of the victims.¹⁸⁹ One human rights organisation summed up the counsel's role:

"They come, bulldoze their way through and take over the process without leaving room for the other party who then has to start everything from scratch. It's done

deliberately to lengthen the case. They also want to name and shame the families."

The WGEID and Special Rapporteur on truth, justice, reparation and guarantees of non-recurrence have repeatedly recommended a restructuring of the AGO, and more specifically the creation of an independent public prosecution service, as did the All-Island Commission.¹⁹¹ The Special Rapporteur strongly encouraged the Government of Sri Lanka to

"consider restructuring the Office of the Attorney General, which currently acts both as public prosecutor and as attorney for the State. This dual role risks creating conflicts of interest

when addressing crimes committed by State officials. The authority of the Attorney General to continue or suspend investigations, and to assign venues for criminal procedures - which, in a linguistically and ethnically diverse and fractious society, plays an almost determining role in whether progress is made in a case - is largely unaccountable and compounds the difficulties."¹⁹²

Many civil society organizations have also lobbied for an independent prosecutor's office for decades. However, there has been no movement on this from consecutive governments. The 20th amendment to the Constitution politicised the appointment of the Attorney General and independent commissions by ensuring that it was the President who had the power to appoint and dismiss anyone in the role.¹⁹³ The 21st amendment slightly reversed this, but appointments are still subject to recommendation of the Constitutional Council, which is dominated by persons

appointed by the ruling party.

3. CONCLUSIONS AND RECOMMENDATIONS

The multiple failures in exhumations provide further evidence that the Government of Sri Lanka is unable or unwilling to ensure accountability for the alleged commission of core international crimes and other serious human rights violations, regardless of when they happened or during which conflict. This is in total violation of the rights of victims, including their right to truth. The Government of Sri Lanka is obliged to develop measures to fulfil the rights of individuals seeking information on the reasons for and circumstances of the abuse suffered, which includes investigations of gross human rights abuses resulting in mass graves. Under international law, the state is obliged to take positive and affirmative action to address mass graves, including making continued and systematic efforts to investigate abuses in order to gather the evidence so as to respond to the questions that victims' families have about what happened, and why

it happened, to identify those responsible, directly and indirectly, and to understand the patterns of abuse.¹⁹⁴ Under international law, the protection of the sites of mass graves is of paramount importance to preserve the integrity of remains, associated evidence and lines of enquiries. Protection measures should safeguard the human remains against contamination, desecration, robbery, scavengers and the movement/relocation of bodies to secondary sites, where a perpetrator is seeking to evade detection.

If a state lacks the political will, or is unable to fulfil these obligations, the international community has a responsibility to assist. If the OMP as a state body is unable to assist victims' families and to perform this role in an independent transparent manner, then the international community including the ICRC or ICMP need to step in.

Many of the failures identified in this report (including the lack of involvement of the families, the limited forensic capacity, the unclear procedures, political interference etc) amount to deliberate steps by the state to thwart victims' right to know the truth, in violation of international and domestic law. These failures have also been recorded by key UN Special Procedures, including the WGEID and the UN Special Rapporteur on truth, justice, reparations and guarantees of non-recurrence. The Special Rapporteur concluded:

“It is unusual for middle-income countries like Sri Lanka to have such problems”.¹⁹⁵ “Sri Lanka urgently needs to improve its scant expertise on the investigation and prosecution of ‘system crimes’,

in other words crimes that involve the systematic and coordinated use of State organs and that result in large-scale violations and abuses of international human rights or international humanitarian law. This would include specialized expertise on investigations, forensics and the design of prosecutorial strategies. Improving judicial capacities regarding system crimes is as necessary as it is urgent.”¹⁹⁶

Though some progress has been made since the Special Rapporteur's last visit to Sri Lanka in 2017 and the 2020 report, including through the work of the OMP, much remains to be done to ensure exhumations are done in line with international standards and established good practice.

Sri Lanka also needs to enact a specific law and policy

governing the management of mass graves, including their identification, preservation and investigation over time and for future generations. This may include establishing a legal entity made up of representatives of the state and local authorities, families and communities concerned, and may include representatives of a specialist international agency, such as the ICRC or the International Commission on Missing Persons (ICMP). Such an authority should be independent of politicians and transparent.

3.1 RECOMMENDATIONS TO RESTORE PAST EXHUMATIONS

The Government of Sri Lanka should:

1. Enact a specific law and policy on the management of mass graves, and exhumations, which includes their identification, preservation and investigation over time. Preservation should include the safe storage of skeletal remains removed from graves or the soil and ensure that the chain of custody remains intact;
2. Establish a legal entity, made up of representatives of government, local authorities, forensic experts, families and communities concerned to have oversight of the issue of mass graves and exhumations;
3. Appoint a family liaison officer for each of the exhumations where relatives continue to wait for answers;
4. Actively engage with

people who suspect their relatives to be among the bodies exhumed, and collect ante-mortem data and DNA from them with their full informed consent;

5. Give relatives an opportunity to identify the remains and any possessions and artefacts recovered to date, and return any identified remains to their families;
6. Bring to justice those responsible for hindering the process of investigation into enforced disappearances, including investigations into mass graves, according to Article 17(1) of the EDA, 2018;
7. In close consultation and cooperation with the families of the disappeared, review the progress of all exhumations conducted to date, publish the findings in full and take action to bring them in line with international standards;

8. Conduct a transparent process of consultation on the proposed legal framework, policy, Standard Operating Procedures on Mass Graves (SOPs) and Guidelines for the Analysis of Skeletal Remains, including with international experts, and ensure that any framework or policy, including SOPs, fully incorporates relevant provisions of the Minnesota and Bournemouth Protocols;
9. Ensure that state authorities understand that the respectful and lawful handling of mass graves is understood as both procedural, by creating the conditions for those affected to articulate their needs and demands, and substantive, by balancing divergences, conflicts and tensions. It requires the active, meaningful participation of victims' families and communities upon whose land mass graves are located, possibly ensured through such standards as that of 'free, prior and

informed consent';

