

2. Implementation of IHL Obligations with Regard to Missing Persons in Post-Armed Conflict Sri Lanka

Danushka S. Medawatte¹

2.1 Introduction

State obligations associated with missing persons continue even after the end of an armed conflict. This is one aspect in which the application of International Humanitarian Law (IHL) transcends the temporal scope of an armed conflict. It could be contended that the attempt to expand IHL's application to post-war contexts blur the lines between *lex specialis* and *lex generalis*. However, continuing humanitarian requirements of those affected by an armed conflict justifies recourse to *lex specialis*, which is IHL. In the Sri Lankan context, the issue of missing persons remains a predominant humanitarian requirement. This has given rise to many psycho-social and socio-legal consequences including the right to know the truth concerning the fate and whereabouts of the missing loved one. Multiple concerns arise not only in respect of missing persons but also with regard to their family members and loved ones. Moreover, the entirety of the social fabric is gravely affected when it is incapacitated from moving towards reconciliatory efforts and sustainable peace by preventing the guaranteeing of rights of missing persons as well as their family members.

Over the years, Sri Lanka has appointed various Commissions of Inquiry (CoI), and compiled multiple reports on missing persons as well as other violations of international human rights law (IHRL) and IHL. This has resulted in the proliferation of documents which record details of missing persons. No consistency can be observed among these reports in terms of factual records, legal analysis, or the proposed recommendations. Therefore, an accurate count of missing persons in Sri Lanka is impossible to ascertain. This difficulty is further aggravated by the interchangeable use of the terms 'enforced disappearances' and 'missing persons' which possess different legal connotations. As per Article 32 and 33 of Additional Protocol I of the Geneva Conventions, missing persons are those whose whereabouts become unknown in connection with an armed conflict. Enforced disappearances have been defined as:

¹ LL.B (Hons.) Colombo, LL.M (Harvard), M.Phil (Colombo) James Souverine Gallo Memorial Scholar (Harvard), Senior Lecturer – Faculty of Law, University of Colombo, Attorney – at – Law (Sri Lanka).

a set of particularly invidious violations of human rights, not only for the victims, who are deprived of their liberty, frequently tortured, and in fear for their lives, but also for their families and friends, who are left in ignorance regarding the fate of their disappeared loved one.²

In Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearances, the phrase has been defined as:

arrest, detention, abduction or any other form of deprivation of liberty by agents of the state or by persons or groups of persons acting with the authorisation, support or acquiescence of the state, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.³

The striking distinction between 'missing' and 'enforced disappearance' thus appears to be the context in which such disappearance occurs and therefore the nature of the legal regime within which it is sought to be addressed. Accordingly, persons become 'missing persons' within conflict contexts due to reasons connected with the armed conflict whereas enforced disappearances can occur within 'peace' contexts that may not have any relationship whatsoever to an armed conflict. Thus, IHL applies to the former whereas IHRL may apply to the latter. In this chapter the terms 'missing persons' the 'disappeared' or 'disappearances' have been used intending similar meaning and is taken in contradistinction to the definition of 'forcibly disappeared' or 'enforced disappearances' that has been stated above.

Reports of the Sri Lankan CoIs do not clarify the circumstances that led to such disappearances. Nor do they explicitly deal with the legal processes and remedies available to those affected thereby. This lack of clarity pose questions as regards the terminology that ought to be utilised as well as the legal regime that should be applied. It is further complicated by the mechanisms proposed for dealing with issues concerning missing persons not being aligned with existing laws. Nor have the recommendations been formulated in a manner that enables the utilisation of existing laws to their maximum capacity to create humanitarian responses.

Despite the work of many CoIs, an alarming number of persons remain missing and their fate and whereabouts remain unknown to date. Family members of missing persons are unaware of the circumstances surrounding the disappearance of loved ones. Thus, their grief continues in a state of ambiguity. When unaddressed and under-reddressed, emotional wounds caused by the continuity of grievances multiplied by the ambiguity of the loss leads to socio-political turmoil. This contributes to perpetuating

2 Markus Schmidt, *Encyclopedia of Genocide and Crimes against Humanity* (2005) Vol 3, 259.

3 International Covenant on the Protection of All Persons from Enforced Disappearances (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3 (ICPPED).

instability thereby stalling the process to reconciliation. Even though it appears that these are problems that are prevalent at present in Sri Lanka which is void of an armed conflict, these issues and their consequences are inherently interlinked with the armed conflict thus necessitating the application of IHL. Therefore, this is an instance which justifies the extension of application of IHL to post-war contexts. This humanitarian necessity has also been identified in the contemporary constitution-making process of Sri Lanka.⁴ It is hence justifiable to draw on applicable principles and provisions of IHL to cater to the humanitarian requirements concerning missing persons.

This chapter is strictly written in a humanitarian sense in that it makes no attempt to assess whether the State or any other actor should bear criminal liability concerning missing persons. This however does create a pathway for continuing application of IHL to ensure repression of IHL violations. An attempt is made to assess Sri Lanka's continuing IHL obligations towards the missing with reference to treaty obligations, domestic implementation of such obligations, case law, and obligations arising on a premise of customary international humanitarian law. Accountability that rises in connection with IHL obligations has also been highlighted in the recent United Nations Security Council Resolution 2474.⁵ In that light, the chapter further seeks to evaluate the nature of obligations that Sri Lanka has undertaken or been vested with according to the findings of Commissions of Inquiry, and Reports of UN bodies.

The primary challenge to resolve when assessing the applicability of IHL to missing persons in contemporary Sri Lanka is whether IHL could continue to apply in post-war or post-conflict settings. What qualifies as a post-war / conflict context should thus be inquired into. Further, it is necessary to examine the conditions that need to be met for the end of application of IHL.⁶ At the outset of this assessment, it needs to be noted that the obligations, for instance, laid down by Article 33(1) of AP I, requires parties to a conflict to fulfil their obligations with regard to missing and dead persons as soon as circumstances permit, and at the latest from the end of active hostilities.⁷ Milanovic contends that

[...] obligations with regard to missing and dead persons, such as facilitating access to gravesites, will continue applying after the end of the conflict, as would the obligations to investigate and prosecute grave breaches of the Conventions and AP I.⁸

⁴ Parliamentary Debates, 11 August 2016, col. 1321.

⁵ UNSC Res 2474 (11 June 2019) UN Doc S/Res/2474 (2019.) This resolution called upon the States by virtue of clause 6 'to take measures, as appropriate, in order to ensure thorough, prompt, impartial and effective investigations and the prosecution of offences linked to missing persons as a result of armed conflict, in accordance with national and international law, with a view to full accountability'.

⁶ See in this respect, Marko Milanovic, 'The end of application of international humanitarian law' (2014) *International Review of the Red Cross* 96 (893), 163 - 188.

⁷ *Ibid.*, p. 174.

⁸ *Ibid.*

While this obligation arises in connection with international armed conflict, it has long been an obligation that has seeped into customary international laws pertaining to armed conflicts irrespective of the nature of the conflict.

According to the Human Rights Council, post-conflict situations are where 'open warfare has come to an end [... even though] such situations remain tense for years or decades and can easily relapse into large scale violence'.⁹ Frère and Wilen contend determination of the length and duration of post-conflict situations is challenging and post-conflict contexts continue 'because one or several actors are either excluded or not content with the peace agreement'.¹⁰ In the Sri Lankan context, it is apparent that there is limited socio-political harmony and that people are far from satisfied with reconciliatory efforts, available legal remedies and avenues of reparation. Political instability and ethno-religious disharmony that has prevailed despite the ending of open warfare has aggravated ethno-religious issues. The tension that remains as a result presages the possibility of the Sri Lankan society relapsing into large scale violence. This indicates that Sri Lanka has not transitioned into a completely peaceful and stabilised State devoid of the impact created by the end of the armed conflict. It is possible therefore, to contend that IHL continues to apply to selected issues of which the roots lie in the armed conflict. The issue of missing persons remains embedded in the armed conflict thus justifying the application of IHL to its contemporary manifestation of the right of family members to know what fate befell their loved ones, and in case of death – the right of families to receive the identified remains of the deceased for proper burial. Accordingly, the assessment of IHL in relation to missing persons of post-war Sri Lanka is premised on this line of argumentation.

