

December
2014

The Presidential Commission to Investigate into Complaints Regarding Missing Persons

Trends, Practices and Implications

A CRITIQUE
CENTRE FOR POLICY ALTERNATIVES

A Critique

**The Presidential Commission to Investigate into
Complaints Regarding Missing Persons:
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**Centre for Policy Alternatives
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The Centre for Policy Alternatives (CPA) is an independent, non-partisan organisation that focuses primarily on issues of governance and conflict resolution. Formed in 1996 in the firm belief that the vital contribution of civil society to the public policy debate is in need of strengthening, CPA is committed to programmes of research and advocacy through which public policy is critiqued, alternatives identified and disseminated.

Address: 24/2 28th Lane, off Flower Road, Colombo 7, Sri Lanka
Telephone: +94 (11four) 2565304/5/6
Fax: +94 (11) 4714460
Web www.cpalanka.org
Email info@cpalanka.org

The Presidential Commission to Investigate into Complaints Regarding Missing Persons (the Commission) was established on 15th August 2013 under Gazette No. 1823/42. Over a year into its mandate, the Commission continues to operate under circumstances that raise serious concerns in respect of the search for truth, justice and accountability in Sri Lanka. The Government of Sri Lanka (GoSL) depicts the Commission not only as its primary instrument to address the grievances of the families of the disappeared, but also since the expansion of its mandate, as the sole mechanism for addressing war time violations of international human rights and humanitarian law, amongst others.

The present critique by the Centre for Policy Alternatives (CPA) captures key issues and trends observed during public sittings of the Commission and the perceptions of affected communities and civil society who have observed and engaged with the present process. At the very outset CPA notes that the Commission, operating under the Commissions of Inquiry apparatus, is structurally flawed, given its dependence on the Executive for appointments, financing and follow up action. Having observed a string of failed State initiatives at transitional justice in recent years and the lack of progress with past Commissions appointed by successive governments, CPA calls for immediate steps to be taken for legal and policy reform that provides for a genuine and credible domestic process at truth seeking, justice and accountability. Failure in this regard further confirms the inability of domestic processes to address grievances in a post war context and strengthens calls for international investigations.

The brief consists of three sections. The first looks into **technical issues** of the present Commission and critiques the operational processes and practices of the Commission. The second explores the **broader issues** embedded in the structure within which the Commission operates, while the final section analyses the **trend perceptions and concerns** and their implications for the Commission's work.

Technical Issues

A key issue that must be noted at the outset is the **lack of awareness around the Commission hearings and the purpose of sittings**. This is evidenced through the large number of new complaints registered at the hearings, even when the Commission holds a second round of sittings in the same district.¹ This goes to show that the spread of word about the initial call for submission of complaints, the process of making complaints and even awareness around the Commission hearings is largely unknown to a number of affected persons. The question persists therefore as to what remedy is available to those, who due to lack of awareness around the Commission and its work, miss both opportunities to register complaints- during the

¹ The Commission held a second round of sittings in the districts of Batticaloa, Kilinochchi and Mullaitivu, to date. Noteworthy is that according to the Commission's own records available on the website, there have been 213, 106 and 166 new complaints recorded in each district respectively. Furthermore, the Commission recorded new complaints from Maritimpattu, a DS division in Mullaitivu previously visited by the Commission. New complaints were recorded both times.

period in which the Commission accepts complaints and at the Commission's public hearings in each of the districts in the Northern and Eastern provinces.

This issue is compounded by the **lack of knowledge regarding the Commission and its mandate**. CPA is aware of instances where persons who came before the Commission and made submissions previously, returned to the Commission's second visit to the same District, unaware that this is the same Commission they have already made submissions to. In some cases persons who attended sittings at one Divisional Secretariat (DS) office, returned to Commission sittings at a different DS office during the same round of Commission sittings, only a day or two since they first made their initial submissions.² The views gathered by CPA in the North and East illustrate that the affected communities are largely unaware of the Commission, let alone its mandate and objective. The Commission therefore needs to raise awareness of its work, the issues it seeks to answer and its public hearings. Although the first round of public hearings was held in January, the Commission, after nine rounds of sittings throughout 2014 has yet to create a clear roadmap.³ Immediate steps should be taken by the Commission to set out a road map for its future work and also raise awareness among the public of its mandate.

