

*The Implementation of certain Human Rights Conventions in  
Sri Lanka*

*Final Report*

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This report has been prepared at the request of the European Commission. The views expressed are those of the three independent experts and are thus not the views of the Commission.

The sources used in the preparation of this report are those included in the non-confidential file of the investigation. To the extent other sources have been used they appear in the footnotes of the report.

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## *Abbreviations*

CAT	Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
CCP	Code of Criminal Procedure
CID	Criminal Investigation Department
CIDT	Cruel, inhuman or degrading treatment or punishment
CPA	Centre for Policy Alternatives
CRC	Convention on the Rights of the Child
EO	Evidence Ordinance
ER 2005	Emergency (Miscellaneous Provisions and Powers) Regulation No. 1 of 2005
ER 2006	Emergency (Prevention and Prohibition of Terrorism and Specified Terrorist Activities) Regulations No. 7 of 2006
GSP+ Guidelines	Special incentive arrangement for sustainable development and good governance UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka
HRC	UN Human Rights Committee
HRW	Human Rights Watch
ICCPR	International Covenant on Civil and Political Rights
ICCPR Act	International Covenant on Civil and Political Rights (ICCPR)) Act No. 56 of 2007
ICJ	International Commission of Jurists
ICRC	International Committee of the Red Cross
IDP	Internally Displaced Persons
IIGEP	International independent group of eminent persons
IPG	Criminal Inspector General
IRPP	Institute on Religion and Public Policy
JMO	Judicial Medical Officer
JSC	Judicial Services Commission
LOAC/IHL	The law of armed conflict or international humanitarian law
LTTE	Liberation Tigers of Tamil Eelam
NGO	Non-Governmental Organisation
PSO	Public Security Ordinance 1947
PTA	Prevention of Terrorism (Temporary Provisions) Act
PTP	Prosecution of Torture Perpetrators Unit
SA/PRS	State agents or persons for whom the State is responsible
SIU	Special Inquiry Unit
TMVP	Tamil Makkal Viduthalai Plidal, the Karuna faction
UN	United Nations
UPR	Universal Periodic Review

## **1. Introduction**

### **1.1. GSP+**

Under the special incentive arrangement for sustainable development and good governance (the GSP+) provided for in Article 8 of Council Regulation 980/2005 of 27 June 2005 (the Regulation) applying a scheme of generalised tariff preferences the Common Custom Tariff ad valorem duties on certain products which originate in a country included in the arrangement shall be suspended. According to Article 9(1) of the Regulation a GSP+ arrangement may be granted to a country which, *inter alia*, has ratified and effectively implemented the conventions listed in Part A of Annex III of the Regulation, among them the International Covenant on Civil and Political Rights (ICCPR), the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and the Convention on the Rights of the Child (CRC). It is further required that the country in question gives an undertaking to maintain the ratification of the conventions and their implementing legislation and measures and accepts regular monitoring and review of its implementation record in accordance with the implementation provisions of the conventions it has ratified.<sup>1</sup> The Commission shall keep under review the status of ratification and effective implementation of the conventions (Article 9(4)).

According to Article 16(2) the GSP+ may be temporarily withdrawn, in respect of all or certain products, in particular if the national legislation no longer incorporates the conventions or if that legislation is not effectively implemented. Where the Commission or a Member State receives information that may justify temporary withdrawal and where it is considered that there are sufficient grounds for an investigation, the Commission may, after certain procedural steps, decide to initiate an investigation (Article 18). The beneficiary country concerned shall be notified of the decision and interested parties shall be invited to make known their views on the issue (Article 19).

Council Regulation 980/2005 was replaced by Council Regulation 732/2008 of 22 July 2008 applying a scheme of Generalized Tariff Preferences for the period 1/1/09 to 31/12/11 (the 2008 Regulation).

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<sup>1</sup> The government of Sri Lanka provided this undertaking with Note Verbale Ref.B/EC/8(5) submitted to the EC on 20 September 2005.

## 1.2. Sri Lanka's application for GSP+ benefits

In its application in 2005 for GSP+ benefits Sri Lanka stated, *inter alia*, that it had deposited instruments of ratification and effectively implemented all 16 Human Rights Conventions referred to in Article 9 and listed under Part A of Annex III of the Regulation. The ICCPR, the CAT and the CRC were listed among conventions ratified.

The Government of Sri Lanka also gave an undertaking to maintain the enforcement of the conventions and their implementing legislation and measures and accepted regular monitoring and review of its implementation record.

In a Status Report on ratification and implementation of conventions referred to in Annex III and listed under Parts A & B of Annex III prepared by the Government of Sri Lanka and annexed to its GSP+ application (the Status Report) it was stated, *inter alia*, that Sri Lanka has subscribed to the Optional Protocol to the International Covenant on Civil and Political Rights.<sup>2</sup>

As far as legislation incorporating the three conventions in issue is concerned it was stated in the Status Report that the Constitution of Sri Lanka guarantees the promotion and protection of human rights of the citizens of Sri Lanka and other persons. The rights of all persons declared and recognized by the Constitution include freedom of thought, conscience and religion, freedom from torture or cruel, inhuman or degrading treatment or punishment (CIDT), right to equality, freedom from arbitrary arrest and detention and punishment and prohibition of retroactive penal legislation, freedom of speech, assembly, association occupation and movement.<sup>3</sup>

As noted in the Status Report some of the derogable rights may be restricted as may be prescribed by law only for specific purposes, such as in the interest of national security, racial and religious harmony and the national economy.<sup>4</sup>

The Status Report also refers to the role of the Supreme Court, the Court of Appeal and the Provincial High Courts in the protection of human rights.<sup>5</sup> It describes the 17<sup>th</sup> amendment to the Constitution as a means to safeguard the citizen's rights.<sup>6</sup> It also describes the national Human Rights Commission of Sri Lanka (NHRC), which is empowered to inquire into complaints of

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<sup>2</sup> Status Report on Ratification and Implementation of Conventions referred to in Article 8 & 9 and listed under Parts A and B of Annex III by Sri Lanka, annexed to Note Verbale Ref.B/EC/8(5) and submitted to the EC on 20 September 2005, p. 2.

<sup>3</sup> Status Report p. 2.

<sup>4</sup> Status Report, p. 3. In the terminology of the ICCPR it is a question of limitations rather than derogations.

<sup>5</sup> Status Report, p. 2-3.

<sup>6</sup> Status Report, p. 3.



infringements of any of the fundamental rights set out in the Constitution but is only empowered to give recommendations.<sup>7</sup> Lastly, it contains more detailed information, *inter alia*, on disappearances,<sup>8</sup> freedom of expression,<sup>9</sup> and the Prevention of Terrorism Act (PTA).<sup>10</sup>

The Status Report also contains information about the implementation of the CRC<sup>11</sup> and the CAT.<sup>12</sup>

In its application for GSP+-benefits under the 2008 Regulation the government of Sri Lanka states that Sri Lanka has continued to show tangible progress and advances in complying with the legislative and administrative implementation of the conventions in issue.<sup>13</sup> The attached Status Report<sup>14</sup> contains, *inter alia*, a reference to the First Optional Protocol to the ICCPR.<sup>15</sup> The Report refers to an advisory opinion of the Supreme Court of Sri Lanka. That opinion states that the provisions of the Constitution,<sup>16</sup> the ICCPR Act<sup>17</sup> and other laws including decisions of the Superior Courts of Sri Lanka give adequate recognition to the civil and political rights referred to in the ICCPR. Rights recognized in the ICCPR are justiciable through the medium of the legal and constitutional processes prevailing in Sri Lanka.<sup>18</sup>

The Status Report 2008 further states that the declaration of a state of emergency and the promulgation of regulation is in accordance with Articles 4 and 5 of the ICCPR.<sup>19</sup>

As far as freedom of expression is concerned the Status Report 2008 states that it is the intention of the Government to bring the Constitutional guarantee to be consistent with Article 19 of the ICCPR.<sup>20</sup>

The Status Report 2008 also refers to a bill concerning assistance and protection to victims of crime and witnesses that had been placed before Parliament.<sup>21</sup> It discusses implementation of ICCPR rights despite allegations of disappearances<sup>22</sup> and states that where allegations of torture, extra

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<sup>7</sup> Status Report, p. 4-5.

<sup>8</sup> Status Report, p. 4-6.

<sup>9</sup> Status Report, p. 6-8.

<sup>10</sup> Status Report, p. 8.

<sup>11</sup> Status Report, p. 9-14.

<sup>12</sup> Status Report, p. 14-19.

<sup>13</sup> Application, p. 1.

<sup>14</sup> Annex II. Status Report on ratification and implementation on Conventions referred to in Articles 8 & 9 and listed under Parts A and B of Annex III by Sri Lanka, annexed to Note Verbale Ref.B/EC/8(20) and submitted to the EC on 9 October 2008 (hereinafter Status Report 2008).

<sup>15</sup> Status Report 2008, p. 9.

<sup>16</sup> The Constitution of the Democratic Socialist Republic of Sri Lanka.

<sup>17</sup> International Covenant on Civil and Political Rights (ICCPR)) Act No. 56 of 2007, referred to as the ICCPR Act.

<sup>18</sup> Status Report 2008 p. 13.

<sup>19</sup> Status Report 2008 p. 15.

<sup>20</sup> Status Report 2008 p. 15.

<sup>21</sup> Status Report 2008 p. 18.

<sup>22</sup> Status Report 2008 p. 20-21.

judicial killings and enforced disappearances are levelled against the armed forces or the police service, impartial investigations has been initiated and necessary punitive measures are taken. It also discusses internally displaced persons,<sup>23</sup> the CRC,<sup>24</sup> the CAT,<sup>25</sup> noting that Sri Lanka follows a zero-tolerance policy in respect of torture, as well as other matters.

### **1.3. The investigation**

On 14 October 2008 the European Commission adopted a decision to initiate an investigation into the effective implementation of the three conventions in issue in Sri Lanka.<sup>26</sup> By a notice of 18 October 2008 interested parties were invited to send any relevant information and comments within 4 months to the Commission.

The European Commission (DG TRADE) requested President Leif Sevón (coordinator), Professor Françoise Hampson and Professor Roman Wieruszewski (the Panel) to make an assessment of the effective implementation of the three conventions in issue. President Sevón is a former judge of the Court of Justice of the European Community and former President of the Supreme Court of Finland. Professor Hampson holds a chair at the University of Essex and is a former member of the UN Sub-Commission on the Promotion and Protection of Minorities and has frequently represented clients before the European Court of Human Rights. Professor Wieruszewski is Professor at the Poznan Human Rights Centre of the Polish Academy of Science and a former Member of the UN Human Rights Committee and an ad hoc Judge at the European Court of Human Rights (the Panel).

In line with the Commission's Decision opening the investigation a major focus of attention for the Panel is "to establish whether the national legislation of the Democratic Socialist Republic of Sri Lanka incorporating the International Covenant on Civil and Political Rights, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention on the Rights of the Child is effectively implemented". The exercise must also be undertaken in light of the underlying purpose of the special incentive arrangement for sustainable development and good governance (the GSP+) under Article 9 of the Regulation and the substantive criteria Sri Lanka had to meet in order to qualify for GSP+ preferences. Thus the Panel

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<sup>23</sup> Status Report 2008 p. 27-29.

<sup>24</sup> Status Report 2008 p. 30-42.

<sup>25</sup> Status Report 2008 p. 42-48.

<sup>26</sup> See OJEU L277 of 18 October 2008.

must also consider any other aspects affecting the effective implementation of the three conventions at stake beyond those relating to the effective implementation of existing Sri Lankan legislation.

#### **1.4. The objectives of the report**

The objective of the present report is to assist the European Commission in the conduct of its investigation as to whether Sri Lanka is effectively implementing its obligations under the ICCPR, CAT and CRC by providing independent and expert legal advice on these matters. In particular, this involves a thorough examination of the legal and factual situation with respect to Sri Lanka's fulfilment of its human rights obligations and commitments under the three UN instruments.

The report is expected to make an assessment of the effective implementation of the ICCPR, the CAT and the CRC in Sri Lanka in the context of the GSP+ Investigation C 265/1 of 18.10.2008. The task is threefold:

- First, the report will assess whether the national legislation of Sri Lanka corresponds to the obligations under the three conventions, whether the obligations under the conventions are actually, adequately and effectively applied in practice and whether the institutions set up in Sri Lanka to protect human rights actually, adequately and effectively fulfil their task.
- Second, a main objective of the report is to assess how the obligations imposed by the three conventions are met in practice. For that purpose it is necessary to examine both the national legislation and the conduct in practice of national authorities, including the courts, which have the potential to violate human rights.
- Third, the report looks into the structure and functioning of the authorities for the protection of human rights, including providing a remedy for any violations. The purpose of these elements in the report is to assess whether the judicial and administrative infrastructure is adequate and if the authorities are effective in the protection of human rights. Such judicial and administrative mechanisms for addressing claims of rights violation under domestic law are necessary in order to give effect to human rights.

The granting of GSP+ -benefits to Sri Lanka was based on the understanding that Sri Lankan legislation fully incorporated the obligations under the three conventions as was stated in the application. This report does not purport to assess all aspects on the questions whether the Sri Lankan legislation fully incorporates the three conventions. Instead the Panel has chosen to look

into areas where doubts have been raised in respect of the effective implementation of the conventions, in particular in the light of activities and events occurring after 27 June 2005.

The report deals mainly, but not exclusively, with events and actions after the GSP+ benefits were granted to Sri Lanka on 27 June 2005. The report focuses on the Sri Lankan government and authorities. It does not deal with violations by the Liberation Tigers of Tamil Eelam (LTTE). The focus on the government action must not be understood as disregarding or minimizing the significance of the LTTE violations or those of any other group.

The representations made by many organisations emphasised the implications of any suspension or withdrawal of GSP+.<sup>27</sup> In some cases, the organisations emphasised Sri Lanka's compliance with ILO standards.<sup>28</sup> The Panel was not asked to examine compliance with ILO standards but only the implementation of three human rights treaties. Two organisations did address the implementation of the three human rights treaties.<sup>29</sup>

## **1.5. Methodology**

The full and comprehensive assessment of the implementation by Sri Lanka of its international obligations under ICCPR, CAT and CRC presupposes an analysis of the Sri Lankan legal system: Constitution, relevant laws, case law, in particular that of the Supreme Court of Sri Lanka. It further requires a review and analysis of available reports from international organizations and reputable non-governmental organizations concerning human rights in Sri Lanka, as well as of all other available relevant information. In addition, it must be based on documents and other information from the Government of Sri Lanka.

Consequently, the Panel has studied the documents submitted in response to the Commissions notice 2008/C 265/01. Some of the organizations that submitted observations have also orally commented on the prevailing situation in Sri Lanka.

The Panel has also studied other documents obtained from publicly available sources. Among these sources are domestic legislation, court reports, reports and statements from the United Nations (UN)

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<sup>27</sup> British Retail Consortium; Calzedonia Holding Spa; Chamber of Garment Exporters; European Branded Clothing Alliance; Free Trade Zone Manufacturers' Association; Joint Apparel Association Forum; Jinadasa Group of Companies; Sri Lanka Apparel Exports Association; Sri Lanka First; Stirling Group; The Business to Peace Alliance.

<sup>28</sup> For example, the submission of Calzedonia Holding Spa.

<sup>29</sup> Joint Apparel Association Forum and Sri Lankan Apparel Exporters Association.

bodies and the UN special procedures, as well as from other international organizations, media reports, NGO reports, academic commentaries and other materials.

This has served as a basis for verification of Sri Lanka's records as far as implementation of international human rights standards is concerned.

In order to be able to confront information thus gathered with the position of the Government of Sri Lanka, a visit to Sri Lanka and meetings with representatives of the Government were sought but not obtained. The establishment of the facts was thus made on the basis of available sources.

The legal analysis is based primarily on existing laws and practices, and not on undertakings and announcements.

## **1.6. Activities of the Panel**

The work has mainly consisted in a desk study of relevant reports and other commentaries on the Human Rights situation in Sri Lanka after 27 June 2005, as well as by meetings of the Panel in Geneva on 15 and 16 June 2009, in London on 24 and 25 June 2009 and in Brussels on 30 and 31 July 2009. The Panel met with representatives of organizations that had made submissions in response to the Commission's invitation as well as of organizations that had not made submissions but which had produced documentation in the public domain that suggested they would be likely to have information relevant to the Panel.

By a Note Verbale the Commission requested permission for the Panel and representatives of the Commission to conduct an on-site visit in Sri Lanka. However, the request was rejected.<sup>30</sup>

This Draft report is based on materials available by 31 August 2009.

## **2. Preliminary Issues**

### **2.1. Sources and basis of the evaluation of the evidence**

The principal source used to determine the scope of the obligations of Sri Lanka under the three human rights treaties is the treaties themselves. In interpreting the scope of the treaty provisions,

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<sup>30</sup> European Commission Note Verbale of 28 May 2009 and Sri Lanka Note Verbale of 17 June 2009.

attention has been paid to relevant General Comments, the Concluding Observations of the treaty bodies in the exercise of their monitoring functions with regard to Sri Lanka and, in the case of the ICCPR, the jurisprudence of the Human Rights Committee under Optional Protocol 1 in relation to Sri Lanka. A secondary source for determining the scope of obligations is material produced in connection with the Universal Periodic Review process and the mandates of Special Procedures which address rights also covered by the three human rights treaties.

The Panel took note of the resolution S-11/1 "Assistance to Sri Lanka in the promotion and protection of human rights" adopted at the special session of the Human Rights Council.<sup>31</sup>

Domestic legislation and case-law was used as the principal source of domestic law.

The sources used to establish the facts include reports submitted by Sri Lanka to the three treaty bodies and in connection with the UPR process, material gathered by the treaty bodies and Special Procedures and reputable national and international non-governmental organizations.<sup>32</sup> In addition, material produced by intergovernmental bodies, such as UNHCR and UNICEF, has also been taken into account.

In evaluating conflicting factual evidence, the Panel sought to determine the extent to which evidence was independently corroborated in other reports. Particular attention was paid to evidence gathered by persons or organizations with access to information from individuals or organizations in Sri Lanka. In line with the practice of the treaty bodies, the Panel treated generalized denials as not being sufficient to displace specific allegations.

With regard to the standard of proof, the Panel chose to apply as a criterion proof beyond reasonable doubt. The Panel did not seek to determine whether violations had occurred in particular cases but sought rather to determine whether the evidence available established that the right in question was being generally effectively implemented.

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<sup>31</sup> Adopted by a recorded vote of 29 to 12, with six abstentions on 27th May 2009.

<sup>32</sup> Sri Lanka submitted its report to the UN Committee on the Rights of the Child, due on 10 August 2008, on 24 October 2008. Sri Lanka submitted its report to the UN Committee against Torture, due on 1 February 2007, on 14 August 2009. Sri Lanka's report due under the ICCPR to the UN Human Rights Committee on 1 November 2007 has not yet been submitted. See, in addition, Human Rights Council, Working Group on the Universal Periodic Review, National report submitted by Sri Lanka, 2 May 2008, A/HRC/WG.6/2/LKA/1, and the outcome of the review at Human Rights Council, Universal Periodic Review, Report of the Working Group on the Universal Periodic Review - Sri Lanka, 5 June 2008, A/HRC/8/46 (paras. 82-84 of that document indicate the response of Sri Lanka to recommendations made by submitting States).

## **2.2. Attribution**

Human Rights treaty obligations only bind the State and its agents. As part of its obligation the State is required to protect individuals within the jurisdiction from violations, including violations at the hands of third parties. Individuals and non-State groups are likely to be affected by the State's implementation of its own obligations and are therefore, indirectly, affected by human rights law.

State agents are not limited to the executive or to security forces. They include all persons who exercise authority in the name of the State. They therefore include courts, judges and prosecutors.<sup>33</sup> This is consistent with the requirement for their independence. It is up to the State to determine how such officials are to be required to take account of the human rights obligations of the State. In addition to being responsible for the acts of State security forces, the State is also responsible for any other forces over which they exercise or could exercise effective or actual control. The Panel has proceeded on the basis that the acts of forces under "Colonel" Karuna, who defected to the government side in 2003, are attributable to the State from the start of the period under consideration in this report. Where responsibility is attributed on this basis, it will be made clear in the text.

## **2.3. Effective implementation**

The State is under an obligation to respect, protect and fulfil the human rights obligations contained in the three treaties. The State is required to implement those international obligations. Implementation includes, but is not limited to, legislative enactment.<sup>34</sup> It also includes secondary legislation and administrative policies necessary to give effect to the commitments. From this can be derived an obligation to ensure that State agents receive training so as to give effect to the rights in question. The State is required not only positively to deliver the right but also to put in place measures to guard against the risk of abuse. That includes, but is not limited to, an effective system of investigation in the event of alleged violations. The test of implementation is practical and not theoretical. Implementation is reflected in the lived experience of the population in the jurisdiction of the State. Only in such a case can implementation be called effective.

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<sup>33</sup> General Comment No.31, Nature of the General Legal Obligation on State Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 4

<sup>34</sup> Ibid.

Isolated cases of alleged violations are not necessarily a sign of failed implementation. An individual State agent might engage in unauthorized action. Generally speaking, where the State's system for providing redress is functioning properly, it should be able to identify whether a violation has occurred, to compensate the victim and to ensure that the necessary steps are identified and implemented to ensure that the violation does not occur again. It is also possible that the domestic authorities fail to identify the act or omission as a violation. That will not necessarily be a sign of inadequate implementation, on condition that the State accepts the finding of the relevant international body and takes the steps necessary to ensure that the domestic interpretation is corrected.

This being said, where there is clear and consistent evidence of conduct in violation of the State's obligations and where this is not corrected by the domestic remedial system, there is a lack of effective implementation of the relevant instruments which also constitutes a violation of the State's obligation to implement its international undertakings.<sup>35</sup> Rather than examining the right to a remedy (ICCPR Article 2(3)) as such, the report examines the effectiveness of the operation of domestic remedies in relation to each right examined.

## **2.4. Derogation**

Under some, but not all, human rights treaties, States are free to derogate from certain of their human rights commitments in specific situations. There is no possibility of derogation under the CAT.<sup>36</sup> That is consistent with treaties covering a wider range of rights, such as the ICCPR, under which the prohibition of torture, cruel, inhuman or degrading treatment or punishment (CIDT) is non-derogable. There is no reference to derogation in the CRC. Article 38 does, however, refer to situations of conflict, in relation to child soldiers and the protection of children in situations of conflict.<sup>37</sup>

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<sup>35</sup> This is independent of but related to the violation of the obligation to provide an effective domestic remedy.

<sup>36</sup> CAT, Article 2(2).

<sup>37</sup> This clearly implies that the CRC is applicable in situations of conflict. This raises a question as to the significance of a derogation under the ICCPR in relation to children. Since this report addresses the concerns of children principally with regard to the issue of child soldiers, which does not come within the scope of the ICCPR, the report will not further consider the impact of a derogation under the ICCPR in relation to a right also covered by the CRC.



Under the ICCPR, a State may derogate in situations of public emergency which threaten the life of the nation.<sup>38</sup> Derogation means that States may modify, not eliminate, certain of their human rights obligations in specific circumstances. Certain rights are non-derogable, meaning that they apply in all circumstances. Under the ICCPR, the prohibition of arbitrary killings (Article 6), torture, cruel, inhuman or degrading treatment or punishment (Article 7), slavery and servitude (Article 8 para. 1 and 2) and freedom of thought, conscience and religion (Article 18) and certain other rights are non-derogable.<sup>39</sup> In addition, derogation measures must not discriminate on grounds of race, colour, sex, language, religion or social origin. Derogation measures must be consistent with the State's other obligations under international law, most obviously obligations under the law of armed conflict or international humanitarian law (see further below).<sup>40</sup>

The government of Sri Lanka has availed itself of the possibility of derogation, most recently on 30 May 2000, when it informed the Secretary-General that it had declared a State of Emergency and was derogating from Articles 9 (2), 9 (3), 12 (1), 12 (2), 14 (3), 17 (1), 19 (2), 21 and 22. For the purposes of this report, it will be assumed, first, that the situation in Sri Lanka entitled the State to derogate throughout the period under examination. It should be noted that, following the declaration of the end of the conflict on 19 May 2009, it can be expected that the State of Emergency and notice of derogation will be lifted in the near future. For the purposes of this report, it has been assumed that the need for derogation may not cease conterminously with the end of hostilities. It has also been assumed, second, that the procedural requirements attaching to derogation have been satisfied. In particular, it is assumed that sufficient explanation has been provided of the need both to derogate and for the specific measures adopted.<sup>41</sup>

Where a State seeks to derogate from a provision in an Article, the derogation must be both necessary and proportionate. General Comment 29 indicates how the analysis will be approached. A State will not be able to establish the necessity of derogation where the conduct in question constitutes a crime against humanity.<sup>42</sup> Similarly, States will not be able to establish the need to derogate from the requirement of humane treatment of detainees, the prohibition of abduction and

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<sup>38</sup> ICCPR, Article 4; see also General Comment No. 29, States of Emergency (Article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 186 (2003).

<sup>39</sup> ICCPR, Article 4(2).

<sup>40</sup> *Ibid.*

<sup>41</sup> In its last Concluding Observations on Sri Lanka in 2003, the Human Rights Committee (HRC) did not comment on the derogation beyond referring to the fact that the Sri Lankan Constitution permitted derogation from a right which is non-derogable under the Covenant; CCPR/CO/79/LKA1 December 2003, para.8. It should be noted that Sri Lanka submitted combined fourth and fifth reports in 2002. Sri Lanka's sixth report is overdue.

<sup>42</sup> General Comment No. 29, *op. cit.*, para.12.

unacknowledged detention or the prohibition of the forcible transfer of parts of the population.<sup>43</sup> Whilst a State may modify the usual application of domestic remedies, it will not be able to justify the total removal of effective remedies.<sup>44</sup> The provisions in the Covenant relating to procedural rights may not be made subject to measures which would circumvent the protection of non-derogable rights.<sup>45</sup> The General Comment expressly provides that,

"In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant."<sup>46</sup>

In assessing the implementation in law and practice of Sri Lanka's obligations in relation to provisions from which the State has sought to derogate, the Panel will seek to apply the approach set out in General Comment No. 29.

## **2.5. The relevance of the law of armed conflict/international humanitarian law and the manner in which and extent to which, it can be taken into account**

When seeking to determine what constitutes an arbitrary killing or an arbitrary deprivation of liberty, it may be necessary to decide whether a law and order or an armed conflict paradigm is applicable. This requires an examination of the relationship between human rights law and the law of armed conflict or international humanitarian law (LOAC/IHL). It is clear that both fields of law may be applicable simultaneously.<sup>47</sup> LOAC/IHL is applicable by virtue of the facts. It is not necessary for the parties to recognise its applicability.

Until the end of hostilities, there was an armed conflict in varying parts of Sri Lanka. The conflict was non-international in character. Sri Lanka is a party to the four Geneva Conventions of 1949 but

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<sup>43</sup> Ibid., para. 13.

<sup>44</sup> Ibid., para. 14.

<sup>45</sup> Ibid., para. 15. The example given is that a trial resulting in the imposition of the death penalty must be in compliance with all the (derogable) provisions of Articles 14 and 15 because Article 6, which deals with the death penalty, is non-derogable.

<sup>46</sup> Ibid., para. 16.

<sup>47</sup> International Court of Justice, Advisory Opinion, Legality or Threat of Use of Nuclear Weapons, July 8, 1996, para. 25. ICJ, Advisory Opinion, The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 9 July 2004, para. 106; Case concerning armed activity on the territory of the Congo, (Democratic Republic of the Congo v. Uganda), judgment of 19 December 2005, para. 216-20. See also General Comment No. 29, op. cit., para. 9.

not to the Additional Protocols of 1977. As a matter of treaty law, it is therefore bound by common Article 3 to the Geneva Conventions. It is also bound by any rules of customary international humanitarian law applicable in non-international armed conflicts.

The detailed operationalisation of the inter-relationship between human rights law and LOAC/IHL has not yet been established. For the purposes of this report, the Panel has made the following assumptions.

First, LOAC/IHL can only affect the operation of human rights law in areas where the fighting is taking place or in relation to issues arising directly out of the conflict but having an effect everywhere. So, for example, the law and order paradigm will be applicable to killings outside areas where active hostilities are occurring but the LOAC/IHL paradigm will be applicable to the conduct of active hostilities. Similarly, detention will generally be covered by human rights law. Where, however, detention is based on grounds relating to the conflict, wherever the detention occurs, it will be examined in the light of LOAC/IHL.

Second, when dealing with an issue which concerns the protection of victims of the conflict, priority will be given to human rights law. Victims are people who have been adversely affected by the fighting, who have not or have ceased to take a direct part in the hostilities and who are in the power of the other side. They include all detainees, including former fighters. Given the obligation of the State under human rights law to protect all those within the jurisdiction and given that, by definition, victims have to be in the power of the State, the priority given to human rights law is consistent with both LOAC/IHL and human rights law. The contrast is between rules concerned with the protection of victims of the conflict and rules concerning the conduct of hostilities. In the case of the latter, in areas of active hostilities, priority will be given to LOAC/IHL as the *lex specialis*. Areas in which isolated killings occur are not areas in which active hostilities are being conducted. They will therefore be analysed in terms of the law and order paradigm. The fighting in the last few weeks of the conflict, however, did constitute active hostilities and killings during the course of that fighting will be analysed in terms of LOAC/IHL.

When required to apply customary LOAC/IHL, the starting point in determining the existence and content of such rules will be the ICRC Customary Law Study.<sup>48</sup> The rules identified in that work will be treated as a guide to the content of customary law and not as a definitive account.

It should be noted that LOAC/IHL binds all the parties to a conflict. Unlike human rights law, non-State armed groups are required to respect the provisions of LOAC/IHL and not only can but should

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<sup>48</sup> Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, 2 vols., CUP, 2005.

be called to account for failing to do so. It goes without saying that all forces fighting on behalf of the State are also required to respect the same rules and should equally be prosecuted for failing to do so.

## **2.6. The distinction between systematic and widespread**

Whilst individual violations represent a breach of the State's obligations under human rights law, particular significance has traditionally been attached to violations which are systematic or widespread. Historically, they were subject to a special procedure precisely on account of that character.<sup>49</sup> More recently, the Statute of the International Criminal Court requires that attacks against the civilian population be widespread or systematic in order to constitute a crime against humanity.<sup>50</sup>

In order to determine that violations are widespread, it is sufficient to establish many cases of the particular violation, possibly in a range of geographical locations. They do not need to occur throughout the territory of the State. Violations will be systematic where they occur, possibly in fewer cases than widespread violations, in circumstances which suggest the active complicity of the State. This can be manifested by the attitude of a particular group of State agents. It does not require that the central authorities of the State should have authorised the conduct in question. Systematic violations occur as a result of the way in which a particular issue is routinely handled. Whilst the perpetrators may not be obeying specific orders, they understand that they are expected to behave in a certain way or at least will not be punished for doing so.<sup>51</sup>

It is sufficient to establish that violations are *either* widespread *or* systematic. In this report, wherever violations are widespread as defined, they will be described as such. That should not be taken to imply that they are not also systematic. Violations will only be described as systematic where they do not occur on a sufficient numerical or geographical basis to describe them as widespread *and* where there is evidence that they are systematic as defined.