2.2 Sri Lanka and Missing Persons: The Backdrop

A 'missing person' is someone whose whereabouts become unknown 'as a direct result of, or in connection with armed conflicts, and other situations of violence'.¹¹ The political instabilities of the 1980s, followed by the full-scale armed conflict that prevailed in Sri Lanka for nearly three decades created an environment where the fate and whereabouts of many individuals became unknown. Various factors such as the proliferation of official documents pertaining to the missing, lack of conceptual clarity on the use of terms such as 'missing' and 'forcible disappearances', and the lack of mechanisms to assess the veracity of records has contributed to conflicting reports concerning the number of individuals regarded as missing persons in Sri Lanka. The numerical statistics presented below are thus to be interpreted in the light of their socio-political settings. In the interest of the legal analysis, no assumptions have been made of the impartiality of Commissions or lack thereof. Nor has an attempt been made to assess the evidentiary value attached by each of the investigating authorities to the facts recorded. It is however submitted that hinders the authorities from accurately accounting for war related casualties and violations. This possibility may

⁹ Human Rights Council, A/HRC/28/76 (10 February 2015) para. 15.

¹⁰ Marie-Soleil Frère and Nina Wilen, *INFOCORE Definition: Post-Conflict* (2015).

¹¹ International Committee of the Red Cross, 'Living with Uncertainty: Needs of the Families of Missing Persons in Sri Lanka'

insinuate that many more individuals have become missing persons than is accounted for by various CoIs.

The first CoI mandated to inquire into disappearances was appointed in 1998. The All Island Commission of Inquiry into Involuntary Removal and Disappearances of Certain Persons was appointed to inquire into 10,136 complaints of disappearances recorded by the three Zonal Commissions.¹² Its task was limited as it was only mandated to examine formerly reported disappearances. When it completed its final report in 2001, it had only investigated 4,473 complaints of disappearances.¹³ Some of its findings were referred to the Missing Persons Unit (MPU) set up under the recommendation of the Zonal Commissions.¹⁴ However, the effectiveness of the MPU was in question and it was disbanded after 2006. Zonal Commission Recommendations further led to the establishment of an MPU and the Disappearances Investigation Unit of the Police. In July 1998, an MPU was set up as a separate unit in the Attorney General's Department. By October 1999, the MPU of the Attorney General's (AG's) Department had received information on 890 cases of disappearances and it had initiated proceedings against 486 individuals in relation to 270 cases.¹⁵

According to the United Nations Working Group on Enforced and Involuntary Disappearances (UNWGEID), the GoSL has been informed of over 12,000 cases of 'enforced disappearances'. At the time of the completion of its report in 2016, over 5,750 cases remained outstanding.¹⁶ The work of the UNWGEID captures both 'enforced' and 'involuntary' disappearances. Thus, the numbers recorded by the UNWGEID encapsulates individuals regarded as missing and those who are regarded as forcibly disappeared. The UNWGEID's work does not provide a guideline on distinguishing between missing persons and those considered to be forcibly disappeared. Thus, it is impossible to ascertain with numerical accuracy the number of individuals considered to be missing persons by the UNWGEID.

Subsequently, the Presidential Commission to Investigate into Complaints regarding Missing Persons (PCICMP – or more commonly referred to as the 'Paranagama Commission') directly dealt with the issue of missing persons in Sri Lanka. During its working period, the records published on its official webpage¹⁷ indicated that a total number of 19,006 civilians were reported missing while the total number of members of the security forces reported missing in action were 5,000.¹⁸ It has also been reported

12 Report of the OHCHR Investigation on Sri Lanka (OISL), 16 September 2015, A/HRC/30/CRP.2, para. 483.

13 Ibid.

14 Ibid.

15 Ibid., para. 501.

16 Human Rights Council, 'Report of the Working Group on Enforced or Involuntary Disappearances on Its Mission to Sri Lanka', 8 July 2016, A/HRC/33/51/Add.2, para. 7.

17 The original source bearing address <http://www.pcicmp.lk/> which was accessed in 2016 is no longer available online.

18 Danushka S. Medawatte, 'Office on Missing Persons Sri Lanka: Taking Women into Account' [Position Paper] 2016 accessed <http://www.fokuswomen.lk/reports/Trans-Just/E-Office-on-Missing-Persons.pdf> on 03 October 2018.

that over 4,000 security personnel and police officers have been reported missing.¹⁹ According to the Paranagama Commission, around 2275 of the initial complaints it received were concerning the abductions committed by the Liberation Tigers of Tamil Eelam (LTTE). In its Report issued under the second mandate, the Commission states that it received over 21,000 complaints concerning missing persons and the work pertaining to the same is ongoing.²⁰ A final report of the Commission has never been released to the public domain and nor has a report on its first mandate ever been released.

According to statistics maintained by the International Committee of the Red Cross (ICRC), 'out of over 34,000 persons that were at some point during the armed conflict considered unaccounted for by their families and reported to the ICRC since 1989, over 16,000 persons are still considered missing by their families'.²¹ There is no clarity of records as regards the number of children that are missing. Statistics have been provided, to the Office of the High Commissioner for Human Rights (OHCHR) during its investigation on Sri Lanka, that the bodies of child soldiers recruited forcibly by the LTTE who died in battle had been sent to their families.²² However, towards the end of the war, this practice is alleged to have been abandoned (possibly due to the dire circumstances associated with armed conflict). Most of the parents who lodged complaints with the Paranagama Commission had stated that their children were taken by the LTTE and nothing has been heard of them since.²³ Report of the OHCHR Investigation in Sri Lanka highlighted the necessity for carrying out an investigation 'to determine the full extent of the recruitment of children and the fate of all those who remain unaccounted for'.²⁴ However, this is yet to be adopted in Sri Lanka and its absence also indicates to the absence of age segregated data pertaining to missing persons.

One of the primary questions that arise in connection with missing persons as has been mentioned elsewhere in the chapter is whether the numbers recorded are accurate.²⁵ Furthermore, it is also questionable whether the family members of missing persons have been adequately redressed or whether they have even been allowed to meet with representatives of CoIs, non-governmental organisations or representatives of international entities to express their grievances. Evidencing this reality, the Centre for Policy Alternatives (CPA) – a Colombo based think-tank and non-governmental entity, has narrated in their commentary on the Paranagama Commission, that the Terrorism Investigation Division (TID) had visited family members of the missing between 16th – 19th of January 2014 and offered them tokens to attend a meeting in Kilinochchi (a District in the Northern Province of Sri Lanka) on the 20th of January 2014 – the

19 Parliamentary Debates, 11 August 2016, col. 1324.

20 Report on the Second Mandate of the Presidential Commission of Inquiry Into Complaints of Abductions and Disappearances (August 2015) p. xviii.

21 ICRC, 'Living with Uncertainty' (Note 11) 3.

22 OISL Report, (Note 12) para. 700.

23 Ibid.

24 Ibid.

25 See for instance the commentary on UNWGEID records.

same day on which the Paranagama Commission was expected to conduct hearings in Kilinochchi.²⁶ In addition to the tokens, families of the missing persons had been incentivized to attend the alternative meeting in exchange for items for children's education and other aid.²⁷ Families which are socio-economically affected due to the disappearance of family members may have opted to attend the alternative meeting purely to receive trivial economic aid despite their pressing need for the truth. The pressure exerted by socio-economic conditions should therefore be taken into cognizance when assessing the requirements of the family members of the missing. In addition to the alleged State interferences with the work of the State's own CoI, another factor that affected the success of this Commission was the lack of awareness amongst affected communities of the Commission itself 'let alone its mandate and objective'.²⁸

There remains an urgent necessity of delving into the circumstances to uncover the truth pertaining to disappearances that have occurred in Sri Lanka. During the Parliamentary debates concerning the enactment on the Office on Missing Persons Act, the need to ensure the right to know what happened to the missing persons was referred to as a 'humanitarian exercise'.²⁹ The following has been extracted from the speech tabled by Hon. Mangala Samaraweera:

[...] for long years, this nation has suffered the phenomena of our citizens going missing from all parts of our country. Today, we have before us a Bill to establish a Permanent Office on Missing [P]ersons. This is an opportunity for all of us, as elected Representatives, to show that we care about our citizens' grief and that we uphold their basic human right to know what happened to their loved ones. *This is a humanitarian exercise* [Emphasis added]. This is an opportunity for our nation to unite in our empathy towards our own citizens, an opportunity for us, as a nation, to set an example to the whole world that we care about our citizens and that we are a nation that is capable of compassion, even after two insurrections in the South and a prolonged conflict in the North. It is also an opportunity for us to make a pledge to our own citizens and future generations that, as a responsible State, we will take measures at all times to ensure that no citizen of our country, whether Sinhala, Tamil or Muslim, will have to go missing ever again.³⁰

26 Centre for Policy Alternatives, 'A Commentary on the Presidential Commission to Investigate Missing Persons During the Period of June 1990 – May 2009 in the Northern and Eastern Provinces' (March 2014) p. 8.

