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**The Curse of Impunity
Part I
Bindunuwewa, the Thin End of the Wedge of Impunity**

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The Supreme Court decision on 27th May to overturn convictions in the Bindunuwewa massacre case should surprise no one. Impunity has been the rule in Sri Lanka, not the exception. Thousands of atrocities – murders, maimings, torture, rape, “disappearances” lie buried under heaps of bureaucratic red tape. Political manipulation, corruption and official incompetence ensure that they will remain buried as long as there is no organised and sustained public demand for those in command to be called to account.

The lack of justice is not for want of information. In many cases the names of perpetrators and details of their involvement and their positions in the chain of command are known, and well documented. But the courts in Sri Lanka – and other administrative structures – have instinctively sided with and protected the political and security elite. To occasionally offer up a subordinate implicated in violence as a sacrificial lamb will do little to restore public faith in Sri Lanka’s security institutions or in the justice system.

In the case of Bindunuwewa and others discussed in this report, there is an urgent need to reexamine the command responsibility of senior officers with an eye to prosecuting the guilty, and reforming security institutions. Without an end to high level impunity, there is no deterrent to organised violence, and no possibility of a lasting peace.

To bolster this deterrent effect, the people of Sri Lanka should demand ratification of the Rome Statute of the International Criminal Court, signalling Sri Lanka’s recognition of the

international jurisdiction of the court to address future war crimes, acts of genocide and crimes against humanity.

Those who want no check on impunity have pointed to the threat of LTTE terror - and (more recently and dubiously) its air and naval power - to discourage discussion of accountability. But impunity in fact has been the primary vehicle of Sri Lanka's near political, military and economic bankruptcy, and has crippled its ability to argue its priorities before the international community.

1. Background

Impunity has for decades progressively crippled the Sri Lankan state and is central to the current crisis. Belated attempts to deal with the past such as a commission to look into the July 1983 mayhem in the South against the Tamils yielded few results. Major massacres and disappearances in the North-East or in the South were not addressed comprehensively. President Chandrika Kumaratunge, who first came to power in 1994 with a call to break with the past, raised many issues of past crimes during the election, and received a strong mandate from the people. But when her peace initiatives became bogged down and war resumed, she fell back on the state machinery to prosecute the war and end up glossing over violations by the State.

Half hearted attempts to tackle violations during the war had no serious impact on the character of the State. Current peace efforts were initiated in a context of steadfast refusal by those in power to face up to this fact. Would-be peacemakers further discouraged efforts to call parties to account for human rights abuses for fear of jeopardising the negotiation process. The dynamics of the peace process set up an implied trade off between the crimes of the State (which had been horrific, but decreased significantly after the cease-fire) and the crimes of the LTTE (which continued unabated and increased, even in government controlled areas with the new freedoms the LTTE gained under the cease-fire agreement). In effect, the peace process left the LTTE free to kill at will. Its victims: political and military opponents, low ranking intelligence personnel and ordinary civilians.

Public faith in the rule of law, already weak, declined further, spawning political extremism on both sides. The handful of convictions by the courts of security personnel implicated in grave crimes against Tamil civilians seemed to be anomalies. The State's lack of seriousness in pursuing the tremendous backlog of egregious cases of abuse, and its complicity with the LTTE's violent actions, put further political pressure on the higher courts to make acquittals – such as we have witnessed in the Supreme Court's overturning of convictions in the Bindunuwewa case in May. These only exacerbated the crisis of credibility for the rule of law.

After the Karuna split in March 2004, the compromise with lawlessness became unmanageable. Dealing with Karuna the lawful, democratic way ran against the grain of the peace process. The peace brokers wanted Karuna removed, and were willing to ignore the human cost. The Government tried to negotiate the contradictory pressures, again covertly and dishonourably. The result is an undeclared war between the intelligence agencies of the Government and the LTTE. In the past few weeks Colombo has witnessed a frequency of killing of Tamil youths, unparalleled even in wartime except briefly in 1995. Journalist Sivaram was the first high-profile civilian casualty in Colombo in this new undeclared war.

Impunity has been a lifelong reality of Sivaram's generation of Tamils, who reached maturity in an atmosphere where the State and the country's leading institutions operated with unrepentant lawlessness. Violence and discrimination were rampant. In May 1983 Tamil students of the University of Peradeniya (Ceylon), the country's premier university, were subjected to a violent pogrom by a section of the Sinhalese students close to the ruling UNP; the attitude of the university authorities suggested complicity (see Appendix I). The incident was a forerunner to the devastating anti-Tamil violence that erupted two months later in July. Like Sivaram, many Tamil students of his time felt they could not return to the University in the wake of the violence. They joined militant groups to fight against the impunity of the State. But in time they themselves became mired in their own culture of impunity.