10. Ensure that the state acknowledges that the rights of families to the truth through the investigation of the multiple violations related to the existence of mass graves, including arbitrary killings and disappearances, are crucial obligations of states and other parties;
11. Ensure that psycho-social support is provided to victims' families, particularly when in contact with law enforcement officers. This should include the treatment of mental health conditions, religious support, peer group support, as well as family support. The most frequently encountered barriers include having a negative opinion about the quality of available services, feelings of judgement from other people, the lack of available services and not knowing where to get help. What is needed is practical and informational support to the relatives of disappeared persons, as well as the provision of emotional support during the entire search process for a missing relative, including walking alongside relatives when dealing with investigations, mass graves and exhumations;

12. Set out in detail the individual responsibilities of the magistrate, local police, CID, Attorney General's Office, and individual forensic experts (including local JMO, senior JMOs, forensic anthropologists, archaeologists, orthodontists and other experts) at each stage of the discovery, exhumation and forensic analysis of remains;
13. Strengthen the forensic capacity in the country, including in respect of mass graves, and implement the recommendations of the All-Island Presidential Commission of Inquiry into Disappearances to refrain from exhumations until 'requisite skills exist', and to establish a Human Identification Centre to train pathologists and other scientists, including on DNA profiling, computerised facial reconstruction and recognition, video superimposition and anthropometric analysis, and in the interim, for information regarding mass graves to be collected and an appropriate body to be assigned to this. A range of digital technologies is increasingly contributing to the discovery and management of mass graves. These include satellite imagery, aerial photogrammetry using drones, LiDAR, geospatial analysis, and

thermal imagery.¹⁹⁷ These new technologies should be used to identify grave sites, and date them. They also offer the possibility of keeping the discovery of graves confidential to help prevent them being disturbed;¹⁹⁸

14. Refrain from conducting any new exhumations until the new legal and policy framework is in place and forensic capacity has been fully strengthened;
15. Commit to always have international observers at any exhumations and to actively involve international forensic experts whenever the complexity of the task requires it;
16. Restructure the Attorney General's Office, and create an independent public prosecution service to ensure that any prosecutions resulting from the exhumations are conducted in an independent and impartial way;
17. Recognise the ethnic and religious plurality of Sri Lankan society, and that these communities have their own diverse rituals and practices which provide comfort in the midst of the chaos that grief and loss imposes, particularly, when the cause of death is violent, or denied.

- The state is obliged to observe these customs and rituals where appropriate as they pertain to the exercise of their human rights including freedom of religion, belief, or expression;
18. Send Sri Lanka's preliminary report to the Committee on Enforced Disappearances, after full consultation with civil society and families of the disappeared, also as a way to reflect on the country's record of preventing and remedying disappearances;
 19. Strengthen the OMP, including by ensuring office holders and staff have relevant expertise, and are impartial and independent; and repeal Section 13 (2) of the OMP Act which says that the findings from OMP investigations 'shall not give rise to any criminal or civil liability';
 20. Make the lack of cooperation with magistrates and non-implementation of magistrate's orders a punishable offence;
 21. Draw up a national exhumation policy, clarifying the role of individual agencies as part of the national transitional justice policy, which is long overdue;
 22. Elaborate and publish a policy document on the steps that will be taken to ensure respect for the chain of custody and to ensure admissibility of evidence in the judicial process is not jeopardised, including by making official records on the chain of the custody and inventory of the finds part of the case record ensuring transparency and credibility;
 23. Enact the proposed Inquest Act;
 24. Further amend the Assistance to and Protection of Victims of Crime and Witnesses Act, No 4 of 2015 to ensure both in law and in practice that victims, their relatives and witnesses are protected against threats, intimidation, harassment and reprisals, and to ensure that victims and their families have adequate access to information about their rights and available remedies.¹⁹⁹

3.2 RECOMMENDATIONS FOR FUTURE EXHUMATIONS TO THE OMP, AND THE INTERNATIONAL COMMUNITY,²⁰⁰ INCLUDING THE ICRC AND ICMP

1. Establish a professionally skilled specialist unit to probe into the locations of other possible mass graves, reinforce their forensic capacity and ensure that it has adequate resources, including for DNA testing;
2. Examine, without undue delay, all locations of potential mass graves, create a database to ensure their protection, in line with the measures set out in the Bournemouth Protocol;
3. Strengthen judicial independence, including in respect of security of tenure, conditions of service, personnel administration and disciplinary matters in the judiciary, including promotions and dismissals, as well as training on international crimes.

ANNEX: MASS GRAVE INFORMATION

1

DATE: 1989

PLACE: Hokandara, Colombo district

BACKGROUND: Remains from the 1987-1989 JVP insurrection period.

NUMBER OF REMAINS DISCOVERED: 19 bodies, with the names of all victims known.²⁰¹

CURRENT STATUS: According to a detailed summary of the case in Volume II of the final report, the victims included people arrested on and in the week after 13 August 1989, the day of the funeral of the father of the officer-in-charge of the local police station, who had been killed by the JVP. On the same day, there had also been a bomb explosion on the Amaragoda-Hokandara Road.²⁰² A week later, on 21 August, the seventh day alms giving for the father of the officer-in-charge, the bodies of those abducted and killed were burned at the site of the bomb explosion. In Volume I of the final report of the Western, Southern and Sabaragamuwa Commission of Inquiry (WSSC), it is confirmed that the bodies were disinterred on a magistrate's order, though there are no further details.²⁰³

2

DATE: 1989

PLACE: Ankumbura, Kandy district

BACKGROUND: Remains from the 1987-1989 JVP insurrection period.