27 Ibid.

28 Centre for Policy Alternatives, 'The Presidential Commission to Investigate into Complaints Regarding Missing Persons: Trends, Practices and Implications' (December 2014) p. 4.

29 Parliamentary Debates, 11 August 2016, col. 1322.

30 Ibid.

The right to know is both founded on and thrived by the humanitarian requirements of family members to know the truth and to achieve closure by learning the fate and whereabouts of the loved one. Inquiries have revealed that for the families of the disappeared, 'the search for truth was paramount' over and above justice, reparations, and other measures such as the issuance of Certificate of Absence.³¹ The same view was held by the families of combatants who were considered Missing in Action (MIA) even though most such families have received and / or accepted Death Certificates on behalf of those MIA.³² Moreover, it has been determined that the Certificate of Absence could help alleviate practical problems pertaining *inter alia* to inheritance, widow's benefits, and access to bank accounts. The recipients of such certificates should also be reassured that the issuance of the certificate is a mere recognition of the fact that the loved one is a missing person and that efforts would be continued to ascertain the fate and whereabouts of such person.³³

Sri Lanka's duty to ascertain the whereabouts of missing persons has further been complicated due to the presence of unmarked and / or mass graves.³⁴ Accordingly, the possibility of ascertaining whether a person who was formerly regarded missing is deceased has been rendered complicated, and in some instances, impossible. This has contributed to the continuing suffering of the family members who do not receive conclusive details from the State that, if provided, would have aided them with the healing process and provided effective closure to the ambiguity advanced by the lack of knowledge surrounding disappearances. Within this backdrop, it is mandatory to apply relevant provisions of IHL to relieve humans of their continuing suffering.

2.3 Sri Lanka's Obligations

2.3.1 Obligations under the Geneva Conventions

Sri Lanka became a State party to the four Geneva Convention of 12 August 1949 on 28 February 1959. Article 3 Common to all IV Geneva Conventions (hereinafter CA 3) stipulate the minimum standards that ought to be met during an armed conflict 'not of an international character'. Given that the armed conflict of Sri Lanka falls into this category, CA 3(1)(a) and (b) prohibiting violence to life and person, and taking of hostages, which seek to provide protection to persons *inter alia* from disappearing or being listed as a missing person, is applicable to the Sri Lankan context. Thus, at a minimum, the GoSL is required to guarantee that the basic humanitarian principles enshrined in CA 3 were upheld during the armed conflict. In the event there has been a failure to do so, it is necessarily implied by law that remedies are provided. This idea emanates from the Latin maxim *ubi jus ibi remedium* which means that for every

31 Final Report of the Consultation Task Force on Reconciliation Mechanisms (2016) p. 6. A Certificate of Absence is a certificate that is issued to the family members of missing persons establishing that such person's current whereabouts are unknown. This prevents the families from being forced to accept Death Certificates.

32 Ibid., p. 6.

33 Ibid., p. 222.

34 Report of the Secretary General's Panel of Experts on Accountability in Sri Lanka (31 March 2011) p. 61.

wrong, the law provides a remedy. Thus, in situations where a specific remedy is not defined in the law, a remedy will be implied and the law will be interpreted broadly to allow the development of a remedy. Given that the remedies should emanate from the law that governs the specific subject, remedies for grievances associated with the missing should be sought within the rich body of IHL. While it could be argued that Rule 149 and 150 of CIHL only deal with State responsibility and reparations as opposed to remedies, this argument could be countered with reference to the aforementioned legal maxim that has gained currency in law.

Article 26 of GC IV on dispersed families requires parties to the conflict to 'facilitate enquiries made by members of families dispersed owing to the war'.³⁵ This provision is sufficiently broad to encapsulate missing persons and their families. Moreover, Protocol I Additional to the Geneva Conventions (AP I)³⁶ specifically deal with missing persons in Articles 22 – 24. Since the classification of the Sri Lankan armed conflict is considered as falling within the scope of an armed conflict 'not of an international character', and since GC I – IV and AP I are regarded as providing a legal regime applicable to international armed conflicts, it is unlikely that Sri Lanka would premise its obligations towards missing persons on the provisions of GC I – IV or AP I. The application of the Geneva Conventions would hence be restricted to the scope and extent of CA 3. Nevertheless, it could be contended that the customary implications of the above provisions are sufficiently broad to have established consistent State practice that would guide Sri Lanka's obligations pertaining to missing persons.

Protocol II Additional to the Geneva Conventions (AP II) covers armed conflicts which do not come within the scope of application of Article 1 of AP I. Accordingly, armed conflicts,

which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups, which under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations [...]

come within the scope of application of AP II. As Sri Lanka's armed conflict occurred on Sri Lankan territory between its armed forces and the LTTE – which was an organized armed group of terrorists – the armed conflict falls squarely within the parameters of AP II. However, Sri Lanka is not a party to AP II. Had Sri Lanka been a party to AP II, many provisions³⁷ therein may have been resorted to in order to prevent individuals

35 A descriptive analysis of the provisions of Geneva Conventions and AP I deemed to be applicable to missing persons has been deliberately avoided in this Chapter due to their direct inapplicability to the Sri Lankan armed conflict characterized as a conflict 'not of an international character'. However, a brief descriptive Factsheet on Missing Persons can be accessed at <<https://www.icrc.org/en/document/missing-persons-and-their-families-factsheet>> accessed 22 August 2019.

36 Protocol I Additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of international armed conflicts (Protocol I) (entered into force 7 December 1978) 8 June 1977, 1125 UNTS 3.

37 See for instance Article 4, 5, 8, and 17 of AP II.

from becoming missing persons and to look for such persons listed as missing, convey information to family members, and if deemed deceased, find the remains such persons. Irrespective of technical pro-sovereign legal interpretations that may seek to prevent the application of these principles and provisions, it is necessary to ascertain these provisions from their humanitarian perspective and provide the broadest possible safeguards to individuals affected by armed conflicts. It is further impossible to contend that these principles remain inapplicable to a State party merely due to non-ratification of AP II, as, much of the body of IHL has consistently been practised by States. This has formed a rich customary body of IHL that encapsulates matters pertaining to missing persons as well.

2.3.2 Customary Law

Rule 117 of Customary International Humanitarian Law (CIHL) relates to accounting for missing persons. The foundation of the duty of the States to account for missing persons is entrenched in the right of the family members to know the fate of their missing loved ones.³⁸ According to CIHL, States bear responsibility to account for persons that have become 'missing persons' as a result of armed conflict. States are responsible for establishing institutional and functional frameworks that are adequately equipped with the capacities – both technical and legal – to search and account for missing persons. It is further established in CIHL, that deliberately withholding information regarding missing persons may amount to inhuman treatment³⁹ and may also be regarded as obstruction of justice. Irrespective of whether the conflict is one of international character or not, the rules pertaining to missing persons applies. Rule 117 should be read in conjunction with Rule 98 on the prohibition of enforced disappearances and Rule 105 relating to respect for family life. The effect of the conjunctive reading of the three provisions lead to the conclusion that States are obligated to prevent disappearances even during armed conflicts, and in cases where such disappearances occur, there is a legal obligation to trace such missing persons and guarantee the right to know of family members thereby safeguarding respect for family life.