The current impasse is largely an outcome of the State's continued reliance on impunity to retain power and prop up flawed institutions, and its refusal to face up to its historical legacy. Only a minuscule fraction of members of the security forces implicated in violations have ever been charged in court, and in order to protect those higher up and others still higher, only those fairly junior have been tried. Even as in the Krishanthi Kumarasamy rape and murder case when the High Court delivered the harshest possible sentence (death), the accused have protested that they were used as fall guys, and the conviction process left everyone who desired justice feeling uncomfortable. (See our Special Report No.12) In contriving to shield those higher up, the cases prepared by the Attorney General's Department were weak with several flaws relating to legal principles involved and their application. Convictions were almost bound to be thrown out on appeal – if defendants had the resources and political support to do so, bringing further ridicule on the system.

2. The Bindunuwewa Fiasco

The latest fiasco concerns the Supreme Court's overturning of convictions in the Bindunuwewa massacre case. The Trial-at-Bar comprising High Court Judges, Sarath Ambepitya, Eric Basanayake and Upali Abeyaratne delivered death sentences on five of the accused in July 2003. Two of the defendants were police Inspector Senaka Jayampathy Karunasena and Sub-Inspector Tyrone Roger Ratnayake. By 27th May, 2005 the five-member bench of the Supreme Court comprising Justices T.B. Weerasuriya, Nihal Jayasinghe, N.K. Udalagama, N.E. Dissanayake and Raja Fernando had acquitted all five on appeal. The bench led by T.B. Weerasuriya ruled that the Attorney General failed to prove the charges without reasonable doubt.

We recall some salient features of the case:

Inmates of the Bindunuwewa Rehabilitation Centre, all young Tamils, were attacked on the morning of 25th October 2000 by a mob of an estimated 2000 comprising villagers and outside elements ferried in, while the Police stood by, abetted and participated in the outrage. 27 youths from the Centre were killed and 14 injured. The youths were either LTTE surrendees or persons picked up on suspicion, none of whom had been charged with any offence.

Almost immediately, persons at the top began making statements that were inexcusably misleading and calculated to shift the blame onto the victims. B.M. Premaratne, SSP of the region told the media that the Tamil youths had broken into the store of the Centre, armed themselves with implements for attack and provoked the villagers by displaying their genitals and throwing stones. The Police had not fired at the mob, he said, because it would have

caused more damage. The Government Spokesman Ariya Rubasinghe claimed in the same vein that the LTTE had contrived the violence to discredit the Government by planting Anton (Anthony) James (an LTTE surrendee who was killed) who instigated the violence. The President said in her speech on 31st October that there had been provocation on both sides. (See UTHR publication *Sri Lanka: The Arrogance of Power...*)

3. Assessing Culpability

The Human Rights Commission (HRC), which was the first to bring out a widely commended preliminary report, dismissed every one of the claims above as completely fictitious or utterly misleading. The store lock was intact, no display of genitals then or at any time previously, victims rather cowering in fear and killed mercilessly or burnt alive, no substance in accusations against James.

The victims *had* protested the previous night to the Officer-in-Charge, Capt. Y.K. Abeyratne, wanting, for example, some commitment on when they would be allowed to leave. This led to some property damage and Lieutenant Abeyratne, the second in command, was beaten and injured after a policeman at the post fired into the air (Commission Report). The Police, under ASP Dayaratne and HQI Seneviratne, and the Army (at the behest of the Police) arrived. The conflict was settled that night. Lt. Abeyratne's wound was dressed by the inmates. There was no provocation on the part of the victims at any time that remotely justified the murder visited on them. Everything the detainees did in the morning when the crowds had gathered at the Centre and stoned them can be readily seen as defensive. The Police had in fact fired that morning when the crowd attacked the inmates, but at the victims - the inmates.

Most importantly, the HRC said, "*All the information we have been able to gather so far does not suggest that what occurred on the 25th was an unpremeditated eruption of mob violence caused by the provocation of the inmates. It is more consistent with a premeditated and planned attack.*"

From this point onwards, however, the aspect of premeditation was systematically discredited by other officials of the State. The Presidential Commission comprising Appeal Court Justice P.H.K. Kulatilaka said, contradicting the HRC, "*I have also placed on the record that this attack was not master-minded or planned by any external forces and that it was not a pre-planned one.*" Alan Keenan observed in his study, '*Bindunuwewa: Justice Undone*' (Law and Society Trust, *State of Human Rights 2004*): "*Such a blanket statement, without any other evidence in the report that such a possibility had been seriously investigated, is clearly not adequate.*"