NUMBER OF REMAINS DISCOVERED: 39

CURRENT STATUS: The existence of this site is confirmed in the final report of the WSSC. The commission references the bodies being disinterred on a magistrate's order.²⁰⁴

50

3

DATE: 1989

PLACE: Nikawaretiya, Kurunegala district

BACKGROUND: Remains from the 1987-1989 JVP insurrection period.

NUMBER OF REMAINS DISCOVERED: 20

CURRENT STATUS: The existence of this site is confirmed in the final report of the WSSC. The commission references the bodies being disinterred on a magistrate's order.²⁰⁵ It is not known what happened to the bodies after their disinterment.

4

DATE: 1989

PLACE: Wilpita, Akuressa, Matara district

BACKGROUND: Remains from the 1987-1989 JVP insurrection period.

NUMBER OF REMAINS DISCOVERED: The exact number of bodies is unclear.

CURRENT STATUS: According to the final report of the WSSC, the grave was situated at the site of an army camp.²⁰⁶

5

DATE: 1990

PLACE: Wavulkelle, Gampaha District

BACKGROUND: Considered as the last mass killing of the JVP insurrection period.

NUMBER OF REMAINS DISCOVERED: 12 people were executed and burnt on tyres inside Wavulkele Forest Reserve

CURRENT STATUS: On 27 February 1990, at least 13 youths aged between 17-34, including two students, were arrested from several villages in Gampaha District and taken into Wavulkele Forest Reserve in Attanagalla by policemen attached to Weeragula and Ganemulla police stations.²⁰⁷ Of these, 12 were tortured, shot and burnt on tyres, while one victim escaped²⁰⁸ with gunshot wounds.²⁰⁹ The JMO who visited the mass grave noted he saw the fire blazing

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with logs and tyres which had been used to burn the bodies.²¹⁰ Evidence given by the sole survivor and family members of the victims who witnessed the arrests resulted in 14 police officers being arrested initially. Under the instructions of the AG, seven were discharged by the magistrate in July 1990. The remaining seven were charged with abduction and murder. In November 1991, one of the defendants was killed by an unidentified gunman, while four officers among the remaining six were indicted in early 1994.²¹¹ However, in 2000, all were acquitted over conflicting evidence. The sole eye witness who survived died in April 2017.²¹²

6

DATE: 1994

PLACE: Walpita Government Farm, Minuwangoda, Gampaha district

BACKGROUND: Remains thought to be of JVP suspects.

NUMBER OF REMAINS DISCOVERED: Around 30 bodies were exhumed under the direction of the local magistrate.

CURRENT STATUS: According to the final report of the WSSC, this mass grave was created following a JVP attack on a farm, local post office, bank and private shop near the junction. After the initial investigation in 1994, 14 suspects, including Ariyaratne Jayathileka, the Chairman of Western Provincial Council, were arrested. In November 1995, SSP Noel Kudahetti, who was among those arrested, was released on bail. The AGO requested the Negombo High Court to revoke the bail order, which the court did. However, one year later, in September 1996, the AGO requested the court to release 11 of the suspects.²¹³ Magistrate Palitha Bandaranayake, who pursued the case, was transferred. Ariyaratne Jayathileka was later acquitted after joining the ruling Peoples' Alliance. He retired from politics in 2000 and died in 2015.²¹⁴ Noel Kudahetti, who retired as a DIG, died in March 2021.²¹⁵ Nimal Fernando Wennappuwa, another police officer among those initially arrested, was later reinstated and appointed as officer-in-charge of a police station in the North-Western Province.²¹⁶

7

DATE: 1994

PLACE: Sooriyakanda, Ratnapura district

BACKGROUND: Remains from the 1987-1989 JVP insurrection period.

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NUMBER OF REMAINS DISCOVERED: More than 300. They were said to include 46 young men, including school children who disappeared in Embilipitiya, but due to the unprofessional exhumation, evidence was lost.

CURRENT STATUS: A magisterial inquiry into the findings at the grave site began on 3 January 1994 under the direction of the Embilipitiya magistrate, Mr Piyasena Ranasinghe. Professor Niriellage Chandrasiri of the Ruhuna Judicial Medical Unit, Chief Judicial Medical Officer L B L De Alwis, and Colombo South Teaching Hospital Chief Judicial Medical Officer S M Colabage, were in charge of the excavation. Untrained manual labour and tools such as pickaxes and bulldozers were used for excavations, thereby damaging many of the remains and mixing up individual skeletons.²¹⁷ On the first day, seven skulls and an assortment of skeletal bones estimated to belong to about 20 bodies were unearthed. The magistrate ordered the evidence to be sealed. On 8 January, a further excavation was due to take place. But, when opposition lawyers arrived at the site, they thought that the graves had been tampered with. A protest was lodged with the Embilipitiya magistrate that one of the pits had been widened, another one had been water logged and subsequently covered with fresh soil and that a skull and a saffron robe had been introduced into one of the pits. The magistrate ordered that this new 'evidence' be separately sealed for further investigation. By the evening of 8 January, six more skulls and a collection of limb bones were collected. Some of the bones apparently belonged to young people, while at least two of the skulls were blindfolded. In the meantime, the government appointed a CID team to investigate the finding of the mass graves. CID officers were present at the site throughout most of the period of excavation after that. On 10 January, the public was given an opportunity to identify the remains at the Embilipitiya magistrate's court. The remains were then sent to the JMO in Colombo, who was asked to verify if the bones were human bones, to specify the period in which the deaths may have occurred and to determine the cause of death. On 17 January 1995, the main lawyer for the opposition asked for a postponement of the hearings due to threats received by some witnesses and the fact that he had been shot at on his return home from the court on 10 January. According to press reports, the Government had stated it was awaiting the results of the JMO's investigations before deciding on further steps.²¹⁸