The Commission has received complaints spanning as far back as 1984 to complaints from the final phase of the war and even beyond 19th May 2009. Many who appeared before the Commission, indicated having gone before several other initiatives in their search for loved ones. Using official figures,⁴ CPA highlighted the **slow pace at which the Commission is operating**,⁵ and pointed out that it would take the Commission 13 years to simply hear every complaint that has come before it- i.e. not investigate. Given the sheer volume of complaints received to date closing in on the 20,000 mark and the pace at which it has worked so far, it is time for the Commission to **re-visit its existing methodology**. CPA was informed that the Commission takes approximately five weeks to process the information gathered at the public hearings.⁶ CPA urges that a more efficient methodology be used to process complaints including a new mechanism with an efficient, computerised data entry system capable of checking for double entries and accessible to the Commission and staff for cross-referencing complaint details and case records. The Commission should also invest in technology that is easily accessible and capable of digitising information before it. Aside from computerised complaints and digitised voice recordings, ways to scan photographs, letters, receipts and newspaper articles should also be considered in order to document and follow up on the complaints made to the Commission in order avoid any delays in moving forward. The

² Persons who made complaints during the Commission hearing at the Mulankavil DS office returned to the Commission hearing at the Pooneryn DS office. Both times were during the Commission's second round of sittings in Kilinochchi district in September 2014.

³ CPA has previously highlighted the need for a solid roadmap moving forward. See: CPA, "A Commentary on the Presidential Commission to Investigate Missing Persons during the periods of June 1990-May 2009 in the Northern and Eastern provinces", March 2014, available at: <http://www.cpalanka.org/a-commentary-on-the-presidential-commission-to-investigate-missing-persons/>

⁴ Figures used in CPA infographic on the Commission up to date till 11/09/2014.

⁵ CPA, Infographic: Presidential Commission on Missing Persons, 11 September 2014, available at: <http://www.cpalanka.org/infographic-presidential-commission-on-missing-persons/>

⁶ CPA meeting with the Chairman and Secretary of the Commission on 29/10/2014.

unwillingness or inability on the part of the Commission to take such initiatives does not bode well for a genuine search for answers and furthermore, severely undermines the efficient and effective operation of the Commission in pursuit of its mandate.

The quality of translations at the Commission hearings is a recurring problem throughout the entirety of the proceedings, and while the issue has been raised a number of times,⁷ remedial action has not been taken. Two elderly gentlemen are tasked with full time translations generally over a period of three and a half days of Commission sittings. CPA has observed the lack of consistency with the quality of the translations during sittings, which has impacted the information collected by the Commission and its overall work. Furthermore, CPA also observed at the most recently concluded sittings held in Vavuniya that one of the translators on his own commenced questioning of the people making submissions without waiting for the Commissioners to start the process.⁸ Such practices raise several issues including the competency of a translator to lead questions into issues of past violations and why the Commissioners who were all present at the time allowed for such a practice. What was also noteworthy is the **translators' and the Commission's lack of contextual knowledge of the affected areas and key issues related to the incidents before the Commission.** In some instances, civil society members and media personnel present at the sittings have had to point out deficiencies with translations and indicate to the Commission as to what exactly the person giving evidence is referring to. CPA urges the Commission take steps to prepare in advance of the sittings including providing an opportunity for the necessary staff from the Commission and its translators to meet in advance with local civil society and community groups to ensure there is a better grasp of the context and cases before it. This will reduce the recurring trauma those testifying have had to experience when recounting how their loved ones went missing and also possibly contribute to the perception that the Commission is genuinely interested in finding the truth and obtaining justice.