This last point was glaring in view of a number of early indications of premeditation that were not followed up. *Silumina*, the Sunday paper of the Government owned Lake House, which obtained access to the area, published in banner headlines on 29th October 2000, under the name of its Chief Editor Sujiwa Dissanayake, that the Police are answerable for the Bindunuwewa massacre. *Amuthu*, another Lake House publication, said the same thing in an article written by its editor S. Manoranjan. Moreover, vehicles, which brought outside agents were parked before the Police for a long time, but there was subsequently no reported attempt to trace their owners. More tellingly, a number of posters, which came up overnight with inflammatory slogans such as '*Feed the flesh of Tiger cubs to our dogs*', were written on the back of previous year's presidential election posters with Kumaratunge's picture. One such poster obtained from the scene was handed over to the President by a Lake House journalist.

In its broad outlines, the legal process took its cue from the Kulatilaka Commission report, rather than the HRC. Yet even the Commission, while rejecting conspiracy and foreknowledge, went so far as to say that ASP Dayaratne, HQI Jayantha Seneviratne, Inspector Karunasena, Sub-Inspectors Walpola, Ratnayake and Abeynarayana were around whilst crimes were committed inside the Rehabilitation Centre, and that they should be the subject of a disciplinary inquiry for their attitude and dereliction of duty. The prosecution, for reasons inadequately explained, as Keenan points out, chose to turn the superior officers Dayaratne and Seneviratne into crown witnesses against their juniors Karunasena and Ratnayake.

Moreover, the two superior officers did nothing for about an hour at least, with 60 armed men at their disposal against a mob with no firearms, while the mob massacred, slashed and burnt buildings. Soon after it ended, the Police were seen mingling comfortably with the mob. All material evidence was destroyed or debased. The three bullets recovered from one victim disappeared after the autopsy. Weapons stacked in a heap after the attack, including bloodstained objects with flesh hanging, also disappeared.

4. Questionable Alibis & Command Responsibility

The failure to prosecute the two senior-most officers present rendered the judicial process questionable from the start. Dayaratne and Seneviratne lied to the Commission under oath that the Police under their instructions fired tear gas to disperse the mob. CID officers assisting the Commission proved that neither the riot squad nor tear gas was ordered into the area, but rather tear gas canisters were later emptied into a ditch for the record. The two officers tried to contrive an alibi for themselves, but the Commission found several gaps and contradictions in their stories as well as proven falsehoods (e.g. firing tear gas and the ASP's claim that he visited the Centre for the second time the previous night). On the morning of the attack, Capt. Y.K. Abeyratne, provenly among the most reliable of witnesses, said that he saw ASP Dayaratne at the scene making a call on his mobile phone within 10 minutes of the start of the attack. Abeyratne was on his way back after alerting the Deputy Commissioner-General, Rehabilitation, from a nearby phone (p108).

According to Inspector Karunasena, the ASP and HQI were at the Centre at 7.30 AM on the 25th and specifically testified to rushing towards the Centre with the ASP and HQI on seeing the preliminary stone throwing that preceded the attack (p121). This is, going by the Commission Report, largely supported by Sub-Inspector Walpola of Uva-Paranagama, who said he asked some protesters to talk to the ASP and HQI early on and saw ASP Dayaratne standing next to the barracks after the stone throwing had started, and before the explosion of the gas cylinder (p126). Others like Wijayapala, Divisional Secretary, Bandarawela, and Inspector Ratnayake spoke of the ASP's and HQI's presence while crimes were yet being committed and armed men were moving around. Wijayapala saw the ASP inside the Centre on an elevation 100 feet from the main gate, while three dead bodies were lying around, some bodies burning and some buildings on fire. Armed men were moving about and coming out of hostels where they searched for inmates. (p111).

The Commissioner accepted the version of Inspectors Jayaratne and Karunasena that they had informed the HQI of buses being stopped and people being mobilised for a demonstration about 7.00 AM. The HQI claimed that he was informed rather, about a traffic block. The ASP, said in contrast that the HQI had told him of crowds gathering for a demonstration at the

Centre and that he (the ASP) had requested Army support from Diyatalawa at 8.00 AM. The Army said that they were summoned only at 8.30, when they were told that the attack had started.

Both the ASP Dayaratne and HQI Seneviratne claimed that they were going for a relatively unimportant disciplinary hearing in Badulla that morning, despite these chaotic developments and prominently displayed incendiary posters having come up over the course of the night in Bandarawela. They claimed to have gone to ASP Wijepala at 8.30 to tell him to oversee Bindunuwewa while they were gone to Badulla.