After intense campaigning and lobbying by the parents of the schoolchildren, nine accused were indicted of 80 charges, including conspiracy to murder 25 persons, including 24 students between 15 and 17 years old in 1995. In February 1999, six army personnel and a school principal received 10-year sentences for conspiracy, abduction with the intent to commit murder, and wrongful confinement in respect of disappearances at Sevana army camp.²¹⁹ But the highest-ranking officer, then Lt. Colonel R P Liyanage, commander of the Sevana Army camp where the children were detained prior to being killed was acquitted due to lack of evidence of his direct involvement in the abductions. On appeal in early 2002 the convictions of four soldiers and the high-school principal were upheld. The AG did not appeal against the acquittal of Lt. Colonel R P Liyanage, against the wishes of the parents.²²⁰ He was later promoted to Brigadier.²²¹ This is despite the WSSC in a special report on the disappearances at Sevana army camp finding that Liyanage bore a measure of responsibility.²²²

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DATE: 1994

PLACE: Essella, Gampaha district

BACKGROUND: Remains from the 1987-1989 JVP insurrection period

NUMBER OF REMAINS DISCOVERED: The bodies were exhumed on the magistrate's order on 13-14 October 1994

CURRENT STATUS: According to the final report of the WSSC, the remains concern 15 or 16 prisoners taken from a local army camp (referred to as "B. army camp") on 19 September 1989. They included three women.²²³ According to the same report, the mass grave was located at the Yatagama village school in Essella. The WSSC observed that the mass grave "was preceded by the sound of the arrival of heavy trucks and the sound of gun shots followed by a very public exhibition of the bullet-riddled bodies of several young men and women had been found lying lined up in a drain near the home of an army officer" who had died in a JVP attack.²²⁴

DATE: 1995

PLACE: Bolgoda lake, Colombo district

BACKGROUND: Remains thought to be of Tamil young men suspected of being LTTE members. Five were identified following detailed forensic examinations (including post-mortem examinations by the Consultant JMO Colombo and facial reconstruction and video superimposition at the University of Glasgow, United Kingdom in November 1996.²²⁵ It is not known whether the remains of those identified were returned to their families.

NUMBER OF REMAINS DISCOVERED: 21 bodies were found floating in the lake, the Alawwa Oya and the Diyawanna Oya.

CURRENT STATUS: Following CID investigations into these cases, 21 Special Task Force police officers were arrested along with three civilians and produced before the Chief Magistrate in Colombo and remanded in 1996. Three officers were subsequently charged with abduction and wrongful confinement of one of the victims, who was identified as Alagaswamy Kumarasingham alias Khanan. Later, the Attorney General Department decided there was insufficient evidence against them and recommended disciplinary action instead.²²⁶

DATE: 1999

PLACE: Duraiyappah stadium, Jaffna

BACKGROUND: As workers sank the foundations for new changing rooms at the Duraiyappah sports stadium in Jaffna, their spades struck bones.

NUMBER OF REMAINS DISCOVERED: Remains to be clarified. It was suspected that those skeletons were those of inhabitants of Jaffna killed and buried during the occupation of the Northern Province by the Indian Peace Keeping Force in 1987.²²⁷

CURRENT STATUS: There were three days of exhumations. On the first occasion 8 skeletons were found, on the next sixteen, and on the third, twenty five.²²⁸

DATE: 1999

PLACE: Chemmani, Jaffna district

BACKGROUND: The location of these mass graves came to light in 1996 during the trial against five soldiers, including Lance Corporal Somaratne Rajapaksa, accused of the rape and killing of schoolgirl Krishanthi Kumarasamy, her mother, brother and neighbour. During the trial, Rajapaksa claimed as many as 400 bodies had been buried at the location where her body was exhumed.

NUMBER OF REMAINS DISCOVERED: 15

CURRENT STATUS: In 1998, a five-member committee identified the members of the forces responsible for 15 disappearances. Four army officers were arrested. The Committee's report was never published. Exhumations were conducted under the JMO Niriella Chandrasiri, Senior Professor of Forensic Medicine, University of Ruhuna.²²⁹ Part of the exhumations at Chemmani were observed by international forensic experts and Amnesty International staff. They did not participate in the exhumations.

Bone samples were sent for DNA testing to the Hyderabad Forensic Laboratory in India and then to the UK for DNA testing. Despite initial arrests of a handful of soldiers and police, no indictments were filed. Under the orders of the AGO, the suspects were released on bail in July 2000. Later on, the case was transferred to the Colombo magistrate's court after the army officers argued that they feared for their lives if they had to appear in the Jaffna magistrate's court. In January 2006 the case came to an end when police told the Colombo Magistrate that they were unable to proceed in the absence

of instructions from the Attorney General, despite having handed over the findings of their investigations.²³⁰

Subsequently, key suspects in this case have been promoted. Captain C J T K Lalith Hewa became a Senior Lieutenant Colonel in charge of an Army Holiday House in Panadura. Captain T D Sasika Perera became a Senior Lieutenant Colonel in charge of the Mannar Army Camp, and later was attached to the Kalawewa Army Camp. Lieutenant Sachindra Wijesiriwardana was a Junior Lieutenant Colonel in charge of the Mullaitivu Army Camp, and then attached to the Army Headquarters in Panagoda. Lieutenant A Yatagama has retired from service.²³¹ Others reportedly named by Somaratne Rajapakse as having been involved were never charged. They include: Jayatilleke, Nazaar, Samarawickrema, Probationary Private Perera, soldier J M Jayasinghe, Lieutenant Thudugala,²³² Lieutenant Udayakumara, Major Karunasekara, Captain Jayawardena, Corporal Bandara, Probationary Private Nishantha, Probationary Private Alwis (dead), Probationary Private Muthubanda, Sergeant Silva, and three police officers (Constable Priyadarshana, Officer Abdul Hamid, and Officer Samarasinghe).²³³ Somaratna Rajapakse continues to serve a life sentence for the rape and killing of Krishanthi Kumarasamy.