CIHL Rule 116 provides for the identification of the dead. According to this rule, the parties to the conflict 'must record all available information prior to disposal and mark the location of the graves' to facilitate the identification of the dead. Due to unfortunate circumstances surrounding armed conflicts, many individuals may lose their lives of which some would be regarded as missing persons in the event of non-discovery of their bodily remains. However, if these customary principles are adhered to by the parties to the conflict, carrying out searches, and accounting for the missing subsequent to the end of the armed conflict would be much less problematic and time consuming.

38 CIHL Rules, p. 423.

39 CIHL Rules, p. 382.

2.3.3 International Convention on the Protection of All Persons from Enforced Disappearances

Sri Lanka became a signatory to the International Convention on the Protection of All Persons from Enforced Disappearances⁴⁰ (hereinafter ICPED) on the 10th of December 2015 and ratified the same on the 25th of May 2016.⁴¹ This is the pioneering and specialised instrument of international human rights law that deals with enforced disappearances. At the time of ratification, the Government of Sri Lanka (GoSL) declared by virtue of Article 32 of the Convention that 'it recognizes the competence of the Committee to receive and consider communication in which a State Party claims that another State Party is not fulfilling its obligations under this Convention'.⁴² Apart from this declaration, no other reservation, understanding, or declaration was made by the GoSL. This is indicative of the present commitment that GoSL has undertaken to prevent disappearances in Sri Lanka and to protect individuals from such disappearances in the future.

Due to Sri Lanka being considered a dualist State, it is necessary to adopt a domestic legislation implementing the protections and prohibitions embedded in the ICPED. Adopting the enabling legislation on ICPED will also have nuances associated with the possibility of effectively applying IHL in Sri Lanka despite the Convention being strictly regarded as falling within the regime of human rights law. Accordingly, the draft bill on the ICPED was presented to Parliament for its second and third readings on 07 March 2018.⁴³ The debate did not consider any substantive aspects of the ICPED as the primary focus of the Parliament at the time was on the state of emergency that was declared due to the religious violence that occurred in Kandy, Central Province - Sri Lanka.⁴⁴ It was more or less restricted to assessments of contextual realities within which disappearances occurred and expressions of apprehension concerning the alleged vindictive approaches that could be set in motion against 'war heroes'.⁴⁵ Except with respect to one clause which raised the question as to whether the GoSL is bound to extradite a particular alleged offender to a foreign State upon so being requested by the said State, a substantial debate did not occur with respect to the content of the ICPED Bill.⁴⁶ All Parliamentarians who expressed their views on the draft bill sought to merely re-narrate instances of political instability and armed conflict which had created a conducive environment within which the whereabouts

40 2716 UNTS 3, entry into force 23 December 2010.

41 United Nations, 'International Convention for the Protection of All Persons from Enforced Disappearances' (*United Nations Treaty Collection*) <https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-16&chapter=4&clang=_en> accessed 05 November 2018.

42 United Nations, 'International Convention for the Protection of All Persons from Enforced Disappearances' (*United Nations Treaty Collection*) <https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-16&chapter=4&clang=_en> accessed 05 November 2018.

43 Parliamentary Hansard, 07 March 2018 Col 148.

44 Ibid. Col 150

45 Ibid. See generally Col 178 onwards.

46 Ibid. Col 179 - 182.

of many individuals became unknown. At the end of the second reading, the Speaker of the Parliament – Hon. Karu Jayasuriya, moved for a vote to adopt the Bill. In the first instance, 53 votes were cast in favour with 19 votes against and 1 abstention.⁴⁷ When moved for the final vote, 53 votes were cast in favour, 16 votes against,⁴⁸ with 4 parliamentarians abstaining.⁴⁹ Accordingly, the Bill was adopted subsequent to the third reading⁵⁰ and the International Convention for the Protection of All Persons from Enforced Disappearances Act No. 05 of 2018 was certified on 21 March 2018. Eighteen months from the date of adoption of the Act, it remains to be seen how this Act would be utilised to cater to disappearances in Sri Lanka.

2.4 Application of IHL to Missing Persons in Sri Lanka

2.4.1 Legislative Enactments

2.4.1.1 *The Office on Missing Persons Act*

The Office on Missing Persons (Establishment, Administration and Discharge of Functions) Act No. 14 of 2016⁵¹ was certified on 23 August 2016. The preamble of the Act is premised on IHL in that it refers to the rights of relatives to know the circumstances in which their loved ones went missing. The Act also establishes the need for searching and tracing of missing persons. It further states that it is necessary to ‘take all measures to search and trace missing persons; to protect the rights and interests of missing persons and their relatives; and towards ensuring non-recurrence’. The establishment of the OMP was further justified with reference to its capacity to transcend the scope of temporally and geographically restrained commissions. This would therefore lead to the possibility of employing best technical and forensic expertise to ‘find the kind of answers that will help the families find closure or psychological and psychosocial support required’.⁵²

This Act comprises of 28 sections. The objectives of the Act are specified in Section 2 while the mandate of the OMP is stated in Section 10. The following have been identified as the objectives of the Act:

47 Ibid. Col. 262 – 263.

48 Ibid. Col. 265 – 266. The following honourable members of the Parliament voted against the adoption of the ICPPED Act of Sri Lanka: Pavithradevi Wanniarachchi, Salinda Dissanayake, Wimal Weerawansa, SC Muthukumarana, Wimalaweera Dissanayaka, Jayantha Samaraweera, T Ranjith de Zoysa, Vijitha Berugoda, Namal Rajapaksa, Janaka Wakkumbura, Kanaka Herath, Udaya Prabhath Gammanpila, DV Chanaka, Sisira Jayakody, Piyal Nishantha de Silva, and Indika Anuruddha Herath.

49 Parliamentary Hansard (Note 43) Col. 265 – 266. The following honourable members of the Parliament abstained from casting the vote: Lucky Jayawardana, Dinesh Gunawardana, Vasudeva Nanayakkara, Chandrasiri Gajadeera.

50 Ibid. Col. 267.

51 Hereinafter the OMP Act.

52 Parliamentary Debates, 11 August 2016, col. 1322.

- (a) to provide appropriate mechanisms for searching and tracing of missing persons, and to clarify the circumstances in which such persons went missing, and their fate;
- (b) to make recommendations to the relevant authorities towards reducing the incidents of 'missing persons' within the meaning of this Act;
- (c) to protect the rights and interests of missing persons and their relatives as provided for in [the] Act;
- (d) to identify proper avenues of redress to which such missing persons or their relatives may have recourse.

These objectives can be interpreted in connection with IHL and they reiterate the need for ascertaining the truth and providing remedies. The objectives of the Act set out in Section 2 are premised on IHL principles pertaining to missing persons and reiterates the need for ascertaining the truth and providing remedies to family members. The mandate of the OMP provided for by virtue of Section 10 capacitates the OMP *inter alia* to clarify the circumstances in which the persons went missing and to make recommendations to the relevant authorities towards addressing the incidence of missing persons. Further, the provision creates a mandate to protect the rights and interests of missing persons as well as their relatives. The right to be informed of relatives has been recognized as a form of redress and the duty to inform relatives of the fate of the missing person has been vested on the OMP through Section 10(1)(d). Significantly, this Act, by virtue of Section 10(1)(e) was able to vest on the OMP the duty of collating data obtained by processes that were formerly carried out by multiple organizations, Government Departments, Commissions of Inquiry and Special Presidential Commissions of Inquiry. Vesting on one entity the responsibility to collate data can be regarded as a positive feature as it enables consistency, specialization, and accuracy.

The OMP Act provides in Section 13(1)(a)(ii) that if an individual is found to be missing or deceased, a report to that effect will be released to the missing person to enable the Registrar General to issue a Certificate of Absence or a Certificate of Death. Furthermore, Section 13(1)(d)(i) requires the OMP to inform the relatives of the circumstances in which a person went missing and his fate. As per Section 13(1)(k)(iii) the OMP is also vested with the power to make recommendations to the relevant authorities on the handling of unidentifiable and identifiable remains. The link of the OMP to IHL has been expressly provided for by Section 4(2)(b). This provision provides that 'the members of the OMP shall be persons with previous experience in the fact finding or investigation, human rights law, international humanitarian law, humanitarian response or possess other qualifications relevant to the carrying out of the functions of the OMP'.