Wijepala denied this, saying that Dayaratne had phoned him at 7.00 AM and said nothing about the disciplinary hearing, but at 8.30 told him in his office that Bindunuwewa was then calm and they were off to Badulla and had left by 8.35 (p153). Dayaratne and Seneviratne claimed that Inspector Jayaratne had informed them at 8.30, when they were about to leave for Badulla, that the Centre was being attacked, and was on fire, and they had gone there immediately and arrived at 9.10 AM (pp142&149). According to researchers who had worked on the matter, the 2-3 miles drive from the Police Station to the Centre does not require 15 minutes from the Police Station to the Centre.

Were in fact the ASP and HQI already at the Centre at the start of the attack, using mobile phones to communicate as available testimony renders plausible? Did ASP Wijepala agree to support an alibi for Dayaratne and Seneviratne and then find himself in deep waters when the former claimed that he had been asked to oversee Bindunuwewa?

While ASP Dayaratne and the HQI have claimed that they left the Police Station at 8.30 after being told that the Centre was on fire and took about 40 minutes to rush the 2-3 miles there in their vehicle, several more credible, or at least mutually consistent, testimonies speak otherwise: Inspector Karunasena and Sub-Inspector Walpola saw them at the Centre before the attack; and Captain Abeyratne saw the ASP at the Centre within 10 minutes of the start of the attack. The DS, Wijayapala, saw the ASP and HQI about while the attack was going on.

What were the ASP and HQI doing at the Centre, given they were doing nothing constructive to protect the detainees? Some detainees in the Kovil building, who ran towards the Police for protection when the attack started, were fired at by the Police. (On Inspector Karunasena's admission, he had ordered the firing 'to prevent the occurrence of any crime', p123.) Others who were outside were asked by the Police to go into their halls, which were thereafter burnt (p116). The survivors were largely those who did not succumb to the intensity of the initial violence and often made it to the dubious safety of the police presence.

The scenario is reminiscent of the Welikade prison massacre of July 1983. It points to the superior officers lending complicity to the attack on the Centre at the behest of a political overlord, and then preparing alibis for themselves. The incident where 7 injured victims at Bindunuwewa sought the safety of a police truck, of whom one was attacked and killed inside by members of the mob who followed them, is also uncomfortably reminiscent of Welikade. Though reportedly not in Bandarawela at that time, SSP (now DIG) B.M. Premaratne must also be called to account for his fairytale remarks blaming the victims. If there was a political hand behind it he could hardly have been in the dark. Habitually cautious security officers do not stick their neck out for something so risky and unlawful without the assurance of political cover.

In passing a death sentence on Karunasena and Ratnayake, the Trial-at-Bar judges, Keenan points out, relied implicitly on ‘command responsibility’, a principle under which a commander may be held criminally responsible, not only for his own acts but also for the acts of his subordinates. This is an important concept of international law increasingly relied upon to address crimes against humanity and war crimes, but in the case of the Bindunuwewa massacre, it was ineffectively applied.

The prosecution presented no direct evidence against the officers convicted, other than selected police photographs that showed them in the camp among other police personnel mingling comfortably with armed attackers immediately after the attack. The prosecution also failed to present clear eyewitness testimony that placed Ratnayake and Karunasena at the scene of the attack when it was taking place, although it is generally accepted that they were there. Instead it relied on ambiguous testimony from other police personnel that Karunasena and Ratnayake were seen positioned near the entrance to the camp prior to the attack. As it turned out, the time at which they were said to have been seen there was much earlier that morning.

If command responsibility was indeed an operating principle of the prosecution, why were the ASP and OIC (who were also present, for the most part at least) let off scot-free, while their juniors were charged with homicide and given death sentences? This remains immensely problematic.

The principle of command responsibility was already implicit in the prosecution’s choice of which of the 60 police officers to indict. Most were heads of units deployed at various points, ostensibly to control the crowd. Keenan pointed out at least one of the accused (against whom the charge would simply not stick) was so far away from the scene as to be out of sight of the disturbance. The Attorney General’s Department as it were went for the kill and refrained from filing lesser charges against the original 41 accused, such as unlawful assembly, thus giving the Court little choice and entailing that most of the accused were discharged. Was the system under pressure to obtain some death sentences for international opinion? The end result was to bring the entire system of justice into ridicule and raise a range of questions.

Keenan predicted a year before the event that there were good reasons to throw out the convictions on appeal – for reasons of the unsound, and unfair, application of command responsibility. Had the Supreme Court done this, it would also have given greater weight to the principle of command responsibility in Sri Lankan jurisprudence – something that is urgently needed to address our impunity problem. It chose instead a route to acquittal that was eminently questionable. It should be clear by now to all observers that the Sri Lankan ruling class is extremely nervous about command responsibility.