12

DATE: 2000

PLACE: Mirusuvil, Jaffna

BACKGROUND: The exhumation took place on 25 December 2000, a week after the victims disappeared.

NUMBER OF REMAINS DISCOVERED: Eight bodies of internally displaced people, including three children. One of them was a 5-year-old, whose body showed signs of torture.

CURRENT STATUS: The case took 15 years to conclude. It was originally filed at the Chavakachcheri Magistrate's Court and subsequently 14 army personnel were taken into custody. Later, the case was transferred to the Anuradhapura Magistrate's Court at the request of suspects to the Attorney General's Department as they feared it would be a threat to their lives. Later the Chief Justice appointed a trial-at-bar at the High Court, Colombo. There were numerous postponements.²³⁴ In 2015, after a lengthy court process, Sunil Ratnayake, a member of the military's elite Long Range Reconnaissance Patrol (LRRP), had been sentenced to death while four other accused were cleared of all charges. The sentence was upheld on appeal in 2015. Just five years after the sentence, in 2020, Ratnayake received a presidential pardon from then President Gotabaya Rajapaksa.²³⁵ In 2021 the US barred Ratnayake from visiting the USA.²³⁶ In early 2023, Canada did the same.²³⁷

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13

DATE: 2010

PLACE: Ganeshapuram, Kilinochchi district

BACKGROUND: Bodies were discovered wrapped in black polythene bags during the cleaning of an old toilet pit.

NUMBER OF REMAINS DISCOVERED: 6

CURRENT STATUS: <https://www.dailymirror.lk/article/mass-grave-in-kilinochchi-4058.html?fbrefresh=1505404589>

14

DATE: 2012

PLACE: Matale, Matale district

BACKGROUND: Workers installing a biogas plant at a construction site in the Matale General Hospital found human remains. Matale Magistrate's Court Case No B 1810/12.

NUMBER OF REMAINS DISCOVERED: By February 2013, 155 bodies had been exhumed.

CURRENT STATUS: This exhumation was carried out under the authority of Magistrate Chathurika Silva. CID did not implement the order to publish public notices in the media encouraging more families of the disappeared and witnesses to come forward. According to the report of the forensic archaeologist, Somadeva, the remains found indicated the use of fire arms and blunt instruments, with iron nails being driven into skulls, and signs of decapitation. He concluded they dated from the late 1980s period, based on some artefacts found among the remains. For over six weeks, CID ignored the magistrate's order to send the skeleton samples for testing overseas. Despite many objections by the Bar Association and other lawyers citing the fact that a magisterial inquiry was already ongoing, the former President appointed a three-member Presidential Commission of Inquiry. The judge of the court was promptly transferred and replaced. The new judge refused to accept additional affidavits and deferred extant affidavits to the Presidential Commission of Inquiry. The commission collected evidence from 156 witnesses and commissioned a forensics report from a laboratory in China and Beta Analytic in Florida, USA.²³⁸

The JMO took samples and sealed them and a copy of the accompanying document was sent to Magistrate Court Matale and the original document to the lab following Beta Analytic (a US specialist company) specific guidelines. The

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samples were provided to the CID maintaining chain of custody. Subsequently, with no expert supervision, the samples were sent for carbon-dating testing to Beta Analytic, which concluded that they dated from before the 1950s.²³⁹ The forensic archaeologist, Raj Somadeva, disputed the Beta Analytic findings, suggesting there may have been contamination resulting in the carbon dating report contradicting the archaeological dating. When the government changed in 2015, the commission reopened its investigation, however upholding the pre-1950s hypothesis and rejecting allegations that the mass grave was a scene of crime. The report submitted to President Maithripala Sirisena was never made public. The magistrate's court case was closed in 2015. Though some parties indicated they would appeal against that decision, as of early 2023, no appeals had been made.²⁴⁰

15

DATE: 2013

PLACE: Thiruketeeswaram, Mannar district

BACKGROUND: Mannar Magistrate Court Case No B768/13. Identity of remains not yet clarified. State sources allege they are the bodies of soldiers killed by the LTTE. Other sources allege these are victims of disappearance at the hands of the security forces.

NUMBER OF REMAINS DISCOVERED: More than 80.²⁴¹ There are thought to be more still to be exhumed.

CURRENT STATUS: On 22 December 2013, Mannar Magistrate Judge Ananthi Kanagaratnam opened an inquiry. She made a preliminary visit to the site with JMO D L Waiyaratne, one of the JMOs involved in the Chemmani investigation in 1999.²⁴² In January 2014, the JMO stated that no signs of clothing or human-made artifacts had been found in the grave. He had packed more than 80 boxes of skeletonised remains for preservation, labelled and sealed them, and transported them under court order to the medico-legal morgue of the Teaching Hospital in Anuradhapura for storage and further examination. Some of the skeletal remains reportedly had bullet holes; others had their hands tied behind their backs.

In April 2014, the Director General of the Department of Archaeology stated that this was a normal cemetery, used since the 1930s, and not a mass grave. Amid petitions by relatives, in August 2016 excavations continued and two more skeletal remains were found.

Prior to a forensic archaeologist/anthropologist dating the grave, a geologist and atomics expert submitted their own reports, which is unusual.

In October 2015, the magistrate prohibited the removal of remains kept in Anuradhapura Teaching Hospital without a court order. In December 2015, the

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CID agreed to send the samples to forensic anthropology teams Argentina, Peru and Guatemala. However, this was not done. Eventually, the CID contacted the Guatemalan forensic anthropology team, but not the others. A Guatemalan forensic team visited Sri Lanka and provided some training. However, they did not visit the Mannar grave site, and did not participate in any exhumations. In early 2023, on court order, some remains were taken to Colombo University Forensic and Anthropology Department for bone analysis. Samples were finally taken by consultant JMO Waidyaratne on 3 January 2023 to be sent to Beta Analytics in Florida, USA. However, they remain in the custody of the magistrate's court, as no direction has been given to date, and funds are to be found.