Thus, the GoSL has made a commitment under its domestic laws to give effect to principles of IHL.

2.4.1.2 The ICPPED Act

The International Convention for the Protection of All Persons from Enforced Disappearances Act No. 05 of 2018 was certified on 21 March 2018. The Act comprises of 25 provisions whereas the ICPPED comprises of 45 provisions. While the complete gamut of provisions contained within the ICPPED have not been incorporated into the domestic law, the substantive purposes that were sought to be achieved through the domestic enactment can be said to have been fulfilled as the Act prohibits wrongful arrests, detention, confinement, abduction, kidnapping, refusal to acknowledge detention,⁵³ aiding, abetting, and conspiring to commit enforced disappearances,⁵⁴ and has ensured that the offences under the Act are cognizable and non-bailable offences.⁵⁵ The Act further spells out the obligations concerning deprivation of liberty,⁵⁶ and rights of relatives, representatives, and Attorneys – at – Law.⁵⁷ Interference with and influencing investigations, and the failure to record or refusal to provide information are considered offences under the Act.⁵⁸ By virtue of Section 18, the Act has also sought to prevent the commission of disappearances subsequent to a person being extradited. Section 18 provides that no person shall be extradited where there is a possibility for such person to be subjected to disappearances.

The complete effect of the protection sought to be provided by the Act has been ensured through Section 23 which makes the provisions of the Act effective 'notwithstanding anything to the contrary in any other written law and accordingly in the event of any inconsistency or conflict between the provisions of this Act and such other written law, the provisions of this Act shall prevail'. It remains to be seen how these provisions will be utilised with reference to addressing the concerns of the family members of missing persons who seek to mobilise the court under this Act. Furthermore, it is yet to be seen how the courts of Sri Lanka will interpret the extent of application of the ICPPED Act and whether it would make references to IHL and IHRL in interpreting the provisions of the ICPPED.

2.4.1.3 Office for Reparations Act

The Office for Reparations Act No. 34 of 2018 was certified on 22 October 2018. The preambular statement of the Act provides that it seeks to provide individual and collective reparations to aggrieved persons. It further identifies that 'a comprehensive reparations scheme anchored in the rights of all Sri Lankans to an effective remedy will contribute to the promotion and reconciliation' in Sri Lanka. In its Bill stage, the draft dated 22 June 2018 specifically referred to the Geneva Conventions of 1949.⁵⁹ As per Section 27 of the draft Bill, the phrase 'aggrieved persons' was interpreted as 'persons who have suffered a violation of human rights or humanitarian law (as

53 Section 3, ICPPED Act [Sri Lanka].

54 Ibid. Section 4.

55 Ibid. Section 5

56 Ibid. Section 15.

57 Ibid. Section 16.

58 Ibid. Section 17.

59 Gazette of the Democratic Socialist Republic of Sri Lanka issued on 25. 06.2018.

contained in the First, Second, Third and Fourth Geneva Conventions of 1949).⁶⁰ However, the enacted version of the Act, in Section 27(a) interprets 'aggrieved persons' as 'persons who have suffered damage as a result of loss of life or damage to their person or property'. It is questionable why references to IHRL and IHL were removed from the Act.

Under the powers and functions of the Office for Reparations, the office is capacitated to receive recommendations from the OMP regarding the reparations that should be made available to aggrieved persons.⁶¹ Section 27(b) specifies that the relatives of a deceased person or a missing person can also be regarded as aggrieved persons for the purposes of the Act. The Act further specifies that 'relatives' of a missing or a deceased person are the spouse, children, parents, brothers or sisters, parents – in law, brothers / sisters – in – law, sons / daughters – in – law.

Even though the Act has removed express references to the application of IHL or IHRL, it is undeniable that reparations are premised on aforementioned legal regimes. Especially, from an IHL perspective, the above assertion could be supported with reference to CIHL Rules 149 and 150. In describing who is regarded as an 'aggrieved person', Section 27(a)(i) states that *inter alia* it is a person who has suffered loss or damage to person or property 'in the course of, consequent to, or in connection with the armed conflict which took place in the Northern and Eastern Provinces or its *aftermath*' (emphasis added). This not only warrants the application of IHL but also responds in the affirmative to the question whether IHL continues to apply in post-war Sri Lanka.

2.4.2 Case Law

Case law on disappearances in Sri Lanka are few and far between despite the number of recorded disappearances being at an alarming rate. Perhaps the lacunae in jurisprudence is aggravated by the lack of a specific mechanism within which such cases ought to have been filed. This lacuna was only address through the establishment of the Office on Missing Persons and the Office for Reparations and the enactment of the ICPPED Act. Due to the novelty of these enactments, all enacted in and after 2016, it is yet to be seen what outcomes these enactments would introduce to the case law of Sri Lanka concerning missing persons. In the absence of a specific mechanism, there are two paths on which one may attempt to ascertain the jurisprudence pertaining to Sri Lanka. The first relates to the writ of *habeas corpus* which has in certain circumstances been drawn on to demand redress for missing persons. The second relates to measures that are sought outside the territorial boundaries of Sri Lanka where individuals aggrieved by the lack of response or undue delays inherent to the legal matrix of Sri Lanka, have sought redress from Treaty Bodies of the United Nations through individual communications.

Burden of proof that the petitioner ought to satisfy in cases of disappearances is one of the practical impediments barring the filing of court cases concerning missing persons. Chaos prevalent in armed conflicts or political instabilities often create a climate

60 Ibid.

61 Office for Reparations Act, Section 11(1)(a).

that prevents a potential petitioner from knowing the exact details pertaining to disappearances. Lack of knowledge concerning the circumstances surrounding disappearances becomes both the rationale justifying rights such as the right to truth concerning the fate of the missing, as well as the cause that hinders the process of realizing those rights.

Even if a person is claimed to have disappeared subsequent to having been taken into custody or having surrendered, the burden of proof ought to be satisfied *beyond a reasonable doubt*. This standard of proof which is common to criminal cases has been adopted in relation to writs of *habeas corpus* as well. For instance, this approach was adopted by the Sri Lanka's Court of Appeal (CA) in *Kodippillige Seetha v. Saravanathan and Others*.⁶² This two-bench judgment concerned the alleged illegal arrest and detention of the petitioner's husband. The CA held that the burden of proof must be imposed 'fairly and squarely' on the petitioner,⁶³ and that 'an ordinary citizen making a serious allegation concerning illegal custody which would amount to a crime must prove the allegation beyond reasonable doubt'.⁶⁴ Given that circumstances surrounding illegal custody are often shrouded with secrecy it is questionable why the CA adopted the higher burden of proof without resorting to adopt the standard of balance of probabilities which would have been fair and just by petitioners affected by illegal arrests and detentions. Given the allegations against the State that many individuals arrested and detained especially in connection with the armed conflict had subsequently been listed as missing persons, altering the standard of burden of proof could have facilitated families affected by disappearances to more easily seek redress from law. In explaining how burden of proof is applied to cases of *habeas corpus*, Dheeraratne J. states in *Kodippillige Seetha* that the burden of proof would rest with the respondents 'had the [...] respondents admitted that the corpus was in fact taken into their custody'.⁶⁵ It is unrealistic to expect that respondents who face allegations of this nature would admit that a person who is now missing was previously in their custody. The threshold is thus too high to be possibly met by family members of missing persons who wish to file an application to obtain a writ of *habeas corpus* concerning their missing loved one. Moreover, the writ is only issued in circumstances where the detention is proven to be unlawful.⁶⁶ This seems to insinuate, rather erroneously that if a person disappears subsequent to being detained lawfully, this remedy would not be made available to family members.

A salient Sri Lankan case in which disappearances was directly dealt with was *Mahinda Rajapaksa v. Kudahetti and Others*.⁶⁷ The case was about the petitioner's attempt to take with him documents related to disappearances to Geneva with a view to submitting the same to the 31st session of the UNWGEID. The allegation was that the respondent prevented the petitioner from taking the said documents on the prem-

62 [1986] 2 Sri LR 228.