With the exception of new questions relating to the expanded mandate, a **majority of the answers to questions asked by the Commission are already in the file** maintained by the Commission for each complaint. CPA has been informed that each complaint file contains answers to basic questions around the identity of person who went missing, the relationship to the person making the complaint, the circumstances under which they went missing, alleged perpetrator and evidence to substantiate such claims.⁹ While understanding the Commission's need to double check the information provided, CPA has noted that in some cases these same questions are the only questions posed during the public sittings. Repeating the same questions add no value to a process that is meant to find answers, when the Commission ideally must be probing deeper with follow-up questions into the

⁷ CPA, Statement: Concerns on the Proceedings of the Presidential Commission to Investigate into Complaints Regarding Missing Persons, 2 October 2014, available at: <http://www.cpalanka.org/concerns-on-the-proceedings-of-the-presidential-commission-to-investigate-into-complaints-regarding-missing-persons/>

⁸ At Vavuniya sittings, 16/12/2014.

⁹ Questions taken from the Commission's data capture form available at: <http://www.pcicmp.lk/images/site/questionnaire%20format%20english.pdf>

circumstances under which the victim went missing. CPA urges that the Commission revisit this practice and ensure that the line of questions meets with standards that lead to an efficient and effective investigation.

What is further noteworthy is **the focus on disappearances in the line of questioning** employed by the Commission. While the expanded mandate permits the Commission to inquire into matters broader than disappearances, the public notice¹⁰ calling for such complaints on wartime violations of human rights and humanitarian law was only published in November 2014.¹¹ Therefore, the persons appearing before the Commission at present are those who made complaints regarding specific incidents of disappearance of a loved one. Inquiring into other matters from those who made complaints regarding missing persons, while giving inadequate attention to the issue of disappearances, is manifestly unfair to those coming before the Commission and affects the integrity of what is perceived as an initiative to address disappearances. As previously highlighted by CPA,¹² this is only one amidst a number of negative implications of expanding the Commission's mandate to inquire into a vast number of issues.

Given the nature of the public hearings, it is crucial that the Commission gives due **notice of the option to give evidence in secret**. This is an important practice the Commission agreed to during sittings earlier in 2014. However, this practice is presently irregular and not uniform across all sittings. The implications for affected communities who come before the Commission and make sensitive complaints are very real and dangerous, especially operating under conditions with no witness and victim protection mechanisms in place. In this regard, CPA reiterates its call for legislation that provides for a strong and credible witness and victim protection mechanism.¹³

Broader Issues

In July 2014, after the completion of the first round of public hearings in the Mullaitivu district, the mandate tasked to the Commission was expanded via Gazette No. 1871/18 to look into allegations of violations of international human rights law and international humanitarian law. There was a noticeable difference in the questions posed by the Commission at the Mullaitivu sittings where the majority of cases coming before the Commission were of disappearances during the final phase

¹⁰ See notice to public, accessible at: <http://www.pcicmp.lk/images/Notice%20Extended%20the%20Scope%20-%20English.pdf>

¹¹ Although the public notice on the Commission's website is dated as issued on 10/10/2014, the notice was only made public on 16/11/2014. See: *Missing Persons Commission to consider Civilian casualties and 'Rule of War'- Whether LTTE was subjected to international humanitarian law*, Presidential Media Unit, 16 November 2014, accessible at: [http://www.defence.lk/new.asp?fname=Civilian casualties and Rule of War 20141116 02](http://www.defence.lk/new.asp?fname=Civilian%20casualties%20and%20Rule%20of%20War%2020141116%20)

¹² CPA Statement available at: <http://www.cpalanka.org/concerns-on-the-proceedings-of-the-presidential-commission-to-investigate-into-complaints-regarding-missing-persons/>

¹³ There is presently no Witness and Victim Protection Law in Sri Lanka. Attempts have been made for several years to enact legislation but none have yet to go before Parliament.

of the war in 2009. CPA raised concerns about the Commission's expanded mandate on two main counts.¹⁴

Firstly, the Commission was established following recommendations of the Lessons Learnt and Reconciliation Commission (LLRC) that specifically stated that in light of the magnitude and sensitive nature of the phenomenon of disappearances and abductions, a separate and dedicated mechanism should be appointed to investigate complaints of disappearances. To compound the Commission's task with a number of other inquiries not directly related to the issue of disappearances was not only a reversal of the LLRC recommendation, but it also ran the risk of **diluting the primary focus of the Commission and overburdening it to impractical levels.**