5. The Political Dimension

There is more to be said on the unanswered question of planning and outside involvement in the Bindunuwewa massacre. Keenan learnt from a personal interview with a ‘reliable source involved in the investigations’, that ‘it was [Uva Province Chief Minister] Weerawanni’s driver who had brought many of the posters to the Bindunuwewa area and had visited the camp surroundings a number of times during the night of the 24th-25th’. This fact would also readily explain the inciting posters on the back of the President’s pictures. In the urgency of getting poster paper for the offending slogans after closing hours, these pictures were evidently picked up from an SLFP (PA) office.

Sources in and close to the President's PA, one a senior politician in the Badulla District, confirmed to our contacts Weerawanni's complicity and that he knew of the attack beforehand, as also suggested by the role of his driver. These persons were clear that the Party was playing with fire and sent messages to the top that justice should be done. Weerawanni himself told journalist Chris Kamalendran shortly after the massacre that he "...believed that the motive of the attack was to create civil unrest in the country." He said he could "not rule out the possibility that the LTTE engineered the attack by provoking the villagers." (*Sunday Times*, 29 October, 2000)

More information on Weerawanni's pivotal role in the cover up and misdirection of public opinion came from PA sources in Badulla. A doctor who was chief of the National Youth Council (NYC) visited Bindunuwewa and was hosted at a dinner by Weerawanni at a hotel in Badulla about 3 days after the massacre. Other guests included local dignitaries and top police officials in the district. On his return to Colombo, the doctor broadcast to the nation on both government television channels (Rupavahini and ITN) and SLBC, blaming the LTTE and the victims for fomenting the massacre to discredit the Government. He charged that Anton James was an LTTE plant who began to stir up trouble and that the victims had been showing their genitals to local village girls and shouting obscenities.

The doctor's line, which had absolutely no substance, can be seen to be the one that Weerawanni was trying to promote and was also the line of B.M. Premaratne, the Senior Police Superintendent in charge of Bandarawela, which we cited above. As to actual participants in the massacre, observers have identified extremists of various affiliations, including the SLFP and JVP.

Whatever the precise nature of the Weerawanni connection, it explains the disinformation coming from the Government soon after the incident and how the judicial process was handled. The Police opened fire to restore order in the hills in the aftermath of the Bindunuwewa massacre. The bullets again showed a magical power for seeking out Tamils.

In sum the courts in Sri Lanka appear to dispense slot-machine justice, with the settings biased to protect the political establishment and the higher ranks of the security forces on whom they depend. The judges do not appear to reflect adequately on the social or political consequences of their work and especially its effects on ethnic harmony, respect for the law and on the lower ranks of the security forces when they are used by their superiors as fall guys. By now a systemic bias is becoming amply evident.

6. Bias: Blaming the Victims

The proceedings in the Bindunuwewa case showed evidence of bias on the part of the Supreme Court justices, including indications that the judges had interpreted the evidence piece-by-piece in favour of the Police. Human Rights Watch recently related reports that justices had appeared hostile to the prosecution and that one judge "*publicly reminded the courtroom to remember that the inmates who had died were members of the LTTE, suggesting that this might mitigate the guilt of the accused.*" The route to acquittal adopted by the Supreme Court was that the Attorney General has failed to prove the charges without reasonable doubt.

A precedent aiding this approach can be found in the Commission report of Justice Kulatilaka. In dismissing off-hand the possibility of an external conspiracy, he tried implicitly to make this position credible by making out provocation by the detainees to be a sufficient reason for a spontaneous attack by the villagers. At this point (*vide pp 165ff*) his arguments rest uncomfortably with conclusions stated here and elsewhere in the unpublished report. The stated facts are these:

At 6.30 AM about 15 inmates were standing outside their billets holding screwdrivers and metal pipes. When the crowd outside stoned them, they stoned back. The Commission report quotes one detainee, *"I saw when the crowd threw stones, our fellows were also getting ready to attack armed with clubs and stones"*. According to other testimony quoted, *"...while the stone throwing was going on the inmates had blown up a gas cylinder which made the villagers who were in the process of throwing stones to make [momentarily] a hurried retreat...they thought the inmates were exploding bombs."* The Report adds, *"Apart from this there is evidence...that just before the stone throwing incident...Anton James was making a call from the telephone that had been disconnected from the office and taken to one of the billets."*

The section then concludes, *"Even though I do not wish in any way to condone the criminal acts of mayhem and murder...it is my duty to place on record this conduct of the inmates which undoubtedly would have provoked the villagers who had been getting on so well with the inmates ever since 1993."*