Where any violation occurs on a widespread or systematic basis, there is a strong implication that domestic remedies are not operating effectively in that particular field. The assumption is that, if

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<sup>49</sup> ECOSOC Resolution 1503 (XLVIII) of 27 May 1970.

<sup>50</sup> Statute of the International Criminal Court, Article 7. Where conduct constitutes a crime against humanity, it is non-derogable according to General Comment No. 29, op. cit., para.12. This suggests that conduct which might, in isolated cases, come within the terms of a derogation will not do so where it occurs on a widespread or systematic basis.

<sup>51</sup> The use of the terms "widespread" and "systematic" is not necessarily the same in sources referred to in the report.

remedies were working effectively, they would both put an end to the practice and act as a deterrent against future violations. In case of violations occurring on a widespread or systematic basis the implementation of the relevant Convention cannot be deemed effective.

### **3.           *Applicability of international human rights law in Sri Lanka***

#### **3.1.        The legal system in Sri Lanka**

Sri Lanka is a constitutional democracy. Legislation is passed by Parliament elected by universal suffrage and proportional representation for a period of six years.<sup>52</sup>

Parliament supervises the proclamation of an emergency which is necessary for issuing emergency regulations under the Public Security Ordinance (PSO).<sup>53</sup>

##### *3.1.1. The Constitution*

The basic law of Sri Lanka is the Constitution of the Democratic Socialist Republic of Sri Lanka (the Constitution). The Constitution was adopted in 1978. It has since been subjected to 17 amendments, the last one in September 2002 (the 17<sup>th</sup> Amendment).

Chapter III of the Constitution contains provisions on fundamental rights. The provisions relevant for the purposes of this report are as follows:

"10. Every person in entitled to freedom of thought, conscience and religion, including the freedom to have or to adopt a religion or belief of his choice.

11. No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

...

13. (1) No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest.

(2) Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the judge of the nearest competent court according to procedure established by law, and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such judge made in accordance with procedure established by law.

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<sup>52</sup> Article 62 of the Constitution.

<sup>53</sup> Article 155 of the Constitution.

(3) Any person charged with an offence shall be entitled to be heard, in person or by attorney-in-law, at a fair trial by a competent court.

(4) No person shall be punished by death or imprisonment except by order of a competent court, made in accordance with procedure established by law. The arrest, holding in custody, detention or other deprivation of personal liberty of a person, pending investigation or trial, shall not constitute punishment.

(5) Every person shall be presumed innocent until he is proved guilty;

Provided that the burden of proving particular facts may, by law, be placed on an accused person.

(6) No person shall be held guilty of an offence on account of any act or omission which did not, at the time of such act or omission, constitute such an offence, and no penalty shall be imposed for any offence more severe than the penalty in force at the time such offence was committed.

Nothing in this Article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

It shall not be a contravention of this Article to require the imposition of a minimum penalty for an offence provided that such penalty does not exceed the maximum penalty prescribed for such offence at the time such offence was committed.

(7) The arrest, holding in custody, detention or other deprivation of personal liberty of a person by reason of a removal order or a deportation order made under the provisions of the Immigrants and Emigrants Act or the Indo-Ceylon Agreement (Implementation) Act, No. 14 of 1967, or such other law as may be enacted in substitution therefore, shall not be a contravention of this Article.

14. (1) Every citizen is entitled to –

(a) the freedom of speech and expression including publication;

(b) the freedom of peaceful assembly;

(c) the freedom of association;

(d) the freedom to form and join a trade union;

(e) the freedom, either by himself or in association with others, and either in public or in private, to manifest his religion or belief in worship, observance, practice or teaching;

(f) the freedom by himself or in association with others to enjoy and promote his own culture and to use his own language;

(g) the freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise;

(h) the freedom of movement and of choosing his residence within Sri Lanka; and

(i) the freedom to return to Sri Lanka.

(2). A person who, not being a citizen of any other country, has been permanently and legally resident in Sri Lanka immediately prior to the commencement of the Constitution and continues to be so resident, shall be entitled, for a period of ten years from the commencement of the Constitution, to the rights declared and recognized by paragraph (1) of this Article.

15. (1) The exercise and operation of fundamental rights declared and recognized by Articles 13(5) and 13(6) shall be subject only to such restrictions as may be prescribed by law in the interest of national security. For the purposes of this paragraph "law" includes regulations made under the law for the time being related to public security.

(2) The exercise and operation of the fundamental right declared and recognized by Article 14(1)(a) shall be subject to such restrictions as may be prescribed by law in the interest of racial and religious harmony or in relation to parliamentary privilege, contempt of court, defamation or incitement to an offence.

(3) The exercise and operation of the fundamental right declared and recognized by Article 14(1)(b) shall be subject to such restrictions as may be prescribed by law in the interest of racial and religious harmony.

(4) The exercise and operation of the fundamental right declared and recognized by Article 14(1)(c) shall be subject to such restrictions as may be prescribed by law in the interests, of racial and religious harmony or national economy.

(5) The exercise and operation of the fundamental right declared and recognized by Article 14(1)(g) shall be subject to such restrictions as may be prescribed by law in the interest, of national economy or in relation to –

(a) the professional, technical, academic, financial or other qualifications necessary for practicing any profession or carrying on any occupation, trade, business or enterprise, and the licensing and disciplinary control of the person entitled to such fundamental right, and

(b) the carrying on by the State, a State agency or a public corporation of any trade, business, industry, service or enterprise whether to the exclusion, complete or partial, of citizens or otherwise.

(6) The exercise and operation of the fundamental right declared and recognized by Article 14(1)(h) shall be subject to such restrictions as may be prescribed by law in the interest of national economy.

(7) The exercise and operation of the fundamental right declared and recognized by Articles 12, 13(1), 13(2) and 14 shall be subject to such restrictions as may be prescribed by law in the interest of national security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting just requirements of the general welfare of a democratic society. For the purposes of this paragraph "law" includes regulations made under the law for the time being relating to public security.

(8) The exercise and operation of the fundamental right declared and recognized by Article 12(1), 13 and 14 shall, in their application to the members of the Armed Forces, Police Force and other forces charged with the maintenance of public order, be subject to such restrictions as may be prescribed by law in the interests of the proper discharge of their duties and the maintenance of discipline among them.

16. (1) All existing written law and unwritten law shall be valid and operative notwithstanding any inconsistency with the preceding provisions of this chapter.

(2) The subjection of any person on the order of a competent court to any form of punishment recognized by any existing written law shall not be a contravention of the provisions of this Chapter.

17. Every person shall be entitled to apply to the Supreme Court, as provided for in Article 126, in respect of the infringement or imminent infringement, by executive or administrative action, of a fundamental right to which such a person is entitled under the provisions of this Chapter."

Under Article 126(2) an application shall be filed within one month from the alleged infringement of a fundamental right.

In a provision on Directive Principles of State Policy, it is stated, inter alia, that the State is pledged to establish a democratic socialist society, the objectives of which include the full realization of the fundamental rights and freedoms of all persons.<sup>54</sup>

The Constitution also contains provisions on the language of the administration stating basically that a person normally has the right to communicate with authorities in his or her language, or in English.<sup>55</sup> It also contains provisions on the language of the courts including provisions on the right to interpretation and translation.<sup>56</sup>

### *3.1.2. The 17<sup>th</sup> Amendment to the Constitution*

The 17<sup>th</sup> Amendment to the Constitution was passed by Parliament in 2001. It established a Constitutional Council comprising the Speaker, the Prime Minister, the Leader of the Opposition and seven other eminent persons including one person appointed by the President, five persons appointed by the President on the nomination of both the Prime Minister and the Leader of the Opposition. One member is nominated by the other smaller parties in Parliament.

The Constitutional Council shall, inter alia, recommend or approve the appointment of suitable persons including the Attorney General, the Inspector General of the Police, the Chief Justice and other judges of the Supreme Court and Court of Appeal, members of the Judicial Service Commission, as well as the chairman and members of the Human Rights Commission.

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<sup>54</sup> Article 27.

<sup>55</sup> Article 22.

<sup>56</sup> Article 24.



### 3.1.3. The ICCPR Act

By the ICCPR Act<sup>57</sup>, the human rights legislation of Sri Lanka was developed further. The ICCPR Act was a response to the ruling by the Supreme Court in the *Singarasa* case,<sup>58</sup> in which the Supreme Court had held that Sri Lanka's accession to the Optional Protocol to the ICCPR was unconstitutional.

The objective of the ICCPR Act as specified in the Act is to give effect to certain Articles in the ICCPR which have not been given recognition either through the Constitution or through other legislative measures and to provide for matters connected therewith or incidental thereto.

The ICCPR Act deals with the right to be recognized as a person before the law (Article 2). Under the Act no person shall propagate war or advocate national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (Article 3). Violation is a criminal offence. The Act further contains provisions regarding the rights of persons charged of criminal offence under any written law, *inter alia*, to legal assistance, interpretation and safeguard against self incrimination (Article 4), regarding certain rights of the child (Article 5), and the right of every citizen to take part in the conduct of public affairs and to have access to public services (Article 6). According to Article 7 every citizen shall be entitled to apply by way of petition addressed to the High Court against the infringement or imminent infringement by executive or administrative action of any human right to which such person is entitled under Articles 2, 4, 5 and 6 of the Act.

In addition to the Constitution and the ICCPR Act a number of other provisions in the Sri Lankan legislation were designed to give effect to the ICCPR.<sup>59</sup>

### 3.1.4. The CAT Act

The objective of the CAT Act<sup>60</sup> is to give effect to the CAT. It provides, *inter alia*, that the fact that any act constituting an offence under the Act was committed at the time when there was a state of war, threat of war, internal political instability or any public emergency, or on an order of a superior officer or a public authority, shall not be a defence to an offence (Article 3). The CAT Act vests

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<sup>57</sup> Certified on 16<sup>th</sup> November 2007.

<sup>58</sup> Nallaratnam Singarasa v. Attorney General, S.C. SPL (LA) No. 182/99 (2006).

<sup>59</sup> A list of the legislation in question is to be found in the Status Report, p. 5, and in the submission by the Joint Apparel Association Forum, 20 January 2009, Annex 5. See also The Supreme Court of Sri Lanka, In the matter of a Reference under Article 129(1) of the Constitution, 17 March 2008.

<sup>60</sup> Convention against Torture or other Cruel, Inhuman or Degrading Treatment or Punishment Act, No. 22 of 1994.

jurisdiction with the High Court to try offences of torture committed by a Sri Lankans or a non-Sri Lankans, in or outside the territory of Sri Lanka.<sup>61</sup>

### *3.1.5. The rights of the child*

Provisions giving effect to the CRC are to be found in the Constitution as well as in a number of laws.<sup>62</sup> Many of the laws enacted deal with issues surrounding the labour of young people, a field in which Sri Lanka has achieved considerable progress.<sup>63</sup> Amendments to the Penal Code introduced in 1995 and 1998 included provisions on, e.g., incest, use of children for obscene publications, begging, procuring for sexual intercourse and trafficking in persons. Amendments to the Employment of Women, Young Persons and Children Act of 2003 enhanced the penalties for the violation of child labour laws.<sup>64</sup>

### *3.1.6. The emergency legislation*

The foundation of Sri Lanka's emergency laws is the Public Security Ordinance 1947 (PSO). In addition, in 1979 the Prevention of Terrorism (Temporary Provisions) Act (PTA) was adopted.

Using the powers under Section 5 of the PSO the President of Sri Lanka has enacted a number of emergency regulations. For the purposes of this report two of these regulations deserve particular attention. The Emergency (Miscellaneous Provisions and Powers) Regulation No. 1 (ER 2005)<sup>65</sup> deals, inter alia, with arrest and detention. It provides that persons acting in any manner prejudicial to the national security or the maintenance of public order, or to the maintenance of essential services may be arrested and held in detention for up to one year without access to judicial review by an independent body.<sup>66</sup> ER 2005 also contains provisions on powers of search and seizure without the need for a court warrant. The provisions on trial procedures allow the use of confessional evidence, create a duty for persons to answer police questions and reverse the normal burden of proof. The Regulation also contains a provision according to which persons should not be released on bail.

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<sup>61</sup> Status Report, p. 20.

<sup>62</sup> See a list in the Status Report p. 14-16 and the Status Report 2008 p. 30-32.

<sup>63</sup> Status Report, p. 16.

<sup>64</sup> Ibid., p. 18.

<sup>65</sup> Published in the Gazette of the Democratic Socialist Republic of Sri Lanka on 13 August 2005.

<sup>66</sup> Amendment to Emergency (Miscellaneous Provisions and Powers) Regulations of 2005 extend that period with a further six months.

The Emergency (Prevention and Prohibition of Terrorism and Specified Terrorist Activities) Regulations No. 7 of 2006 (the ER 2006) define and criminalise terrorism and acts of terrorism and create new offences including engaging in transactions with a terrorist or terrorist group regardless of knowledge and intent. It also attempts to limit the accountability of civilian and military authorities in the performance of their duties.

### **3.2. Institutions with the responsibility for providing remedies for alleged violations of human rights**

#### *3.2.1. The National Police Commission*

*The National Police Commission* was created by the 17<sup>th</sup> Amendment to the Constitution of Article 155A in 2001 and then appointed in 2002. It is in charge of disciplinary control over all officers except the Inspector General (Article 155G(2)).<sup>67</sup> However, this procedure was only established in January 2007 and therefore no conclusions are yet available regarding its effectiveness.<sup>68</sup> The legitimacy and credibility of the National Police Commission was called into question due to Presidential appointments of Commissioners in 2006.<sup>69</sup>

#### *3.2.2. The courts*

The Constitution provides that the institutions for administration of justice shall be the Supreme Court, the Court of Appeal, the High Court and other such courts of first instance, tribunals and such institutions as Parliament may from time to time ordain and establish.<sup>70</sup>

The Supreme Court hears and determines as first and only instance any question relating to the infringement or imminent infringement by executive or administrative action of any fundamental

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<sup>67</sup> Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, A/HRC/7/3/Add.6, 26 February 2008 (hereinafter "Report of the Special Rapporteur on torture"), para. 56-58, p. 16-17; Philip Alston, UN Special Rapporteur on extrajudicial executions, Follow-up to country recommendations, A/HRC/8/3/Add.3 14 May 2008, para. 59, p. 16 (hereinafter "Report of the Rapporteur on extrajudicial executions").

<sup>68</sup> Implementation rules were adopted on 17 January 2007. See Rules of Procedure (Public Complaints) 2007, reproduced in Sri Lanka's report submitted to the UN Committee against Torture on 14 August 2009, Annex 1.

<sup>69</sup> Ibid.

<sup>70</sup> Article 105.

right declared and recognized by Chapter III of the Constitution.<sup>71</sup> A petition to that effect shall be brought within one month of the alleged infringement.<sup>72</sup>

Where in the course of a hearing in the Court of Appeal into an application for orders in the nature of a writ of habeas corpus, *certiorari*, prohibition, *procedendo*, *mandamus* or *quo warranto*, it appears to such Court that there is prima facie evidence of an infringement or imminent infringement of the provisions of Chapter III or Chapter IV by a party in such application, such Court shall forthwith refer such matter for determination by the Supreme Court.<sup>73</sup>

The President may refer a question to the Supreme Court for its opinion.<sup>74</sup>

Since 2005 the President has made appointments to the Supreme Court without a recommendation of the Constitutional Council as prescribed in the Constitution.<sup>75</sup>

In order to safeguard the independence of the judiciary it is provided that a judge shall not be removed from office except by an order of the President made after an address of Parliament supported by a majority of the total number of Members of Parliament (including those not present) has been presented to the President for such removal on the ground of proved misbehaviour or incapacity.<sup>76</sup>

There is a Judicial Service Commission which shall consist of the Chief Justice and two Judges of the Supreme Court. The appointment, transfer, dismissal and disciplinary control of judicial officers are vested in that Commission. "Judicial officer" does not include a Judge of the Supreme Court or the Court of Appeal or of the High Court.<sup>77</sup>

### 3.2.3. *The National Human Rights Commission*

The National Human Rights Commission (NHRC) was created by legislation in 1997 and recognized under 17<sup>th</sup> Amendment of Constitution. It was empowered to conduct investigations into complaints of violations of fundamental rights, such as violations of Article 11 of the Constitution

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<sup>71</sup> Article 126(1).

<sup>72</sup> Article 126(2).

<sup>73</sup> Article 126(3).

<sup>74</sup> Article 129(1).

<sup>75</sup> International Bar Association, *Justice in retreat: A report on the independence of the legal profession and the rule of law in Sri Lanka*. May 2009 (hereinafter the "IBA Report"), p. 24. It should be noted that Sri Lanka emphasized the 17<sup>th</sup> Amendment to the Constitution in the Status Report, but certain elements of the amendment do not appear to be applied in practice.

<sup>76</sup> Article 107(2).

<sup>77</sup> Article 114.

prohibiting torture (Article 14 of Establishment Act No. 21).<sup>78</sup> The NHRC can refer the matter for reconciliation or mediation.<sup>79</sup> If this procedure fails, the NHRC may recommend initiating a prosecution of an alleged perpetrator.<sup>80</sup> The NHRC is empowered to inquire into complaints of infringement of any of the fundamental rights set out in the Constitution. The NHRC is only empowered to make recommendations.<sup>81</sup>

Since 2005 the President has made appointments to the NHRC without a recommendation of the Constitutional Council as prescribed in the Constitution.<sup>82</sup>

On 26 October 2007 the sub-committee on accreditation of the International Coordinating Committee (ICC) of National Human Rights Institutions took the decision to downgrade the NHRC from "A" to observer "B" status (not fully compliant with Paris Principles) due to two primary concerns: 1) It was not clear that the appointment of Commissioners was in compliance with the Paris Principles; and 2) in practice, it was not clear the NHRC remained balanced, objective and un-political particularly with regards to the discontinuation of follow-up to 2,000 cases of disappearances in July 2006.<sup>83</sup>

#### *3.2.4. Commissions of inquiry*

Under the Presidential Commission of Inquiry Act No. 17 of 1948 the President can set up a Commission of Inquiry to investigate the administration of public departments, offices or agencies, or allegations of misconduct by a member of the public service.<sup>84</sup> The President is authorized to set the terms of reference for the commissions and appoint its members. He or she can also revoke the warrant establishing a commission at any time. The Act does not require commissions' reports or recommendations to be made public. Whether the report or any part of it is to be made public is subject to presidential discretion.

Since 1991 there have been nine Commissions of Inquiry to investigate enforced disappearances and a number of other human rights inquiries.<sup>85</sup>

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<sup>78</sup> Report of the Special Rapporteur on torture para. 59, p. 17.

<sup>79</sup> Ibid.

<sup>80</sup> Ibid.

<sup>81</sup> Status Report p. 4.

<sup>82</sup> IBA Report, p. 24.

<sup>83</sup> International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, Report and Recommendations of the Subcommittee on Accreditation, Geneva 22 to 26 October 2007.

<sup>84</sup> Section 2 (1) Commissions of Inquiry Act.

<sup>85</sup> Amnesty International, Twenty Years of Make-believe. Sri Lanka's Commissions of Inquiry, 2009, p. 10, hereinafter Amnesty International, Twenty Years of Make-believe.

On 4 September 2006 the President announced that the government would invite *an international independent commission* to probe abductions, enforced disappearances and extrajudicial executions. But on 6 September 2006 he announced that he would invite an international independent group of eminent persons (IIGEP) *to act as observers* of the activities of a local commission.<sup>86</sup> Subsequently, on 2 November 2006 the President created a Commission of Inquiry to investigate and inquire into 15 cases of alleged serious violations of human rights arisen since 1 August 2005. Later a 16<sup>th</sup> case was added. The Presidential Warrant authorized the Commission of Inquiry to conduct "independent and comprehensive investigations" and to "examin(e) the adequacy and propriety of the investigations already conducted pertaining to such incidents amounting to serious violations of human rights".<sup>87</sup>

In 2007 the Commission created a victim and witness assistance and protection unit and on 8 May 2007 it adopted a scheme for the providing assistance and protection to victims and witnesses. For a short period of time the Commission used video conferences when hearing witnesses living abroad. However, the Presidential Secretariat ordered the suspension of witness testimony through video conferencing. The Presidential Directive cited future witness protection laws.<sup>88</sup>

In March 2008 the IIGEP decided to conclude its work. Subsequently, some of the members of the Commission resigned.

The term of the Commission of inquiry came to end in June 2009. At that stage hearings into seven cases were concluded and reports on five cases finalized. According to the Chairperson of the Commission the Commission had by then not started the hearings in two cases and decided not to embark on two other cases.<sup>89</sup>

To the knowledge of the Panel the reports of the Commission have not been made public.

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<sup>86</sup> Ibid., p. 12.

<sup>87</sup> Ibid., p. 13.

<sup>88</sup> Ibid., p. 35-36.

<sup>89</sup> Interview with retired Supreme Court Judge Nissanka Udalgama, The Sunday Times, "The Commission acted as a deterrent: Justice Udalgama", 21 June 2009 and The Daily Mirror, "Serious rights violations: Commission recommended", 22 June 2009.

## 4. *Effective implementation of human rights treaties*

### 4.2. **Legislative Steps**

After the ruling by the Supreme Court in the *Singarasa* case the government prepared the ICCPR Act. It sought an advisory opinion of the Supreme Court as to the extent of compliance of the Sri Lankan Constitution and law with the rights contained in the ICCPR. The Supreme Court arrived at the conclusion that "the legislative measures referred to in the communication of ... the President dated 4.3.2008 and the provisions of the Constitution and of other law, including the decisions of the Superior Courts of Sri Lanka give adequate recognition to the Civil and Political Rights contained in the International Covenant on Civil and Political Rights and adhere to the general premise of the Constitution that individuals within the territory of Sri Lanka derive the benefit and guarantee of rights contained in the Covenant".<sup>90</sup>

The opening language of the ICCPR Act states that the objective of the Act is to give effect to certain Articles in the ICCPR which have not been given recognition through legislative measures and to provide for matters connected therewith or incidental thereto.

The following remarks on the views expressed in the advisory opinion and the above statement in the ICCPR Act do not purport to be exhaustive.

Article 16 of the Constitution ensures the continuation in force of laws that existed when the Constitution entered into force notwithstanding any inconsistency with constitutionally declared fundamental rights; Article 16 thus undermines the protection of fundamental rights that are in fact recognized by the Constitution. For example, provisions of criminal law or laws on land and succession that are discriminatory against women remained in force.<sup>91</sup>

A second problem arises in the context of the First Additional Protocol to the ICCPR. Any interference in the submission of applications to the Human Rights Committee is not consistent with the State's obligations under the Optional Protocol. The fact that the Sri Lankan government did not use the opportunity in the context of the ICCPR Act to make it clear that individuals were free to submit such applications might be misleading for individuals who, in the light of the *Singarasa* case might believe that such an application amounts to a contempt of the Sri Lankan

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<sup>90</sup> Supreme Court (S.C.) Ref. No 1/2008.

<sup>91</sup> Submission of the Centre for Policy Alternatives (CPA), p. 4-5.

courts and therefore refrain from making a submission. This could amount to a violation of the Optional Protocol.

The Sri Lankan legislation does not include provisions corresponding to all the rights covered under the ICCPR. An example is the right to life.<sup>92</sup> The right to life has nevertheless been protected by the courts in a number of cases.<sup>93</sup> It has therefore been suggested that the right to life is well entrenched into the domestic law of Sri Lanka.<sup>94</sup> However, the omission of a provision on the right to life runs contrary to the objective stated in the opening language of the ICCPR Act, i.e. to give effect to certain Articles in the ICCPR which have not been given recognition through legislative measures.

A number of problems also arise in the context of restrictions in Article 15 of the Sri Lankan Constitution. In the ICCPR the distinction between "limitations" and "restrictions" is a safeguard. Some human rights may legitimately be limited in their enjoyment and exercise and may be suspended in exceptional circumstances such as states of emergency.

The Sri Lankan bill of rights speaks of "restrictions" on points where the ICCPR uses the expression "limitation". The bill of rights does not follow the ICCPR expressly setting out a list of non-derogable rights but identifies them by implication. The rights which are susceptible of restriction under the Constitution are not as extensive as those provided for in ICCPR Article 4(2). The Constitution does not refer to the substantive controls of necessity and proportionality. The Supreme Court of Sri Lanka has in some cases by interpretation imposed a requirement of reasonableness on the imposition of restrictions on rights. However, this requirement has been introduced on an *ad hoc* basis and has not introduced a change that is generally and universally applicable. Further, the general nature of Article 15(7) of the Constitution has the effect of undermining many of the limits on permitted restrictions enumerated in the other subsections of the Article, as it permits restrictions as may be prescribed by law, for instance, in the interest of national security, public order and the protection of public health and morality.<sup>95</sup>

It has been held that these restrictions, some of which are not strictly within the permitted scope of derogations set out in Article 4(1) of the Covenant, nevertheless appear to have been included in the collective interest of the community of persons and the general well being of the nation, and in this

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<sup>92</sup> *Ibid.*, p. 8.

<sup>93</sup> See, e.g., Legal opinion by Sanjeeva Jayawardena, June 2008, p. 23-24. The opinion is attached to the submission by 19 Sri Lankan lawyers. See also that submission, p. 14-19.

<sup>94</sup> Submission by 19 Sri Lankan lawyers, p. 18.

<sup>95</sup> Submission by the Centre for Policy Alternatives (CPA), 13 February 2009, p. 8-10.



perspective may be argued to be justified.<sup>96</sup> To this has been added that the emergency regulations are subject to monthly review by the Legislature and judicial scrutiny by the Supreme Court.<sup>97</sup>

Neither of these arguments is convincing. Article 4(1) of the Covenant cannot be given an extensive interpretation. The conditions for declaring an emergency and enacting emergency laws are strictly and narrowly defined and limited to exceptional circumstances, with safeguards to ensure that the rights of the population in general are not abused under the colour of law. These limits must be observed to ensure that the emergency laws are an extension of the rule of law rather than an abrogation of it.<sup>98</sup> The scrutiny by the Legislature and the Supreme Court does not remove the problems unless they take such an approach to the limits. That does not seem to be the case.

Further problems arise out of the emergency regulations. Only some of them are raised here.<sup>99</sup>

The principle of legality requires criminal offences to be clearly defined in unambiguous language. The HRC has stressed that vague, imprecise and ambiguous definitions of the offences of terrorism in domestic legislation are in breach of the principle of legality of offences.<sup>100</sup> Many of the provisions in the emergency regulations do not meet this requirement as it is difficult to know with certainty what acts will be considered unlawful. For instance, ER 2006 creates the offence of engaging in terrorism or "acts of terrorism" (Regulations 6 and 20) and criminalizes certain activities, transactions and communications with persons or groups committing terrorist offences (Regulation 7, 8 and 9).

ER 2005 and Presidential orders made under the PSO delegate sweeping powers to the military personnel to perform functions normally carried out by law enforcement officials, including powers of investigation, search, arrest and detention. Under Regulation 19 the Secretary of the Ministry of Defence may order the arrest and detention of a person for up to one year. The ordinary courts are expressly excluded from questioning the making of a Regulation 19 order. The HRC has previously expressed concerns about the Secretary of Defence having the power to order detention.<sup>101</sup> It has also stated that if administrative detention is used, for reasons of public security, it must be controlled by the same provisions governing detention while under arrest or awaiting trial. It must

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<sup>96</sup> Legal opinion by Sanjeeva Jayawardena, June 2008, p. 18-21.

<sup>97</sup> Submission by 19 Sri Lankan lawyers, p. 7.

<sup>98</sup> International Commission of Jurists, Sri Lanka: Briefing Paper, Emergency Laws and International Standards, March 2009, p. i.

<sup>99</sup> For an extensive analysis see *ibid.*, *passim*.

<sup>100</sup> Concluding remarks of the HRC on, *inter alia*, Belgium, CCPR/CO/81/BEL, 12 August 2004, para. 24, Canada, CCPR/CC/CAN/CO/5, 20 April 2006, para. 12. See also Martin Scheinin, Special Rapporteur on Fundamental Freedoms while Countering Terrorism, Report, A/HRC/10/3/Add.1, para. 236 – 238.

<sup>101</sup> HRC, concluding observations of Sri Lanka, CCPR/C/79/Add56, 27 July 1995, para. 19.

not be arbitrary, and must be based on grounds and procedures established by law (ICCPR Article 9(1)), information of the reasons must be given (ICCPR Article 9(2)) and court control of the detention must be available (ICCPR Article 9(4)) as well as compensation in the case of breach (ICCPR Article 9(5)).<sup>102</sup>

Basic fair trial rights are guaranteed in international law and the Constitution of Sri Lanka, and should be respected even during a state of emergency. The Sri Lankan emergency laws undermine the right against self-incrimination by permitting the use of confessional evidence and creating a "duty" for persons to answer police questions. Provisions under ER 2005 also reverse the normal burden of proof, undermining the principle of presumption of innocence. The HRC has consistently affirmed that the burden of proof should always be on the prosecution, based on the principle of presumption of innocence.<sup>103</sup>

Finally, people whose rights are limited or infringed because of an emergency law should be able to challenge the legality of measures taken against them, and states are obliged to conduct prompt, effective, impartial and independent investigations and to bring to justice those responsible for violations. The ICCPR and other international standards require States to bring to trial and punish those guilty of human rights violations. HRC considers that amnesty laws, or other similar measures, help to create a climate of impunity for the perpetrators of human rights violations and undermine efforts to re-establish respect for human rights and the rule of law, in breach of the ICCPR. Failure to investigate or bring to justice perpetrators of human rights violations may in itself give rise to a breach of the ICCPR. States Parties to the ICCPR may not relieve such perpetrators from personal responsibility.<sup>104</sup>

The Secretary General of the UN underlined at the conclusion of his visit to Sri Lanka on 23 May 2009 the importance of an accountability process for addressing violations of international humanitarian and human rights law.

However, ER 2006 and other emergency laws attempt severely to limit the accountability of civilian and military authorities in the performance of their duties. ER 2006, Regulation 19 provides that no action or suit shall lie against any public servant specifically authorized by the government of Sri Lanka to take action in terms of the regulations, provided that such person has acted in good faith and in the discharge of his official duties.

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<sup>102</sup> General Comment No 8, Rights to liberty and security of persons, 30 June 1982, para. 4.

<sup>103</sup> General Comment No 13, para. 7. See also International Commission of Jurists, Sri Lanka: Briefing Paper, Emergency Laws and International Standards, March 2009, p. 21.

<sup>104</sup> General Comment No 31, para. 18.