16

DATE: 2014

PLACE: Kaluwanchikudy, Batticaloa district

BACKGROUND: Kattankudy Magistrate Court Case No B172/14. Remains thought to be victims of LTTE killings, in particular Muslim people abducted and killed on 12 July 1990 at Kurukkalmadam.

NUMBER OF REMAINS DISCOVERED: Possibly more than 160.²⁴³ None have been exhumed to date.

CURRENT STATUS: The son of one of the people killed by the LTTE testified before the Lessons Learnt and Reconciliation Commission (LLRC) and the Presidential Commission on Disappearances. Local Muslims testified before the Presidential Commission that they could identify the location where the LTTE buried the Muslims killed in July 1990. The state initially investigated this site more expeditiously than others where security forces had been implicated.²⁴⁴ Nevertheless, there were many postponements, often due to forensic experts such as the Chief JMO and the Government Analyst who were based in Colombo not being present.

Since then, investigations have stalled and no exhumations have taken place. This is apparently due to the fact that the state came to realise that the continuation of investigations on this mass grave might implicate Vinayagamoorthy Muralitharan (Colonel Karuna), who in July 2004 switched sides from the LTTE to work with the military and in 2008 officially joined the Mahinda Rajapaksa regime.²⁴⁵

In 2019, the OMP made an application to the Kattankudy Magistrate's Court seeking permission to visit the suspected site, along with representatives from the Office of the JMO.²⁴⁶ It is not clear whether permission was granted.

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17

DATE: 2018

PLACE: Mannar, Mannar district

BACKGROUND: Mannar Magistrate's Court Case No. B232/18. Origins of the skeletons remains are not yet clarified.

NUMBER OF REMAINS DISCOVERED: By December 2018, 318 skeletons had been exhumed, including 28 children

CURRENT STATUS: This grave was discovered during building works at the Sathosa cooperative shop. The owners informed the police. In November 2018, the OMP applied to act as an observer in the investigation into the suspected gravesite in Thiruketheeswaram, Mannar. Among the objects that were recovered were metal bindings which had been used to tie legs together.²⁴⁷ During 2019, the OMP continued to observe the case, and with the assistance of forensic anthropologists, the OMP reviewed the progress of the investigation thus far and discussed the findings with relevant stakeholders including representatives of the families.

In January 2019, an OMP commissioner and two legal representatives (CHRD) of the families observed the process of the JMO handing over the bone and teeth samples to Beta Analytic (based in Miami, Florida). In February 2019, radio carbon dating revealed that the samples may have come from the 15th-18th centuries. Upon receiving results, the Mannar Magistrate temporarily halted excavations and requested the investigation team submit a comprehensive report. As of late May 2023, this had still not been submitted.

SLA spokesperson, Brigadier Sumith Atapattu, claimed the SLA was not responsible for the grave: 'The army is not involved in that gravesite. We had nothing to do with it.'²⁴⁸

18

DATE: 2019

PLACE: Pudukudiyiruppu, Mullaitivu district

BACKGROUND: Mullaitivu Magistrate's Court Case No AR/808/19

NUMBER OF REMAINS DISCOVERED: 9

CURRENT STATUS: Remains were discovered in October 2019. The Magistrate ordered local police to protect the site and conduct an investigation, and the JMO to examine the remains. An OMP Commissioner and staff member observed

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the visit by the Magistrate to the site and made recommendations regarding steps to be adopted to advance the investigation.²⁴⁹

19

DATE: 2020

PLACE: Mullaitivu, Mullaitivu district

BACKGROUND: Mullaitivu Magistrate's Court Case No AR/503/20

NUMBER OF REMAINS DISCOVERED: Unknown

CURRENT STATUS: OMP observed the hearing at the court, according to its 2020 Annual Report.²⁵⁰ The 2021 Annual Report does not provide an update about the case. ITJP, FOD, CHRD and JDS have not been able to obtain further details.

20

DATE: 2020

PLACE: Kilinochchi, Kilinochchi district

BACKGROUND: Kilinochchi Magistrate's Court of Case No B/542/20

NUMBER OF REMAINS DISCOVERED: One female skeleton, one skull and loose teeth were recovered.

CURRENT STATUS: OMP observed the hearing at the court.²⁵¹ The 2021 Annual Report does not provide an update about the case. ITJP, FOD, CHRD and JDS have not been able to obtain further details.

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ENDNOTES

1 Interview with Britto Fernando, 5 Apr 2023

2 In Guatemala, after 36 years of civil war, there were more than 6,000 exhumations between 1996 and 2012. See <https://www.ictj.org/news/guatemalas-claudia-paz-crimes-past-and-present-justice-must-be-done>. In the former Yugoslavia more than 27,000 (70%) of the 40,000 persons reported missing as a result of the conflict have been accounted for. See <https://www.icmp.int/news/sida-director-general-carin-jamtin-visits-icmcs-western-balkans-program/>. In Spain, at least 2,000 mass graves linked to the Spanish civil war have been located, but many more remain unidentified. See José-Paulino Fernández-Álvarez and others, 'Discovery of a mass grave from the Spanish civil war using ground penetrating radar and forensic archaeology', *Forensic Science International*, vol 267 (Oct 2016), p e10-e17

3 ITJP, Gotabaya Rajapaksa's role in 1989 mass atrocities,

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May 2022, <https://itjpsl.com/reports/gotabaya-rajapaksa-the-sri-lankan-presidents-role-in-1989-mass-atrocities>

4 Amnesty International, Sri Lanka: Chemmani exhumations – positive first steps towards truth and justice, 22 Jun 1999, <https://www.amnesty.org/ar/wp-content/uploads/2021/06/asa370171999en.pdf>

5 The list is not exhaustive. The organisations are aware of some other exhumations (such as at Poojapitiya, Kandy district in late 1993-early 1994) but were unable to obtain sufficient verified information to include them in the Annex. In fact, some confidential sources also reported mass graves in Matale and Anuradhapura districts from the 1971 JVP insurrection, though these are also not included as there was not sufficient verified information.