63 Ibid., 228.

64 Ibid.

65 Ibid., 232.

66 *Juwants v. Lathiff, Police Inspector, Special Task Force, and Others* [1988] 2 Sri LR 185

67 [1992] 2 Sri LR 223.

ise that they were 'fabricated documents which were likely to be prejudicial to the interests of national security and which were likely to promote feelings of hatred or contempt to the Government [...]'.⁶⁸ The case refers to eleven bundles of paper retrieved from the petitioner's bag which he had declared as containing 'photographs and particulars of the missing persons'.⁶⁹ Due to the technical nature of fundamental rights jurisprudence under which this case was filed, no detailed analysis pertaining to missing persons and the need to ascertain their whereabouts occurred. The entire case focused on whether the petitioner had been invited to address the UNWGEID and whether him having to leave behind the documents had resulted in the infringement of freedom of speech. It was finally determined that the rights of the petitioner had not been violated. This case, though factually connected to missing persons, does not contribute to the legal jurisprudence pertaining to the same as the reasoning and the decision of the case have only been considered in relation to the fundamental rights jurisprudence of Sri Lanka.

In 1994, the Court of Appeal of Sri Lanka considered another landmark case entitled *Leeda Violet and Others v. Vidanapathirana, OIC, Police Station Dickwella and Others*.⁷⁰ This case concerned the denial of the arrest and custody of an individual which compelled the court to discuss disappearances. In response to a jurisdictional challenge, the then Justice SN Silva stated *obiter* that Article 141 of the Constitution vests the Court of Appeal with the power to issue writs of *habeas corpus* 'intended to safeguard the liberty of the citizen'⁷¹ and further contended that

'[t]he rule of law, freedom and the safety of the subject would be completely nullified, if any person in authority can cause the disappearance of an individual who has been taken into custody and blandly deny [to the Court of Appeal] having jurisdiction to safeguard the liberty of the subject, any knowledge of the whereabouts of such individual'.⁷²

It was further stated herein that several hundreds of applications for writs of *habeas corpus* had been filed in the Court of Appeal in respect of persons whose arrest and custody were denied by respondents who were personnel of Sri Lanka Police or the armed forces.⁷³ It was held that there was no basis to arrest or keep the person in custody and that the denial of arrest and detention was not acceptable. As a redress measure, the court imposed exemplary costs in respect of each of the disappeared individuals. Even though the case directly dealt with disappearances, the final outcome of the case cannot be regarded to be adequately responding to the gravity of the offence. The case does not refer to the applicability of IHL. Nor is its final outcome compatible with the gravity of the offence. Incidentally, none of these cases refer to the applicability of IHL to disappearances irrespective of whether such disappearanc-

68 Ibid., 227.

69 Ibid., 228.

70 [1994] 3 Sri LR 377.

71 Ibid., 377.

72 Ibid., 378.

73 Ibid., 381.

es had been caused by consequences associated with the armed conflict or through denied arrests and detentions that had created a conducive environment for impunity.

On 25 October 1999, Mr. Jegatheeswara Sarma, a citizen of Sri Lanka communicated to the Human Rights Committee of the United Nations that his son was removed from their residence and was handed over to the members of the military on the alleged suspicion of him being a member of the LTTE.⁷⁴ His whereabouts had then become unknown thereby leading to his parents to form the belief that he is a missing person. Mr. Sarma states that he and other arrested individuals were paraded before his son whose face was covered by a hood by then, and, that he informed the ICRC and several human rights groups of these incidents. This arrest and detention have later been denied.⁷⁵ Subsequently, Mr. Sarma has been informed that his son was dead.⁷⁶ The State raised a preliminary objection in this matter stating that Mr. Sarma has not exhausted domestic remedies and that he ought to have requested the issuance of a writ of *habeas corpus* 'which gives the possibility for the Court to force the detaining authority to present the alleged victim before it'.⁷⁷ However, in the light of subsequent case *Rosalin v. Sundaralingam and Others* where it was stated that a request for a writ of *habeas corpus* cannot be made in circumstances when there is no corpus in existence or when the corpus has ceased to exist,⁷⁸ it is unlikely that the Court of Appeal would have granted the said writ in the *Sarma* matter.

Subsequent to carrying out a criminal investigation, Sri Lanka informed the HRC, that a Corporal of the Sri Lankan Army and two other persons had 'involuntarily removed' Mr. Sarma's son.⁷⁹ The Committee concluded by stating that:

the State party is under an obligation to provide the author and his family with an effective remedy, including a thorough and effective investigation into the disappearance and fate of the [Mr. Sarma's] son, his immediate release if he is still alive, adequate information resulting from its investigation, and adequate compensation for the violations suffered by the author's son, [Mr. Sarma] and his family. The Committee considers that the State party is also under an obligation to expedite the current criminal proceedings and ensure the prompt trial of all persons responsible for the abduction of the author's son under section 356 of the Sri Lankan Penal Code and to bring to justice any other person who has been implicated in the disappearance.

74 *Mr. S. Jegatheeswara Sarma v. Sri Lanka*, Communication No. 950/2000, UN Doc. CCPR/C/78/D/950/2000 (2003).

75 *Ibid.*, para. 2.5.

76 *Ibid.*, para. 2.3.

77 *Ibid.*, para. 4.2.

78 [2005] 1 Sri LR 260, 262.

79 *Jegatheeswara* (Note 74) para. 7.4.

In *Machchavallavan v. OIC Army Camp, Plantain Point, Trincomalee and Others*⁸⁰ the petitioner sought two writs of *habeas corpus* from the CA in respect of his two sons who had allegedly disappeared after a cordon and search by Army officers.⁸¹ As this case concerns disappearances that have occurred directly in connection with the armed conflict of Sri Lanka, attention ought to have been paid to IHL. However, the analysis of the case is confined to the *habeas corpus* jurisdiction of Sri Lanka. The case makes no reference to IHL and armed conflict or the contemporary socio-political realities. Focus of the case purely rests on whether the application ought to have been one of *writ of habeas corpus* or whether the CA was under obligation to have referred the matter to the Supreme Court as a matter of fundamental rights. This is a common lacunae that can be observed in cases concerning *habeas corpus* irrespective of whether the disappearance has been reported in connection with IHL. Perhaps, it is a result of the Sri Lankan legal system not having recognised specific provisions pertaining to disappearances and missing persons up until recently. Therefore, Sri Lanka is yet to produce case laws concerning missing persons which make direct references to the applicability of IHL and the ICPPED. This is not only a lacuna of the legislative duty to take adequate cognizance of the applicability of IHL when drafting related laws, but is also a lacunae on the part of the Sri Lankan judiciary which has played a passive role thereby abstaining from purposively interpreting existing laws of Sri Lanka to give effect to IHL's humanitarian benefits.

2.4.2 Commission Reports, the OISL Report and the CTF Report

Over the years, Sri Lanka has experimented with truth-ascertainment and discovery of circumstances surrounding disappearances. In this exercise, various Commissions of Inquiry (CoI) have played a determinant role. While several CoIs were mandated during the armed conflict, for this chapter's purposes of ascertaining the continuing significance of IHL in Sri Lanka, the analysis has been restricted to CoIs that were commissioned and mandated after the end of the armed conflict in 2009. The first of such commissions was named the Commission of Inquiry on Lessons Learnt and Reconciliation (LLRC). The report of the said commission was issued in November 2011. Chapter 4 of the report was entirely dedicated to issues arising in connection with IHL.

The LLRC Report also consists of a list of persons who have allegedly surrendered to the armed forces in May 2009 and are then alleged to have disappeared.⁸² However, the list has not been released to the Public even though the rest of the Report is available in the public domain. As per the representations that were made to the Commission, the disappearances were results of abductions, unlawful arrests, arbitrary detentions, and involuntary disappearances.⁸³ It was also noted that a substantial

80 [2005] 1 Sri LR 341.