### 4.3. Non-legislative measures

The 17<sup>th</sup> Amendment to the Constitution has been allowed to fall into abeyance by the government notwithstanding the emphasis placed on it by the government in the Status Report.<sup>105</sup> That amendment provides for important checks and balances on the executive presidential powers by providing that appointments of independent commissions and persons to senior positions in the public service are subject to recommendations or approvals by the Constitutional Council. That is the case with, for instance, the Attorney General, the Inspector General of Police, the Chief Justice and other judges of the Supreme Court and the Court of Appeal.<sup>106</sup> In the absence of a Constitutional Council, the President has appointed commissions and persons to senior positions directly.

This affects the institutions discussed below in this subsection and has been a matter of concern.<sup>107</sup> It has been suggested that many of the institutions have lost much of their independence because of the President's handling of the Amendment.<sup>108</sup> This has adversely affected at least some of the institutions.<sup>109</sup>

Together with a number of other factors, such as the prevailing climate of impunity and the absence of an effective witness protection scheme, it has adversely affected the effective implementation of human rights in Sri Lanka.

#### 4.2.1. Investigations carried out by the police

States must effectively investigate all allegations of serious human rights violations with certain minimum standards. Such an investigation shall include the collection and analysis of all physical and documentary evidence and statements from witnesses.<sup>110</sup> The duty effectively to investigate crimes becomes paramount particularly in those cases where there are allegations of serious human rights violations by the State's security forces in order to bring those responsible to justice,

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<sup>105</sup> In 2007 it was announced that a Parliamentary Select Committee was in the process of finalizing a report which would enable the reconstitution of the Constitutional Council. See Minister of Disaster Management and Human Rights, Press Release of 13 October 2007 on the visit of L. Arbour to Sri Lanka.

<sup>106</sup> IBA Report, May 2009, p. 23.

<sup>107</sup> Ibid.

<sup>108</sup> International Crisis Group, Sri Lanka's Human Rights Crisis, Asia Report No. 135, 14 June 2007, p. 19, hereinafter International Crisis Group, Sri Lanka's Human Rights Crisis.

<sup>109</sup> See Section 3.2.2., *supra*.

<sup>110</sup> UN Principles of the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, Recommended by the Social and Economic Council resolution 1989/65, 24 May 1985.

including persons responsible for crimes committed by State security forces, police and law enforcement agents, or paramilitary groups, so that the State sends a clear message that such killings are neither condoned nor sanctioned by government officials or personnel.<sup>111</sup>

Section 56(d) of the Police Ordinance of Sri Lanka places a positive duty on all police officers to detect crime and bring offenders to justice.<sup>112</sup> Police officers also have a positive duty to investigate crime under Part V of the Code of Civil Procedure (CCP).<sup>113</sup> All investigations must be completed without delay.<sup>114</sup>

In an interview the Chairperson of the recent Commission of Inquiry noted that the "Commission was unique because we were asked to do the investigations based on the premise that Police investigation was not satisfactory ... At the end of the police investigation, they concluded that there were no witnesses and closed the case."<sup>115</sup>

The efficiency of police investigations has been strongly criticised. For instance, on 14 May 2008 Philip Alston, UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, submitted a report to the 8<sup>th</sup> Human Right Council pointing out that during his visit to Sri Lanka he had found that the police failed to respect and ensure the right to life. He also stated that the government's response to human rights violations by the police was unsatisfactory.<sup>116</sup> The International Commission of Jurists (ICJ) noted in its submission to the Human Right Council Universal Periodic Review that the Sri Lankan authorities had proved unable or unwilling to solve the growing number of targeted killings of employees of international organisations in government territory. The police investigation into the killings in August 2006 of 17 Action Contre la Faim (AFC) workers had lacked impartiality, transparency or willingness to cooperate with outside forensic experts. In the absence of effective investigations, the number of killings had increased.<sup>117</sup> The investigation into the AFC killings has recently also been strongly criticised by University Teachers for Human Rights (Jaffna).<sup>118</sup> In June 2007 the International Crisis Group stated that in the face of the explosion of political crimes and rights violations, law enforcement agencies and the judicial system have failed almost completely. There had been almost no credible police investigations and very few arrests or indictments in any of the hundreds of killings, abductions,

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<sup>111</sup> HRC Resolution 2004/37, Article 6.

<sup>112</sup> Police Ordinance (as amended), 1956, Volume III, Chapter 53.

<sup>113</sup> Code of Criminal Procedure Act, No. 15, 1979 (as amended), Article 109(5), (CCP).

<sup>114</sup> CCP, Article 120.

<sup>115</sup> Interview with retired Supreme Court Judge Nissanka Udalagama, Sunday Times 21 June 2009.

<sup>116</sup> Report of the Special Rapporteur on extrajudicial executions, para. 55.

<sup>117</sup> ICJ, Submission to the Human Right Council, 2nd Session of the Universal Periodic Review, 5 -16 May 2008, p. 3.

<sup>118</sup> University Teachers for Human Rights, Jaffna (UTHR), Special Report No: 33, 4 August 2009, Third Anniversary of the AFC Massacre, *passim*.

and disappearances over the preceding year and half. There was no evidence of real investigation, even as Karuna forces operated openly throughout the Batticaloa district and the rest of the Eastern Province. The police were accused not only of a failure to act, but of an active obstruction of justice in order to cover up the role of government forces in rights violations.<sup>119</sup>

There are two different types of flaws in the investigatory system. The first is the attitude and conduct of those responsible for the investigations and the second is the structural weakness of institutions designed to ensure that the police perform their role properly and independently.

The attitude of the police may have been affected by the shift in their role under the emergency legislation. They have increasingly become a counter-insurgency force, rather than a body which maintains public order in the interest of the community and investigates crimes.<sup>120</sup> Police, military and the government are reportedly more interested in distorting facts, perverting the evidence and silencing witnesses rather than conducting any real investigations.

The failure to carry out effective investigations is, however, a long-standing problem and not simply the product of the situation since the end of the cease-fire. The Panel took note of the figure which has been regularly quoted that there exists a mere 4% conviction rate in criminal cases.<sup>121</sup> The danger in such a situation is that people think there is no point in complaining to the police and they may then take the law in their own hands.<sup>122</sup> The lack of any effective system of witness protection also acts as a disincentive to submitting complaints.<sup>123</sup>

Cases of investigation and prosecution and investigations of violations allegedly committed by the police, armed forces and government officials are thus inadequate, scant and number in single digits.<sup>124</sup> The failing cannot be attributed solely to the difficulties caused by the armed conflict in Sri Lanka. For instance, the investigation of deaths in custody, where all the evidence is in the hands of the authorities, is no more successful. The causes of lack of successful investigations also include lack of training, lack of adequate forensic expertise and lack of witness protection. Above

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<sup>119</sup> International Crisis Group, Sri Lanka's Human Rights Crisis, p. 16 -17.

<sup>120</sup> Report of the Special Rapporteur on extrajudicial executions, para. 53.

<sup>121</sup> See AHRC statement "AHRC supports Deputy Solicitor General's call for top priority to be given to the improvement of forensic facilities in Sri Lanka", 3 March 2005.

<sup>122</sup> E.g. the Bindunuwewa massacre. Philip Alston, Special Rapporteur, Civil and Political Rights, Including the Question of Disappearances and Summary Executions, Mission to Sri Lanka, 28 November-6 December 2005, E/CN.4/2006/53/Add. 5, 27 March 2006 (hereinafter "Report of the Special Rapporteur Alston, Mission to Sri Lanka"), para. 60.

<sup>123</sup> The Special Rapporteur reported that several of his interlocutors said, that it was better to be a victim than a witness.

<sup>124</sup> Statement by Special Rapporteur of extrajudicial executions, 5 September 2006; Press Statement by UN High Commissioner for Human Rights on Conclusion of her visit to Sri Lanka, 13 October 2007; Report by the Special Rapporteur on extrajudicial executions, para. 8, p. 5; International Crisis Group, Sri Lanka's Human Rights Crisis, p. 16 – 18; Asian Human Rights Commission (AHRC), State of Human Rights in Eleven Asian Nations, 2007 (hereinafter "AHRC, State of Human Rights in Eleven Asian Nations"), p. 298-300.

all, the inadequate number of successful prosecutions is a product of lack of political will and an attitude of complacency towards the inadequacy of the legal system.<sup>125</sup> During the period under review there is no evidence of any attempt to improve the effectiveness of investigations. All the recommendations made by the Special Rapporteur in his report in 2006, with one exception, have been ignored.<sup>126</sup> In the same period, the incidence of unlawful killings from whatever cause has increased.

The investigations into killings, whether carried out by State agents or persons for whom the State is responsible (SA/PSR) or others, have been wholly ineffective. This represents a wholesale failure of the criminal justice system.

In many cases,<sup>127</sup> the Supreme Court called upon the National Police Commission, the Police Department and the Prisons Department to take strict steps to subject erring individual officers to appropriate disciplinary action. None of these directions were implemented.<sup>128</sup>

#### *4.2.2. The role of the Attorney General's Department*

The Attorney General's Department is the chief legal advisor to the President and to all departments and ministries of government, including State security forces and the police. Under the 17<sup>th</sup> Amendment to the Constitution the Attorney General is appointed by the President subject to the approval of the Constitutional Council. However, the President appointed the current Attorney General in violation of the 17<sup>th</sup> Amendment.

According to a report by the International Crisis Group many believe that the Attorney General's Department has become "increasingly politicised" during President Rajapaksa's tenure.<sup>129</sup>

It has been suggested that the Attorney General's Department does not vigorously prosecute criminal cases involving serious human rights violations. "Cases against State officials, when they do happen, take "many years" to prosecute, and the delays in torture cases are "even longer" than on

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<sup>125</sup> Report by the Special Rapporteur on extrajudicial executions, para. 52.

<sup>126</sup> The suggestion that there should be an increase in the number of Tamils and Muslims in the police force. The government recruited 175 Tamil speaking personnel to the Police Department serving in the Eastern province, Joint Apparel Association Forum, Submission 20 January 2009, p. 11.

<sup>127</sup> *Perrea v. Iddalmagoda*, 2003 [2] SriL.R., 63, *Wewalage Rani Fernando case* SC(FR) No 700/2002, SCM 26/07/2004, *J. Wagaachige Dayraratne v. IPG and Others*, SC(FR) 337/2003 SCM 17.5.2004, *Sanjeeva v. Suraweera*, 2003 [1] SriL.R 317.

<sup>128</sup> Kishali Pinto Jayawardena, "Sri Lanka dysfunctional criminal justice system", published by the AHRC, Hong Kong, page 49.

<sup>129</sup> International Crisis Group, *Sri Lanka's Judiciary: politicized courts, compromised rights*, Asia report No 172, 30 June 2009, p. 9, available at: <http://www.crisisgroup.org/home/index.cfm?Ibid=6186>.

other charges."<sup>130</sup> Given the laxity with which the perpetrators of torture are indicted by the Attorney General's Department (in certain cases omitting on even the officer-in-charge of the police station who consented and acquiesced in the torture perpetrated upon the victim), it is not a matter for surprise that there is reluctance to indict perpetrators who inflict suffering, or for that matter, mental pain."<sup>131</sup>

The Attorney General has the power to compel a Magistrate to transmit the case proceedings to the Attorney General and suspend the Magistrate's inquiries.<sup>132</sup> Should the Attorney General be of the opinion that a case is disclosed against a perpetrator by investigative proceedings taken by the Police and the Magistrate, but that the work of the police or the Magistrate is defective, the Attorney General has the power to order and instruct the Magistrate to re-investigate in the manner desired by the Attorney General. The Magistrate is bound to comply with such an order.<sup>133</sup> Even if a Magistrate is of the view that there is sufficient evidence to commit a person to stand trial and so orders, the Attorney General has the power to quash the order and direct the Magistrate to discharge the complaint and the accused.<sup>134</sup>

The role of the Attorney General in the prosecution of cases, including its responsibilities and powers during the investigative stage, by its very nature places the Attorney General in a conflict of interest as far as any inquiry into the administration of justice, thereby excluding him and any members of his Department from a role greater than the victims in an inquiry.

The conflict of interest regarding the Attorney General's Department was one of the reasons why the IIGEP concluded its work.<sup>135</sup>

#### 4.2.3. *The courts*

The judicial system of Sri Lanka has not been capable of meeting the challenges caused by the explosion of political crimes and human rights violations.<sup>136</sup>

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<sup>130</sup> Ibid., p. 21.

<sup>131</sup> Kishali Pinto Jayawardena, Rule of law in decline in Sri Lanka: Study on prevalence, deterrence and causes of torture and other forms of cruel inhuman and degrading treatment or punishment in Sri Lanka, page 39, published by The Rehabilitation and Research Centre for Torture Victims, Copenhagen, Denmark, available at <http://material.ahrchk.net/srilanka/AHRC-FST-024-2009-CIDTP.pdf>.

<sup>132</sup> CCP Article 398.

<sup>133</sup> CCP Article 397(1)(2), 398(2) and 399.

<sup>134</sup> CCP Article 196.

<sup>135</sup> IIGEP, Public Statement, 6 March 2008. The stance of the Government of Sri Lanka on the matter is summarized in the paper entitled "The position of the Government of Sri Lanka with regard to the several issues contained in the 6<sup>th</sup> Public Statement of the IIGEP", 23 April 2008.

<sup>136</sup> International Crisis Group, Sri Lanka's Human Rights Crisis, p. 16.

The judiciary is, or has been, vulnerable to two forms of political influence: from the government and from the former Chief Justice. Since the operation of the Constitutional Council ceased in 2005, presidential nomination of judges has not been the subject of any additional appraisal and approval process prior to formal appointment. This makes the judiciary vulnerable to executive interference and jeopardises its independence. However, many would not dispute the merits of the President's appointments.<sup>137</sup>

The perception that the judiciary suffers from political influence has arisen in recent years due to the excessive influence of the former Chief Justice, the apparently inconsistent jurisprudence of the Supreme Court in relation to certain issues, and through tensions between the judiciary and the executive.<sup>138</sup> It is commonly believed that the former Chief Justice used the administration of the case allocation procedure as a tool to sideline senior Supreme Court judges from hearing politically sensitive cases.<sup>139</sup> It has also been suggested that the contempt of court powers of the Supreme Court have been used inappropriately, particularly by the former Chief Justice to stifle criticism from the civil society.<sup>140</sup> Efforts to enact contempt of court-legislation have failed.

High Court judges exercise a particularly important role in respect of criminal prosecutions in the High Court under the CAT Act. However, it has been reported that this is not a jurisdiction that has been exercised in a manner that justifies the objectives with which the CAT Act was enacted in 1994.<sup>141</sup>

#### *4.2.4. The National Human Rights Commission*

The NHRC can only make recommendations and is not empowered directly to approach the courts. It therefore lacks the capacity to conduct detailed criminal investigations into complaints of torture.<sup>142</sup> Additionally, the NHRC is not adequately funded or resourced and was therefore not capable of dealing with an exponentially worsening human rights crisis.<sup>143</sup>

The NHRC enjoyed a good reputation during the first 10 years of its existence and was granted 'A' status by the International Coordinating Committee of National Human Rights Institutions (ICC).

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<sup>137</sup> IBA Report, p. 26.

<sup>138</sup> *Ibid.*, p. 7.

<sup>139</sup> *Ibid.*, p. 32.

<sup>140</sup> *Ibid.*, p. 35.

<sup>141</sup> Kishali Pinto Jayawardena, *Rule of Law in decline in Sri Lanka*, op. cit. p. 92.

<sup>142</sup> *Id.*, p. 195.

<sup>143</sup> Minority Rights Group International Report "One year on: counter-terrorism sparks human rights crisis for the Sri Lanka minorities," 13 December 2007 (hereinafter "Minority Rights Group International Report"), p. 8.



However, an impasse at the Constitutional Council resulted in the President directly appointing his own members to the NHRC which flew in the face of the Constitution.<sup>144</sup> UN Special Rapporteurs have questioned the enforcement capacity of the NHRC and expressed concern that the enabling legislation grants very limited powers to the NHRC.<sup>145</sup> The Bar and academics are unanimous that the NHRC is not seen as having the will or power to address the more serious human rights issues.<sup>146</sup> Reduced capacity and willingness to investigate complaints, abandonment of the previous practice of holding hearings and a fractious relationship with civil society led to loss of public confidence in the NHRC. Serious concerns with the NHRC include: it is generally viewed as inactive, not prosecuting cases effectively through human rights investigations; incompetent or inactive senior staff in Jaffna; and an excessively hostile relationship with many NGOs.<sup>147</sup> It has been suggested that these defects have the effect that human rights cases are passed off to a mediation body that has no human rights mandate or teeth, resulting in civil/political rights not being appropriately dealt with through the mediation procedure.<sup>148</sup> However, the government had announced its intention to increase the powers of NHRC

Also, in 2007 the NHRC sent internal circular No. 7 dated 20/6/2007 that the secretary of the NHRC had set down a prescriptive period for receiving complaints of 3 months meaning that all complaints of torture, extra-judicial killings, disappearances etc. were prescribed unless complaints were made within 3 months of the date of the violation.<sup>149</sup> The NHRC also withdrew services such as visits to police stations and its 24 hour hot line for making complaints.<sup>150</sup> On 21 October 2007, the NHRC imposed a 'blackout' on its sub-offices (including Jaffna).<sup>151</sup> In effect, the NHRC placed a 'gagging' order on human rights abuses. According to representatives of the NHRC, it received 405 complaints of torture in the first nine months of 2007.

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<sup>144</sup> International Crisis Group, Sri Lanka's Human Rights Crisis, p. 19 - 20.

<sup>145</sup> Address by Louse Arbour, UN High Commissioner for Human Rights, 6th Session of the Human Right Council, 11 December 2007, Report of the Special Rapporteur on torture, para. 61-62, p. 17-18; Report of the Special Rapporteur on extrajudicial executions, para. 47, p. 11-14.

<sup>146</sup> Ibid.

<sup>147</sup> Kishali Pinto Jayawardena, Rule of law in decline in Sri Lanka, op. cit., p. 189.

<sup>148</sup> Ibid.

<sup>149</sup> AHRC, State of Human Rights in Eleven Asian Nations, p. 327-328; Report of the Special Rapporteur on torture, para. 60, p. 17.

<sup>150</sup> Ibid.

<sup>151</sup> Report of the Special Rapporteur on torture para. 60, p. 17.

#### 4.2.5. Commissions of Inquiry

The use in Sri Lanka of Commissions of Inquiry has been criticised. The particular Commission of Inquiry established in 2006 has also been criticized.

On 7 January 2007 Kishali Pinto Jayawardene published an article stating, *inter alia*, that putting the primary focus on the Commission of Inquiry (aided as it is supposed to be by a team of international observers) and thus shifting attention away from the due functioning of the "normal" rights protection monitors such as the National Human Rights Commission, is unbelievable.<sup>152</sup>

In October 2008 Louise Arbour, UN High Commissioner for Human Rights noted that the Commission of Inquiry is an ad hoc response to a series of particularly shocking incidents and should not be a substitute for effective action by relevant law enforcement agencies.<sup>153</sup>

The IIGEP expressed in its first public statement concern that there were no adequate victim and witness protection provisions under Sri Lankan law.<sup>154</sup> On 19 September 2007 the IIGEP issued a public statement according to which the IIGEP concluded that the investigation and inquiry process to date had failed to comply effectively with international norms and standards.

On 17 March 2008 the IIGEP took the decision to cease its activities on the ground that the proceedings of inquiry and investigation had fallen short of transparency and compliance with basic international norms and standards. The IIGEP had time and again pointed out the major flaws of the process: first and foremost the conflict of interest at all levels, in particular with the Attorney General's Department. Additional flaws included the restrictions on the operation of the Commission through lack of proper funding and independent support staff, poor organisation of the hearings and lines of questioning, and refusal of State authorities at the highest level to fully cooperate with the investigations and inquiries. Underlying it all was the impunity that had led to the prior fruitless investigations. There was a climate of threat, direct and indirect, to the lives of anyone who might identify persons responsible for human rights violations, including those who are likely to have been committed by the security forces. There had been and continued to be a lack of political and institutional will to investigate and inquire into the cases before the Commission.<sup>155</sup>

In a final public statement on 15 April 2008 the IIGEP noted that the victims and witness protection programme enjoyed no statutory basis, lacked fully trained staff and did not have sufficient funds to offer adequate assistance to those in need of protection. The Commission had not ensured the

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<sup>152</sup> Kishali Pinto Jayawardena, Focus on Rights, The Sunday Times, 7 January 2007.

<sup>153</sup> Amnesty International, Twenty Years of Make-believe, p. 9.

<sup>154</sup> IIGEP, Public Statement of 11 June 2007, p. 1 - 2.

<sup>155</sup> IIGEP, Public Statement of 6 March 2008.

protection of victims and their families from intimidation and their representation by legal counsel. There was no provision to extend the protection arrangements beyond the life of the Commission.<sup>156</sup>

In its report of 2009, published before the Commission of Inquiry had concluded its work, Amnesty International noted that the inquiries had not focused on the failures of the investigations by the police and the Attorney General's department investigations into the same cases. Amnesty International also criticises the fact that the progress of the Commission's inquiries was slow and that investigations were held in camera during the first year.<sup>157</sup> The security forces may have obstructed the investigations, refusing to provide information on grounds of national security. Public hearings had been disrupted by private counsel who, both in the context of the hearings and in public statements, had attacked witnesses, members of the Commission and the IIGEP in inflammatory and political terms. There have also been problems with the translation of statements made by witnesses.<sup>158</sup>

According to the Chairperson of the Commission of Inquiry, the IIGEP had from the beginning been confrontational. They had questioned the independence of the Commission. They had also been complaining over the delays but the Chairperson was of the view that the Commission had taken time for good reasons. The Commission had to have the Commission of Inquiry Act amended but that had taken eight months.<sup>159</sup>

#### *4.2.6. Conclusion*

The National Human Rights Commission is deeply flawed and has lost all credibility after being stocked by political appointees. Other domestic institutions are increasingly politicized or dysfunctional. The law enforcement agencies and the judicial system have failed almost completely. There had been almost no credible police investigations and very few arrests or indictments in any of the hundreds of killings, abductions and disappearances over the past year and a half of sustained violence.<sup>160</sup>

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<sup>156</sup> IIGEP, Public Statement of 11 June 2007, p. 2

<sup>157</sup> Amnesty International, *Twenty Years of Make-believe*. p. 13-14.

<sup>158</sup> *Ibid.*, p. 23-24.

<sup>159</sup> Interview with retired Supreme Court Judge Nissanka Udalagama in *Sunday Times*, 21 June 2009.

<sup>160</sup> International Crisis Group, *Sri Lanka's Human Rights Crisis*, p. 16.

## 5. *Effective Implementation and Compliance*

Throughout the period in issue broad concern about the human rights situation in Sri Lanka has been expressed by a variety of credible sources, including UN special procedures and reputable NGOs.<sup>161</sup> These suggest that there are problems with the compliance by Sri Lanka with its human rights commitments.

By way of illustrative example, on 5 September 2006 Philip Alston stated at the Human Rights Council that the situation in Sri Lanka had deteriorated significantly since he visited Sri Lanka at the end of 2005. Civilians were not simply caught in the crossfire of the conflict but rather were targeted for strategic reasons.<sup>162</sup>

On 13 October 2007 Louise Arbour, UN High Commissioner for Human Rights, stated that in the context of the armed conflict and the emergency measures taken against terrorism, the weakness of the rule of law and the prevalence of impunity was alarming. There were a large number of reported killings, abductions and disappearances that remained unresolved. In the absence of more vigorous investigations, prosecutions and convictions, it was hard to see how this would come to an end. While Sri Lanka has much of the necessary human rights institutional infrastructure, critical elements of protection had been undermined or compromised.<sup>163</sup>

On 11 December 2007 Louise Arbour addressed the 6<sup>th</sup> Session of the Human Rights Council stating, inter alia, that while the Government pointed to several initiatives it had taken to address these issues, there had yet to be an adequate investigation or credible public accounting for the vast majority of the cases of abductions and disappearances. Regrettably, the various national institutions and mechanisms that could be expected to safeguard human rights had failed to deliver adequate protection.<sup>164</sup>

In December 2007 the Asian Human Rights Commission issued a report which summarized the situation in Sri Lanka as follows: "The situation of human rights, the rule of law and the independence of the judiciary deteriorated further during the year 2007...There were no improvement in any of the areas relating to human rights and the rule of law, in fact, even the discourse on human rights suffered a serious setback as the Sri Lankan government refused to

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<sup>161</sup> See further below.

<sup>162</sup> Statement by Philip Alston, Special Rapporteur on extrajudicial executions, Statement, 5 September 2006

<sup>163</sup> Press statement by Louise Arbour on conclusion of her visit to Sri Lanka, Colombo, 13 October 2007.

<sup>164</sup> Address by Ms. Louise Arbour, UN High Commissioner for Human Rights, on the occasion of the resumed 6<sup>th</sup> Session of the Human Rights Council, Geneva, 11 December 2007.

engage in any meaningful discourse about the improvement of the situation with the local human rights groups, international human rights groups, the Human Rights Council and with Louise Arbour..."<sup>165</sup>

On 6 March 2008 Human Rights Watch issued a report<sup>166</sup> which stated that the involvement of the security forces in "disappearances" is facilitated by Sri Lanka's emergency laws, which grant sweeping powers to the army along with broad immunity from prosecution.

At the 2<sup>nd</sup> Session of the Universal Periodic review on 5 – 16 May 2008 the International Commission of Jurists noted that concerns had been raised regarding the functioning and independence of some of Sri Lanka's state institutions. The capacity to protect human rights is limited by the longstanding climate of impunity, the dangerous security situation and the sheer scale of the crisis.<sup>167</sup>

On 19 June 2008 the International Federation of Human Rights in its annual report stated that the human rights situation in Sri Lanka had deteriorated dramatically, especially in the Jaffna peninsula. Enforced disappearances, extrajudicial killings, recruitment of child soldiers, torture, threats, and, in general, massive violations of human rights and war crimes had increased, resulting in a real climate of fear and insecurity throughout the country. In 2007 the government established a policy to discredit, almost systematically, human rights activities, particularly by accusing defenders of human rights being "supporters of the LTTE", "traitors" or "enemies of the State".<sup>168</sup>

In her statement of 26 May 2009 at the Eleventh Special Session of the Human Rights Council, on behalf of all Special Procedures mandate holders of the Human Rights Council, Ms. Magdalena Sepúlveda, independent expert on the question of human rights and extreme poverty, reiterated the concern at the serious human rights situation in Sri Lanka and at the lack of transparency and accountability that accompanies the crisis. Weak institutional structures permitted impunity to go unabated. Those defending human rights did not have the space they need to do their important work without fear or reprisals.<sup>169</sup>

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<sup>165</sup> AHRC, State of Human Rights in Eleven Asian Nations.

<sup>166</sup> Human Rights Watch, Recurring Nightmare: State Responsibility for "Disappearances" and Abductions in Sri Lanka, 6 March 2008, Volume 20 No. 2(C), (hereinafter Human Rights Watch, Recurring Nightmare), available at: [http://www.hrw.org/sites/default/files/reports/srilanka0308\\_1.pdf](http://www.hrw.org/sites/default/files/reports/srilanka0308_1.pdf), *inter alia* p. 2, 3 and 5.

<sup>167</sup> *Ibid.*, p. 4.

<sup>168</sup> International Federation of Human Rights, Asia, Observatory for the Protection of Human Rights Defenders, Annual Report 2007, available at: <http://www.fidh.org/IMG/pdf/OBS2007-UK-asie.pdf>.

<sup>169</sup> Magdalena Sepulveda, independent expert on the question of human rights and extreme poverty, The human rights situation in Sri Lanka, statement delivered on behalf of all Special Procedures mandate holders of the Human Rights Council at the Eleventh Special Session of the Human Rights Council, 26 May 2009.

On May 27 2009, at the same session, Forum Asia stated that the deep rooted issue of discrimination and impunity had been allowed to continue unabated throughout the decades. There had been a sharp increase of uninvestigated killings and disappearances of journalists, media workers, human rights defenders and religious personalities.<sup>170</sup>

Justice Nihal Jayasinghe, Sri Lankan High Commissioner to the UK, categorically denied that civilians were killed by Sri Lankan artillery as the Sri Lankan artillery had never fired on civilians. The allegations that up to 4000 civilians had died in the final assault were baseless as the final assault on the LTTE leadership was carried out after all the civilians were rescued by the military. There were no disappearances, rape, torture or murder taking place in the "welfare villages" for displaced people.<sup>171</sup>

The examination that follows of particular rights is not comprehensive. The non-inclusion of a right protected by the ICCPR should not be interpreted as signifying compliance by Sri Lanka with the relevant provision.

## **5.1. Unlawful killings**

### *5.1.1. International standards*

Article 6 of the ICCPR prohibits arbitrary killings and requires States to protect the right to life. A killing can be arbitrary either because there were no grounds for the resort to potentially lethal force or because the force used was disproportionate to the aim being pursued. Generally speaking, the framework of analysis is that of a law and order paradigm. During the conduct of hostilities, however, it is necessary to apply a LOAC/IHL paradigm, in which case a killing will only be arbitrary if it violates LOAC/IHL provisions.<sup>172</sup> The obligation to protect the right to life requires the State to protect those within the jurisdiction from threats to life, even at the hands of third parties. It also requires the State to investigate all killings.

The HRC in General Comment No. 6 to the ICCPR states that the right to life is non-derogable "even in time[s] of public emergency which threatens the life of the nation" (Article 4). While the right is not absolute, 'protection against arbitrary deprivation of life which is explicitly required by

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<sup>170</sup> UN Human Rights Council Special Session on Sri Lanka, Statement delivered by FORUM ASIA, 27 May 2009.

<sup>171</sup> Letter by Justice Nihal Jayasinghe to Mr. Ben De Pear of ITN, London, dated 17 June 2009, available at: <http://www.slhclondon.org/news/Channel4%20170609.pdf>

<sup>172</sup> See 2.5 above.

the third sentence of Article 6 (1) is of paramount importance' and states 'should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces. The deprivation of life by the authorities of the State is a matter of the utmost gravity. Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities.'<sup>173</sup>

### *5.1.2. Domestic implementation*

As noted above, Sri Lankan law does not expressly provide for the obligation to protect the right to life. The Penal Code in Chapter XVI, Articles 293-365 does, however, identify the different types of unlawful violence to the person, including offences affecting life.<sup>174</sup> The UN Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions has, however, "... concluded that extrajudicial executions were widespread and included political killings designed to suppress and deter the exercise of civil and political rights as well as killings of suspected criminals by the police." The Special Rapporteur found that both Government forces and the LTTE were responsible and that the perpetrators enjoyed complete impunity. He found that the investigations carried out by the police were "completely inadequate."<sup>175</sup>

This section considers unlawful killings in a law-enforcement context, unlawful killings during the conduct of active hostilities and deaths in custody.