6 Under the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims

of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, as adopted by the General Assembly in 2005, satisfaction should include the 'search for the whereabouts of the disappeared [...] for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities'. See Principle 22 (c) at <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-and-guidelines-right-remedy-and-reparation>

7 Haglund, William D, Melissa Connor, and Douglas D Scott. 'The Archaeology of Contemporary Mass Graves', *Historical Archaeology* 35, No 1 (2001): 57-69

8 The Revised United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and

Summary Executions, para 110, 2017

9 Pass, Allan D, and Ayn Embar-Seddon, *Forensic Science*, Book 1, 2nd ed, 'Mass Graves', Salem Press, 2015

10 José-Paulino Fernández-Álvarez, David Rubio-Melendia, Antxoka Martínez-Velasco, Jamie K Pringle, Hector-David Aguilera, 'Discovery of a mass grave from the Spanish Civil War using Ground Penetrating Radar and forensic archaeology,' *Forensic Science International*, vol 267, Oct 2016, p e10-e17

11 Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary execution, Oct 2020, UN Doc A/75/384, <https://digitallibrary.un.org/record/3888738?ln=en>

12 The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016), Office of the United Nations High Commissioner for Human Rights, New York/Geneva, 2017. See <https://www.ohchr.org/sites/default/files/Documents/Publications/MinnesotaProtocol.pdf>

13 Klinkner, M and Smith, E (forthcoming), 'Mass Grave Protection and Investigation Guidelines', project website <https://www.bournemouth.ac.uk/research/projects/mass-grave-protection-truth-justice>

14 Klinkner, M and Smith, E (forthcoming), 'Mass Grave Protection and Investigation Guidelines', project website <https://www.bournemouth.ac.uk/research/projects/mass-grave-protection-truth-justice>

15 <https://www.npr.org/sections/coronavirus-live-updates/2020/04/10/831875297/burials-on-new-york-island-are-not-new-but-are-increasing-during-pandemic> The people in mass burials on Hart Island were those who have not been claimed by a family member or loved one.

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17 This definition is the one used in the Bournemouth Protocol and constitutes a composite definition from the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, at Annex A, 1, and the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Annex V, 8, and echoes article 24(1) of the International Convention for the Protection of All Persons from Enforced Disappearance.

18 First Report of the UN Working Group on Enforced or Involuntary Disappearances, UN Doc E/CN.4/1435, 26 Jan 1981, para 81

19 International Convention for the Protection of

All Persons from Enforced Disappearance, Article 24(2)

20 UN Commission on Human Rights, 'Report of the independent expert to update the Set of Principles to combat impunity', 18 Feb 2005, E/CN.4/2005/102, available at: <https://www.refworld.org/docid/42d66e7a0.html>

21 UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law : resolution / adopted by the General Assembly, 21 March 2006, A/RES/60/147, available at: <https://www.refworld.org/docid/4721cb942.html>

22 Principle 24

23 J E Mendez and F J Bariffi, 'Truth, Right to, International Protection' (Jan 2011), in R. Wolfrum (ed.), *Max Planck Encyclopaedia of Public International Law* (online edn)

24 *ibid*

25 <https://www.ohchr.org/sites/default/files/disappearance-convention.pdf>

26 ICPED, Preamble and Articles 18 and 24(2)

27 ICPED, Article 24(3)

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28 See WGEID, General Comment on the Right to Truth in Relation to Enforced Disappearances, 2010, para 4, https://www.ohchr.org/sites/default/files/Documents/Issues/Disappearances/GC-right_to_the_truth.pdf

29 Callamard report, op cit, para 58

30 Callamard report, op cit, para 14

31 Callamard report, op cit, para 62. The Iraqi Mass Graves Affairs directorate, in principle, is an interesting model, set up to 'undertake protecting, looking for, investigating and exploring' mass graves in coordination with relevant authorities'. <https://www.icmp.int/wp-content/uploads/2006/01/The-first-amendments-mass-graves-protection-legislation-number.pdf>. In practice, lack of resources has crippled the initiative. Professionals of the Medico-Legal Institute calculate that it will take over 800 years to complete their task. A/HRC/38/44/Add.1.

32 A/HRC/41/CRP.1, para 260

33 First Geneva Convention, art. 17 (3); Third Geneva Convention, art. 120 (4); Fourth Geneva Convention, art. 130 (1)

34 CED/C/7, principle 1, para. 4

35 A/HRC/17/38, para. 8

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36 <https://www.bournemouth.ac.uk/research/projects/mass-grave-protection-truth-justice>

37 Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary execution, Oct 2020, UN Doc A/75/384, <https://digitallibrary.un.org/record/3888738?ln=en>

38 Three main legal sources have been considered: International human rights and humanitarian law, along with the emerging international disaster relief/response law.