These concerns raised by CPA have materialised today, with **the issue of disappearances being sidelined in the monumental task ahead of the Commission.** Exacerbating the already heavy workload of the Commission, it was recently reported¹⁵ that the Commission is involved in seeking livelihood assistance for affected persons, resolving disputes relating to land and formulating a program for counseling services in line with LLRC recommendations. While these are essential aspects of post-war reconciliation, the Commission is ill equipped in manpower and expertise to take on such a diverse range of issues. The Commission must assert its position and its mandate, in order for it to not be perceived as an alternative dispute resolution mechanism. While the Commission has a clear mandate with regard to its scope, there is a genuine concern as to the progress made on finding answers to the fate of the thousands who have been reported missing, before it. Addressing the real needs of the war-affected communities must not therefore be undermined by the Commission's diffused focus.

Secondly, CPA raised concerns about the **vague terms of reference of the Advisory Council of International Experts** (the Council). To date six appointments have been made to the Council.¹⁶ Although the members of the Council have so far not attended a single public sitting of the Commission, the Commission has indicated that the Council has submitted an opinion 'which the Commission has found extremely useful in analysing the Mandate of the Commission'.¹⁷ This opinion has so far not been made public, adding to the confusion of the precise role of the Council in its engagement with the Commission. CPA reiterates the call for greater transparency in the mandate and functions of the Council. In this regard, CPA also

¹⁴ CPA, Statement: Concerns on the Expansion of the Mandate of the Commission of Inquiry to Investigate into Complaints Regarding Missing Persons, 25 July 2014, available at: <http://www.cpalanka.org/concerns-on-the-expansion-of-the-mandate-of-the-commission-of-inquiry-to-investigate-into-complaints-regarding-missing-persons/>

¹⁵ *Missing Persons Commission has acted promptly to deal with complaints*, Daily News, 2 December 2014, accessible at: [http://www.defence.lk/new.asp?fname=Missing Persons Commission has acted promptly to deal with complaints 20141202 01](http://www.defence.lk/new.asp?fname=Missing%20Persons%20Commission%20has%20acted%20promptly%20to%20deal%20with%20complaints%2020141202%2001)

¹⁶ The Right Honourable Sir Desmond de Silva, QC (Chairman); Sir Geoffrey Nice, QC; Prof. David Crane; Avdhash Kaushal Esquire; Ahmer Bilal Soofi Esquire; Motoo Noguchi Esquire.

¹⁷ *Expert Panel and Missing Persons Commission hold discussion*, Presidential Media Unit, 20 October 2014, accessible at: [http://www.defence.lk/new.asp?fname=Expert Panel and Missing Persons Commission hold discussion 20141020 01](http://www.defence.lk/new.asp?fname=Expert%20Panel%20and%20Missing%20Persons%20Commission%20hold%20discussion%2020141020%2001)

calls on the Council to meet with civil society and community groups and to explain its role in the search for the truth, justice and accountability. A transparent and inclusive process will not merely dispel fears of the Council being used by the Executive to undermine any efforts at a genuine process at reconciliation and transitional justice but also provide clarity regarding its role in the present process.

A persisting concern also remains about the **lack of witness and victim protection mechanisms**. The Commission maintains that a public hearing is necessary in order to keep the hearings transparent, but fails to provide requisite safeguards for such a hearing, especially given the context of a heavily militarised North and the absence of witness and victim protection legislation. There have been a number of incidents of interference by GoSL security personnel in and around the proceedings with no serious action taken by the Commission to prevent reoccurrence. Security personnel dressed in civilian clothing have attended and carefully monitored those attending the sittings and making complaints. In some instances those attending have been photographed.¹⁸ Families of the disappeared have been visited or contacted by the Criminal Investigation Department (CID) and the Terrorist Investigation Department (TID) and questioned about the missing person, and in some cases, the complaint made to the Commission has been inquired into.¹⁹ There have been cases where families have been encouraged to go before the Commission and have even been provided transportation to the Commission hearings by the GoSL forces,²⁰ while in others, families have been intimidated to not attend.²¹ There are instances in which the TID and the CID have demonstrated knowledge of certain cases of disappearances registered with the Commission that have previously not been recorded elsewhere.²² This level of **interference, intimidation and surveillance** is not conducive to the work of a Commission tasked with matters so sensitive, especially given the militarised conditions in the North and the fear of reprisals for truth seeking around wartime atrocities.