### *5.1.3. Unlawful killings by State agents or persons for whom the State is responsible in a law enforcement context*

Unlawful killings<sup>176</sup> perpetrated by soldiers, police and paramilitary groups with ties to the government are a major problem in Sri Lanka.<sup>177</sup> Even during the ceasefire, these types of killings were widespread and included political killings for the purpose of suppressing and deterring the exercise of civil and political rights as well as killings of suspected criminals by police.<sup>178</sup> Philip

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<sup>173</sup> U.N.Doc. HRI/GEN/1/Rev.1 at 6 (1994).

<sup>174</sup> Government of Ceylon, Legislative Enactments, Penal Code, 1956 Revision, Reprinted 1990.

<sup>175</sup> Report of the Special Rapporteur on extrajudicial executions, para.8

<sup>176</sup> Killings other than those occurring during the conduct of active hostilities are analysed in terms of a law and order paradigm; *ibid.*, para. 32

<sup>177</sup> Statement of Special Rapporteur on extrajudicial executions, UNHCR, 5 Sept. 2006; Press Statement by UN High Commissioner for Human Rights on Conclusion of her Visit To Sri Lanka, 13 October 2007; Report of the Special Rapporteur on extrajudicial executions, para. 8, p. 5; Minority Rights Group International Report, p. 6-7.

<sup>178</sup> Report of the Special Rapporteur on extrajudicial executions, para. 8, 44, p. 5, 15-16; Amnesty International, Submission to the UN Universal Periodic review for Sri Lanka, 2008, p. 4.

Alston, UN Special Rapporteur on Extrajudicial Executions, estimated that there were around 300 such killings, committed by all armed groups, in 2005.<sup>179</sup> Other killings, such as massacres and reprisal killings have occurred implicating both the government and the LTTE.<sup>180</sup>

The Government was compromised by its association with the Karuna faction, the TMVP.<sup>181</sup> The Karuna faction worked openly with Government security forces at checkpoints, carried weapons on the streets and escaped investigation despite many complaints to police and security forces about their involvement in child abductions, torture, and killings of civilians.<sup>182</sup> The relationship between the Karuna faction and the Government was unclear as of 2005.<sup>183</sup> Special Rapporteur Philip Alston found 'no clear evidence of official collusion' but only 'strong circumstantial evidence of (at least) an informal cooperation between government forces and the Karuna faction.'<sup>184</sup> He subsequently (2008) found that the situation had evolved for the worse and that the two TMVP factions "... no longer constitute truly independent armed groups but instead receive direction and assistance from the security forces."<sup>185</sup> In any event, it appears that the Government had completely failed to comply with recommendations to sever ties with the group and instead intensified its collaboration with various paramilitary factions.<sup>186</sup>

Many killings and disappearances of civilians were carried out against those suspected of being informants for or collaborators with the LTTE, particularly Tamils around Colombo and Jaffna and had occurred in high security zones with a heavy military presence. In Jaffna, many of these violations had occurred during military imposed curfews. While many of the perpetrators were unknown, it appears there is involvement or complicity of security forces and supported by the Eelam People's Democratic Party (EPDP) who work closely with Government forces.<sup>187</sup> Groups known for carrying out extra-judicial killing and abductions, such as the Karuna faction, were reportedly housed in government security forces' camps or in locations that were under security forces' protection.<sup>188</sup>

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<sup>179</sup> Report of the Special Rapporteur Alston, Mission to Sri Lanka, para.10. Until December 2005, the ceasefire between the forces of the main parties was largely respected. Those killed were largely civilians; *Ibid.*, para.4.

<sup>180</sup> International Crisis Group, Sri Lanka's Human Rights Crisis, p. 8-10; Minority Rights Group International Report, p. 6-7; Amnesty International, Submission to the UN Universal Periodic review for Sri Lanka, para 4.1.

<sup>181</sup> Report of the Special Rapporteur on torture, para.16, p. 9.

<sup>182</sup> *Ibid.*

<sup>183</sup> Report of the Special Rapporteur on extrajudicial executions, para. 49, p. 14.

<sup>184</sup> Report of the Special Rapporteur Alston, Mission to Sri Lanka, para. 16.

<sup>185</sup> Report of the Special Rapporteur on extrajudicial executions, para 50.

<sup>186</sup> *Ibid.*, para. 52.

<sup>187</sup> *Ibid.*, para. 18-20, p. 7-8; International Crisis Group, Sri Lanka's Human Rights Crisis; Minority Rights Group International Report, p. 7; Amnesty International, Submission to the UN Universal Periodic review for Sri Lanka, 4.1.

<sup>188</sup> Minority Rights Group International Report, p. 7; UTHR, Can the East be won through human culling, Special Report, 3 August 2007.



Throughout the country, many Tamil and Muslim civilians were killed primarily for exercising rights including freedom of movement while others were killed in retaliation or because they were deemed to be LTTE ‘sympathizers.’<sup>189</sup> Other civilians were intentionally killed for political or ‘strategic reasons.’<sup>190</sup> For example, the army assisted by the pro-government Tamil paramilitaries reportedly engaged in a deliberate policy of extra-judicial killings and abductions upon those they considered to be supportive of the LTTE.<sup>191</sup>

Attacks, abductions, intimidation and threats against humanitarian aid and human rights workers (predominately Tamils) increasingly occurred by a number of perpetrators.<sup>192</sup> For example, seventeen aid workers were killed allegedly by at least one member of the Muslim Home Guard (Jehangir) and two police constables in the presence of the Sri Lankan Naval Special Forces.<sup>193</sup> According to UN Undersecretary General John Holmes, thirty aid workers were killed ‘execution style’ between 2006 and 2007, sixteen of whom were Tamils.<sup>194</sup> The government responded to the incident by calling Holmes a ‘terrorist.’<sup>195</sup> A senior opposition MP accused an Air Force officer of being involved in the killing of two Red Cross workers leading to the officer’s eventual arrest.<sup>196</sup> "According to a study by the Law and Society Trust, from January 2006 through December 2007, 44 humanitarian workers were killed, and 23 were disappeared. The worst affected organizations were Action Contre la Faim (17 dead), the Tamils Rehabilitation Organization (9 dead), the Danish Demining Group (6 dead), Halo Trust (6 dead), and the Sri Lanka Red Cross Society (4 dead), but a total of more than 18 organizations have been affected."<sup>197</sup>

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<sup>189</sup> Report of the Special Rapporteur Alston, Mission to Sri Lanka; See also Statement From Special Rapporteur on extrajudicial executions, UNHCR, 5 Sept. 2006; International Crisis Group, Sri Lanka’s Human Rights Crisis, p. 19; UTHR Special Report No 33, A Travestied Investigation, Erosion of the Rule of Law and Indicators for the Future of Minorities in Lanka, issued on 4 August 2009, sets out the evidence obtained in its own inquiries and identifies those whom they say carried out the attack, allegedly in the presence of the military commandoes.

<sup>190</sup> Statement of the Special Rapporteur on extrajudicial executions, UNHCR, 5 Sept. 2006; Press Statement by UN High Commissioner for Human Rights on Conclusion of her Visit to Sri Lanka, 13 October 2007; Submission to the UN Universal Periodic review for Sri Lanka, Amnesty International, 4.1.

<sup>191</sup> International Crisis Group, Sri Lanka’s Human Rights Crisis; Amnesty International, Submission to the UN Universal Periodic review for Sri Lanka, , 4.1.

<sup>192</sup> Minority Rights Group International Report, p. 5-6; AHRC, State of Human Rights in Eleven Asian Nations, p. 304-305.

<sup>193</sup> AHRC, State of Human Rights in Eleven Asian Nations, p. 305. In the special report No 33, A Travestied Investigation. Erosion of the Rule of Law and Indicators for the Future of Minorities in Sri Lanka, dated 4 August 2009, University Teachers for Human Rights (Jaffna) notes that the government is claiming that the COI has found the LTTE to be responsible for the killings.

<sup>194</sup> Minority Rights Group International Report, p. 5-6.

<sup>195</sup> Ibid., p. 6.

<sup>196</sup> Ibid., p. 8.

<sup>197</sup> Report of the Special Rapporteur on extrajudicial executions, para. 43, citing Law and Society Trust, Under Fire: Persons in Humanitarian Service: A Preliminary Report on Killings and Disappearances of Persons in Humanitarian Service in Sri Lanka, January 2006 - December 2007 (7 March 2008). The case of those working for Action Contre la Faim was one of the cases investigated by the Commission of Inquiry originally monitored by the International

In the two years following the report of his visit to Sri Lanka, the Special Rapporteur on extrajudicial executions found that there had been a dramatic increase in the number of extrajudicial killings. Such killings were, by 2008, widespread but with significant regional variation in the level and pattern of abuse.<sup>198</sup>

In the Jaffna area, for example, there was a high rate of killings amongst those suspected of being an LTTE informant, collaborator or 'sympathizer'. The determination was based on arbitrary criteria such as a record of past collaboration with the LTTE. Past collaboration ranged from attending LTTE rallies to receiving military training. Since Jaffna had been under LTTE control for such an extended period, virtually everyone had some voluntary or involuntary association with the LTTE and determining who was to be killed had little or no relationship to what individuals had actually done.<sup>199</sup> Government forces attempted to identify suspects at check points and during search operations. Identity cards were confiscated and suspects were ordered to report to a military base where they were interrogated. If government forces determined a person was a collaborator, they were at high risk of being killed and if they were not deemed to be a collaborator, they were threatened with death unless they provided the names of actual collaborators. An exact number of extra-judicial killings in Jaffna are not available due to the high rate of disappearances.

In the East of Sri Lanka during this period there were also a significant number of unlawful killings.<sup>200</sup>

During the ceasefire, when different areas of the country were controlled by different groups, there was a real difficulty in carrying out investigations when a suspect fled from a government-controlled area to an area controlled by the LTTE.<sup>201</sup> That being said, it should be noted that such a claim depends on their being a suspect, which cannot be determined without an investigation. The Special Rapporteur commented on the general lack of investigative ability on the part of the police and other impediments.<sup>202</sup> The system for internal police investigations was structurally flawed and the Special Rapporteur found that there had been no investigation into any of the cases referred by him to the Government.<sup>203</sup> He attributed a significant part of the difficulty to the fact that the police had become a counter-insurgency force.

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Independent Group of Eminent Persons; see *ibid.*, para. 38-41 and Action Contre la Faim, "The Muttur massacre: A struggle for justice", June 2008.

<sup>198</sup> Report of the Special Rapporteur on extrajudicial executions, para.17.

<sup>199</sup> *Ibid.*, para. 18.

<sup>200</sup> *Ibid.*, para.24-27.

<sup>201</sup> Report of the Special Rapporteur Alston, Mission to Sri Lanka, para. 34-35.

<sup>202</sup> *Ibid.*, para. 34; e.g. para.37.

<sup>203</sup> Report of the Special Rapporteur on extrajudicial executions, para. 55.

By 2008, the Special Rapporteur reported that "More than two years later, the Government has completely failed to implement the Special Rapporteur's recommendations for improving police respect for human rights, police effectiveness in preventing killings, and police accountability. Indeed, there has been significant backward movement. Rather than improving the investigative and crime prevention capacity of the police, the Government has even more completely subordinated the police to the counterinsurgency effort. Since the Special Rapporteur's visit took place, the Government has required the Inspector General of Police to report to the Minister of Defence."<sup>204</sup>

Of particular significance was the erosion of the independence of the National Police Commission.<sup>205</sup>

#### *5.1.4. Unlawful killings during the course of active hostilities*<sup>206</sup>

Between the report of his visit to Sri Lanka and the follow-up in 2008, the Special Rapporteur noted that there had been a new round of hostilities characterised by exceptional brutality and the disregard of LOAC/IHL and human rights law.<sup>207</sup>

During the recent hostilities which resulted in victory for the Sri Lankan forces, there were widespread allegations that both sides showed a wanton disregard for human life and violated LOAC/IHL.<sup>208</sup> It was claimed that the LTTE used the civilian population as "human shields" and prevented them from leaving the conflict zone. The government is said repeatedly to have hit facilities known to be fulfilling medical functions and to have fired heavy weapons into densely populated areas. The casualty figures for those killed and injures are not known.<sup>209</sup> Owing to the refusal to grant access to journalists, it is not possible to obtain accurate figures. Without knowing what was targeted and why, it is difficult to establish whether the security forces breached their

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<sup>204</sup> Ibid., para. 56-57.

<sup>205</sup> As for instance suggested by Human Rights Watch, submission to the UPR of Sri Lanka, 4 May 2008, available at: <http://www.hrw.org/en/news/2008/05/04/universal-periodic-review-sri-lanka%20>.

<sup>206</sup> See 2.5 on the relevance of the law of armed conflict/international humanitarian law.

<sup>207</sup> Report of the Special Rapporteur on extrajudicial executions, para. 16.

<sup>208</sup> U.N. Tells of Bloodbath in Sri Lanka, May 11, 2009, The New York Times, available at: <http://www.nytimes.com/2009/05/12/world/asia/12lanka.html>; Amnesty International, UN Security Council must act immediately to stop "bloodbath" in Sri Lanka, 11 May 2009, <http://www.amnesty.org/en/news-and-updates/news/un-security-council-must-act-immediately-stop-bloodbath-sri-lanka-20090511>; Human Rights Watch, Sri Lanka: Repeated Shelling of Hospitals Evidence of War Crimes, May 8, 2009, <http://www.hrw.org/en/news/2009/05/08/sri-lanka-repeated-shelling-hospitals-evidence-war-crimes>; Human Rights Watch, Sri Lanka: Satellite Images, Witnesses show Shelling Continues, May 12, 2009, <http://www.hrw.org/en/news/2009/05/12/sri-lanka-satellite-images-witnesses-show-shelling-continues>.

<sup>209</sup> The UN estimated that 7,000 civilians were killed. The Times estimated the figure as 20,000, see Times photographs expose Sri Lanka's lie on civilian death at beach, The Times, 29 May 2009, available at: <http://www.timesonline.co.uk/tol/news/world/asia/article6383477.ece>.

obligations under human rights law, as interpreted in the light of LOAC/IHL. The damage inflicted on a facility known to be serving as a hospital raises serious concerns, as does the subsequent detention of Tamil Doctors who reported the attacks to the outside world.<sup>210</sup> The Sri Lankan government unilaterally undertook not to fire heavy artillery into the "no fire zone" but there is significant evidence that they in fact did so.<sup>211</sup>

#### *5.1.5. Deaths in custody*

In a report issued on 27 March 2006 the UN Special Rapporteur on extrajudicial executions Philip Alston noted that the police were engaged in summary executions. Reports, unchallenged by the Government, to the Panels knowledge, show that from November 2004 to October 2005 the police shot at least 22 criminal suspects after taking them into custody. The Government confirmed that in no internal police inquiry had been opened in any of these cases. The other main cause of deaths in police custody is torture.<sup>212</sup>

Force allegedly became necessary when handcuffed suspects attempted to escape or attacked the officers. All shootings were fatal and no officers were injured. Government confirmed that none of these cases led to an internal police inquiry because no complaints were made.<sup>213</sup>

An often reported reason given for killing of suspects in police custody or those held in detention is that the detainees attacked police with grenades or some other weapons and therefore, the use of lethal force was justifiable self-defence. Another common justification used by police is that suspects or detainees were trying to escape.<sup>214</sup> However, many of these 'justifiable killings' are surrounded by questionable circumstances.<sup>215</sup> Killings of detainees by the police has a long history in Sri Lanka and Magistrates often accept the versions given by police and will declare a shooting justifiable before such cases are brought before the High Court and before all of the evidence has

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<sup>210</sup> There were UN and Red Cross witnesses of the shelling of the hospital, see War Without Witness Sri Lanka, Sri Lankan Government paraded Doctors in custody, to cover-up War-Crime Evidences –But, facts speak for itself.

<sup>211</sup> See Sri Lanka admits attacks on 'no-fire' zone, Telegraph, 1 May 2009, and Sri Lankan hospital shelled in Tamil no-fire zone, Guardian, 9 April 2009.

<sup>212</sup> Report of the Special Rapporteur, extrajudicial executions, para. 53 and 54; AHRC, State of Human Rights in Eleven Asian Nations, p. 323-345.

<sup>213</sup> Ibid.

<sup>214</sup> AHRC, State of Human Rights in Eleven Asian Nations, p. 298-299.

<sup>215</sup> Ibid., p. 323-345.

been examined.<sup>216</sup> Higher authorities are said to approve of these types of killings as former Inspectors General of Police have publicly approved of it.<sup>217</sup>

#### *5.1.6. Killings by unknown persons*

Lynching and mob killings by civilians were also reported to have taken place throughout 2007.<sup>218</sup> In all instances of mob killings people have taken matters into their own hands because they felt contacting the police was pointless.<sup>219</sup> On 27 Sept. 2008, a grenade attack by unidentified persons was carried out against the Executive Director of Transparency International Sri Lanka.<sup>220</sup> He was legal counsel in a number of sensitive fundamental rights cases including allegations of torture, extra-judicial killings and disappearances.<sup>221</sup> Another lawyer who was appearing in a fundamental rights case against police received death threats. Unidentified persons killed his clients who had initiated a bribery cases against the police and a fundamental rights case 2 weeks earlier.<sup>222</sup>

Attacks on the media, both through verbal threats by the Government and through brutal and physical assaults by unknown persons have been widely reported.<sup>223</sup> A significant number of journalists have been killed (6-10 depending on the criteria used) since 2006 which prevented and deterred the press from closely monitoring conflict-related violence.<sup>224</sup> The Free Media Group, an independent media watchdog, reported that a total of 12 Tamil journalists were killed from 2006 – 2007 in Jaffna alone.<sup>225</sup> In May 2007, gunmen entered the premises of the Uthayan newspaper office and randomly shot at workers, killing and injuring several.<sup>226</sup> A fact-finding mission from Reporters without Borders found that since this attack "local journalists have lived and worked in fear." The report noted that "murders, kidnappings, threats and censorship have made Jaffna one of the world's most dangerous places for journalists to work. At least seven media workers, including two journalists, have been killed there since May 2006. One journalist is missing and at least three

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<sup>216</sup> Ibid.

<sup>217</sup> Ibid., p. 300.

<sup>218</sup> AHRC, State of Human Rights in Eleven Asian Nations, p. 308

<sup>219</sup> Ibid.

<sup>220</sup> International Committee of Jurists, Press Release, September 2008.

<sup>221</sup> Ibid.

<sup>222</sup> Ibid

<sup>223</sup> AHRC, State of Human Rights in Eleven Asian Nations, p. 323-327; Amnesty International, Silencing Dissent, AI Index ASA 37/001/2008, 7 February 2008.

<sup>224</sup> Report of the Special Rapporteur on extrajudicial executions, para. 45; International Crisis Group, Sri Lanka's Human Rights Crisis, p. 14; AHRC, State of Human Rights in Eleven Asian Nations, p. 323-327.

<sup>225</sup> Minority Rights Group International Report, p. 6

<sup>226</sup> AHRC, State of Human Rights in Eleven Asian Nations, p. 323 – 327.

media outlets have been physically attacked."<sup>227</sup> In another incident, the police removed the security detail protecting Sri Lanka's top defence correspondent without warning on 18 August 2007.<sup>228</sup> The security detail was provided after he had been previously attacked on a number of occasions.<sup>229</sup> Reporters Without Borders responded by stating that 'Sectors of the army [were] trying to gag or kill' him.<sup>230</sup> Numerous journalists have been abducted, attacked, threatened or forced into exile.<sup>231</sup>

Motivations for targeting journalists include: accusations of supporting the LTTE; having criticized the Government too strongly; and having revealed information the Government did not like.<sup>232</sup> For example, during the military's campaign in the eastern territories, journalists were repeatedly attacked for reporting on the humanitarian situation there and media organizations were labelled as 'terrorists' if they were critical of the government.<sup>233</sup> In some instances, journalists have been targeted for harassment by the Karuna faction with the blessing of government forces.<sup>234</sup> Following the killing of Lasantha Wickrematunge, editor of the Sunday Leader, in January 2009, (a killing which he himself had foretold<sup>235</sup>), other journalists have fled Sri Lanka. An analysis conducted by Minority Rights Group International (MRG) shows that almost all journalists killed, attacked or threatened since 2006 were from minority groups.<sup>236</sup>

Another group particularly at risk are human rights defenders. In November 2006, for example, Nadaraja Raviraj, co-founder of the Civil Monitoring Commission was shot dead in daylight in Colombo.<sup>237</sup> Lawyers who defend those charged with security offences are also subject to harassment.<sup>238</sup>

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<sup>227</sup> Fact-finding report by the International Press Freedom, Mission to Sri Lanka, Jaffna's media in the grip of terror, August 2007, available at [http://www.rsf.org/spip.php?page=article&id\\_article=23380](http://www.rsf.org/spip.php?page=article&id_article=23380).

<sup>228</sup> International Crisis Group, Sri Lanka's Human Rights Crisis, p. 14; The Sunday Leader, The War on the Media, 22 April 2007; Public Release from the Civil Monitoring Commission, the Free Media Movement and the Law & Society Trust, 31 October 2007 (reporting that from January-August 2007, 3 media personnel were killed and 5 media personnel disappeared. The report does not specify causes of deaths or how/why they disappeared); Minority Rights Group International Report, p. 6.

<sup>229</sup> Reporters without borders/Reporters sans frontières, forwarded by the Asian Human Rights Commission, Sri Lanka: Life of journalist Iqbal Athas in danger after his revelations about purchase of Ukrainian Migs, 30 August 2007.

<sup>230</sup> Reporters without Borders, statement 29 August 2007.

<sup>231</sup> See for instance, International Press Freedom and Freedom of Expression Mission to Sri Lanka, Media under fire: Press freedom lockdown in Sri Lanka, December 2008.

<sup>232</sup> International Crisis Group, Sri Lanka's Human Rights Crisis, 14; Minority Rights Group International Report, p. 6; Amnesty International, Silencing Dissent, op. cit.

<sup>233</sup> Minority Rights Group International Report.

<sup>234</sup> Amnesty International, Silencing Dissent, op. cit.

<sup>235</sup> "I hope my murder will be seen not as a defeat of freedom but an inspiration". The Guardian, 13 January 2009, available at: <http://www.guardian.co.uk/commentisfree/2009/jan/13/wickrematunga-final-editorial-final-editorial>.

<sup>236</sup> Minority Rights Group International Report, p. 6.

<sup>237</sup> Report of the Special Rapporteur on extrajudicial executions, para. 44.

<sup>238</sup> IBA report.

A third group are those perceived as critics of the government. On 20 August 2009 the Executive Director of the Centre for Policy Alternatives, Dr. Paikiasothy Saravanamuttu, received an anonymous death threat. According to the death threat Dr. Saravanamuttu would be killed because Sri Lanka stands to be deprived the GSP+ benefits due to information supplied by Dr. Saravanamuttu to the EC Commissioner for External Relations.<sup>239</sup>

#### *5.1.7. Killings by persons for whom the State is not responsible*

The LTTE has notoriously used assassination of Tamil opponents as a mechanism for suppressing rival nationalist movements.<sup>240</sup> The LTTE resorted to indiscriminate attacks on civilians in Ampara, Batticaloa and Trincomalee as means of terrorizing the population and this became more common during the first 5 months of 2008.<sup>241</sup> The LTTE has also targeted journalists and forced critical Tamil newspapers to close.<sup>242</sup>

#### *5.1.8. Obligation to investigate killings*

The obligation to investigate any killing, whether committed by a SA/PSA or a third party, is an intrinsic element in the obligation to protect the right to life. There are two different types of flaws in the investigatory system. The first is the attitude and conduct of those responsible for the investigations and the second is the structural weakness of institutions designed to ensure that the police perform their role properly and independently.

The attitude of the police may have been affected by the shift in their role under the Emergency legislation. They have increasingly become a counter-insurgency force, rather than a body which maintains public order in the interests of the community and investigates crimes.<sup>243</sup> Police, military and the government are reportedly more interested in distorting facts, perverting the evidence and silencing witnesses than in any real investigation.<sup>244</sup> For example, on 19 June 2007 three Tamil fishermen were shot and killed under questionable circumstances by the Sri Lankan military in the

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<sup>239</sup> See statement by CPA, Dr. Paikiasothy Saravanamuttu, CPA Executive Director, received death threat, 20 August 2009; statement by concerned citizens and civil society organizations, Statement Condemning Death Threat against Dr. Paikiasothy Saravanamuttu.

<sup>240</sup> International Crisis Group, Sri Lanka's Human Rights Crisis, p. 9.

<sup>241</sup> Report of the Special Rapporteur Alston, Mission to Sri Lanka, para. 30, p. 10.

<sup>242</sup> International Crisis Group, Sri Lanka's Human Rights Crisis, 14 p. 14; AHRC, State of Human Rights in Eleven Asian Nations, p. 323-324.

<sup>243</sup> Report of the Special Rapporteur on extrajudicial executions, para. 53.

<sup>244</sup> Bob Dietz, Asia program coordinator, Committee to Protect Journalists, Sri Lanka Special Report: Failure to Investigate, 23 February 2009.

eastern village of Kalkudah.<sup>245</sup> When family members of the fishermen tried to locate their bodies, the army and police said that they would only release the bodies if the family members signed documents saying that they were members of the LTTE.<sup>246</sup> When they refused, the wives of the fishermen were assaulted by the military.<sup>247</sup> The next day, the Sri Lankan Ministry of Defence reported on its website that three LTTE members had been shot and killed by the military with the assistance of the police.<sup>248</sup> In another incident, four Muslims were killed in Polonnaruwa (north-central Sri Lanka) by the army on 28 June 2007.<sup>249</sup> The army initially claimed that the four Muslims were among 11 LTTE members that they had killed but later changed their story claiming the Muslims had been killed by terrorists.<sup>250</sup>

The Commission of Inquiry established to investigate fifteen (subsequently sixteen) high profile cases of killings, is not a substitute for an effective investigatory system. It is rather a sign of the failure of the latter. The Commission of Inquiry has completed its work but the results have not, as yet, been made public. It is not known whether they ever will be. The indictment of its effectiveness comes from the IIGEP.<sup>251</sup>

During the early years of the cease-fire, there were some attempts to improve the operation of the independent oversight mechanisms, such as the NHRC and the National Police Commission. Since 2005, these attempts have been reversed.<sup>252</sup>

#### *5.1.9. Conclusion*

During the period covered by the investigation, there has been a high rate of unlawful killings in Sri Lanka, including killings carried out by the security forces, persons for whom the State is responsible and the police. These include both operational killings and deaths in custody. There were also a large number of killings in areas controlled by the government where the perpetrator is unknown. The LTTE was also responsible for many killings. The level of killings increased following the end of the ceasefire. In the last few months of the armed conflict, there were significant levels of civilian casualties, even if the precise number is not known. There are real

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<sup>245</sup> Minority Rights Group International Report, p. 5.

<sup>246</sup> Ibid.

<sup>247</sup> Ibid.

<sup>248</sup> Ibid.

<sup>249</sup> Ibid.

<sup>250</sup> Ibid.

<sup>251</sup> Report of the Special Rapporteur on extrajudicial executions, para. 39-41; see also discussion of Commissions of Inquiry above.

<sup>252</sup> Ibid, para. 56, 57, 59 and 67.



concerns that both parties may have violated their obligations under human rights law, interpreted in the light of LOAC/IHL.

## **5.2. Torture**

### *5.2.1. International standards*

Article 7 of the ICCPR prohibits torture or cruel, inhuman or degrading treatment or punishment (CIDT) and the provision is non-derogable even during states of emergency. The Human Rights Committee (HRC) has stated in its General Comment 7 that it is not enough for states to simply prohibit and criminalize acts of torture or CIDT. They must ensure effective protection through some machinery of state control. Additionally, states should not make sharp distinctions between different forms of treatment or punishment. Distinctions depend on the kind, purpose and severity of the particular treatment in question.

Part I (Articles 1-16) of CAT defines torture (Article 1), and commits parties to taking effective measures to prevent any act of torture in any territory under their jurisdiction (Article 2). These include ensuring that torture is a criminal offence (Article 4), establishing jurisdiction over acts of torture committed by or against a party's citizens (Article 5), ensuring that torture is an extraditable offence (Article 8), and establishing universal jurisdiction to try cases of torture where an alleged torturer cannot be extradited (Article 5). Parties must promptly investigate any allegation of torture (Articles 12 and 13), and victims of torture must have an enforceable right to compensation (Article 14). Parties must also ban the use of evidence produced by torture in their courts (Article 15), and are barred from deporting, extraditing or refouling people where there are substantial grounds for believing they will be tortured (Article 3). Parties are also obliged to prevent other acts of cruel, inhuman or degrading treatment or punishment, and to investigate any allegation of such treatment within their jurisdiction (Article 16).

### *5.2.2. Domestic implementation*

Sri Lanka has various domestic laws that were enacted in order to prevent and criminalize torture and cruel, inhuman and degrading treatment (CIDT) by police, the military and other government officials. Under ordinary circumstances some of these laws and institutions meet international

standards to ensure, protect and enforce human rights but many of the safeguards against torture contained therein have either been rendered ineffective, inoperable or non-applicable under the government's Emergency Regulations. At other times these laws, protections and procedures have for the most part been ignored. The provisions which safeguard against the risk of torture or CIDT include not only measures specifically addressing such ill-treatment but also provisions regulating the grounds of detention and safeguards against abuse in detention. The government has also created various human rights institutions at the national level that were designed to monitor human rights and to receive complaints regarding human rights violations including torture or CIDT. Some of these institutions have either advisory and/or investigative/prosecutorial powers. However, many, if not all, of these institutions have been rendered ineffective due to lack of resources (personnel/and funding), lack of political will, apathy and/or conflicts of interest.

All of these issues have led to a climate where the police, armed forces and government officials have not only failed to fulfil their international obligations to protect against torture and CIDT. The ineffectiveness of institutional safeguards against torture and other human rights has allowed the police, armed forces and other government officials to engage in unlawful acts themselves or to be complicit in such acts with complete impunity.

Article 11 of the Sri Lankan Constitution states: 'No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.' However, the Supreme Court applies a high standard of proof in torture related cases.<sup>253</sup> According to the government, there are two standards of proof (i.e. balance and preponderance of the evidence (civil standard)) and beyond a reasonable doubt (criminal standard).<sup>254</sup> In 'Fundamental Rights Cases' such as torture, the Supreme Court makes decisions based on documentary evidence and oral pleadings and applies the civil standard. Liability is primarily upon the State. Conversely, the Court must be satisfied that criminal offences (including torture), are proved beyond a reasonable doubt for criminal convictions to be upheld. Penal sanctions are imposed against the individual.<sup>255</sup>

Article 13 foresees a number of fundamental safeguards, such as freedom from arbitrary arrest (Article 13(1)) and the right to be informed of reasons for arrest. Article 13(2) stipulates that 'every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the judge of the nearest competent court according to the procedure established by law, and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of

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<sup>253</sup> Report of the Special Rapporteur on torture, p. 19.