39 http://www.lastrights.net/LR_resources/html/LR_mytilini.html

40 A Sweeney, 'The Elusive Right to Truth in Transitional Human Rights Jurisprudence,' *International and Comparative Law Quarterly*, vol 67 (Apr 2018) at 368-69

41 <https://unesdoc.unesco.org/ark:/48223/pf0000127160>

42 UN Doc E/CN.4/2005/102, Principles 2-4

43 Basic Principles and Guidelines, at para 22(b)

44 CED, Article 6

45 J M Henckaerts and L Doswald-Beck, 'Customary International Humanitarian Law, vol I: Rules' (Geneva, Cambridge University Press, 2006) [CIHL study]

46 C. Pilloud and others, 'Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949' (Geneva, Martinus Nijhoff, 1987)

47 See <https://ihl-databases.icrc.org/ar/customary-ihl/v2/rule112>

48 UN, Comprehensive Report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka, 28 Sep 2015, para 73, <https://undocs.org/Home/>

49 <https://www.ohchr.org/sites/default/files/Documents/Publications/MinnesotaProtocol.pdf> and https://www.icmp.int/wp-content/uploads/2022/02/mass_graves_project_english-4.pdf

50 See <https://www.ohchr.org/en/hr-bodies/hrc/regular-sessions/session30/res-dec-stat>

51 Report of the OHCHR Investigation on Sri Lanka (OISL), 16 Sep 2015, A/HRC/30/CRP.2, <https://digitallibrary.un.org/record/803408?ln=en>

52 Preliminary observations of the Working Group on Enforced or Involuntary Disappearances at the conclusion of its visit to Sri Lanka, 9-18 Nov 2015, <https://www.ohchr.org/en/statements/2015/11/preliminary-observations-working-group-enforced-or-involuntary-disappearances>

53 See https://www.srilankalaw.lk/gazette/2018_pdf/05-2018_E.pdf

https://www.srilankalaw.lk/gazette/2018_pdf/05-2018_E.pdf

54 EDA, Article 3

55 UN, Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence on his visit to Sri Lanka, 18 Jun 2020, para 43, https://srilankabrief.org/wp-content/uploads/2020/09/A_HRC_45_45_Add.1-EN.pdf and Office of Missing Persons, Interim Report, Aug 2018, p15-16, <http://www.omp.gov.lk/storage/app/uploads/public/5faa528e479e0618163564.pdf>

56 WGEID General Comment on enforced disappearance as a continuous crime, 2010, see <https://www.ohchr.org/en/special-procedures/wg-disappearances/general-comments>

57 See Article 1 (enters into force on day of certification) of EDA, https://www.srilankalaw.lk/gazette/2018_pdf/05-2018_E.pdf

58 <https://www.newsfirst.lk/2020/02/26/unhrc-resolutions-30-1-violates-basic-structure-of-constitution-dinesh-gunawardena/>

59 See <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/152/58/PDF/G2015258.pdf?OpenElement>

60 <https://www.ohchr.org/en/hr-bodies/hrc/sri-lanka-accountability/index>

61 UN, Report of Special Rapporteur on truth, justice,

reparations and guarantees of non-recurrence, 'Follow-up on the visits to Burundi, the United Kingdom of Great Britain and Northern Ireland and Sri Lanka', 5 Aug 2021, para 30, <https://www.ohchr.org/en/documents/country-reports/ahrc4860add2-follow-country-visits-burundi-united-kingdom-great-britain>

62 See UN, 'Follow-up on the visits of the Working Group on Enforced or Involuntary Disappearances to Peru and Sri Lanka', 10 Sep 2019, <https://www.ohchr.org/en/documents/country-reports/ahrc4240add1-follow-visits-working-group-enforced-or-involuntary>

63 idem, para 13

64 Amnesty International, 'Sri Lanka: When will justice be done?', Jul 1994, <https://www.refworld.org/docid/3ae6a9bac.html>

65 According to the final report of the presidential commission of inquiry for the Western, Southern and Saburagamawa Provinces, Volume II (p112), police justified the lack of investigation into the Hokandara mass grave (see Annex), for instance, based on ERs 55FF.

66 <https://www.amnesty.org/fr/wp-content/uploads/2021/06/asa370041994en.pdf>

67 See <http://www.omp.gov.lk/omp-documents/omp-act>

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249 OMP, 2019 Annual Report, para 3.31, <http://www.omp.gov.lk/storage/app/uploads/public/601/142/db5/601142db52d27533751009.pdf>

250 2020 Annual Report, para 2.33 and 3.5, <http://www.omp.gov.lk/storage/app/uploads/public/604/847/009/604847009edfb770550416.pdf> and Annex

251 2020 Annual Report, para 2.33 and 3.5, <http://www.omp.gov.lk/storage/app/uploads/public/604/847/009/604847009edfb770550416.pdf> and Annex

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Established in 2013, the ITJP is the main body that has extensively investigated and documented unlawful detentions, torture and sexual violence in Sri Lanka. The research group is led by South African transitional justice expert, Yasmin Sooka, and employs international investigators who have worked for tribunals, the United Nations, and the UK's Preventing Sexual Violence Initiative.

🖱️ itjpsl.com

Journalists for Democracy in Sri Lanka (JDS) was founded in 2009 by journalists, writers and human rights defenders who were forced into exile. The group was instrumental in exposing some of the gravest mass atrocities committed during the final stages of Sri Lanka's war while constantly monitoring and reporting on rights situation in the island. JDS functions as Sri Lankan partner organization of Reporters Without Borders (RSF).

🖱️ www.jdslanka.org

The Center for Human Rights and Development (CHRD) is a leading Sri Lankan human rights organization established in 1997 by human rights lawyers and activists providing a source of legal support and strategic guidance for minorities. CHRD's strength is its grassroots human rights defender network and its holistic approach to working with victims and their families, including in the context of exhumations of mass graves.

🖱️ <https://srilankachrd.org>

Families of the Disappeared (FoD) has worked on enforced disappearance since 1989 and created 27 October as an annual commemoration of the disappeared as well as established a "Monument for the disappeared". FoD is a member of the Asia Federation against Disappearances (AFAD) and the International Coalition against Enforced Disappearances (ICAED).

DESIGN:

🖱️ TEMPLO.CO.UK

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