Over a year has passed since the Commission was established in August 2013, however there has been **no update on the status of the complaints heard so far**. An interim report was expected during the course of the year, however no such report has been made public to date. Those appearing before the Commission deserve to know the status of their complaints and what they should anticipate in terms of their search for truth and justice.

¹⁸ CPA Statement available at: <http://www.cpalanka.org/concerns-on-the-proceedings-of-the-presidential-commission-to-investigate-into-complaints-regarding-missing-persons/>

¹⁹ CPA interviews with civil society actors on the ground. Some of these actors have been involved in submitting complaints to the Commission on behalf of families of the disappeared.

²⁰ Several persons making complaints were seen being provided with transport by members of GoSL forces outside the Commission hearings in September at the Pooneryn DS office in the Kilinochchi district in September 2014.

²¹ Civil society members raised these concerns before the Commission during the Commission's Mannar stings in August 2014.

²² Based on information received from civil society and community groups in the North and East.

Perceptions and Concerns

One mother in search of her son when questioned on what relief she has received, replied: *"I didn't get anything, I don't want also. But I want my son"*.²³ Such sentiments are often made before the Commission. The number of times such statements were made goes to show that the families' **intention of coming before the Commission is largely based on truth seeking**. Although the Commission is mandated to inquire if 'reasonable relief' has been granted, the purpose for many of travelling far and forgoing the day's wages is primarily of finding answers. Families have in some instances demanded that the Commission locate their missing loved ones, in the belief that they are still alive after many years. Recent reports of persons reappearing after decades spent in detention centres²⁴ go to show that all hope is not lost for families who continue to believe that their loved ones may return at some point. In other instances, families have appealed before the Commission to, at the very least, find the remains of their loved ones to perform religious rites and to find closure. The Commission must therefore make it, its absolute priority to heed their voices and address their particular need for answers.

The Commission makes the repeated assertion that the sheer volume of complaints received is evidence of the faith the families of the disappeared has placed in it. Many of the individuals coming before the present Commission have gone before many others in the past with no positive outcome. In the vast majority of cases, families have made complaints to the Police, the National Human Rights Commission and the ICRC without getting any closer to uncovering the whereabouts or the truth of what became of their loved ones. Several have indicated this, passionately asking the Commission during public sittings about the futility of such exercises. Such outbursts by families searching for their loved ones demonstrates the gravity of the situation: the trauma experienced by thousands of affected communities, the lack of genuine assistance by the State to address grievances, the fallacy of previous entities meant to provide answers and the thriving culture of impunity attested to in the inaction by bodies that are meant to investigate, inquire and hold perpetrators to account. Regardless of what is construed by the State and the Commission, the high number of complaints before the Commission can be deduced as families **wanting to exhaust all available means and mechanisms in their search for loved ones**.

CPA has previously noted that **the line of questioning employed by the Commission implies a trend of inherent bias**.²⁵ The leading questions posed by the Commission are capable of influencing testimony and can thereby affect subsequent findings. Remaining impartial and independent is critical to the success of the Commission. Furthermore, CPA has observed how in some instances, the Commission's questions relating to the circumstances under which the victim disappeared stop abruptly

²³ At Manthai West sittings, 09/08/2014.

²⁴ *Long thought dead, man returns home after 25 year detention*, The Sunday Times, 14 December 2014, accessible at: <http://www.sundaytimes.lk/141214/news/long-thought-dead-man-returns-home-after-25-year-detention-132458.html>

²⁵ CPA Statement available at: <http://www.cpalanka.org/concerns-on-the-proceedings-of-the-presidential-commission-to-investigate-into-complaints-regarding-missing-persons/>

following claims that victims were last seen surrendering to the GoSL forces. In addition, CPA has also observed an interest by the Commission in questions regarding livelihood assistance and of the Commission being somewhat dismissive of claims of loved ones being spotted entering GoSL controlled areas.