Rather than provocation, the same facts are immediately suggestive of the detainees acting defensively upon seeing the gathering crowds behaving threateningly, the failure of the Police to disperse them and perhaps more than a sixth sense that the Police was conniving in an attack on them. Keenan cites sources who told him that HQI Seneviratne after going into the Centre unarmed to negotiate with the detainees the previous night, pronounced upon his return, in a voice loud enough to have been heard by the crowd that had gathered around the camp, something to the effect, *"these people are bad people, they overran the police post, they forced me to come in without a gun and put knives against our throats."* In retrospect, these were menacing words. As for 'external forces', the Commission report concluded, *"...as to whether particular "external forces" masterminded the attack on the Rehabilitation Centre...I have to place on record that no evidence came up before me to that effect."* More appropriately, the Commission did not look for that evidence, and the HRC did draw attention to such evidence in inclining towards the organising role of a force capable of mobilising *agent provocateurs* over a wide area to put up posters overnight and to summon crowds. And then how did the police hierarchy manage to remain in the dark after being at the Centre on the 24th night when a crowd gathered and threw stones until quite late?

This brings us to Anton James, whom the Report, after the precedent set by government propaganda early on, alludes to repeatedly as a sinister presence - the man who removed the telephone from the Centre's office to a billet and was even making calls just before the attack. Was he, as it were, summoning Tiger reinforcements?

The Commission and the Courts should have cleared this up and then the action of the detainees would have been seen as none other than defensive against hopeless odds, by persons several of whom had military training. We and other researchers have verified that Anton James was in fact making desperate calls for intervention in the belief that they were going to be attacked. One call was to his brother in Batticaloa to contact Brigadier Zacky, the

local army commander; he had also said that he would call the ICRC. The Commission report records (p140/141), “*Around midnight he [HQI Seneviratne] received a telephone call from a caller who was allegedly giving a call from Batticaloa. The caller said he received information that people were surrounding the Bindunuwewa Rehabilitation Centre*”. The HQI told the Commission that he did not give any weight to this call because he had taken care of things at the Centre. Further inquiry would have shown that James as a surrendee was desperately appealing to the authorities responsible for their protection and was doing so sensibly by the best means available.

Instead of finding out what is relevant, the Commission tries to create impressions, showing James’ presence in a light as would raise eyebrows. The Report says (p 89): “*Anton James fought for the LTTE against the Sri Lanka government and [was] involved in a number of acts of terrorism for a period of 13 years. He participated in a number of attacks on army camps including Kiran camp...was involved in the murder of 18 STF personnel...*” At this point a judicial report acquires a narrow political and ideological colouring, oblivious to the fact that the Tamil people and the rest of the world are painfully conscious of that overarching thing called *state terrorism* in Sri Lanka.

The Chief Minister Weerawanni factor suggests to us that there is still a great deal about the Bindunuwewa massacre that we do not know, which the system has tried relentlessly to bury. It further raises questions about whether the higher judiciary is equipped to deal with the broader issues of justice and reconciliation in Sri Lanka. The indications are, they are part of the problem. We return to the earlier point about resistance to command responsibility.

7. Throwing a Veil Over Other Crimes Against Humanity

"There was a standard routine when prisoners were brought to Plantain Point Camp. For soldiers bored with torture, it was a festive occasion. There would be wild howling, and soldiers would assemble with a variety of gadgets to swing at prisoners [as for example when the boat bringing them from Mutur docked at the jetty]. Babu, who was hit on the head with a hammer, went insane and later succumbed. In the meantime Babu's father went to the ICRC. But his name was not found in the lists at detention camps." (Rep.No.10)

On 31st March 2005, nearly fifteen years after the fact, the Supreme Court bench led by Justice Shiranee Bandaranayake, with Justices N.K. Udalagama and Raja Fernando finally accepted that the sons of the petitioner K. Manjavalalan in fact disappeared after being taken by the Army in a round up to Plantain Point Army camp in Trincomalee, along with other youths, on 6th July 1990. The Supreme Court judgment held that since there was no evidence against the Officer-in-Charge of the Plantain Point Camp, no liability was cast on him. The State was responsible for the disappearance while in detention at the camp and the subsequent presumed death. For all his pains and agony over 15 years and an earlier rejection by the Appeal Court, the Supreme Court ordered the State to pay the father compensation of USD 1500 a piece.

The bias of the system cannot be overstated. More than 200 Tamil youths disappeared in the Trincomalee District in 1990, and Plantain Point then under Colonel Sunil Tennekoon was particularly notorious (our Report No.10). In the mid-1990s the North-East Disappearance Commission made some sharp strictures on Tennekoon for his impertinent response to the

Commission's request for a list of detainees. Tennekoon told the commissioners that the list was destroyed when a landmine blasted his commanding officer's vehicle in December 1990.