<sup>254</sup> Ibid., footnote 19, p. 19.

<sup>255</sup> Ibid.

the order of such judge made in accordance with the procedure established by law.’ Article 15 prohibits any limitation of this right in times of public emergency. However, it provides for the possibility of restriction of the safeguards and rights granted above in the interests of national security, public order and the protection of public health or morality.<sup>256</sup> The Constitutional provisions do not, however, appear to be effective.

The CAT Act incorporates international norms within CAT into domestic law. Torture is defined in Article 12 as: any act which causes severe pain, whether physical or mental, to any person, being an act, which is done for any of the following purposes: obtaining information or confessions;<sup>257</sup> punishing persons for any act which he or a third person has committed;<sup>258</sup> intimidating or coercing such person or other persons; or done for any other reason based on discrimination, and being in every case, an act which is done by, or at the instigation of or with the consent or acquiescence of, a public officer or other person acting in an official capacity."<sup>259</sup> The definition of Article 12 under the CAT Act is in conformity with Article 1 of CAT. However, it does not expressly include ‘suffering’ and does not contain any provision on the right of either the victim or a dependant to compensation. There are relatively few successful cases under the Act.<sup>260</sup> Under Article 2 of the Act, acts of torture, participation in torture, complicity, aiding and abetting, incitement, and the attempt to torture are punishable offences.<sup>261</sup> Offences under the CAT Act shall be a ‘cognizable and non-bailable offence.’<sup>262</sup> The state may not use exceptional circumstances such as the state or threat of war, internal political instability, public emergency or the fact that a person(s) were given order to engage in unlawful acts by a superior officer or a public authority as a defence against charges of torture.<sup>263</sup>

When seeking redress for alleged acts of torture preference is given to actions under constitutional fundamental rights in lieu of the CAT Act because the burden of proof is the civil standard under the Constitution rather than the criminal one required under the Act.<sup>264</sup> For example, in the *Sriyani Silva* case, the Supreme Court used CAT itself instead of the CAT Act as the CAT Act does not

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<sup>256</sup> Ibid., p. 12-13.

<sup>257</sup> CAT Act, Article 12(a)(i).

<sup>258</sup> Ibid., Article 12(a)(ii).

<sup>259</sup> Ibid. Article 12(a)(iii).

<sup>260</sup> Report of the Special Rapporteur on torture, p. 11.

<sup>261</sup> Ibid.

<sup>262</sup> CAT Act, Article 2(5).

<sup>263</sup> Ibid., Article 3.

<sup>264</sup> Committee Against Torture, Consideration of reports submitted by States Parties under Article 19 of the Convention, Sri Lanka, U.N. Doc. CAT/C/28/Add.3 (1997), para. 17.

include provisions concerning compensation.<sup>265</sup> Adoption of the CAT Act was an effort to criminalize torture and bring perpetrators to justice. While a significant number of indictments have been filed under the Act, the majority of prosecutions initiated against police officers or member of the armed forces on charges of abduction, unlawful confinement, or torture have been inconclusive due to a lack of sufficient evidence and the unavailability of witnesses<sup>266</sup>.

Articles 321 and 322 of the Penal Code criminalizes acts which may fall within the scope of CAT, such as intentionally causing harm or grievous harm with the aim of extorting confessions or information leading to the detection of an offence or misconduct or to compel restoration of the property. Offences are punishable by 10 years maximum imprisonment and a fine. There are 'Illustrations' to Article 321 which describe torture cases: '(a) A, a police officer, tortures Z in order to induce Z to confess that he committed a crime. A is guilty of an offence under this section. (b) A, a police officer, tortures B to induce him to point out where certain stolen property is deposited. A is guilty of an offence under this section.' Article 364 of the Penal Code outlaws rape of a woman in custody (including in a remand home and a women's and children's institution) and foresees punishment of 10-20 yrs imprisonment and a fine. The perpetrator shall be ordered to pay compensation to the victim for injuries caused.

The Code of Criminal Procedure (CCP) provides safeguards against the risk of torture. The safeguards often take the form of rights for detained persons. Article 37 and Article 65 of the Police Ordinance set the legal time limit of police custody of 24 hours, excluding the time necessary for the journey from the place of arrest to the Magistrate; the requirement to maintain an 'Information Book,' including the file, by the Criminal Investigation Department and any bureau of investigation for the purpose of recording statements; and the obligation of the officer in charge of the police station who is responsible for the Information Book to furnish three certified copies of all notes resulting from the investigation and of all statements recorded in the course of the investigation to the Magistrate (Article 147, CCP). Other safeguards include: the notification of the Magistrate's Court of arrests of persons without warrant by any police officer (including information whether the person have been offered bail or otherwise, Article 38, CCP); and informing the arrested persons of the reason for arrest (with a right for the arrested person to see the arrest warrant if so requested, CCP Article 53). Where an officer in charge of a police station

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<sup>265</sup> *Kottabadu Durage Sriyani Silva vs. Chanukah Idamalgoda, Officer in Charge, Police Station Payagala and Six others*, cited in written statement submitted by the South Asia Human Rights Documentation Centre (SAHRDC), a non-governmental organization in special consultative status, Civil and Political Rights: Torture and Detention, E/CN.4/2004/NGO/129, 8 March 2004, p. 5.

<sup>266</sup> *Ibid.*; Amnesty International, Annual Report 2003; Information provided by the Joint Apparel Association Forum suggests that, since 2004 more cases have been brought under the ordinary Penal Code than under the Torture Act.

‘considers that the examination of any person by a medical practitioner is necessary for the conduct of an investigation’, he can order such examination by a governmental officer (CCP Article 122(1)) However, the Code lacks fundamental safeguards such as the right to inform a family member of the arrest or the right to access to a lawyer and/or a doctor of their choice for a person arrested and held in custody. The code does not specify the interrogation conditions and is silent about the possibility of the presence of a lawyer and an interpreter during interrogation. Moreover, many of the protections in the CCP do not apply in cases of detention under the Emergency Regulations (See section on Emergency Regulations).

Post-mortem examinations (including exhuming bodies) may be ordered by a Magistrate or an investigator empowered by the Minister (CPP Article 373). A person in police detention can complain to the Magistrate and ask for a medical examination by a Judicial Medical Officer (JMO). The Magistrate may subsequently order the police to take the victim to the JMO. There are serious flaws with this procedure. In most cases the victim is accompanied to the JMO by exactly the same police officer who is responsible for the alleged torture or ill treatment and thus the independence of the examination is jeopardized. Access to the JMO is not guaranteed and the alleged victim is often taken to an ordinary medical doctor not trained in forensic medicine. Medical personnel in various prisons acknowledge that they regularly receive complaints of torture or ill treatment from detainees transferred from police stations to prisons and many of these complaints are corroborated by physical evidence. Medical personnel only feel responsible for treating obvious wounds and do not take further action to corroborate allegations of torture or ill treatment such as reporting the alleged abuse to the authorities or sending the victim to a JMO.<sup>267</sup>

Articles 24 - 27 of the Evidence Ordinance (EO) do not allow confessions into evidence that were extracted through torture. This rule is not applicable to those detained under Emergency Regulations ((ER)-See below).

The wide range of emergency measures introduced by the government authorize detention in a much wider range of circumstances than the law ordinarily applicable but do, theoretically, contain safeguards. Although the Prevention of Terrorism Act (PTA) of 1979 was suspended in 2002 after the Cease Fire Agreement (CFA) was agreed, it was reintroduced under the emergency regulations. Section 9(1) allows for the detention of persons under a detention order (DO) for a period of ‘three months in the first instance, in such place and subject to such conditions as may be determined by the Minister’ and renewable for up to 18 months.

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<sup>267</sup> Report of the Special Rapporteur on torture, para. 43; see generally para. 38-39. For a more detailed discussion, see 5.2.4., *infra*.

The ER 2005 confers powers of arrest, detention, search and seizure, and reduces legal rights during trial. The regulations were drawn from the PTA and allow detention without charge for 90 days, renewable for up to one year. Regulation 19 allows security forces to hold suspects for up to a year under ‘preventive detention’ orders issued by the Secretary to the Ministry of Defence.<sup>268</sup> A suspect detained under the ER 2005 need not be produced before a magistrate for up to 30 days. ‘Public Officers’ and those authorized by the President may make arrests in addition to the police or military. The ER 2005 permits joint operations of arrest between the army and the police without clarifying their respective responsibilities (Regulation 19(2) and Regulation 24). Regulation 56 allows for bodies to be disposed of without public notification and the deputy inspector general of police can cremate bodies and consequently destroy potential evidence of torture or CIDT. Safeguards require that persons arrested by the army must be turned over to the police within 48 hours and families must be notified of arrest. The NHRC must be notified of all detentions within 48 hours and it has the authority to visit detainees wherever they are held. The ER 2005 expands admissibility of confessions by allowing those made to senior police officers to be entered into evidence in court contrary to the Evidence Ordinance. In effect, the ER 2005 short circuits judicial scrutiny and supervision provided for in the Code of Criminal Procedure. ER 2005 was properly enacted but it does not meet international legal standards. While criminal laws, specifically the Prevention of Terrorism Act (PTA) and Emergency Regulations, all contain some procedural safeguards and check and balances, they are either not functioning effectively or being disregarded.

The Prevention and Prohibition of Terrorism and Specified Terrorism Activities, No. 7 of 2006 allows for the criminalization of a broad range of activities as a result of the activities identified in regulations 6, 7 and 8 and the definition of terrorism in regulation 20.<sup>269</sup> The Regulations contain an immunity clause for any government official for any action taken under the ER 2005 so long as they acted in good faith and within the discharge of their duties (Regulation 19).

Presidential Directive of 7 July 2006 on Protecting Fundamental Rights of Persons Arrested and/or Detained addresses detention by the security forces generally. The Directive provides that no person shall be arrested or detained under any Emergency Regulation or the Prevention of Terrorism Act No. 49 of 1979, except in accordance with the law and proper procedure and by a person who is authorized by law to make such an arrest or order such detention; the person making the arrest or detention should identify himself by name and rank, to the person or relative or friend of the person

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<sup>268</sup> Ibid., para.43; see generally para.41 - 47. Also see generally, Human Rights Watch, Return to War, 5 August 2007, part VII.

<sup>269</sup> Human Rights Watch, Return to War Human Rights under Siege, August 2007, available at <http://www.hrw.org/en/reports/2007/08/05/return-war>.

to be arrested; the person to be arrested should be informed of the reason for the arrest; all details of the arrest should be documented in the manner specified by the Ministry of Defence; the person being arrested should be allowed to make contact with family or friends to inform them of his whereabouts; when a child under 18 years of age or a woman is being arrested or detained, a person of their choice should be allowed to accompany them to the place of questioning; as far as possible, any such child or woman arrested or detained should be placed in the custody of a Women's Unit of the Armed Forces or Police or in the custody of another woman military or police officer; the person arrested or detained should be allowed to make a statement in the language of his choice and then asked to sign the statement; if he wishes to make a statement in his own handwriting it should be permitted; members of the NHRC or anyone authorized by it must be given access to the arrested or detained person and should be permitted to enter at any time, any place of detention, police station or any other place in which such a person is confined; and the NHRC must be informed within 48 hours of any arrest or detention and the place the person is being detained. This Directive was reissued on 12 April 2007. Human Rights Watch argues that "The fact the President had to issue them [the Directives] twice suggests that members of the military and police were frequently violating the law and that the government lacked the will to hold those responsible for abuses accountable. Without concrete action, including prosecutions of those arbitrarily arrested by the security forces, the directives appear aimed more at assuaging international opinion than holding accountable police and soldiers who commit crimes."<sup>270</sup>

### *5.2.3. Proscribed ill-treatment during the normal investigative process*

International reports indicate continued and well-documented allegations of widespread torture and ill treatment mainly committed by State forces (police and military) particularly in situations of detention.<sup>271</sup>

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<sup>270</sup> Ibid.

<sup>271</sup> UN News Service, UN human rights expert reports allegations of torture in Sri Lanka, 29 October 2007 (quoting Manfred Nowak regarding torture of detainees by Sri Lankan police/military). Special Rapporteur on torture, p.2; para.70-73, p. 19-20; AHRC, State of Human Rights in Eleven Asian Nations, p. 295-7. The Government of Sri Lanka denies that torture is widespread but "is only occasionally resorted to by over-zealous investigative personnel ...". See the Response of the Delegation of Sri Lanka to the Report of Professor M. Nowak, Special Rapporteur on Torture, on his mission to Sri Lanka.

#### *5.2.4. Proscribed ill-treatment of those detained under Emergency Regulations and/or those detained in the North and East of Sri Lanka*

Procedural safeguards and checks and balances against torture within the Emergency Regulations either do not apply or are disregarded leading to a situation where torture has become a routine practice in the context of counter-terrorism efforts.<sup>272</sup> It is alleged that all groups involved in the conflict have engaged in torture and CIDT.<sup>273</sup> There are particularly widespread allegations of torture, CIDT in and near recent conflict zones. The allegations include claims of sexual assault, including rape.<sup>274</sup> There are consistent reports that such allegations are not promptly or impartially investigated.<sup>275</sup> Allegations of torture or CIDT by the police of those in detention were reported to the Inspector General of Police, the Attorney General's Department, and the NHRC by either the victims themselves or by human rights organizations on the victim's behalf.<sup>276</sup> Some of these cases were reported to the National Police Commission.<sup>277</sup> However, remarkably few of these allegations resulted in serious investigations or prosecutions under the CAT Act.<sup>278</sup> Whilst in previous years there had been some investigations by the Special Inquiry Unit (SIU) of the Criminal Investigation Division (CID), the Asian Human Rights Commission is not aware of any such investigations in 2007.<sup>279</sup>

Although some victims of torture in Sri Lanka are provided with compensation by the Supreme Court in cases brought under Article 11 of the Constitution, many of these cases have not been accompanied by criminal proceedings under the CAT Act.<sup>280</sup> Constitutional rights litigation is not a substitute for the prosecution of suspected perpetrators.

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<sup>272</sup> Statement by Manfred Nowak to the Third Committee at the 62nd session of the General Assembly, 29 October 2007; Report of the Special Rapporteur on torture, para. 70.

<sup>273</sup> UNHCR Eligibility Guidelines for Assessing the International Protection Need of Asylum-Seekers from Sri Lanka, April 2009, p. 7-9.

<sup>274</sup> Ibid.

<sup>275</sup> Asian Legal Resource Centre, Sri Lanka: Prevention of impunity requires clear leadership from the government, 25 February 2009; Asian Legal Resource Centre, Sri Lanka: The abdication of the duty to investigate crimes, 26 February 2009, available at: [http://www.alrc.net/doc/mainfile.php/alrc\\_st2009/539/](http://www.alrc.net/doc/mainfile.php/alrc_st2009/539/); see also International Press Institute, "IPI calls immunity a dark stain on Sri Lankan Government", 19 January 2009; see also ICG, Sri Lanka's Return to War: Limiting the Damage, 20 Feb. 2008; Human Rights Watch, Sri Lanka: Recurring Nightmare, p. 9, where it is stated that "those in conflict areas and refugee camps in the north and east have regular complaints of increased sexual violence and enforced sex work from soldiers and armed men."

<sup>276</sup> AHRC, State of Human Rights in Eleven Asian Nations, p. 298.

<sup>277</sup> Ibid.

<sup>278</sup> Ibid.

<sup>279</sup> Ibid.

<sup>280</sup> UN News Service, UN human rights expert reports allegations of torture in Sri Lanka, UN News Service, 29 October 2007 (explaining that 1994 Torture Act was meant to criminalize torture but while a significant number of indictments brought under the Act, only 3 people had been convicted at that time); Report of the Special Rapporteur on torture, para. 63-69, p. 18-19.



Government officials candidly recognize that torture by police and security forces is widespread and those detained in police stations are routinely mistreated to exact confessions from suspects—sometimes resulting in death.<sup>281</sup> There are significant levels of police brutality and impunity.<sup>282</sup> Senior police officials have made appeals to the public not to make allegations of torture and mistreatment, so as to prevent the demoralization of officers, claiming that police officers are overburdened due to terrorism and an increase in organized crime duties.<sup>283</sup> Government officials are complacent and tolerant of such conduct. The vast majority of deaths of those being detained are not caused by ‘rogue’ police officers but by ordinary officers taking part in an established routine.<sup>284</sup> Fact-finding by UN Special Rapporteurs regarding ill-treatment and torture was at times impeded by hiding or transferring detainees, particularly those who had been most seriously subjected to torture, as they still bore marks of ill treatment.<sup>285</sup>

Detainees and other victims often do not complain or report incidents of torture or CIDT due to intimidation by police officers and threats of further violence.<sup>286</sup> Police have threatened to fabricate criminal cases of possession of narcotics or dangerous weapons against victims.<sup>287</sup> Detainees regularly reported that habeas corpus hearings before a magistrate either involved no real opportunity to complain about police torture because they were often escorted to courts by the perpetrators of torture or CIDT or because the Magistrate did not inquire into whether the suspect had been mistreated in custody.<sup>288</sup> Medical examinations conducted in alleged torture or CIDT of detainees are reportedly conducted in the presence of the perpetrators.<sup>289</sup> Detainees are sometimes taken to see a JMO or District Medical Officer (DMO) who fail to examine the victims or prescribe treatment but merely sign papers implying that doctors are merely ‘signing off’ that the victim had been examined and/or treated.<sup>290</sup> Detainees had previously not reported incidents of torture or CIDT treatment because they would be subjected to further and more severe similar treatment after returning from medical examinations.<sup>291</sup> Although increased numbers of detainees began requesting medical treatment and reporting such abuse to doctors as of 2007, subsequent assaults were still

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<sup>281</sup> Report of the Special Rapporteur Alston, Mission to Sri Lanka, para. 54. p. 18. See also Reports of the Special Rapporteur on torture (reporting shock over torture measures used by Sri Lankan army on detainees who were suspected LTTE members, such as burnings with soldering irons and suspension by the thumbs).

<sup>282</sup> Report of the Special Rapporteur Alston, Mission to Sri Lanka, para. 50. p. 17; AHRC, State of Human Rights in Eleven Asian Nations, p. 298.

<sup>283</sup> AHRC, State of Human Rights in Eleven Asian Nations, p. 298.

<sup>284</sup> Report of the Special Rapporteur Alston, Mission to Sri Lanka, para. 54, p. 18.

<sup>285</sup> Report of the Special Rapporteur on torture, p. 7, 19-20.

<sup>286</sup> Ibid. para. 73, p. 20; AHRC, State of Human Rights in Eleven Asian Nations, p. 295.

<sup>287</sup> Report of the Special Rapporteur on torture, p. 7, 19-20.

<sup>288</sup> Ibid.

<sup>289</sup> Ibid.

<sup>290</sup> AHRC, State of Human Rights in Eleven Asian Nations, 2007, p. 297.

<sup>291</sup> Ibid.

reported.<sup>292</sup> In one case, the detainee was assaulted in front of the doctor for reporting ill treatment at the hands of those detaining him.<sup>293</sup>

#### 5.2.5. *Inhuman conditions of detention - general*

A combination of antiquated facilities coupled with severe overcrowding give rise to degrading treatment at some prisons.<sup>294</sup>

Conditions of detention in police stations are basic and often without natural light, sufficient ventilation and detainees sleep on concrete floors.<sup>295</sup> Inadequate prison facilities have led to convicted prisoners being held together with pre-trial detainees in violation of ICCPR Article 10.<sup>296</sup> Conditions for criminal suspects are not as problematic as they are only held for 24 hours but become inhuman for suspects who are held for many months and up to a year under the Emergency Regulations.<sup>297</sup>

#### 5.2.6. *Inhuman conditions of detention – the camps*

In assessing the conditions of detention in the camps, in addition to the other sources generally relied upon, the UN Guiding Principles on Internal Displacement have been used to interpret the relevant provision of the ICCPR, CAT and the CRC.

Camps for internally displaced persons (IDPs) have existed for some years, not only to accommodate people displaced by conflict, but also due to the 2004 Tsunami. "According to UNCHR, by February 2009 there were over 281.000 people internally displaced from the face of the conflict that began in 2006. This was in addition to a caseload of over 214.000 conflict-displaced people from the period up to 2006 (UNOCHA CHAP, February 2009) bringing the number of people displaced in Sri Lanka by conflict to almost half a million."<sup>298</sup> The Government has failed to protect IDPs in camps, particularly regarding physical security. In the past, there were continued incursions and attacks by the LTTE, disappearances and abductions and threats and attacks upon individuals by irregular and armed groups such as the TMVP, including infiltration of

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<sup>292</sup> Ibid.

<sup>293</sup> Ibid.

<sup>294</sup> Report of the Special Rapporteur on torture, para. 83-89, p. 22-23.

<sup>295</sup> Ibid.

<sup>296</sup> Ibid.

<sup>297</sup> Ibid.

<sup>298</sup> Internal Displacement Monitoring Centre, Sri Lanka: Civilians displaced by conflict facing severe humanitarian crisis, 1 May 2009, p. 3. See also UNCHR, Sri Lanka: Country Operation Profile.

camps at night. A further problem was the approaches used by security forces in response to security incidents, including roundups, the methods used to identify suspects, the reasons provided for detention and the location of some individual's detention.<sup>299</sup>

According to reports describing the camps during 2007, conditions within some of the camps could be construed as CIDT treatment. For example, food shortages were common and family ration cards were arbitrarily distributed.<sup>300</sup> Sanitation was grossly inadequate at many of the camps.<sup>301</sup> There were only eight latrines for 1,400 people and camp officials complained of overflowing toilets and cases of diarrhoea at the Arthiviravar camp in Batticaloa.<sup>302</sup> Overcrowding was a problem at this same camp, Thiraimadu and at others.<sup>303</sup> One tent was shared by 2 or 3 families and leaked whenever it rained.<sup>304</sup> Other shelters were tin-roofed abodes that were scorching hot in the sun.<sup>305</sup>

A specific situation emerged in the aftermath of the end of the conflict in spring 2009 which resulted in almost 300.000 civilians crossing to the government controlled areas from the conflict zone and being held for security reasons in military controlled IDP camps in the North. Current conditions in the camps established to meet the needs of recent IDPs are appalling. It must be recognized that the government was faced with a daunting practical challenge, in view of the numbers requiring assistance in a short period of time. Nevertheless, the conditions are avoidably inhuman and degrading, as reported by a number of domestic and international independent sources.<sup>306</sup> There are very severe restrictions on the ability of humanitarian organizations to access the camps. In particular, they are not allowed to speak to any of the residents. There is severe overcrowding, inadequate water, sanitation, food and health care. The security forces and members of groups for whom the State is responsible are free to wander around the camps. Many individuals are alleged to have been abducted. The camps are controlled by the security forces, both outside the camp and within. The over-riding priority is security concerns and not the meeting of humanitarian

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<sup>299</sup> Walter Kälin, The Representative of the Secretary General on the Human Rights of Internally Displaced Persons, *UN Expert Emphasizes Sustainable and Durable Solutions For Sri Lanka's Internally Displaced Persons*, 27 December 2007.

<sup>300</sup> AHRC, *State of Human Rights in Eleven Asian Nations*, 2007, p. 312.

<sup>301</sup> *Ibid.*, p. 312-313.

<sup>302</sup> *Ibid.*

<sup>303</sup> *Ibid.*, p. 313.

<sup>304</sup> *Ibid.*

<sup>305</sup> *Ibid.*

<sup>306</sup> See, for example, Amnesty International Briefing paper *Unlock the camps in Sri Lanka*, 7 August 2009, available at: <http://www.amnesty.org/en/news-and-updates/news/unlock-camps-sri-lanka-20090807>.

needs.<sup>307</sup> It is understood that a Constitutional Rights case has been filed with the Supreme Court on behalf of the IDPs in the camps.<sup>308</sup>

#### 5.2.7. *Seeking a remedy*

The frequent failure to prosecute police accused of torture, CIDT and killing those in custody is due in part to deficiencies in internal investigations. Complaints (other than those under the CAT Act) are received by the Inspector General of the Police (IGP), who selects either the Special Investigations Unit (SIU) or the Criminal Investigation Department (CID) to carry out an internal investigation.<sup>309</sup> This is likely to result in a member of the CID investigating the conduct of a close colleague in the police. Senior police officers with regional command responsibilities also conduct inquiries into allegations of torture. Investigations into serious incidents typically last 2-4 years. Many complaints are not investigated at all.<sup>310</sup> Cases referred to the Attorney General seldom lead to convictions.<sup>311</sup> This is due in part to the lack of evidence gathered and partly to a judiciary that moves cases along slowly - tolerating years of delay - because of the massive case overload.<sup>312</sup>

Jurisdiction under the CAT Act lies with the High Court. Complaints therefore have to be addressed to the Attorney General's Department (AG).<sup>313</sup> Upon the instruction of the Attorney General, the Special Investigation Unit (SIU) under the supervision of the Inspector General of the Police conducts investigations.<sup>314</sup> The Prosecution of Torture Perpetrators Unit (PTP), established pursuant to the recommendations of the UN Committee against Torture, monitors the work of the SIU and the CID, and is also in charge of investigation of torture cases.<sup>315</sup> The Attorney General's

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<sup>307</sup> See also arbitrary detention and freedom of movement below.

<sup>308</sup> Centre for Political Alternatives, fundamental rights case in the Supreme Court of Sri Lanka challenging the curtailment of internally displaced persons (IDPs) interned in the camps in Vavuniyaa, 12 June 2009.

<sup>309</sup> The complaints may be received from a variety of sources including the NHRC and NGOs. The CIBID does not investigate allegations against CIBID officers. Report of the Special Rapporteur Alston, Mission to Sri Lanka, para. 58, p.19.

<sup>310</sup> Ibid.

<sup>311</sup> Ibid. For example, Alston cites the Attorney General as having told him of 64 indictments but it is not clear whether this refers to indictments under the CAT Act and/or the Penal Code. Report of the Special Rapporteur Alston, Mission to Sri Lanka, para. 58. It appears to be difficult to obtain reliable statistics. Evidence submitted by the Joint Apparel Association for the period 2000-2008 refers to 92 indictments under the CAT Act and 199 under the Penal Code.

<sup>312</sup> Report of the Special Rapporteur Alston, Mission to Sri Lanka, para. 58, p. 19; Report of the Special Rapporteur on torture, para. 53-54, p. 16; AHRC, State of Human Rights in Eleven Asian Nations, p. 306.

<sup>313</sup> Report of the Special Rapporteur on torture, p. 15-16.

<sup>314</sup> Ibid.

<sup>315</sup> Ibid.

Department decides on the indictment of alleged offenders on the basis of files submitted by the SIU and PTP.<sup>316</sup>

Although there have been 34 indictments filed by the Attorney General under the CAT Act, these indictments have only led to three convictions as of October 2007.<sup>317</sup> The emergency laws effectively render protections against torture and CIDT, such as the right to communicate with family, friends, counsel, the right not to be held in unofficial places of detention and other safeguards against arbitrary detention.

#### *5.2.8. Conclusion*

Whilst Sri Lanka has an impressive record in passing legislation to criminalise torture and to provide safeguards against torture and CIDT, in practice such treatment remains "widespread".<sup>318</sup> This is in part because the PTA and ER are not subject to the legislative protections. In addition, such protections as do exist in legislation appear to be routinely ignored in practice. Many complaints of proscribed ill-treatment are not referred to judicial authorities owing to a fear of the consequences and lack of faith in the effectiveness of the remedies. Where complaints are made, they are investigated neither effectively nor expeditiously. Whilst some proceedings have been successful, these have been principally Constitutional proceedings to the benefit of the victim, rather than criminal proceedings against alleged perpetrators. In these circumstances, it is not surprising that the proceedings do not appear to have had a deterrent effect on the commission of torture or CIDT. There is a prevailing climate of impunity for this human rights violation. The prohibition of torture and CIDT is not implemented in practice in Sri Lanka.

### **5.3. Arrest and detention**

#### *5.3.1. International standard*

Article 9 of the ICCPR states that everyone has the right to liberty and security of person and that no one shall be subject to arbitrary arrest and detention. Any deprivation of this right must be based on such grounds and in accordance with such procedures as are established by law (Article 9(1)).

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<sup>316</sup> Ibid.

<sup>317</sup> Ibid., p. 21.

<sup>318</sup> Ibid., para.70.

At the time of a person's arrest, he must be informed of the reasons for his arrest and promptly informed of the charges (Article 9(2)). Anyone arrested or detained on a criminal charge must also be promptly brought before a judge and given a trial within a reasonable amount of time (Article 9(3)). Article 9(4) gives every person arrested and detained the right to challenge the lawfulness of his detention. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation (Article 9(5)).

Article 10(1) of the ICCPR states that everyone arrested and detained shall be treated with humanity and dignity. Accused persons must be segregated from convicted detainees and accused children must be segregated from adults in detention (Article 10(2)(a) and (b) respectively).

Articles 9 and 10 of the Covenant are potentially derogable.<sup>319</sup> It is not clear whether administrative detention or internment is compatible with the prohibition of arbitrary detention.<sup>320</sup> This could be important as Sri Lanka has derogated from Articles 9(2) and 9(3) but not from Article 9(1). Whilst Articles 9 and 10 are potentially derogable, this does not mean that a State is free to disregard the essence of the right. It would appear from General Comment No. 29 that the Human Rights Committee would be unlikely to find it justifiable for a State to tell a detainee nothing of the charges against him or to exclude all possibility of review of the lawfulness of detention or, in the case of criminal detainees, for a trial to be indefinitely prolonged. Some modification of the normally applicable domestic provisions on account of the emergency would clearly be legitimate. For the purposes of this Report, it will be assumed that administrative detention is potentially lawful, even without derogation from Article 9(1) in situations of emergency but that there is a requirement that it be invoked only where necessary and in a proportionate manner.<sup>321</sup>

### *5.3.2. Domestic implementation*

Constitutional safeguards relating to arrest and detention include Article 13 of the Constitution which foresees a number of fundamental safeguards, such as freedom from arbitrary arrest (Article 13(1)) and the right to be informed of reasons for arrest. Article 13(2) stipulates that 'every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the judge of the nearest competent court according to the procedure established by law, and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the

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<sup>319</sup> See section 2.4 above.

<sup>320</sup> General Comment No. 8, U.N. Doc. HRI/GEN/1/Rev.1 at 8 (1994).

<sup>321</sup> This interpretation of Article 9(1) is not necessarily the view of the authors of the Report.

order of such judge made in accordance with the procedure established by law.’ Article 15 prohibits any limitation of this right in times of public emergency. However, it provides for the possibility of restriction of the safeguards and rights granted above in the interests of national security, public order and the protection of public health or morality.<sup>322</sup>

As discussed above, the Code of Criminal Procedure (CCP) relating to arrest and detention potentially safeguards the integrity of a person arrested or detained. However, many of the protections in the CCP do not apply in cases of detention under the Emergency Regulations (See above, Section 5.2.2, Domestic implementation on Torture and see Section 3.1.6. on Emergency Regulations)

The ER 2005 confers powers of arrest, detention, search and seizure, and reduces legal rights during trial. The Regulations expand admissibility of confessions by allowing those made to senior police officers to be entered into evidence in court contrary to the Evidence Order. In effect, the Regulations short circuit judicial scrutiny and supervision provided in the Code of Criminal Procedure. ER 2005 was properly enacted but it does not meet international legal standards with regard to arrest and detention. While criminal laws, specifically the Prevention of Terrorism Act (PTA) and Emergency Regulations (ER), all contain some procedural safeguards and check and balances, they are either not functioning effectively or being disregarded.