The questioning itself along with the Commission's response to some of the testimony has been **insensitive to the grievances of the families and loved ones of the disappeared**. Following are excerpts from two different sittings that demonstrate serious concerns with the line of questioning.

First excerpt from a wife searching for her missing husband:²⁶

Wife of victim: ...Some people who had seen him came and reported that my husband was seen at Omanthai army camp. There were many people who were working within the camp, they too have told me that they have seen my husband... (Commission asks a question) From the LTTE camp he escaped and then came into Army controlled area... (Commission asks a question) I have been in Vanni searching for my husband all over the place and people fed me with similar information.

Commission: You should have been the Chairman of this Commission to get so much of assistance.

Second excerpt from a mother searching for her daughter:²⁷

Mother of victim: While we were running she went missing.

Commission: So you didn't concentrate on your daughter while you were running? Whether the daughter was coming with you? Didn't you look for your daughter, whether she's also running with you?

The Commission, and in some instances even the translators, have shown **little empathy and understanding of wartime conditions, their experiences and circumstances under which their loved ones went missing**. Furthermore, the above line of questioning is an indicator to the assumptions and preconceived notions the Commissioners have arrived at prior to questioning the people who have come before them.

The gender balance of those attending the sittings is also worth noting. CPA observed that the majority of complaints were of **male victims and the majority of those making complaints were females**. There is hence a need to formulate **gender sensitive questions and methodology**. A large number of families of the disappeared have lost the primary breadwinner of the family and thousands of female-headed households are in existence in the North and East of Sri Lanka. The Commission in certain cases was seen to be oblivious and insensitive to these dynamics, especially in cases of single member families with no means of financial assistance or income generation. Furthermore **there is no assistance provided for families of the disappeared to attend the hearings and make submissions**. The Commission has not given due importance or support to the fact that those making complaints spend

²⁶ At Mannar sittings, 10/08/2014.

²⁷ At Mulankavil sittings, 27/09/2014.

their entire day at the hearings, forgoing daily earnings that have a sizeable impact on their livelihoods.

There is also the concern about the status of investigations, if any. Although the Commission has received to 20,000 complaints to date, there is still **no indication of any investigations presently underway**. Media reports²⁸ indicate that the Commission approached President Rajapaksa to appoint an investigations team. This is problematic given the significant number of complaints before the Commission against GoSL forces with questions being raised whether an investigative team appointed by the Executive can be independent. Moreover it is unclear what specifically the Commission has in mind in terms of 'investigations'. Investigations at a bare minimum need to inquire into the status of GoSL detention centres, wartime hospital records, IDP camp registrations and rehabilitation centre registrations. However the expectation of the families is to probe much deeper.²⁹ Families expect the Commission to investigate individual cases and inquire further into last seen whereabouts in order to ascertain what became of the victims, and provide them with answers on their whereabouts if still alive. The Commission therefore must set out its plans for investigations as a matter of priority. It is worrying that almost a year after the first round of hearings, the Commission has still not identified an independent investigations team or started genuine inquiries into complaints.

Although the Commission has remained open to meetings with civil society, INGOs, foreign embassies and media personnel, engaging with and addressing the concerns raised has been minimal. The question as to the real will and aim of the Commission is therefore a legitimate one. **Greater dialogue to address the real grievances in the search for truth** must be commenced as a matter of urgency - having worked with war affected communities over a number of years, civil society is capable of providing assistance and consultations in this regard.

Truth seeking and justice are important issues for the war affected communities, and the Commission must not lose sight of this need. CPA urges the Commission and relevant actors to take immediate steps to address the concerns raised in this note to ensure the calls of affected communities are met and to demonstrate a genuine desire to address issues that will facilitate long-term reconciliation in Sri Lanka.

²⁸ 'Form Team to Probe SL Disappearances', The New Indian Express, 29 September 2014, accessible at: <http://www.newindianexpress.com/world/Form-Team-to-Probe-SL-Disappearances/2014/09/29/article2454409.ece>

²⁹ A number of families making submissions have already searched for their loved ones in detention centres, IDP camps registrations and have even checked hospital records. Their intention of coming before the Commission is to uncover information unavailable or out of their reach.