Going by the evidence amassed by the Disappearance Commission, the principle of command responsibility is clearly applicable to Tennekoon as the camp commandant in the matter of the petitioner's two sons M. Arumugam (20) and M. Mahendrarajah (25). The case of the two youths was not an isolated one. There was a regime of torture and disappearance at the camp stretching over several months. How could one not hold Tennekoon personally responsible?

The Supreme Court skirted the applicability of command responsibility. It merely admitted arrest leaving the well-documented horrendous things that took place afterwards shrouded as it were in mystery. The particular event was as it were an anomaly in the course of a conscientious Officer-in-Charge of the Army camp doing his duty. The judgment held that *'the Commanding Officer has the authority to arrest and detain and was in overall charge of such operations. In the circumstances, the state is responsible for the infringement of the fundamental rights of the two corpora, aged 22 and 25 years of age, at the time of arrest on July 6, 1990. Their right to personal liberty enshrined in Article 13 (4) of the Constitution had been violated.'*

Today the Disappearance Commission records have been consigned to the Government Archives, while the Attorney General's Department spends public money defending Major General Tennekoon against a father of two disappeared sons, on whose behalf they should have been prosecuting Tennekoon. Ironically, the Disappearance Commission has already accepted as fact most of these reported disappearances. The commissioners were themselves senior judges, lawyers or leading members of civil society.

The torments then served out at Plantain Point were so novel and varied that a number of things could have happened to the two youths. Here is another testimony from Rep.No.10: *"Young prisoners were dressed in army uniform, given unloaded guns, and made to walk at the head of foot patrols. About 5 to 10 miles out, when Suthahar was ahead in a patrol, a soldier behind struck an anti-personnel mine, losing a foot. Suthahar then heard the other soldiers asking for the 'Demala Ekkenek' (Tamil fellow). Suthahar quickly hid among the bushes."* At Plantain Point again, an old man, a retired teacher, was tortured, his flesh burnt and was left die slowly of septic, foul-smelling, wounds. His final resting place was a huge pit, where those who, like him, died of torture were burnt with tyres.

What we have is justice being allowed to seep down over 15 years like water through stone-baked clay. The justice finally delivered is in such minuscule amounts and so long delayed that the effort to get at it hurts those like the old rural father, who persist, infinitely more than it affects the system, which is barely ruffled. What the Government pays for crippling the life of a family is less than the airfare it would pay to send the Major General on a routine foreign trip.

Indeed, were the principle of command responsibility applied consistently, rather than selectively to secure useful limited convictions, several present and past major generals would have been behind bars. There would have been no need for show trials with corporals, inspectors and sub-inspectors.

On 5th September 1990, 159 detainees were taken from the Eastern University refugee camp with Brigadier (later Maj. Gen.) P.A. Karunatileke present. They all disappeared. Four days

later 184 villagers taken to Sathurukondan army camp were slaughtered. The latter area came under Brigadier (later Maj. Gen.) A.M.U. Seneviratne. Maj. Gen. (later Lt. Gen. and Army Commander) Gerry de Silva who was then in command of the East called at the Eastern University on 8th September. When told about the 159 abductions 3 days earlier, he implicitly acknowledged them saying that they were all guilty. He almost certainly called at the Sathurukondan camp, where the atrocity took place the following day, on his way back to Batticaloa. In response to a letter from Eastern University, Air Chief Marshal Walter Fernando, the head of the Joint Operations Command replied that only about 30 detainees were taken and had been released. Of those supposedly released, none was ever seen. (Our Reports 7&8.)

In the case of Jaffna in 1996, the hundreds of disappearances took place over more than four months under the overall command of Maj. Gen. (later Lt. Gen., Army Commander and Ambassador to Pakistan) Srilal Weerasooriya, below whom were divisional commanders Maj. Gen. P.A. Karunatileke and Maj. Gen. (later Chief of Staff and High Commissioner to Australia) Janaka Perera. (Sp.Rep.7, 9&12)

We must also point out that these atrocities under consideration are not dissimilar to the worst in any time or place in history, when men under arms were given absolute impunity to vent their passions. Kanthsamy Krishnakumar, the sole survivor from Sathurukondan testified, *“50 commandos walked about 150 of us to the Sathurukondan army camp, which we reached about 7.00 or 8.00 p.m. Four were separated from the rest, attacked with swords and kris knives and were pulled away out of the camp. All were then taken to one place, attacked and burnt with tyres...”*(our Rep. No.8). Testimonies elsewhere are very similar (e.g. Sp. Rep. No.12).