The Prevention and Prohibition of Terrorism and Specified Terrorism Activities, No. 7 of 2006 allows for the criminalization of a range of peaceful activities that are lawful under Sri Lankan and international law, as a result of the activities identified in regulations 6, 7 and 8 and the definition of terrorism in Regulation 20.<sup>323</sup> This regulation contains an immunity clause for any government official for any action taken under the ER 2005 so long as they acted in good faith and within the discharge of their duties (Regulation 19).

According to the Presidential Directive of 7 July 2006, on Protecting Fundamental Rights of Persons Arrested and/or Detained which addresses detention by the security forces generally, no person shall be arrested or detained under any Emergency Regulation or the Prevention of Terrorism Act No. 49 of 1979, except in accordance with the law and proper procedure and by a person who is authorized by law to make such an arrest or order such detention; the person making the arrest or detention should identify himself by name and rank, to the person or relative or friend of the person to be arrested; the person to be arrested should be informed of the reason for the

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<sup>322</sup> Report of the Special Rapporteur on torture, p. 12-13.

<sup>323</sup> Human Rights Watch, Return to War, August 5, 2007, Part VII.

arrest; all details of the arrest should be documented in the manner specified by the Ministry of Defence; the person being arrested should be allowed to make contact with family or friends to inform them of his whereabouts; when a child under 18 years of age or a woman is being arrested or detained, a person of their choice should be allowed to accompany them to the place of questioning; as far as possible, any such child or woman arrested or detained should be placed in the custody of a Women's Unit of the Armed Forces or Police or in the custody of another woman military or police officer; the person arrested or detained should be allowed to make a statement in the language of his choice and then asked to sign the statement; if he wishes to make a statement in his own handwriting it should be permitted; members of the NHRC or anyone authorized by it must be given access to the arrested or detained person and should be permitted to enter at any time, any place of detention, police station or any other place in which such a person is confined; and the NHRC must be informed within 48 hours of any arrest or detention and the place the person is being detained. This Directive was reissued on April 12, 2007. As already noted at the end of section 5.2.2., according to Human Rights Watch "The fact the president had to issue them [the Directives] twice suggests that members of the military and police were frequently violating the law and that the government lacked the will to hold those responsible for abuses accountable. Without concrete action, including prosecutions of those arbitrarily arrested by the security forces, the directives appear aimed more at assuaging international opinion than holding accountable police and soldiers who commit crimes."<sup>324</sup>

### 5.3.3. *Duration of detention*

There is a problem of excessively prolonged detention by police under Emergency Regulations and a lack of safeguards for those detained under them.<sup>325</sup> Information regarding the numbers of those arrested and detained under Emergency regulations and the status of those detained is rarely made available.<sup>326</sup> Journalists, newspaper operators and political opponents have been arrested and detained under Emergency Regulations sometimes without charge or have been falsely accused of being a 'terrorist' for reporting the 'wrong stories' typically involving police, military or

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<sup>324</sup> Ibid.

<sup>325</sup> Address by Louise Arbour, UN High Commissioner for Human Rights, 6<sup>th</sup> Session of the Human Rights Council, Geneva, 11 December 2007; Report of the Special Rapporteur on torture; International Crisis Group, Sri Lanka's Human Rights Crisis, p. 13; AHRC, State of Human Rights in Eleven Asian Nations, p. 302.

<sup>326</sup> Minority Rights Group International Report, p. 4-5; AHRC, State of Human Rights in Eleven Asian Nations, p. 302.



government officials.<sup>327</sup> The case of the arrest of journalist J. S. Tissainayagam in March 2008 is a case in point which will be referred to in more details in a later section. The Emergency Regulations have also been used by the police to target Tamils via searches, arrests, and detention.<sup>328</sup> Mass arrests are also a problem and the Supreme Court has tried to curtail them but the practice continues regardless of their rulings.<sup>329</sup> Only a limited number of cases have been submitted to the UN Working Group on Arbitrary Detention. In the majority of cases, the Sri Lankan government responded to the communication of the Working Group. In every case referred to it, the Working Group found the detention to be arbitrary.<sup>330</sup>

Police operations during armed conflict were subject to emergency legislation that permitted prolonged detention without *habeas corpus* and admission of evidence of confessions that would not be admissible under ordinary rules of evidence.<sup>331</sup> Many police officers are accustomed to 'investigating' by forcibly extracting confessions and to operating without meaningful disciplinary procedures or judicial review.<sup>332</sup>

In eastern Sri Lanka, families who have returned home whose children were formally associated with the LTTE are targeted and requested to report to the TMVP offices with their children.<sup>333</sup> There are reports the TMVP refused to release these children, claiming that they were holding them for questioning but in some instances this resulted in their recruitment into the TMVP. The TMVP/Karuna faction reportedly rounded up individuals (including children) and 'arrested' them on suspicion of being associated with or in support of the LTTE.' When they were informed by UNICEF that they did not have authority to 'arrest' individuals, the group responded that it had in fact 'arrested' people but would either release them or hand them over to Sri Lankan Police.<sup>334</sup> In

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<sup>327</sup> International Crisis Group, Sri Lanka's Human Rights Crisis, p. 14; AHRC, State of Human Rights in Eleven Asian Nations, p. 302, 325-327; Amnesty International, Silencing Dissent, op. cit.

<sup>328</sup> Minority Rights Group International Report, p. 4.

<sup>329</sup> Address by Ms. Louise Arbour, UN High Commissioner for Human Rights, 6<sup>th</sup> Session of the Human Rights Council, 11 December 2007.

<sup>330</sup> Opinions adopted by the Working Group on Arbitrary Detention, E/CN.4/2006/7/Add.1, 19 October 2005, Opinion 8/2005, pp. 33-36; A/HRC/10/21, Opinion 30/2008, p.8.

<sup>331</sup> Report of the Special Rapporteur Alston, Mission to Sri Lanka, para. 50, p. 17; International Crisis Group, Sri Lanka's Human Rights Crisis, p. 13 (explaining that under Emergency Regulations, suspects may be detained without charge for 90 days, charged and held withheld bail indefinitely, held in 'preventive detention up to a year by order of the Secretary of the Ministry of Defence and kept in incommunicado detention up to 30 days'); AHRC, State of Human Rights in Eleven Asian Nations, p. 302.

<sup>332</sup> Report of the, Special Rapporteur Alston, Mission to Sri Lanka, para. 50-52. p. 17-18; Report of the Special Rapporteur on torture (reporting shock over torture measures used by Sri Lankan army on detainees who were suspected LTTE members, such as burnings with soldering irons and suspension by the thumbs); AHRC, State of Human Rights in Eleven Asian Nations, p. 298.

<sup>333</sup> Report of the Secretary-General on children and armed conflict in Sri Lanka, S/2007/758, 21 December 2007 (hereinafter SG Report on children and armed conflict in Sri Lanka 2007), para. 20, 59, p. 9, 19.

<sup>334</sup> Ibid., para. 53, p. 17.

October 2007, a representative from the office of the TMVP in Trincomalee stated that the group no longer detained persons and that previously they had only taken individuals into custody for two days for questioning. However, this same representative stated that TMVP personnel were immune from arrest and searches by virtue of possessing a TMVP membership identity card that was issued by the TMVP. The card was said to be officially recognized by the police and armed forces.<sup>335</sup>

More recently, UNHCR continues to report arbitrary detentions and abductions in the East of the country by the TMVP.<sup>336</sup>

On 12 September 2006 new emergency regulations were put in place by the President appointing a Secretary of Justice as ‘Commissioner of Rehabilitation’ to oversee ‘protective accommodation and rehabilitation centres’ for persons separated from armed groups where they were to receive training and rehabilitation prior to their release.<sup>337</sup> Subsequently, 200 persons including children sought this special protection and surrendered to Sri Lankan security forces. They were then held in Jaffna, Kandy and Pallekele Prisons and children were detained in the same cells as adults.<sup>338</sup> There is an absence of clear procedures for the treatment of formerly recruited children who come within the custody of Sri Lankan security forces.<sup>339</sup> The Government maintained that Sri Lankan armed forces no longer had the authority to detain persons and were obligated to immediately hand over any arrested persons to the police.<sup>340</sup>

Prison visits by government officials or by the NHRC are being undertaken but do not extend to unpublished and unofficial places of detention authorized under the emergency regulations.<sup>341</sup>

#### 5.3.4. *Detention in the camps*

Individuals have been detained in two types of camp: counter-terrorism detention camps and IDP camps. Emergency Regulations were also used by government armed forces to establish and detain predominately Tamils in ‘special counter-terrorism detention centres.’<sup>342</sup> For example, one of these camps was set up in Boosa, a southern town in Galle. Only limited information about these centres

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<sup>335</sup> Report of the Special Rapporteur on torture, para. 12, p. 8.

<sup>336</sup> UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka, April 2009, p. 9, 11.

<sup>337</sup> *Ibid.*, para. 59, p. 19.

<sup>338</sup> *Ibid.*

<sup>339</sup> *Ibid.*, para. 60. On 31 July 2009 Sri Lanka adopted a National Framework Proposal on the Re-integration of Ex-combatants.

<sup>340</sup> Report of the Special Rapporteur on.

<sup>341</sup> Minority Rights Group International report, p. 4-5.

<sup>342</sup> *Ibid.*

was available.<sup>343</sup> In this camp alone, there were 118 people (predominately Tamils) detained without charge.<sup>344</sup> Owing to the limited amount of information, it is not clear for how long detainees are held in such camps, whether they have access to independent third parties, such as doctors and lawyers, and to what conditions of detention they are subjected.

During and following the fighting in the East of the country, camps were established for internally displaced people (IDPs). Whilst the conditions in and around the camps were not problem-free, people were generally free to live with family and friends and were not forced to live in the camps. Whilst there were difficulties in ensuring that the IDPs had access to their livelihoods, some of those in the camps were able to leave them for work. There was a significant level of return by IDPs to homes in the East from 2007 onwards, although again the circumstances of return and the conditions that awaited them were not problem-free.<sup>345</sup> That is in dramatic contrast to the camps that have been established to deal with IDPs who fled the fighting in the North in 2008 and 2009.

In 2009, massive numbers of displaced people have been housed in camps after they fled the conflict. The camps are surrounded and detainees do not have the right to leave the camps (e.g. to live with friends or relatives) or even to move between different parts of the same camp. Even family reunification within the camps is proving very difficult, if not impossible, to achieve. The security forces not only provide perimeter security but manage the camps.<sup>346</sup> No one can enter without their permission. It is reported that members of armed groups associated with the government wander round the camps in plain-clothes. Those in the camps are, in effect, deprived of their liberty. To all intents and purposes, they are interned. It is not clear whether there is any basis in Sri Lankan law for mass internment and, in particular, whether they are detained under the Emergency Regulations. It is not clear whether the Sri Lankan government regards them as being detained. If not, that is a novel form of unacknowledged detention. It is not that the detention of a specific individual is denied. It is the fact of the detention itself which would be denied.

Whilst the huge practical challenge which faced the government has to be taken into account, the need to screen some IDPs and the need to provide food, water, sanitation, shelter and health care was foreseeable. The government had previously had to run camps, albeit on a much smaller scale, to deal with those displaced by the fighting in the East of Sri Lanka. Even internment powers have

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<sup>343</sup> Ibid.

<sup>344</sup> Ibid.

<sup>345</sup> UNHCR, Position on the Protection Needs of Asylum-Seekers from Sri Lanka, December 2006; UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka, April 2009.

<sup>346</sup> The alarming situation in the IDP camps has been highlighted by numerous Human Rights organizations. See, for instance, Human Rights Watch, Sri Lanka: Free Civilians From Detention Camps, 28 July 2009, available at <http://www.hrw.org/en/news/2009/07/28/sri-lanka-free-civilians-detention-camps>.

to be used against individuals, rather than whole populations, on account of the risk possibly posed by specific individuals. Mass internment is not a lawful solution to the genuine need to screen IDPs in order to seek out former LTTE members. That is aggravated by the conditions in the camps, which may, in part, be the result of them being under the control of the military, whose only priority appears to be security, rather than civilians whose priority would be the meeting of humanitarian needs. Internees should, at least, be able to expect personal security. It is reported that persons have disappeared from within the camps, presumably at the hands of the security forces and those allowed to wander around freely.<sup>347</sup>

### 5.3.5. Seeking redress

Article 17 of the Constitution entitles every person to a remedy for the infringement of fundamental rights by State action. Additionally, Article 126(2) states that "any person [who] alleges that any such fundamental right ... has been infringed ... may ... apply to the Supreme Court ... praying for relief or redress in respect of such infringement." In granting relief, the Supreme Court has construed the relevant constitutional provisions as containing the right to compensation.<sup>348</sup>

Compensation cannot be claimed as part of criminal proceedings, however, in cases related to Article 321, PC ('intentionally causing harm'), Magistrate courts may award compensation to be paid by the offender when the Court refrains from imposing a prison sentence or from a proceeding to conviction (Article 17(4), CCP).

However, Section 26 of PTA 2002 states: "No suit, prosecution or other proceeding, civil or criminal, shall lie against any officer or person for any act or thing in good faith done or purported to be done in pursuance or supposed pursuance of any order made or direction given under the act." Although the PTA was suspended in 2002, it was reintroduced under the Emergency Regulations. Thus it seems that the abovementioned avenues of redress or compensation have been effectively rendered inoperable under the Emergency Regulations. Since no remedies exist under the emergency laws and the Criminal Code for unlawful detention, the local magistrate courts and the provincial high courts are unable to order compensation for such offences.<sup>349</sup> Although *habeas corpus* is available in the high courts, it is rarely successful in gaining releases and initial review of

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<sup>347</sup> See, for example, BBC report "Dolphin van scare in Vavunya camps", 24 August 2009, available at [http://bbc.co.uk/sinhala/news/story/2009/08/090824\\_idp\\_vans.shtml](http://bbc.co.uk/sinhala/news/story/2009/08/090824_idp_vans.shtml).

<sup>348</sup> *Saman v. Leeladasa and Another*, S.C. Application No. 4/88, 6 and October 1988. The right to compensation for unlawful detention is provided for in Article 9(5), from which Sri Lanka has not derogated.

<sup>349</sup> International Crisis Group, Sri Lanka's Judiciary: Politicised Courts, Compromised Rights, Asia Report N°172, Executive Summary, 30 June 2009.

detention decisions by magistrates is superficial.<sup>350</sup> Although relief for arbitrary arrest and detention can ‘technically’ be found by filing a "fundamental rights" application in the Supreme Court; distance, difficulty of travel, (especially for Tamil litigants) and the cost of hiring one of the limited number of Colombo-based Supreme Court lawyers create impassable barriers for most litigants.<sup>351</sup> A constitutional fundamental rights case has been filed with the Supreme Court on behalf of those interned in the camps.

### *5.3.6. Conclusion*

Some of the safeguards attaching to arrest and detention in "normal" circumstances are recognised in legislation in Sri Lanka. There are nevertheless certain missing protections. The operation in practice of the safeguards appears to be problematic and there appears to be no means in practice of obtaining effective redress, save, on occasion, from the Supreme Court.

A more significant problem is detention related to the emergency. The powers of detention result in both arbitrary arrests and mass detention and there appears to be no effective possibility of review of lawfulness. Virtually all safeguards against arbitrariness are missing, together with safeguards against the risk of ill-treatment. The prohibition of arbitrary detention is not implemented in Sri Lanka, particularly in relation to detention under Emergency Powers.

## **5.4. Disappearances**

### *5.4.1. International standard*

The UN Declaration on Enforced Disappearances describes "disappeared" persons as those who are "arrested, detained, or abducted against their will or otherwise deprived of liberty by government officials, or by organized groups or private individuals acting on behalf of, or with the direct or indirect support, consent, or acquiescence of the government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or by a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law."<sup>352</sup> Disappearances are a violation of the right to due process, liberty and security of a person, and to freedom from torture.

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<sup>350</sup> Ibid.

<sup>351</sup> Ibid.

<sup>352</sup> Declaration on the Protection of all Persons from Enforced Disappearances, Preamble.

The Declaration also contains a number of provisions aimed at preventing "disappearances," by stipulating that detainees must be held in officially recognized places of detention, of which their families must be promptly informed; that they must have access to a lawyer; and that each detention facility must maintain an official up-to-date register of all persons deprived of their liberty.

Enforced disappearances constitute "a multiple human rights violation."<sup>353</sup> They potentially violate the right to life, the prohibition on torture and cruel, inhuman, and degrading treatment, the right to liberty and security of the person, and the right to a fair and public trial.<sup>354</sup> They represent the ultimate violation of the prohibition of arbitrary detention since, by virtue of the denial of detention, the disappeared person is denied all protection of the law.

A disappearance is a violation not only of the rights of the missing person but also constitutes inhuman treatment for the next-of-kin.

Sri Lanka has a duty to investigate serious violations of human rights and to punish the perpetrators under international law.<sup>355</sup> States are obligated to criminalize enforced disappearances and to prosecute any person who commits, orders, attempts to commit, or otherwise participates in an enforced disappearance, or has responsibility as a superior.<sup>356</sup>

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<sup>353</sup> United Nations Commission on Human Rights, Report submitted January 8, 2002, by Mr. Manfred Nowak, independent expert charged with examining the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearance, pursuant to paragraph 11 of Commission Resolution 2001/46, 2002, E/CN.4/2002/71, p. 36.

<sup>354</sup> Under the ICCPR, no one should be subjected to arbitrary arrest or detention. An arrested person should be informed, at the time of arrest, of the reasons for his arrest and is to be promptly informed of any charges against him. Anyone arrested or detained on a criminal charge must be brought in a timely fashion before a judge or other officer authorized by law to exercise judicial power, and every person deprived of his or her liberty by arrest or detention has the right "to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful." ICCPR, Article 9(4). Further protections are offered by Article 6 (the right to life), Article 7 (prohibition of torture), and Article 17 (protection from arbitrary interference with privacy, family and home). The rights under Articles 9 and 17 are derogable during public emergencies, but even then the derogation should be proportional and subject to judicial control. States must provide careful justification for any specific measures based on a proclamation of a national emergency. The principles of legality and the rule of law require that the fundamental requirements of a fair trial be respected even under Emergency Regulations. UN Human Rights Committee, General Comment 29, States of Emergency (Article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 186 (2003).

<sup>355</sup> ICCPR Article 2, CAT Articles 4, 5, and 7. Where enforced disappearances constitute a widespread or systematic attack against the civilian population, they may constitute a crime against humanity, Rome Statute of the International Criminal Court, Article 7(1)(i).

<sup>356</sup> Independent expert Manfred Nowak in his 2002 report on "disappearances" to the UN Commission on Human Rights stated: "As the [UN] Human Rights Committee rightly concluded, in the case of particularly serious human rights violations, such as enforced disappearances, justice means criminal justice, and purely disciplinary and administrative remedies cannot be deemed to provide sufficient satisfaction to the victims. Perpetrators of enforced disappearance should, therefore, not benefit from amnesty laws or similar measures." United Nations Commission on Human Rights, Report submitted January 8, 2002, by Mr. Manfred Nowak, independent expert charged with examining the existing international criminal and human rights framework for the protection of persons from enforced or

The State has an obligation to ensure that persons having knowledge of an enforced disappearance have the right "to complain to a competent and independent State authority and to have that complaint promptly, thoroughly and impartially investigated by that authority."<sup>357</sup> The state should promptly refer the matter to the appropriate authority for investigation whenever there are reasonable grounds to believe that an enforced disappearance has been committed even in the absence of a complaint. Any person alleged to have perpetrated an act of enforced disappearance should to be brought before competent civil authorities for the purpose of prosecution and trial when the facts support the allegation.<sup>358</sup>

Disappearances are deemed to be a continuing offence so long as the state continues to conceal the fate or the whereabouts of the "disappeared" person. The obligation to carry out an effective investigation into an alleged disappearance is also a continuing obligation.

The ICCPR requires states to provide an "effective remedy" for violations of rights and freedoms and to enforce such remedies.<sup>359</sup> The HRC has stated that "reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations."<sup>360</sup>

#### *5.4.2. Domestic implementation*

Sri Lanka's Constitution meets international standards by guaranteeing fundamental human rights, including the right to liberty, and security of person, the right to a fair trial, and the prohibition against torture. However, the Emergency Regulations have superseded its protections.<sup>361</sup> ER 2005

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involuntary disappearance, pursuant to paragraph 11 of Commission resolution 2001/46" (New York: United Nations, 2002), E/CN.4/2002/71.

<sup>357</sup> Declaration on the Protection of all Persons from Enforced Disappearances. This includes possible disappearances at the hands of non-State actors. See also Convention against Enforced Disappearances, Article 3.

<sup>358</sup> Ibid., Articles 13 and 14.

<sup>359</sup> General Comment No. 31, op. cit.

<sup>360</sup> General Comment No. 31, op. cit.

<sup>361</sup> The emergency regulations have consistently deviated from international standards, such as the ICCPR and the Convention against Torture. Specifically, on their face and in practice the emergency regulations are in conflict with Article 2(3) of the ICCPR, Article 6 of the ICCPR on the inherent right to life and freedom from arbitrary deprivation of life, Article 7 on the prohibition of torture and cruel, inhuman or degrading treatment or punishment, Article 9(1) of the ICCPR on the rights of liberty and security and the prohibition of arbitrary arrest and detention, Article 9(2) ICCPR on the right to be informed on the reason for one's arrest, Article 9(3) of the ICCPR on the right to be promptly produced before a judge, Article 9(4) on the right to take proceedings before a court, Article 9(5) of the ICCPR on the entitling of a victim of a human rights violation to compensation and Article 14 on the right to a fair trial. While, as mentioned above, Sri Lanka on several occasions submitted its derogations from ICCPR to the UN Secretary-General, it often failed to indicate the specific provisions from which it has derogated and the reasons for the derogation. See "The State of Civil and Political Rights in Sri Lanka," Asian Centre for Human Rights, December 2003; Reports by the Sri Lanka

enables security forces to arrest without a warrant any person "acting in any manner prejudicial to the national security or to the maintenance of public order, or to the maintenance of essential services." The term "prejudicial to the national security" is not further defined.<sup>362</sup> The PTA was suspended in 2002; however, it is still in force through the Emergency Regulations and § 9(1) still applies. This section allows for the detention of persons under a detention order (DO) for a period of 'three months in the first instance, in such place and subject to such conditions as may be determined by the Minister' and renewable for up to 18 months. Although the PTA was temporarily suspended in 2002 after the Cease Fire Agreement (CFA) was agreed upon, it was reintroduced under the Emergency Regulations. ER 2005 does not require officials to publish a list of authorized places of detention, in violation of international standards.

#### 5.4.3. *Pattern of uninvestigated disappearances*

Sri Lanka has a history of disappearances during the armed conflict. Commissions have documented how thousands of people have been kidnapped by armed men. Disappearances appear to have been treated by the state as a legitimate means of warfare.<sup>363</sup> The victims largely belong to the minority Tamil community, but youths from the Sinhala community disappeared during the JVP insurgency as well.<sup>364</sup> In the late 1980s, Sri Lanka suffered tens of thousands of disappearances.<sup>365</sup> Many are still unaccounted for.<sup>366</sup> That remains relevant in the period 2005 – 2009 owing to the continuing character of the violation and the continuing obligation to investigate. As of October 2006, the ICRC had received more than 350 reports of disappearances.<sup>367</sup> The Sri Lankan National Human Rights Commission logged 419 such complaints from December 2005 to September

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Commission of Inquiry into Involuntary Removal and Disappearance of Certain Persons and by the UN Working Group on Disappearances concluded that emergency laws were among the key reasons contributing to the spree of disappearances in the 1990s. See "Final Report of the Commission Of Inquiry into Involuntary Removal and Disappearance of Certain Persons (All Island)," 2001, [http://www.disappearances.org/news/mainfile.php/frep\\_sl\\_ai/](http://www.disappearances.org/news/mainfile.php/frep_sl_ai/); UN Commission on Human Rights, "Report of the Working Group on Enforced or Involuntary Disappearances: Civil and Political Rights, Including Questions of Disappearances and Summary Executions: Report on the Visit to Sri Lanka by a Member of the Working Group on Enforced or Involuntary Disappearances," E/CN.4/Add.1/2000/64 (1999).

<sup>362</sup> Emergency (Miscellaneous Provisions and Powers) Regulations, The Gazette of the Democratic Socialist Republic of Sri Lanka Extraordinary, No.1405/14, August 13, 2005, Regulation 19.

<sup>363</sup> AHRC Statement, Sri Lanka: White vans without number plates; the symbol of disappearances reappear, September 13, 2006, available at: <http://www.ahrchk.net/statements/mainfile.php/2006statements/729/>.

<sup>364</sup> Somini Sengupta, Specter of kidnappings returns to torment Sri Lanka - Asia - Pacific - International Herald Tribune, October 31, 2006, available at [http://www.nytimes.com/2006/10/31/world/asia/31iht-lanka.3348712.html?\\_r=1](http://www.nytimes.com/2006/10/31/world/asia/31iht-lanka.3348712.html?_r=1).

<sup>365</sup> Ibid.

<sup>366</sup> Ibid.

<sup>367</sup> Ibid.



2006.<sup>368</sup> A private advocacy group, Home for Human Rights, documented 203 cases of missing people in the first nine months of 2006, using newspaper clippings and other reports. It listed another 965 victims of extrajudicial killings, some of whom may also have been abducted.<sup>369</sup>

Sri Lanka has among the highest number of new cases in the world since 2006 and incidents of abductions and disappearances are carried out by State, non-state actors and opposition groups.<sup>370</sup>

More than 1,500 people were reported missing from December 2005-December 2007.<sup>371</sup> Some are known to have been killed while others were found in detention; however, the majority remains unaccounted for. During periods of armed conflict, it may obviously be difficult to determine whether a missing person has been "disappeared" or killed in the fighting. International humanitarian law contains provisions on the need to seek for the missing at the close of each military engagement. The NHRC does not publicize its data on 'disappearances' but Human Rights Watch learned there were 1,000 cases reported to the NHRC in 2006 alone and over 300 cases within the first 4 months of 2007. There is a pattern of enforced disappearances in the capital, Colombo.<sup>372</sup> On 11 June 2008, the UN Working Group on Disappearances reported that "In the past two months alone, the Working Group has sent 22 urgent actions to the Government. Out of those cases, 18 disappearances took place in May. The Working Group is also concerned that both women and humanitarian aid workers are being targeted".<sup>373</sup>

The NHRC ceased providing statistics on forced disappearances by state security forces, pro-government paramilitary groups or the LTTE allegedly due to pressure from the government.<sup>374</sup> In March 2008, Human Rights Watch provided documentation on several hundred cases compiled by

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<sup>368</sup> Ibid.

<sup>369</sup> Ibid.

<sup>370</sup> Human Rights Watch, *Recurring Nightmare*; Statement from Santiago Corcuera Cabezut, Chair-Rapporteur of the UN Working Group on Enforced or Involuntary Disappearance, 10 March 2008; International Crisis Group, *Sri Lanka's Human Rights*, p. 10-13; AHRC, *State of Human Rights in Eleven Asian Nations*, p. 300.

<sup>371</sup> Address by Ms. Louise Arbour, UN High Commissioner for Human Rights, 6<sup>th</sup> Session of the Human Rights Council, Geneva, 11 December 2007 (expressing her special attention to the 'alarming numbers' of reports regarding abductions and disappearances from 2005-2007); AHRC, *State of Human Rights in Eleven Asian Nations*, p. 300-306, (reporting that the former Foreign Affairs Minister Mangala Samaraweera stated that a person is abducted every five hours in Sri Lanka and that abductions, killings had become so commonplace that no matter who did it, the state was responsible for it. He was later dismissed from his post and the government claimed his remarks were 'politically motivated').

<sup>372</sup> Written statement by Asian Forum for Human Rights and Development (FORUM-ASIA), February 24, 2008; International Crisis Group, *Sri Lanka's Human Rights Crisis*, p. 10-11; AHRC, *State of Human Rights in Eleven Asian Nations*, p. 301.

<sup>373</sup> UN Press release, United Nations Expert Group deplores recent wave of disappearances in Sri Lanka, 11 June 2008, available at <http://www.unhcr.ch/hurricane/hurricane.view01/D564F9EDD64E959FC12574650049042C>.

<sup>374</sup> Human Rights Watch, *Recurring Nightmare*.

local human rights groups since mid-2006.<sup>375</sup> The number of disappearances increased throughout 2008 by more than 500 cases after a brief decline in mid-2007.<sup>376</sup> On 8 November 2008 the chairman of the Presidential Commission on Disappearances, retired High Court Judge Mahanama Tilakaratne, stated that 886 persons missing or abducted in the past two years were still unaccounted for.<sup>377</sup> The greatest concentration of disappearances during 2008 occurred in Vavuniya and the Eastern Province.<sup>378</sup> The HRW report concluded that a crucial factor was "the systemic impunity enjoyed by members of the security forces and pro-government armed groups for abuses they commit."<sup>379</sup>

#### *5.4.4. Pattern of "abductions" followed by subsequent recognition that the individual is detained*

It is alleged that, in a significant number of cases, persons are effectively kidnapped and, after a certain period of time has elapsed, they appear in detention. At the time they were detained, they were denied the protection of the law. Even if their detention is acknowledged subsequently, they are disappeared persons from the time of being detained until the detention is acknowledged. The fact that they are subsequently found in State detention, strongly suggests that the State was implicated in their original disappearance.<sup>380</sup>

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<sup>375</sup> Ibid. The appendix to this report contains a detailed description of 99 cases documented by Human Rights Watch. A list of 498 additional cases documented by Sri Lankan human rights groups is available at: <http://hrw.org/reports/2008/srilanka0308/srilanka0308cases.pdf>.

<sup>376</sup> Ibid.

<sup>377</sup> See *ibid.*, p. 41-2: "On June 28, 2007, the chairman of the Presidential Commission on abductions, disappearances, and killings, Judge Tillekeratne, told the media that 2,020 abductions and "disappearances" were reported to his commission between September 14, 2006, and February 25, 2007 (1,713 cases of "disappearances" and 307 abductions). According to Tillekeratne, 1,134 persons were later "found alive and reunited with their families," but the fate of the rest remains unknown. Although Judge Tillekeratne presented the figures as proof that the majority of the "disappeared" had returned to their homes, it shows in fact that at least 886 people "disappeared" without a trace in less than 12 months."