81 Ibid.

82 Report of the Commission of Inquiry on Lessons Learnt and Reconciliation (November 2011) (LLRC Report), p. 114.

83 Ibid., p. 157.

amount of disappearances were reported as having been committed by the LTTE, especially in Batticaloa, Jaffna, and Muttur.⁸⁴ Moreover, the need to adopt specific measures to redress families living without certainty concerning their missing loved ones was highlighted during the hearings of the Commission.⁸⁵ It has further been noted that it is a prerequisite for achieving reconciliation within a post-war context.⁸⁶ Those who made representations further noted that the ambiguity pertaining to the loss remains as there is no conclusive proof to determine whether the missing persons are dead or alive.⁸⁷ The LLRC Report also noted that 'Mothers and Friends of Missing Persons in Batticaloa' requested the setting up of a mechanism exclusively dedicated to addressing the issues concerning missing persons.⁸⁸ The recommendations of the Commission are focused on the establishment of an entity dedicated to recovering information pertaining to missing persons mainly with the involvement of law enforcement authorities.⁸⁹ There is limited reference to the necessity of continuing application of IHL despite the report stating that cooperation is necessary with agencies such as the ICRC 'to trace the whereabouts of the missing persons and ensure reunification with the families'.⁹⁰ While the report does contain an entire chapter on IHL, it does not specifically deal with IHL's application to missing persons, their families or to the obligations that a State bears in respect of individuals who are arrested and / or detained. If arrests and detentions are said to have led to 'disappearances', and if surrendees, as have been stated in the LLRC Report, have become 'missing persons' it cannot be argued that IHL's application has ended at the close of the war. Even though the application of IHL to missing persons has not been expressly dealt with in the report, from an implementation perspective, it could be contended that the report's references to IHL do indicate the potentials and avenues for implementation of international law at the domestic level. Especially given the legal significance attributable to reports of this nature, subsequently courts and authorities may rely on the content of such reports to aid an interpretation premised on IHL. Thus, these analyses are significant for the advancement of IHL's application and implementation in Sri Lanka.

The LLRC Report also states that not only should the State adopt 'definitive action against alleged cases of disappearances, but that the State should also adopt 'preventive measures [which] would have a significant impact on the reconciliation process.'⁹¹ It is therefore necessary to assess whether IHL's application is restricted to inquiring into the whereabouts of missing persons or whether it is capable of playing a more expansive role that would also determine the scope, extent, and success of reconciliation mechanisms. Government Agent for Vavunia and the Probation and Child Care Commissioner (Northern Province) had established a Family Tracing and Reunification (FTR) Unit for unaccompanied and separated children in response to

84 Ibid., p. 160.

85 Ibid., p. 157.

86 Ibid., p. 157. See also, Parliamentary Debates, 11 August 2016, col. 1328.

87 LLRC Report, p. 158 - 159.

88 Ibid., p. 162.

89 Ibid., p. 163 onwards.

90 Ibid., p. 164.

91 Ibid., p. 157 and also p. 339.

complaints concerning missing children filed by parents alleging that the LTTE had abducted children to be conscripted into the armed group.⁹² This initiative was commended by the Commission. As per the FTR Unit, by the time it made its representation to the commission, it had received 2,564 tracing applications out of which 676 were concerning missing children.⁹³

The LLRC Report further highlighted the need to consider the issuance of death certificates and monetary compensation as matters of priority where necessary.⁹⁴ The legal provisions that have enabled next of kin to apply for Certificates of Absence concerning missing persons was commended by the Commission.⁹⁵ However, the representations that were made to the Commission revealed that the inability to obtain Death Certificates, if so wished by the next of kin, concerning missing persons has posed impediments to the continuity of ordinary lifestyles as well as obstructing the next of kin from availing themselves of compensation and other rehabilitation facilities offered.⁹⁶ The LLRC Commission has also emphasised that the relatives of missing persons are entitled to know where their loved ones are, and that they possess the right to know the truth regarding the fate that befell the loved one. This has been identified as a factor leading to closure.⁹⁷

The Report of the United Nations Secretary General's Panel of Experts on Accountability in Sri Lanka, more commonly known as the 'Darusman Report', was issued on 31 March 2011. The panel was mandated to advise the Secretary General regarding the process that should be adopted in Sri Lanka to create accountability 'having regard to the international humanitarian, and human rights law during the final stages of the armed conflict in Sri Lanka'.⁹⁸ Even though the LLRC Report had not been released by then, the Darusman Commission expressed concern regarding the resourcefulness of such commissions, *inter alia*, to cater to the needs of missing persons, and regarding the possibility of such CoIs to create the political will to effectively implement the recommendations of such commissions.⁹⁹ In hindsight, this apprehension has proven true. In its recommendations, the Panel of Experts requested that the government provide 'death certificates for the dead and missing, expeditiously and respectfully, without charge, when requested by family members, without compromising the right to further investigation and civil claims'.¹⁰⁰ Exposing another facet of disappearances, the Darusman Report expounds that within camps of internally displaced persons (IDPs) where unrelated individuals are compelled to live in the same tent, women, whose husbands were missing, became vulnerable to abuse.¹⁰¹

92 Ibid., p. 178 – 179.

93 Ibid., p. 179.

94 Ibid., p. 164.

95 Ibid., p. 164.

96 Ibid., p. 268.

97 Ibid., p. 339.

98 Report of the Secretary General's Panel of Experts on Accountability in Sri Lanka (Note 34) p. i.

99 Ibid., p. vi.

100 Ibid., p. vii.

101 Ibid., p. 45.

Subsequent to the LLRC, the next major Commission that inquired into missing persons was the Paranagama Commission. The Presidential Commission to Investigate into Complaints Regarding Missing Persons - the 'Paranagama Commission', was established by former President Mahinda Rajapaksa on 15 August 2013.¹⁰² Under its first mandate,¹⁰³ the Commission was expected to inquire into missing persons and associated circumstances that have occurred between 10 June 1990 and 19 May 2009.¹⁰⁴ The first mandate required the Paranagama Commission to receive complaints and inquire into abductions and disappearances that have occurred in the North and the East within the aforementioned temporal scope. The Paranagama Commission was required by the President to report on seven issues¹⁰⁵ out of which ascertaining the whereabouts of missing persons, measures that should be adopted to prevent recurrence, and relief to be granted to family members were directly linked with IHL.

A report has been issued to the public concerning the Commission's second mandate to address the facts and circumstances surrounding civilian loss of life and the question of the responsibility of any individual, group or institution for violations of international law during the conflict that ended in May 2009'. Neither has a final report ever been released and nor has a report been released on its first mandate. There are minimal references in the report on the second mandate to missing persons and disappearances. However, the report takes cognizance of the fact that an inquiry may establish that disappearances have occurred in a widespread or systematic manner.¹⁰⁶

102 Report on the Second Mandate of the Presidential Commission of Inquiry Into Complaints of Abductions and Disappearances (Note 20) p. xii.

103 Its mandate was expanded and a second mandate was thereby designed to assess facts and circumstances surrounding the loss of civilian lives, and to ascertain responses to the question of responsibility.

104 Report on the Second Mandate of the Presidential Commission of Inquiry Into Complaints of Abductions and Disappearances (Note 20) p. xviii.

105 Gazette Extraordinaire of the Democratic Socialist Republic of Sri Lanka No. 1823/42 (15 August 2013). The Commission was required to report on:

Whether any persons resident in the Northern and Eastern Provinces during the period June 10, 1990 to May 19, 2009 have been abducted or have disappeared from their places of residence;

Evidence in proof of the fact that such persons have been abducted or have disappeared;

Who are those so abducted or have disappeared and their present whereabouts;

Cogent factors or evidence that would help form an idea about the person or persons responsible for the said abduction or disappearances;

Legal action that could be instituted against the person or persons who are found to be responsible;

Measures that should be taken to ensure that there will be no recurrence of such acts in the future;

If there is any reasonable relief to be granted as an obligation on the part of the Government to the parents, spouses and dependants of those alleged to have been so abducted or have disappeared.

106 Report on the Second Mandate of the Presidential Commission of Inquiry Into Complaints of Abductions and Disappearances (Note 20) p. 105.