By rare chance some of the more gruesome happenings sneaked into the press. A report in the *Island* of 1st November 1990 filed by its Amparai Correspondent, K.N. Tharmalingam, an intrepid senior citizen, stated: *“A number of headless bodies of adult males have been washed ashore in Akkaraipattu and Tirukovil recently. It appears that the necks have been cut with some guillotine type machine, as the cut appears very fine and smooth which is not possible with any sword. Fifty-year old Mrs. Periyathamby Marimuthu of Vinayagapuram identified one of the bodies washed ashore as resembling that of her son called Rejendiran alias Raju aged 19. According to eyewitnesses about 32 such bodies had been washed ashore and the Island understands that inquests were not held into these killings. Whenever a body is washed ashore, the people living in the locality bury it on the beach itself. They explained that the law is dead in this area, and there is no person in authority to entertain such complaints.”*

The true, but freak report sent Deputy Defence Minister Ranjan Wijeratne into a flurry of denial, citing local officials as never having heard of such a thing (Rep.No.6). Our Special Rep. No.3 released on 16th October 1990 gave several instances of headless bodies and heads appearing on the shore from about 20th September 1990, totalling an estimated 40 and above. These persons were possibly strangled in the STF camp Thirukkivil under Inspector Ratnayake and then dumped in the sea as with those strangled at STF HQ, Bullers Rd., Colombo, under DIG Lionel Karunasena in 1995, and dumped in lakes and waterways.

8. No Trade Off Between Peace and Impunity

What the Supreme Court judgment on the fundamental rights petition of Manjavalalan above tells us is that if you are looking for justice in Sri Lanka for such outrages as we describe

above, the like of which have resulted in war crimes tribunals elsewhere, you are wasting your time. What the constitutional fundamental rights of a father whose children were murdered by officers of the State amounts to is that he might receive a sop of USD 1500 a piece, far less than his trouble and expense, if he survives the ordeal of systematic obstruction and procrastination by the justice machinery. The disappearance commissioners and the thousands who went before them ought to be very angry that their time and energies were used in a public relations exercise to sweep the dirt under the carpet – incriminating documents in the Archives which have next to no impact on the course of justice.

No part of the legal process comes out with credit in this charade of justice. It has long been pointed out that the immediate backdrop to the Bindunuwewa massacre was the preceding parliamentary election campaign where chauvinism flowed freely. When its attempt to find a political solution to the ethnic problem through a new constitution was undermined by the UNP, the PA campaign led by then Prime Minister Ratnasiri Wickremanayake shifted its rhetoric, fighting the elections on the slogan of crushing terrorism. To attain his own ends, the UNP leader Ranil Wickremasinghe spawned the extremist JHU while at the same time seeking deals with the LTTE. The fruit of these efforts was the MoU with the LTTE, the wording of which allowed room to brand as paramilitaries all Tamils requiring protection from the LTTE. Amidst the resulting mayhem Deputy Defence Minister Wickremanayake has spoken of ‘retaliation’, rather than a commitment to enforce the rule of law (speech in Trincomalee 22nd April 2005).

One could hardly be surprised that the LTTE and the Sinhalese extremists are thriving in this environment. If Supreme Court Justices were content to regard as Tigers the Bindunuwewa victims, among whom was a 12 year old and others picked up on mere suspicion, how could one blame the credulousness of ordinary villagers and security personnel? The present peace process, which was predicated on forgetting the misdeeds of one side and licensing the misdeeds of the other, has now degenerated into a farce of criminality, where parties have carved out domains of impunity and each runs its own repellent fiefdom.

We are here talking about crimes of torture and mass murder, where apart from the fact that persons were arrested and are missing, we know little else except the high degree of certainty that the end was sadistic and brutal. The testimony that came from the sole survivor at Sathurukondan who was left for dead is exceptional. We have no evidence of the kind that would convict individual torturers. Even the odd man long presumed dead may turn up a wreck, if alive. To deny command responsibility is to fall behind the world in denying justice all together in such matters, and to wallow in Sri Lanka’s present morass.

If what the State did are Crimes against Humanity, there should be no equivocation on that. It is only then that we would have the ability to deal with the LTTE’s crimes. The LTTE has never been proved wrong in its belief that violence and obduracy pay handsomely. Equivocation on criminality in the name of peace, has made peace ever more remote. The pressing need of the moment is to review the peace process and place impunity at the top of the agenda. Without it the highly controversial Joint Mechanism for tsunami relief portends dissension and disaster. The past is too much alive. Impunity and history are catching us up with a zeal corresponding to our determination to ignore them.