<sup>378</sup> Ibid.

<sup>379</sup> Ibid.

<sup>380</sup> One example is the case of the controversial arrest of Sudar Oli, editor Mr N. Vidyatharan in February 2009; the police spokesman first told the media that he had been abducted by a group of gunmen and driven off in a white van in broad daylight while he was attending a family funeral. The story later changed to say that he was arrested by the Colombo Crimes Bureau. See "Controversy Over Arrest of Tamil Newspaper Editor", in LankaNewspaper.com, 27 February 2009. Reporters without Borders and other press watchdogs reacted strongly on this arrest.

*5.4.5. Other disappearances where there is evidence that State agents or persons for whom the State is responsible are implicated*

Abductions for ransom and other reasons have targeted both Tamils and Muslims in the capital.<sup>381</sup> Abductions for ransom are primarily utilized to fund the TMVP.<sup>382</sup> Disappearances also appear to be part of the government's counter-insurgency strategy.<sup>383</sup> Many killings and disappearances take place inside high security zones and during curfew hours.<sup>384</sup> This suggests that at least some may have been committed by people working directly with or with the consent of the security forces, in particular the Sri Lanka army.<sup>385</sup> Many of those reported missing were abducted by either the LTTE or the TMVP as a means of forcible recruitment, particularly the abduction of children.<sup>386</sup> According to a Presidential Commission report, certain sectors of the population are disproportionately affected by disappearances and killings, with males under the age of 30 in Jaffna and Colombo comprising the majority of disappearances and killings.<sup>387</sup> Other studies confirm this trend and reflect that a disproportionate number of those abducted or disappeared are Tamils.<sup>388</sup>

A report issued on 10 January 2008 by the UN Working Group on Enforced and Involuntary Disappearances reported cases examined by the Working Group between November 2006 and November 2007. In the report, it is stated that the Sri Lankan army and the Criminal Investigation Department were allegedly responsible for a large number of the cases. Other possible perpetrators include the Sri Lankans security forces, the police and the Karuna Group. According to the report there is a growing culture of impunity for perpetrators of enforced disappearances, as the Government is not taking effective steps to bring rising numbers of disappearances under control. The path to achieving justice for the victims and their families is reportedly long and arduous, with delays and interferences by high officials in investigations and inquiries, as well as threats to witnesses and family members.<sup>389</sup>

There is no evidence that any measures have been implemented by the police or security forces to secure the release of children abducted, recruited and used by TMVP/Karuna faction despite clear

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<sup>381</sup> International Crisis Group, Sri Lanka's Human Rights Crisis; AHRC, State of Human Rights in Eleven Asian Nations, p. 303.

<sup>382</sup> Ibid.

<sup>383</sup> Written statement by FORUM-ASIA, cit.; International Crisis Group, Sri Lanka's Human Rights Crisis.

<sup>384</sup> Written statement by FORUM-ASIA, cit; Minority Rights Group International Report, p. 5.

<sup>385</sup> Amnesty International, Silencing Dissent, op. cit., p. 1-2.

<sup>386</sup> International Crisis Group, Sri Lanka's Human Rights Crisis, p. 12-13.

<sup>387</sup> Public Release from the Civil Monitoring Commission, the Free Media Movement and the Law & Society Trust, 31 October 2007, p. 4-5.

<sup>388</sup> AHRC, State of Human Rights in Eleven Asian Nations, p. 303-304.

<sup>389</sup> Report of the Working Group on Enforced or Involuntary Disappearances, A/HRC/7/2, 10 January 2008, para. 330, p. 73.

knowledge that it is taking place.<sup>390</sup> The lines between politically motivated ‘disappearances’ and abductions for ransom are blurred.<sup>391</sup> There have also been numerous cases of child abductions by Karuna forces (and the LTTE) from IDP camps.<sup>392</sup> However, the LTTE and the TMVP, on behalf on its military wing Karuna, agreed with UNICEF to release abducted children within their ranks, with the objective of completing that process by 1 January 2007.<sup>393</sup> As of September 2007, LTTE and TMVP continued to abduct children.<sup>394</sup> In spite of the LTTE signing the ‘Action Plan’ on 15 October 2007 regarding the concerns mentioned above, the TMVP/Karuna faction continued to abduct children for the purposes of recruitment.<sup>395</sup> Sri Lankan security forces are complicit in the abduction of children by the Karuna faction and at least some elements of the security forces have facilitated and sometimes participated in those abductions.<sup>396</sup> The complicity of certain security forces in the abductions is common knowledge in the eastern area.<sup>397</sup>

The government responds extremely negatively to any criticism by issuing threats, particularly against international monitors, NGOs and journalists.<sup>398</sup> International reports indicate continued and well-documented allegations of widespread abductions and disappearances mainly committed by the State’s police and armed forces. Allegations are not promptly or impartially investigated.<sup>399</sup>

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<sup>390</sup> Statement by Alan Rock, UN Special Advisor on Children and Armed Conflict, 13 November 2006, *available* at <http://www.un.org/children/conflict/pr/2006-11-13127.html>; Statement From Special Rapporteur on Extra-Judicial Killings, UNHCR, 5 Sept. 2006; Press Statement by UN High Commissioner For Human Rights on Conclusion of her Visit to Sri Lanka, 13 October 2007; SG Report on children and armed conflict 2007, para. 21-23, p. 10; Report of the Special Rapporteur on torture, para. 16, p. 9.

<sup>391</sup> See generally, Human Rights Watch, *Recurring Nightmare*; Sri Lanka: Submission to the UN Universal Periodic Review: Second Session of the UPR Working Group, 5-16 May 2008, Amnesty International (2008), para. 7; Report of the Working Group on Enforced or Involuntary Disappearances, January 10, 2008, A/HRC/C/7/2.

<sup>392</sup> International Crisis Group, *Sri Lanka’s Human Rights Crisis*, p. 8.

<sup>393</sup> Alan Rock, UN Special Advisor on Children and Armed Conflict, Statement, 13 November 2006.

<sup>394</sup> SG Report on children and armed conflict in Sri Lanka 2007; International Crisis Group, *Sri Lanka’s Human Rights Crisis*, p. 6.

<sup>395</sup> *Ibid.*, p. 16-17.

<sup>396</sup> Human Rights Watch, *Recurring Nightmare*, p. 51.

<sup>397</sup> Statement by Alan Rock, UN Special Advisor on Children and Armed Conflict, 13 November 2006; Statement of Special Rapporteur on extrajudicial executions, UNHCR, 5 Sept. 2006; Press Statement by UN High Commissioner For Human Rights on Conclusion of her Visit to Sri Lanka, 13 October 2007; SG Report on children and armed conflict in Sri Lanka 2007, para. 21-23, p. 10; Report of the Special Rapporteur on torture, para. 16, p. 9.

<sup>398</sup> International Crisis Group, *Sri Lanka’s Human Rights Crisis*, p. 18-19; Minority Rights Group International Report, p. 5.

<sup>399</sup> SG Report on children and armed conflict 2007, p. 17-19 (reporting that a petition was filed on 11 June 2006 by 40 families with the Presidential Commission and the Supreme Court regarding abduction of family members (children) and a subsequent complaint filed on their behalf to the HRC on 19 October 2006. As of September 2007, no investigation or significant follow up had been conducted by the Police or the HRC. To the contrary, the families who filed the complaints were subjected to increasing intimidation); Minority Rights Group International Report, p. 8 (reporting that a senior opposition MP implicated the Defence Secretary and two Air force officers of being involved in some of the highest profile abduction cases).

#### *5.4.6. Seeking redress*

Various agencies receive information about missing persons. The government of Sri Lanka has complained that this results in confusion with regard to numbers and an accurate indication of the identity of the missing. Save in the case of those who disappear and are subsequently acknowledged to be in detention, very few cases are elucidated and virtually no prosecutions have been brought for participation in a disappearance.

Aside from the NHRC, the government has created at least nine special bodies to address human rights violations including ‘disappearances’ and abductions but thus far, all of them have failed to deter or stop these and other human rights violations.<sup>400</sup> To the contrary, they appear to serve as a means for the government falsely to claim that it is taking steps to improve human rights in the face of the increasing number of those abducted and/or ‘disappeared.’<sup>401</sup>

#### *5.4.7. Conclusion*

Sri Lanka has failed to implement its obligation to prevent enforced disappearances by State agents and other forces for which it is responsible. Indeed such forces are implicated in the dramatic increase in disappearances between 2005 and 2009. It has also failed to prevent disappearances at the hands of third parties. It has also failed to implement its obligation to carry out effective investigations into alleged disappearances. The completely inadequate investigations result in complete or virtually complete impunity.

### **5.5. Freedom of movement**

#### *5.5.1. International standard*

ICCPR Article 12 provides that any person lawfully within the territory of a State has the right of liberty of movement and freedom to choose his residence. The right can be subject to restrictions but only if they are provided by law, necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the Covenant. Any restriction has to be on one of the grounds listed and

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<sup>400</sup> Human Rights Watch, UPR Submission, Sri Lanka, February 2008, available at [http://libid.ohchr.org/HRBodies/UPR/Documents/Session2/LK/HRW\\_LKA\\_UPR\\_S2\\_2008\\_HumanRightsWatch\\_upr\\_submission.pdf](http://libid.ohchr.org/HRBodies/UPR/Documents/Session2/LK/HRW_LKA_UPR_S2_2008_HumanRightsWatch_upr_submission.pdf).

<sup>401</sup> Ibid.

has to be both necessary and proportionate. In General Comment No. 27, the HRC stated that Articles 12 and 13 are closely linked.<sup>402</sup> It emphasized that the possible limitations are exceptional. The law itself has to establish the conditions under which the rights may be limited. Article 12(3) clearly indicates that it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them. Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected. The principle of proportionality has to be respected not only in the law that frames the restrictions, but also by the administrative and judicial authorities in applying the law. States should ensure that any proceedings relating to the exercise or restriction of these rights are expeditious and that reasons for the application of restrictive measures are provided. Restrictions should use precise criteria and should not confer unfettered discretion on those who implement them. The application of the restrictions permissible under Article 12(3) needs to be consistent with the other rights guaranteed in the Covenant and with the fundamental principles of equality and non-discrimination. Thus, it would be a clear violation of the Covenant if the rights enshrined in Article 12(1) and (2), were restricted by making distinctions of any kind, such as on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The relevant provisions of customary LOAC/IHL are superficially different. In fact, when one considers the situation which they are designed to address, there is no real difference. The right to be free to move around a country must also include the right not to move unless one wishes to do so. LOAC/IHL is designed to address the more common problem in situations of armed conflict. It imposes restrictions on the ability to oblige people to move on account of the conflict. The ICRC's study of Customary International Humanitarian Law suggests that displacement can only be ordered when the security of the civilians or imperative military reasons so require.<sup>403</sup> All possible measures must be taken to ensure that displaced civilians are received in satisfactory conditions of shelter, hygiene, health, safety and nutrition. Members of the same family should not be separated.<sup>404</sup> Displaced persons have a right to voluntary return in safety to their homes or places of habitual residence as soon as the reasons for their displacement cease to exist.<sup>405</sup>

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<sup>402</sup> General Comment No.27, Freedom of Movement, CCPR/C/21/Rev.1/Add.9, 1999.

<sup>403</sup> Henckaerts and Doswald-Beck, *op. cit.*, Rule 129.

<sup>404</sup> *Ibid.*, Rule 131.

<sup>405</sup> *Ibid.*, Rule 132.

When interpreting the provisions of human rights law on freedom of movement, account should be taken of these customary LOAC/IHL principles.

### *5.5.2. Domestic legislation*

Article 14(1)(h) of the Constitution gives all citizens freedom of movement and freedom to choose a place of residence in Sri Lanka. Article 15(6) and (7) establishes the grounds on which limitations may be placed on the exercise of the right. The ER 2005, under Regulations 12, 14(1) and 18(1) allow for the imposition of specific restrictions, either by reference to the place or the individual. Section 18 of the PSO allows for broad restrictions to be imposed on freedom of movement. Specific Emergency Regulations establish a variety of special zones, such as "High Security Zones", "Prohibited Zones" and "Restricted Zones"

### *5.5.3. Freedom of movement in practice*

Tamils, especially those from the North, cannot leave their areas without permission in writing from the security forces which restricts freedom of movement.<sup>406</sup> Permission is required to enter security areas.<sup>407</sup> The rules and procedures for such practices and for issuing permissions are arbitrary or impossible to discover by civilians and otherwise erratically enforced.<sup>408</sup> It appears to be part of the increasing militarisation of life in the North of Sri Lanka. These restrictions prevent people both from moving around within an area and also from leaving the area to seek security.

Mass evictions have also occurred. In 2007, the government reportedly expelled from Colombo hundreds of Tamils who were from the eastern and the northern regions.<sup>409</sup> Emergency regulations were routinely used to cordon off particular areas within predominately Tamil neighbourhoods, and the Sri Lankan military would conduct searches of Tamil homes, check ID cards and set up stringent check points all of which inhibited their freedom of movement.<sup>410</sup> The Supreme Court attempted to curtail mass evictions but they continued in spite of the Court's rulings.<sup>411</sup>

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<sup>406</sup> Centre for Policy Alternatives, Monitoring Factors Affecting the Sri Lankan Peace Process, Cluster Report, Nov. 2007- Jan. 2008, p.10-11; Feb.2008-April 2008, p.16-18; May 2008-July 2008, p. 9-10.

<sup>407</sup> Ibid.

<sup>408</sup> Ibid.

<sup>409</sup> International Crisis Group, Sri Lanka's Human Rights Crisis. p. 15; Minority Rights Group International Report, p. 4.

<sup>410</sup> Minority Rights Group International Report, p. 4.

<sup>411</sup> Ibid., p. 4-5.

Government forces have also restricted movement of Muslims and Tamils. For example, the military allowed Muslims to return to their home adjoining High Security Zones (HSZs) but they faced severe restrictions on their movement which hampered their livelihood.<sup>412</sup> Fishermen who make their best catches at night were not allowed to fish except during specific daylight hours and were only permitted access to a zone 2 km off the coast.<sup>413</sup> Government-issued ID cards issued to returnees have hampered freedom of movement.<sup>414</sup> The ID's are additional to the standard national ID card and part of the Government's anti-terror strategy. However, villagers expressed concerns that the additional documentation restricted family visitors, mobility and children's access to education if they need to travel outside of their villages.<sup>415</sup> In August 2006, the A9 highway linking the northern peninsula of Jaffna to the rest of the county was closed isolating 60,000 people and restrictions on farming and fishing were imposed limiting freedom of movement and putting civilians at risk of starvation.<sup>416</sup>

A different aspect of the problem of freedom of movement was seen in IDP camps in 2008. A statement by Human Rights Watch highlighted the plight of over 400 IDPs who were 'arbitrarily detained' by the authorities. On May 10 and 11, local authorities conducted a survey in Kalimodai camp to assess the wishes of displaced persons on their preferred place of residence. Out of the then camp population of 257, only five families indicated a wish to remain in Kalimodai. The large majority indicated that they wished to leave and had alternative places to stay, including with nearby host families. As of July 2008, the CPA reported unconfirmed information indicates only 28 people had been released.<sup>417</sup>

The reverse of this problem was seen in the case of forced resettlement of IDPs in the East of Sri Lanka. In 2006, a battle to take over Vakarai in the Batticaloa district forced 35,000 civilian (including children, elderly and the sick) to make long and dangerous journeys to government controlled areas.<sup>418</sup> Continued fighting from 2006-2007 forced thousands of more civilians to flee and the government began a massive drive of forced resettlement in violation of UN Guiding Principles on Internal Displacement—Principles 14 & 15.<sup>419</sup> The government also forcibly returned

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<sup>412</sup> Ibid., p. 3.

<sup>413</sup> Ibid.

<sup>414</sup> Ibid.

<sup>415</sup> Ibid.

<sup>416</sup> Ibid.

<sup>417</sup> Centre for Policy Alternatives, Monitoring Factors Affecting the Sri Lankan Peace Process, Cluster Report, May 2008-July 2008, p.10, citing Human Rights Watch, Press Release, by Brad Adams, Asia director at Human Rights Watch, UK: Abusive Ex-Commander Allowed to Return to Sri Lanka, 2 July 2008.

<sup>418</sup> AHRC, State of Human Rights in Eleven Asian Nations, p. 310-313.

<sup>419</sup> Ibid., p. 311.



15,000-25,000 in September 2006 and another wave of forced returns occurred in March 2007.<sup>420</sup> IDPs were threatened by the government and military officials that humanitarian aid, water and electricity would be cut off if they refused to return to their homes.<sup>421</sup> There were reports of the military threatening and beating IDPs with sticks to force them onto busses that were forcing them back to their homes.<sup>422</sup> The government refused to allow humanitarian workers to accompany IDPs back to their places of return on 'security grounds' raising questions as to why IDPs were being returned to areas deemed 'unsafe' for humanitarian workers.<sup>423</sup>

In May 2007 an area spanning 90 km in the Muttur East and Sampur areas were declared as High Security Zones (HSZ) and IDPs whose homes were located in this area and who had fled during the fighting were not allowed to return to their homes.<sup>424</sup> However, this same area was then designated by the government as a 'Special Economic Zone' and subsequently opened to large local and foreign investment.<sup>425</sup> In other words, some people were allowed to be in the zone but not the original inhabitants.

Whilst the LTTE was not formally bound by human rights treaty obligations, it was bound by LOAC/IHL.<sup>426</sup> The LTTE had a record of using killings to deter civilians from exercising their right to freedom of movement and other fundamental human rights.<sup>427</sup> The LTTE imposed restrictions on the freedom of movement of civilians (including children 13 years and above), prohibiting people from leaving the Vanni unless they were provided with a pass. Permission to leave Vanni was dependent upon specific conditions, including that one family member remained in Vanni. Local passes were difficult to obtain. Children released by the LTTE were not provided with the necessary documentation to enable them to leave Vanni resulting in their inability to be reunited with their families.<sup>428</sup> In one instance LTTE restrictions on movement was the direct consequence of the deaths of six IDPs when their boat capsized as they tried to flee Vaharai, Batticaloa, on 15 December 2006.<sup>429</sup> The LTTE also used civilians as human shields and prevented them from leaving the conflict zone.

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<sup>420</sup> Ibid.

<sup>421</sup> Ibid., p. 311-312.

<sup>422</sup> Ibid.

<sup>423</sup> Ibid., p. 312.

<sup>424</sup> Ibid. p. 314.

<sup>425</sup> Ibid.

<sup>426</sup> See 2.5 above.

<sup>427</sup> Statement of Special Rapporteur on extrajudicial executions, 5 Sept. 2006.

<sup>428</sup> SG Report on children and armed conflict 2007, para. 5, 14-15, p. 2-3, 7, 40.

<sup>429</sup> Ibid., para. 35, p. 13.

Movement of humanitarian assistance and aid workers was also restricted by the LTTE.<sup>430</sup> The detailed pass system that was implemented in January of 2007 created additional restrictions on the movement of humanitarian workers.<sup>431</sup> The 'Action Plan' signed by the LTTE expressed commitments ensuring safe passage of humanitarian aid/workers but it did not meet international minimum standards.<sup>432</sup>

Since the end of the conflict, a major issue has become the detention of civilians in what are, in effect, internment camps. The dramatic influx of people into the camps posed massive humanitarian challenges; huge numbers arrived within a very short period of time. OCHA estimated that around 20,000 people arrived in the camps in two or three days in mid-May, 2009.<sup>433</sup> At checkpoints into government-controlled areas, those who were known to be or who claimed themselves to be LTTE cadres were taken away and are being held away from the camps. The rest of the displaced are being held in camps, with a view to being screened. In June 2009, the United Nations was more worried about the issue of freedom of movement than living conditions in camps.<sup>434</sup> Two months after the conflict ended, the Government continued to hold approximately 280,000 people (predominately Tamils) in detention camps.<sup>435</sup>

As discussed above (5.3.4), there appears to be no freedom of movement between different sub-camps and the IDPs are not free to leave, even if they have family or friends with whom they could be accommodated. Other issues of concern include the military nature of the camps, distribution of identification cards to those in the camps, the lack of family reunification, and the severe limitations on access to the camps by humanitarian workers.

Stringent security measures post-conflict continue throughout the country, hampering the movement of people and goods, adding costs to economic activities.<sup>436</sup>

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<sup>430</sup> Ibid., p. 13-15.

<sup>431</sup> Ibid.

<sup>432</sup> Ibid., para. 48, p. 16.

<sup>433</sup> UN News Centre, UN efforts focusing on plight of civilians in post-conflict Sri Lanka, 18 May 2009, available at <http://huru.org/apps/news/story.asp?NewsIBID.=30837&Cr=sri+lanka&Cr1>.

<sup>434</sup> Megan Rowling, UN aid chief urges free movement for Sri Lanka's war-displaced, AlterNet, 10 June 2009, available at: [http://www.alertnet.org/db/an\\_art/20316/2009/05/10-131752-1.htm](http://www.alertnet.org/db/an_art/20316/2009/05/10-131752-1.htm).

<sup>435</sup> Human Rights Watch, Sri Lanka: IMF Should Not Condone Abuses, July 22, 2009, available at: <http://www.hrw.org/en/news/2009/07/22/sri-lanka-imf-should-not-condone-abuses>.

<sup>436</sup> The National Peace Council of Sri Lanka, Ensure the Freedom of Movement in Post War Sri Lanka, 30 June, 2009.

#### *5.5.4. Seeking redress*

In the case of restrictions imposed under emergency legislation, there would appear to be no possibility of challenging the provisions and little or no possibility of challenging the manner of their implementation. It is not clear on what legal basis IDPs can be held against their will in the internment camps or subjected, in effect, to rule by the military. As noted above a constitutional fundamental rights case has been submitted to the Supreme Court on behalf of the IDPs.

#### *5.5.5. Conclusion*

Restrictions on freedom of movement are not, in and of themselves, a violation of human rights law. In order for the restrictions to be legitimate, they need to be necessary and to be applied in a reasoned, non-arbitrary and proportionate manner. The principal problem posed by the general restrictions on freedom of movement in Sri Lanka is that they appear to be imposed and enforced in an arbitrary and disproportionate manner. In relation specifically to the recently established camps, it must be recognised that the government does have legitimate security concerns. The screening of IDPs in order to identify LTTE fighters is legitimate. The mass internment of the civilian population in the North, however, is both arbitrary and disproportionate

### **5.6. Freedom of assembly**

#### *5.6.1. International standards*

The right of peaceful assembly has been regulated in ICCPR Article 21.<sup>437</sup> Restrictions on that right if in place must be "in conformity with the law and necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others". That right is potentially derogable under Article 4.

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<sup>437</sup> The freedom of association is regulated by ICCPR Article 22 which makes reference to the ILO Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize. On this matter see joint submission of European Trade Union Confederation (ETUC) and International Trade Union Confederation of 19 November 2008.

### 5.6.2. Domestic implementation

The Constitution of Sri Lanka recognizes the right of peaceful assembly. However, according to Article 14(b), this right is reserved for citizens and permanent legal residents of Sri Lanka only.

The ER 2005, part 3, control of meetings, processions, publications, firearms and right of entry,<sup>438</sup> provides in Regulation 13(1) that "The President may, by order, prohibit the holding of public processions or public meetings, or of such public processions or meetings as may be specified in that order in any area in Sri Lanka for such period as may be so specified, subject to such exemptions as may be made by that order or by any subsequent order made under this regulation processions and meetings".

The Emergency Regulations were criticized during the Universal Periodic Review for Sri Lanka in 2008. Sri Lanka Democracy Forum (SLDF) noted that the Emergency Regulation stifle media freedom and freedom of expression at an alarming level, and enable the President to ban any public meeting, procession, or gathering which, in his opinion, threatens national security or public order.<sup>439</sup>

According to the US Department of State, Bureau of Democracy, Human Rights, and Labour (report concerning the situation in 2005, 8 March 8 2006),<sup>440</sup> as far as freedom of peaceful assembly and association is concerned, "the law provides for freedom of assembly, and the government generally respected this right in practice; however, some restrictions existed. The Emergency Regulations enacted on August 18 give the president the power to restrict meetings, assemblies and processions. The law states that rallies and demonstrations of a political nature cannot be held when a referendum is scheduled; however, the government generally granted permits for demonstrations, including those by opposition parties and minority groups. On May 9, police and security forces fired into a crowd of rock-throwing protesters, killing 1 and injuring 15 in Batticaloa District. The estimated crowd of 500 was protesting the establishment of a new checkpoint. On June 10, police broke up a political protest in Colombo using tear gas, water cannons, and baton charges when protesters blockaded the presidential residence".

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<sup>438</sup> Regulations made by the President under Section 5 of the Public Security Ordinance (Chapter 40), The Gazette of the Democratic Socialist Republic of Sri Lanka, No. 1405/14 -- Saturday, August 13, 2005.

<sup>439</sup> Sri Lanka Democracy Forum (SLDF), Submission to the UPR of Sri Lanka, 2008, p. 9. See also Joint Civil Society Report, joint submission to the UPR of Sri Lanka 2008, p.2.

<sup>440</sup> <http://www.state.gov/g/drl/rls/hrrpt/2005/61711.htm>.

### 5.6.3. Conclusion

The law provides for freedom of association and assembly, and the government generally respected this right in practice. However, some restrictions exist, such as those under the ER. Available information does not allow forming firm conclusions as far as an effective implementation of those rights is concerned. The emergency regulations have a serious negative impact on the practical implementation of the right to assembly.

## 5.7. Freedom of expression

### 5.7.1. International standards

Freedom of expression regulated in ICCPR Article 19 is a cornerstone of democratic society. Article 19(2) requires protection of the right to freedom of expression, which includes not only freedom to "impart information and ideas of all kinds", but also freedom to "seek" and "receive" them "regardless of frontiers" and in whatever medium, "either orally, in writing or in print, in the form of art, or through any other media of his choice". Article 20(2) prohibits "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence".

### 5.7.2. Domestic implementation

Sri Lankan law guarantees freedom of the press and freedom of speech (Articles 10, 14(1)(a) of the Constitution). However, the ER 2005 Regulations 18, 28, 29 and 33, the ER 2006 Regulation 9 and the PTA enable the Government to enact regulations restricting freedom of expression, assembly and association. Analysis of those regulations presented by the International Commission of Jurists show that "these emergency regulations are so broadly defined that it is difficult for a person to know whether or not they are committing an offence. This creates pre-conditions for self-censorship and a chilling effect on free and open debate."<sup>441</sup> Emergency regulations go far beyond permitted restrictions of the freedom of media. In particular they fail to distinguish between information that could threaten national security and the legitimate expression of controversial ideas.

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<sup>441</sup> International Commission of Jurists, Sri Lanka: briefing paper, Emergency Laws and international standards, March 2009, p. 25-26.

The case of journalist J. S. Tissainayagam, an ethnic Tamil columnist with the Sunday Times newspaper and editor of the Outreach website, who was arrested by the police Terrorist Investigation Division (TID) on 7 March 2008 is particularly significant.<sup>442</sup> Following his arrest Mr Tissainayagam was detained for more than five months without charge, and following charge, for a further year before his trial in August 2009. Mr Tissainayagam was convicted on 31 August 2009 of two charges inciting racial disharmony/communal violence under the PTA through writing and publishing two articles in the North Eastern Monthly magazine at the time where the Cease-Fire Agreement was in force. He was convicted on a further charge under the ER of aiding and abetting terrorist organisations through raising money for this magazine. When the articles in question were published the Cease-Fire Agreement, under which the PTA was suspended, was in force. Mr Tissainayagam was sentenced to twenty years of rigorous imprisonment. His publisher is awaiting trial on the same charges, while his publisher's wife is awaiting trial on charges and abetting her husband.

The practical implementation of the freedom of expression remains one of the most serious problems in Sri Lanka. In 2003 the HRC recommended, *inter alia*, that Sri Lanka protect media pluralism<sup>443</sup> and raised concern about persistent reports of harassment against media personnel and journalists, and that the majority of such allegations had been ignored or rejected by the competent authorities.<sup>444</sup> The government in its report to the Human Rights Council stated that "participation and democratic scrutiny are guaranteed by free media – both printed and electronic ..."<sup>445</sup> However, in the Report of the Working Group on the Universal Periodic Review Sri Lanka several countries formulated the recommendations concerning freedom of expression. "Take measures to safeguard freedom of expression and protect human rights defenders, and effectively investigate allegations of attacks on journalists, media personnel and human rights defenders and prosecute those responsible (Ireland); Take measures to improve safeguards for freedom of the press (Denmark); Adopt effective measures to ensure the full realization of the right to freedom of expression for all persons (Poland)."<sup>446</sup>

Recently the government decided to reactivate the Sri Lanka Press Council Law No. 5 of 1973, which provides for the possibility to fine and/ or sentence journalists and publishers to terms of

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<sup>442</sup> On this case see, for example, Human Rights Watch, "Letter to President Mahinda Rajapakse of Sri Lanka to Free Journalists Unfairly Held", 22 January 2009.

<sup>443</sup> Concluding observations of the Human Rights Committee: Sri Lanka, 13 December 2003, CCPR/CO/79/LKA, para. 17.

<sup>444</sup> *Ibid.*, para. 18.

<sup>445</sup> National Report Submitted in Accordance with Paragraph 15 (A) of the Annex to Human Rights Council Resolution 5/1, A/HRC/WG.6/2/LKA/1, 2 May 2008, para. 55, p. 13.

<sup>446</sup> Report of the Working Group on the Universal Periodic Review Sri Lanka, A/HRC/8/46, 5 June 2008, para. 39-41.

imprisonment. That move has been criticized by the several media organizations in the country. In the letter to the President they point out "a media culture cannot be based on slapping charges against journalists, fining them or sending them to jail."<sup>447</sup>

The 2007 Global Freedom Report published by Freedom House has described the Sri Lanka press as "not free". According to the U.S. State Department 2008 report, "The government made several attempts to prevent independent media houses from criticizing the government and its policies." Senior government officials repeatedly accused critical journalists of treason and often pressured editors and publishers to run stories that portrayed the government in a positive light."<sup>448</sup>

Based on various information and reports one is forced to conclude that the above mentioned recommendations of the UN Human Rights Committee have not been implemented and that in fact the situation, as far as freedom of press is concerned, has deteriorated. The Commonwealth Human Rights Initiative reported: "... Members of the press have been repeatedly treated as enemies of the state for questioning or criticising the government, for reporting on Tamil issues or disseminating Tamil – language news"<sup>449</sup>.

On 3 May 2008 the International Federation of Journalists (IFJ) released its 6<sup>th</sup> Press Freedom Report for South Asia (2007-2008).<sup>450</sup> The report states that, in the case of Sri Lanka, "Verbal and physical attacks, harassment, restrictions on access and vilification of media personnel have become a common feature in the lives of journalists, photographers and all those engaged in the gathering, publication and dissemination of information in Sri Lanka. The lackadaisical approach of law enforcement agencies toward complaints made by media personnel about attacks and harassment has enhanced the culture of impunity for attacks on the media community. No progress has been made in any investigations into killings of journalists that have occurred during the period under review (...) A range of emergency regulations has been promulgated that restrict access to conflict-affected areas for civil society actors, including humanitarian agencies and the media. The regulations enable arbitrary arrest and detention, and control dissemination of information considered to be contrary to the interests of national security."