Systematic and widespread disappearances, if proven to have been committed, are regarded by the Commission as crimes against humanity.¹⁰⁷ It is further noted that in cases where disappeared individuals are subsequently found to have been mistreated and / or killed, such practices amount to violations of Article 3 common to the Geneva Conventions.¹⁰⁸ The report also inquires into 'whether the LTTE as a non-state actor was subject to international humanitarian law in the conduct of its military operations' and establishes that the LTTE could also be held liable for similar violations of IHL.¹⁰⁹

In 2015, OHCHR issued its report entitled Report of the OHCHR Investigation in Sri Lanka (OISL Report). This report was a result of OHCHR's comprehensive investigation into alleged serious violations and abuses of human rights and related crimes.¹¹⁰ However, the lack of an enabling legislation then to domestically implement the International Convention for the Protection of All Persons from Enforced Disappearances was highlighted by the OISL Report.¹¹¹ It was further pointed out that 'it is crucial that this legislation be enacted by the time the Office of Missing Persons becomes functional'.¹¹² The legal framework pertaining to both of these have presently been laid out by the GoSL and it remains to be seen how the laws are utilised by the people for invoking their redresses.

The OISL Report states that:

the Government has a duty to make every effort to trace the whereabouts of [disappeared / missing] persons, to inform the

107 Ibid., p. 105.

108 Ibid., p. 105. Para. 435 of the report states as follows:

[T]he Commission's first Mandate overlaps with its Second Mandate to the extent that complaints of disappearances during the final phase of the conflict, in addition to invoking international human rights law, may amount to allegations of the crime against humanity of forced disappearances. In this respect, the Commission is concerned to establish whether a discernible pattern of widespread or systematic conduct emerges. Furthermore, where there is evidence that persons who went missing were subsequently mistreated and / or killed, this may constitute an allegation of a violation of Common Article 3 to the Geneva Conventions, namely murder, cruel treatment, torture or the carrying out of executions without prior judgment, as war crimes.

109 Ibid., p. xii. See also p. 65 – 66. Paragraphs 302 – 304 state as follows:

The LTTE, as non-state actors engaging in armed conflict, are liable for any transgressions of IHL. Three theories support this conclusion. The first holds that non-state actors are bound by IHL 'by reason of their being active on the territory of a Contracting Party' [...] Under the second theory, armed groups are bound by rules of IHL when they exercise control over territory sufficient to enable them to mount sustained military operations. [...] The third theory is that international humanitarian treaty and customary law create rights and obligations for individuals, including non-state actors. Thus, individuals are bound by these rules directly under international law and may be held individually criminally responsible for violations amounting to war crimes.

110 OISL Report (Note 12) para. 13.

111 Ibid., para. 15.

112 Ibid.

families of any progress in locating the missing, to ensure reunification with their families if appropriate, or to hand over the body of the person, if confirmed as deceased.¹¹³

The content of the OISL Report read in conjunction with the provisions of the OMP Act indicates that the government of Sri Lanka (GoSL) has accepted the continuing nature of IHL obligations. The OISL Report notes that families which were looking for their missing loved ones were being sent from place to place without being given any information which 'made the search psychologically as well as financially onerous'.¹¹⁴

OISL report notes that when questioned regarding missing persons, the Sri Lanka army claimed to have acted lawfully at all times and that the army had declared that 'many of those missing either died during confrontation with the military or fled the country illegally and were living in western countries'.¹¹⁵ In this respect, it seems necessary to highlight that humanitarian law's purposes are different from those of international criminal law or that of any *ad hoc* tribunal which is set to ascertain criminal responsibility. IHL's purpose is primarily humanitarian. Thus IHL's interest in alleviating human suffering precedes its potential of functioning as a tool of retributive justice. While IHL can be used to prosecute and penalise individuals responsible for committing violations, the process would be framed within a humanitarian mandate as opposed to a retributive mandate that appears to have gained momentum in international criminal law. Irrespective of who has violated the legal principles under IHL, at the end of an armed conflict which has occurred between the State armed forces and non-State actors, the State bears a responsibility, *inter alia*, to search for missing persons, ascertain their whereabouts and to reunify families. If some of the missing persons are deceased as a result of the armed conflict, the State bears the duty to ascertain who died in such circumstances, hand over human remains to family members and aid the families with their healing process leading to closure. It is impossible to merely make unsubstantiated claims concerning the whereabouts of missing persons. Quoting a written submission, CTF has taken cognizance of the reality that the humanitarian goal of identification of human remains takes a back seat within processes of which the primary goal is criminal prosecution.¹¹⁶ It states:

This type of investigation [a complicated forensic investigative process] is often a slow and very lengthy process; although it may also strive to provide victim identification for those of the missing who are deceased and return their mortal remains to their families, the primary goal of the investigators is usually criminal

113 Ibid., para. 391.

114 Ibid., para. 448.

115 Ibid., para. 438.

116 Final Report of the Consultation Task Force on Reconciliation Mechanisms (Note 31) P. 397.

prosecution. This, and many other factors, may result in the delay of the humanitarian goal of identification.¹¹⁷

Thus, it is necessary to grant primacy to tracing missing persons. If remains are found of a person deemed to have been missing, a forensic analysis could be carried out to ascertain the cause of death and circumstances surrounding death. Such approaches could also lead to the finding of perpetrators, if any. Furthermore, this approach could also aid in supporting or disproving the claims made by different entities concerning the circumstances in which the disappearances occurred.

The CTF consisted of a panel of eleven members drawn from civil society organisations appointed to 'seek the views and comments of the public on the proposed mechanisms for transitional justice and reconciliation [...]'.¹¹⁸ This panel was appointed in late January 2016. A final and comprehensive report of the CTF has been issued to the public. The CTF report highlights that an 'overwhelming majority' of the participants at public meetings were from the families of the disappeared.¹¹⁹ It has been noted that '[t]his reveals their fervent hope for truth and closure and also for confirmation of a deep and abiding belief that a loved one is still alive'.¹²⁰ The CTF notes that the above sentiment has, at present, also led to the refusal of reparations.¹²¹ This report contains a separate chapter on the OMP and makes references to the necessity to urgently redress requirements of family members of missing persons. This report has amply highlighted the necessity of redressing issues concerning the missing which can also have an impact on reconciliation efforts of Sri Lanka.

The reports that have been analysed in this segment of the chapter lead to some interesting conclusions. First is that IHL's continued validity and applicability in Sri Lanka in relation to missing persons has been recognized, if not expressly, by implication in all such reports. This recognition has been used to support IHL's premise that the family members of a missing person are entitled to know the fate of the loved one as well as the circumstances in which such person disappeared. Further, the reports establish the rights of the family members to have access to the remains of deceased loved ones if discovered thereby enabling them to conduct a proper burial that will guarantee their entitlement to truth as well as closure. The crux of these arguments lead to the conclusion that the body of literature that has been produced in Sri Lanka through various reports indicate the continued relevance of IHL in Sri Lanka to missing persons as well as their family members.

2.5 Conclusion

Despite the end of the armed conflict in 2009, the consequences that have arisen in relation to the armed conflict continue to remain and affect the entirety of Sri Lanka which is currently grappling with transitional processes. One of the primary goals of

117 Ibid.

118 Ibid., at p. VII.

119 Ibid., p. 4.

120 Ibid., p. 4.

121 Ibid., p. 44.

such a transitional process is to redress past violations and to take cognizance of the mammoth impact that some such violations have effected on the contemporary society. Undoubtedly, the impact of missing persons continues to remain unless and until the right to know of the families is addressed and effective remedies are provided. As per the general body of IHL that has been analysed in detail in this chapter, effective remedies pertaining to missing persons include searching for missing persons, ascertaining the truth pertaining to the circumstances in which a person's whereabouts became unknown, ascertaining whether the missing person is alive or dead, and if dead, searching for remains and handing them over to the family members for proper burial. All of these aspects are covered by IHL and this chapter propounds that IHL's application is not restricted to the exact temporal scope of the armed conflict as there remains continuing impacts that can only be fully redressed through IHL's effective application. Hence, it is contended that IHL can and should apply in relation to issues pertaining to missing persons in Sri Lanka in the post-war context.