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<sup>447</sup> Daily Mirror, Wednesday 24 June 2009, front page.

<sup>448</sup> See U.S. Department of State, Diplomacy in Action. 2008 Human Rights Report: Sri Lanka, February 25, 2009, p. 11.

<sup>449</sup> Commonwealth Human Rights Initiative, Stamping Out Rights: The impact of Anti-Terrorism Laws on Policing, 2007.

<sup>450</sup> International Federation of Journalists, In the balance, Press Freedom in South Asia 2007 – 2008, available at: <http://asiapacific.ifj.org/en/pages/in-the-balance-press-freedom-in-south-asia-2007-2008-2>.

On 19 June 2008 the International Federation of Human Rights (FIDH) issued its Annual Report for 2007. In the report<sup>451</sup> FIDH states "Since the resumption of hostilities in 2006 between the Government of President Mahinda Rajapakse and the Liberation Tigers of Tamil Eelam (LTTE) ..., the human rights situation in Sri Lanka has deteriorated dramatically, especially in the Jaffna peninsula. Enforced disappearances, extrajudicial killings, recruitment of child soldiers, torture, threats, and, in general, massive violations of human rights and war crimes have increased, resulting in a real climate of fear and insecurity throughout the country ... In 2007, the safety of defenders considerably worsened, especially following denunciations of abuses committed by the parties in conflict, corruption and impunity, in a context where the number of attacks and threats from all parties to the conflict against them increased dramatically. Journalists have been particularly affected by acts of retaliation and intimidation because of their role in these denunciations ... In 2007, the Government established a policy to discredit, almost systematically, human rights activities, particularly by accusing defenders of being "supporters of the LTTE", "traitors" or "enemies of the State". On several occasions, the Government challenged the "allegations" of human rights defenders who dared to question its policy on human rights, saying they were "unfounded" and influenced by LTTE propaganda".

In October 2008 a joint mission to Sri Lanka of members of the International Press Freedom and Freedom of Expression took place. The mission "found deterioration in the press freedom situation since its last visit in June 2007 marked by continuing murders of journalists, attacks, abductions, intimidation and harassment."<sup>452</sup>

The next report for 2008-2009 brought even more drastic evidences of serious violations of the freedom of press. On 8th January 2009 Lasantha Wickramatunge, the editor-in-chief of the Sunday Leader, has been brutally murdered.

In May and June 2009 in Sri Lanka a significant increase in the number of threats on the media community has been observed. According to the statistics provided by Media Matters Sri Lanka Bulletin (15) – 29th of June 2009<sup>453</sup> one media worker was physically attacked; eleven were threatened seriously (one was abducted, seriously threatened and later released; four are under investigation, one is in detention and four are potentially at risk. Three media workers have left the country due to safety reasons. One of those, well-known media activist Sunanda Deshapriya and his

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<sup>451</sup> See International Federation of Human Rights, Asia – Observatory for the Protection of Human Rights Defenders – Annual Report 2007, available at: <http://www.fidh.org/IMG/pdf/OBS2007-UK-asie.pdf>.

<sup>452</sup> See Media under fire: Press freedom lockdown in Sri Lanka, Report, International Press Freedom and Freedom of Expression Mission to Sri Lanka, December 2008.

<sup>453</sup> These statistics reflect the attacks and threats directed towards media workers during May and June 2009.



family, who are currently in Sri Lanka, have continued to receive threats by callers, and through postings on websites. The most recent case is well-known astrologer Chandrasiri Baranda who had a column in a Sinhala weekly and who also appeared on television, and has been issued with a 90 day detention order under ER. His crime appears to have been a prediction that suggested political changes where the President will lose power.

The media workers of some newspapers in Jaffna were seriously threatened in June 2009.

The authors of the Bulletin cited above believe that the threats appear to be coordinated and are targeting journalists and media workers who have previously written stories critical of the government or military and/or who are suspected of having links with the international community. The nature of some of the threats is violent, while others have been treated well.

On 1st of June 2009 Mr Poddala Jayantha, a secretary of the Sri Lanka Working Journalists Association and an award winning journalist, was abducted and severely assaulted. He too was named by the state media as a traitor indirectly implying that all his efforts aimed at improving freedom of media was done due to obtain financial reward from the LTTE.

According to the survey made by the Committee to Protect Journalists: Special Report: Journalists in Exile 2009<sup>454</sup> at least 11 Sri Lankan journalists were driven into exile in 2008 amid an intensive government crackdown on critical reporters and editors. The surge from Sri Lanka accounted for more than a quarter of the journalists worldwide who fled their native countries in 2008 after being attacked, harassed, or threatened with violence or imprisonment.<sup>455</sup>

The Ministry of Defence in Sri Lanka seems to be in disagreement with the statements that freedom of press in Sri Lanka is under threat. On the webpage review conducted by the Ministry and focused on attacks against journalists, lawyers, civil society<sup>456</sup> there were published various statements claiming, "The accusations against Sri Lanka are not only unfair it is overrated and fabricated and Sri Lanka deserves an apology for the manner it has been treated."<sup>457</sup> The authors of the articles published at the website mentioned above, have different approach to the current situation and state that „some media groups sympathetic to the LTTE became hostile to the government and presented material from the Tamil Website without verification. Others from international organisations wrote reports based on data supplied by the same source. Thus these groups ganged to mould public

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<sup>454</sup> Available at: <http://cpj.org/reports/2008/06/exiles-08.php>.

<sup>455</sup> For more examples on attacks on journalists, see section 5.1.6., *supra*.

<sup>456</sup> Available at: [http://www.defence.lk/new.asp?fname=20090618\\_02](http://www.defence.lk/new.asp?fname=20090618_02).

<sup>457</sup> Shenali Waduge, Where in the world is there no Discrimination?, Available at: [http://www.defence.lk/new.asp?fname=20090610\\_03](http://www.defence.lk/new.asp?fname=20090610_03) (Last modified on: 6/10/2009 12:50:48 PM).

opinion in favour of the LTTE in an unethical manner. As such, they failed in their responsibility to preserve the canons of justice, fair play and honest commitment."<sup>458</sup>

On 16th July 2009 the International Press Freedom Mission to Sri Lanka issued an open letter to President Rajapaksa expressing an extreme concern over the deterioration of press freedom despite the military victory over the LTTE.<sup>459</sup>

In the Joint Civil Society Report (JCSR) it was noted that media freedom has been heavily restricted with the imposition of stringent limitations on reporting on the war.<sup>460</sup> SLDF noted that the emergency regulations stifle media freedom and freedom of expression at an alarming level, and enable the President to ban any public meeting, procession, or gathering which, in his opinion, threatens national security or public order.<sup>461</sup>

According to JCSR, media persons and institutions have been subjected to a range of acts of violence and intimidation including assassination and assault, arson and intimidation.<sup>462</sup> ACHR urged the Government to ensure independent functioning of the freedom of the press, and not to use anti-terrorism laws to question and arrest media personnel for political ends.<sup>463</sup> OMCT noted that human rights defenders in Sri Lanka are facing increasing persecution and threats to their lives.<sup>464</sup>

Amnesty International points out that "there are severe restrictions facing journalists, as well as the unlawful killing of journalists with insufficient investigation into murder."<sup>465</sup>

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<sup>458</sup> Dr.P.A.Samaraweera, International media and LTTE propaganda war - An Opinion, available at: [http://www.defence.lk/new.asp?fname=20090523\\_08](http://www.defence.lk/new.asp?fname=20090523_08) (Last modified on: 5/23/2009 10:56:36 PM).

<sup>459</sup> See: <http://www.article19.org/pdfs/letters/open-letter-to-his-excellency-president-mahinda-rajapaksa.pdf>.

<sup>460</sup> Joint Civil Society Report, joint submission to the UPR of Sri Lanka, 2008, p. 5. The Report was jointly submitted by: Association of Family Members of the Disappeared, Association of War Affected Women, Centre for Human Rights and Development, Centre for Policy Alternatives, Centre for Society and Religion, Centre for Women and Development, Christian Alliance for Social Action, Citizens' Committee, Community Trust Fund, Ecumenical Association of Third World Theologians, Equal Ground, Families of the Disappeared, Father J. J. Bernard, Free Media Movement, Gampaha District Human Rights Committee, Dr. Mario Gomez, Home for Human Rights, Human Development Organisation, INFORM Human Rights Documentation Centre, International Friends for Global Peace, International Movement Against Discrimination and Racism, Law & Society Trust, Muslim Information Centre, Research and Action Forum for Social Development, Rights Now - Collective for Democracy, Right to Life Human Rights Centre, Transparency International Sri Lanka, United Federation of Labour, Women and Media Collective.

<sup>461</sup> Sri Lanka Democracy Forum (SLDF), Submission to the UPR of Sri Lanka, 2008, p. 9. See also Joint Civil Society Report, joint submission to the UPR of Sri Lanka, p. 2.

<sup>462</sup> See the following submission to the 2008 UPR of Sri Lanka: Joint Civil Society Report, joint submission, p.5; Amnesty International, p.4; Asian Centre for Human Rights, p. 6; Sri Lanka Democracy Forum, USA, p. 9; People for Equality and Relief in Lanka, p. 5; Society for Threatened Peoples, p. 3.

<sup>463</sup> Asian Centre for Human Rights, sub mission to the UPR of Sri Lanka, p. 6 - 7.

<sup>464</sup> World Organization Against Torture, p. 2. See also Amnesty International, p. 4; Tamil Information Centre, p. 4.

<sup>465</sup> Amnesty USA, 2 May 2008, available at: <http://www.amnestyusa.org/document.php?!lang=e&id=ENGUSA20080502001>.

### 5.7.3. Conclusion

As far freedom of expression and information in Sri Lanka is concerned one can conclude that the Sri Lankan legislation, in particular the very general antiterrorist legislation, imposes limitations of that freedom, which are not compatible with the obligations under ICCPR Article 19. The policy of the government and its propaganda against all critics of its policy effectively puts very serious restrictions on the freedom of press. The culture of impunity prevails as far as physical assaults and attracts against journalist are concerned which de facto seriously limits the freedom of press.

## 5.8. Freedom of religion

### 5.8.1. International standards

ICCPR Article 18 guarantees freedom of religion. Its beneficiaries are all persons subject to jurisdiction of the State party to the Covenant. According to Article 18(2) "no one should be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice." The fundamental character of that right is underlined by the fact that no derogations from provisions of Article 18 are permitted under Article 4 of the Covenant. Limitations are allowed provided that they are "prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others" (Article 18(3)).

In its General Comment No 22 the HRC pointed out that "Article 18.2 bars coercion that would impair the right to have or adopt a religion or belief, including the use of threat of physical force or penal sanctions to compel believers or non-believers to adhere to their religious beliefs and congregations, to recant their religion or belief or to convert".

### 5.8.2. Domestic implementation

Freedom of religion is protected by the Constitution, Articles 10 and Article 14(1)(c), freedom of worship. However, according to Article 9 Buddhism is accorded the foremost place and the State is obliged to protect it and foster it. That provision combined with case law,<sup>466</sup> which clearly forbid proselytizing Christianity while accepting encouraging Buddhism, may give reason for concern as far as standards under Article 18 are concerned.

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<sup>466</sup> See Catholic Ministry provincial Sisters of the Holy Cross of the Third Order of St. Francis in Menzigen, Special Determination No. 19/2003, 25 July 2003.

Sri Lanka was known as the country of religious tolerance. However deterioration of religious freedom of minorities has been observed.

From 2 to 12 May 2005, the Special Rapporteur on freedom of religion or belief carried out a visit to Sri Lanka with a view to assessing the situation of freedom of religion or belief in the country, in particular in the light of recent reports of attacks against certain religious groups, allegations of unethical conversions and the introduction of draft laws criminalizing certain acts aimed at converting anyone to another religion. In her report, she condemns the attacks that have been carried out against members of the Christian minorities and criticizes the passive attitude of the Government. She urges the Government to take systematic action, including through its judicial apparatus, to address these attacks. Moreover, noting certain instances of the use of improper ways of persuading people to change their religion by some religious groups, the Special Rapporteur calls on those groups to respect the religions of others and not to use aggressive forms of proselytism, which could disturb the atmosphere of religious harmony and exacerbate religious tensions. However, she advises against the adoption of draft laws that would criminalize certain acts aimed at converting anyone to another religion as their implementation would lead to human rights violations, and because they are not an appropriate response to the current religious tensions.

The Special Rapporteur on freedom of religion or belief noted that the recent deterioration of religious tolerance and the absence of appropriate action by the Government had brought respect for freedom of religion or belief to an unsatisfactory level.<sup>467</sup> The Special Rapporteur stated that the draft legislation on the criminalization of "unethical conversions" was not an appropriate response to religious tensions<sup>468</sup> and that it would lead to violations of the right to freedom of religion or belief.<sup>469</sup>

During the Universal Periodic Review for Sri Lanka in 2008 the Institute on Religion and Public Policy (IRPP) reported that religious freedom in Sri Lanka is generally respected and protected by both the Government and society at large; however, proposed legislation on religious conversion would seriously curtail religious freedom.<sup>470</sup> The Becket Fund for Religious Liberty (BFRL) reported that the most troubling aspect of the draft anti-conversion legislation is that it would criminalize a central principle of religious liberty - the ability to freely choose and change one's

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<sup>467</sup> Special Rapporteur on freedom of religion, E/CN.4/2006/5/Add.3, para. 109.

<sup>468</sup> *Ibid.*, para. 121.

<sup>469</sup> *Ibid.*, para. 122.

<sup>470</sup> Institute on Religion and Public Policy, *cit.*, p. 1. See also People for Equality and Relief in Sri Lanka, Submission to the UPR of Sri Lanka, 2008, p. 5. See also Christian Solidarity Worldwide and Tamil Centre for Human Rights, joint submission, p. 2.

religion.<sup>471</sup> BFRL added that since 2001, the Supreme Court has issued a series of judgments restricting the rights of non-Buddhist religions under law.<sup>472</sup> IRPP noted that episodes of religious violence and unrest arise sporadically.<sup>473</sup>

### 5.8.3. Conclusion

In general Sri Lanka is complying with its obligations under Article 18. However some recent developments, including attempts to pass new restrictive law and deterioration of freedom of religion in practice, seriously compromise implementation of Article 18 of the ICCPR.

## 5.9. Access to justice and the right to a fair trial

### 5.9.1. International standards

Article 14 of the ICCPR provides that all persons shall be equal before the courts and tribunals. Everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law (Article 14(1)). Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law (Article 14(2)). Article 14(3) provides, *inter alia*, that everyone shall be entitled to be tried without undue delay, to have the free assistance of an interpreter if he cannot understand or speak the language used in court and not to be compelled to testify against himself or to confess guilt.

Sri Lanka has also committed itself to the UN Basic Principles on the Independence of the Judiciary. Further interpretative guidance regarding the independence of the judiciary can be found in international guidelines such as the Beijing Statement on Principles on the Independence of the Judiciary in the Lawasia Region.<sup>474</sup>

The notion of judicial independence means that the judiciary must not only be institutionally independent from the other branches of government, but also that individual judges are capable of deciding cases before them according to the law and principles of justice while being free from

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<sup>471</sup> The Becket Fund for Religious Liberty, Submission to the UPR of Sri Lanka, p.2-3.

<sup>472</sup> *Ibid.*, p.1-2.

<sup>473</sup> Institute on Religion and Public Policy, *cit.*, p.1. See also submission to the UPR of Sri Lanka 2008 by People for Equality and Relief in Lanka, p.5; Christian Solidarity Worldwide and International and Tamil Centre for Human Rights, joint submission, p.2.

<sup>474</sup> Adopted in August 2007

reprisals of any kind. It is well-established in international law that the independence of the judiciary is to be ensured with particular regard to the manner in which judges are appointed as well as the conditions governing their promotion, manner of qualifications, transfer and cessation of their functions.<sup>475</sup>

### 5.9.2. Domestic implementation

There are severe restrictions on access to judicial review of legislation and while the Constitution permits review of executive/administrative action, some emergency regulations operate to shield actions of officials from the courts.<sup>476</sup> The Supreme Court is a court of first instance in fundamental rights cases and exercises a quasi-investigative role.<sup>477</sup> It is an Apex Court so there is no right of appeal.<sup>478</sup> Lower courts determine whether or not a detention is lawful (habeas corpus).<sup>479</sup> The powers of magistrates to investigate these questions are, however, limited by provisions in the emergency legislation.<sup>480</sup> The judges have little power to grant any real remedy for illegal or abusive detention. A judge has no power to order release, even if a person is ill-treated or detained for manifestly improper reasons.<sup>481</sup> Such a limited judicial role in detention also results in little protection against torture.<sup>482</sup> There is a fear of reprisals for bringing suits regarding human rights violations, creating a ‘chilling effect’ which discourages victims from seeking redress before the court.<sup>483</sup>

The Sri Lankan Constitution guarantees the independence of the judiciary in Article 107, which provides for removal of judges of the Supreme Court and Court of Appeal upon an order of the President supported by a majority of Parliament on the grounds of proven misbehaviour or incapacity.

Some of the problems relating to the appointment of judges have been discussed above.<sup>484</sup>

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<sup>475</sup> General Comment, No 13, Equality before the courts and the rights to a fair trial and public hearing by an independent court established by law, Section 1 (Article 14) adopted at the 21<sup>st</sup> session 1984.

<sup>476</sup> HRC, Communication No. 1376/2005, 24 July 2008, UN Doc. CCPR/C93/D/1367/2005.

<sup>477</sup> Aquinas V. v. Tambimuttu, Sri Lanka: Legal Research and Legal System, Hauser Global Law School Program, New York University School of Law, January 2009, available at: [http://www.nyulawglobal.org/globalex/Sri\\_Lanka.htm](http://www.nyulawglobal.org/globalex/Sri_Lanka.htm).

<sup>478</sup> Ibid.

<sup>479</sup> Ibid.

<sup>480</sup> International Crisis Group, Sri Lanka’s judiciary: politicised courts, compromised rights, Asia report No 172, 20 June 2009, p. 16-17.

<sup>481</sup> Ibid., p. 18.

<sup>482</sup> Ibid., p. 19.

<sup>483</sup> HRC, Concluding observations of the Human Rights Committee, Sri Lanka, 1 December 2003, CCPR/CO/79/LKA, para. 9.

<sup>484</sup> Section 4.2.3.

As far as removal of judges is concerned there have been threats of impeachment proceedings against a judge of the Supreme Court. Such threats have a chilling effect on members of the judiciary willing to speak out on rule of law related issues.<sup>485</sup> As regards the removal of judges from the High Court and the courts of first instance there have been reports that the former Chief Justice had misused his role in the Judicial Services Commission (JSC) in order to dismiss or transfer judges without any apparent or objective reasons.<sup>486</sup> The dismissal procedures of the JSC have been criticised by HCR.<sup>487</sup>

Although hundreds of police officers and military personnel have been indicted since 1994 there have, according to a report by Amnesty International of June 2009, been only a small number of convictions. There have been three convictions under the CAT and up to 2007 fewer than 30 convictions for abduction or wrongful confinements. There is only one case where security forces were convicted for murder.<sup>488</sup>

In its report of June 2009 Amnesty International is of the view that the criminal justice system has critical shortcomings that obstruct justice for victims of human rights violations. It is subject to political pressure, lacks effective witness protection and is glacially slow. The vast majority of human rights violations over the last 20 years have never been investigated, let alone heard in court. Those that do make it to trial rarely conclude with a conviction. Defendants are acquitted for want of evidence, witnesses refuse to testify, hearings are subject to repeated delays and even the prosecution has failed to appear in court in key human rights cases. This is not simply a problem of inadequate resources or institutional capacity; it is a problem of political will.<sup>489</sup>

Amnesty International also criticises the practice of transferring cases from one court to another. Such transfers, which according to Amnesty International, are not infrequent in Sri Lanka, contributes substantially to the problem of impunity and make it more difficult, more expensive and more dangerous for witnesses, victims and their family members to reach the court, increasing the likelihood that they will fail to appear and that their cases will be dismissed for lack of evidence.<sup>490</sup> The transfer of cases may also result in problems with accurate interpretation during the proceedings.

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<sup>485</sup> IBA report, p. 27.

<sup>486</sup> Ibid., p.28.

<sup>487</sup> Communication No 1376/2005, 24 July 2008, UN Doc. CCPR/C/93/D/1376/2005.

<sup>488</sup> Amnesty International, Twenty Years of Make-believe, p 11.

<sup>489</sup> Ibid., p. 2.

<sup>490</sup> Ibid., p. 23.

As regards the right to a fair trial a major flaw arises out of the fact that there is no witness protection program in Sri Lanka. In view of the intimidation of witnesses, witnesses are reluctant to come forward.<sup>491</sup> A proposal for witness protection legislation has been tabled and recent information indicates that it might advance.<sup>492</sup>

### *5.9.3. Conclusion*

The Sri Lankan legislation of the right to a fair trial and access to justice, and particularly the emergency legislation, as well as their implementation do not in all respects guarantee the rights provided for in the ICCPR. The system is slow and cannot guarantee a fair trial within a reasonable time. The powers of magistrates to investigate whether a detention is lawful or not, the lack of efficient remedies for illegal or abusive detention and the fact that a judge has no power to order release, even if a person is ill-treated or detained for manifestly improper reasons prohibits efficient judicial control of detentions. The fear of reprisals for bringing suits regarding human rights violations, creating a 'chilling effect' which discourages victims from seeking redress before the court. The prevailing climate of impunity, in particular under the ER, and the lack of a witness protection scheme seriously endanger a fair trial.

## **5.10. The rights of the child**

### *5.10.1. Situation of child soldiers*

In the context of the implementation of the Convention of the Rights of the Child (CRC) in Sri Lanka of particular concern is the situation of child soldiers. The Optional Protocol to the CRC on the involvement of children in armed conflict, which has been ratified by Sri Lanka, clearly specified State obligations in that area. The Penal Code Article 35 (d) prohibits recruitment of a child for use in armed conflict.

However, almost 25 years of civil conflict has had an extremely negative impact on the situation of children in Sri Lanka. During the transition to peace and the reconstruction process, children who have been affected by the armed conflict remain a particularly vulnerable group.

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<sup>491</sup> International Crisis Group, Sri Lanka's Human Rights Crisis, p. 23, footnote 143.

<sup>492</sup> See Assistance and Protection to Victims of Crime and Witnesses Bill presented on 8 June 2008. Statement by the Mission of the Democratic Socialist Republic of Sri Lanka, 3 August 2009, Ref.: B/PRO/6, point II.



In 2003 the Committee on the Rights of the Child (the CRC Committee) had recommended Sri Lanka to implement a plan of action for the respect of the rights of children during the reconstruction process.<sup>493</sup> In particular, the Committee recommends that the State party:

- (a) Prioritize the demobilization and reintegration of all combatants under 18 and ensure that all armed groups reintegrated into the national armed forces adhere to the minimum age of recruitment of 18 years;
- (b) Develop, in collaboration with NGOs and international organizations, a comprehensive system of psychosocial support and assistance for children affected by the conflict, in particular child combatants, unaccompanied internally displaced persons and refugees, returnees and landmine survivors, which also ensure their privacy;
- (c) Take effective measures to ensure that children affected by conflict can be reintegrated into the education system, including through the provision of non-formal education programmes and by prioritizing the rehabilitation of school buildings and facilities and the provision of water, sanitation and electricity in conflict-affected areas;
- (d) Seek in this regard technical assistance from, among others, UNICEF.

The Committee also requested additional information on child combatants and child prisoners of war to be included in the Sri Lanka initial report under the Optional Protocol to the CRC on the involvement of children in armed conflict.

In October 2008 the Government of Sri Lanka submitted its third and fourth combined periodic reports to the CRC Committee. The reports address the issues mentioned above. However, they have not yet been a subject of review by the CRC Committee.

It has to be stressed that the Government has undertaken efforts to improve the situation of children affected by the armed conflict. The Government also takes steps to report these efforts to the CRC Committee. However, there is reliable information confirming that the armed conflict has had an extremely negative impact on the implementation of the CRC in Sri Lanka. The recruitment of child soldiers remains one of the most problematic issues in Sri Lanka.

On 13 November 2006, Allan Rock, the Special Advisor to the UN Special Representative for Children and Armed Conflict visited Sri Lanka. In its press statement he said that<sup>494</sup>

"the mission's initial findings revealed that the LTTE had not complied with its commitments under the Action Plan, to stop child recruitment and release all the children within their ranks. Under-age recruitment continued and the LTTE had yet to release several hundred children as verified by UNICEF.

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<sup>493</sup> See Committee on the Rights of the Child, Concluding observations, Sri Lanka, 2 July 2003, CRC/C/15/Add. 207, para. 44–46.

<sup>494</sup> See Press Statement at the conclusion of the mission, available at: <http://www.un.org/children/conflict/pr/2006-11-13127.html>.

The mission also found that the Karuna faction continued to abduct children in government-controlled areas of the East, particularly in the Batticaloa district. Between May and November 2006, 135 cases of under-age recruitment by abduction had been reported to UNICEF, with evidence that this trend was accelerating.

The mission also discovered a disturbing development involving the Karuna abductions. It found strong and credible evidence that certain elements of the government security forces are supporting and sometimes participating in the abductions and forced recruitment of children by the Karuna faction."

On 24 January 2007 Human Rights Watch (HRW) issued its report *Sri Lanka: Complicit in Crime: State Collusion in Abductions and Child Recruitment by the Karuna Group*.<sup>495</sup> In this report, HRW documented a pattern of abductions and forced recruitment by the Karuna group in Sri Lanka over the year 2006. With case studies, maps and photographs, it showed how Karuna cadres operated with impunity in government-controlled areas, abducting boys and young men, training them in camps, and deploying them for combat. The report states that "at least since June, and probably before, the Sri Lankan government has known about the abductions. The areas where they have taken place are firmly under government control, with myriad military and police checkpoints and security force camps. No armed group could engage in such large-scale abductions, and then hold and train the abductees for combat in established camps, without government knowledge and at least tacit support".<sup>496</sup>

According to the report of the Civil Monitoring Commission, Free Media Movement and Law & Society Trust issued in 31 October 2007 (using the UNICEF data) from January up to August 2007, the total number of children recruited was 1683: held by LTTE – 1469, held by Karuna – 214.

On 21 December 2007 the Secretary-General of the United Nations presented to the UN Security Council a Report on "Children and armed conflicts in Sri Lanka"<sup>497</sup> pursuant to Security Council Resolution 1612 (2005). The Report states that<sup>498</sup> "Abduction and recruitment of children by the Karuna faction continued to take place from the streets, temples, homes and internally displaced persons camps in the east, mainly in Government-controlled areas. Reports were also received that children were recruited and abducted in areas in close proximity to Sri Lankan security forces offices and checkpoints...There has been no evidence to date that any measures have been instituted by the police or the security forces to secure the release of the children abducted, recruited

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<sup>495</sup> Human Rights Watch, *Sri Lanka: Complicit in Crime: State Collusion in Abductions and Child Recruitment by the Karuna Group*, January 2007, Vol. 19, No.1(C), available at:

<http://www.hrw.org/sites/default/files/reports/srilanka0107webwcover.pdf>

<sup>496</sup> *Ibid.*, p. 4. In June 2006, UNICEF issued a public statement noting dozens of child abductions by the Karuna group and calling for government action to halt the abuse.

<sup>497</sup> See SG Report on Children and Armed Conflict, 2007.

<sup>498</sup> *Ibid.*, para. 23 and 57.

and used by the Karuna faction despite clear knowledge of the same by the police or the security forces. There is an urgent need for the Government of Sri Lanka to exercise its primary responsibility of protecting its citizens, actively take steps to secure the release of all children abducted by the Karuna faction who are being held in Government-controlled areas and ensure their return to their families."

In its 2007 report<sup>499</sup> International Federation of Human Rights (FIDH) states that "Since the resumption of hostilities in 2006 between the Government of President Mahinda Rajapaksa and the Liberation Tigers of Tamil Eelam (LTTE)... the human rights situation in Sri Lanka has deteriorated dramatically, especially in the Jaffna peninsula. Enforced disappearances, extrajudicial killings, recruitment of child soldiers, torture, threats, and, in general, massive violations of human rights and war crimes have increased, resulting in a real climate of fear and insecurity throughout the country ...".

In 2008 during the Universal Periodic Review on Sri Lanka, the Asian Centre for Human Rights noted that armed opposition groups have been responsible for grave violations of international humanitarian law through killings, abductions and recruitment of child soldiers.<sup>500</sup> Of the non-state actors, the LTTE remained the main violator of international humanitarian law, in particular through targeting of civilians with explosive devices.

The Sri Lankan Civil Society Working Group on Child Recruitment (SLCSWG) noted that the forced recruitment of children and the use of child combatants have been long associated with Sri Lanka's violent ethnic conflict.<sup>501</sup> According to the Sri Lanka Democracy Forum (SLDF), the United States were dismayed that in spite of assurances given to the UN and international scrutiny, the LTTE and the Karuna faction had not ceased to recruit children nor kept their commitments to release all children in their ranks. SLDF further noted that though the LTTE and the Karuna faction were primarily responsible for recruitment, the government could not absolve itself from taking responsibility for TMVP actions, given the visible and close association between the TMVP and the government.<sup>502</sup>

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<sup>499</sup> See International Federation of Human Rights, Asia, Observatory for the Protection of Human Rights Defenders, *op. cit.*, p. 224.

<sup>500</sup> See Summary prepared by the Office of the High Commissioner for Human Rights, in accordance with paragraph 15 (C) of the Annex to Human Rights Council Resolution 5/1, A/HRC/WG.6/2/LKA/3, 3 April 2008.

<sup>501</sup> Sri Lankan Civil Society Working Group on Child Recruitment (including) the Centre for Policy Alternatives (CPA), The Institute of Human Rights (IHR), National Peace Council (NPC), Law and Society Trust (LST), Mothers and Daughters of Lanka International Movement against All Forms of Discrimination (MADR)) submission to the UPR of Sri Lanka, 2008.

<sup>502</sup> Sri Lanka Democracy Forum (SLDF), submission to the UPR of Sri Lanka, 2008.

On 20 May 2008 the Coalition to Stop the Use of Child Soldiers issued its Child Soldiers Global Report 2008 – Sri Lanka.<sup>503</sup> The report stated that "The Liberation Tigers of Tamil Eelam (LTTE) continued to recruit and use children, despite repeated commitments not to do so. Children in the east of the country were forcibly recruited and used by the Karuna faction, a breakaway group of the LTTE, with the complicity of, and in some instances actively working with, the security forces".

According to the report "In February 2006 the Penal Code was amended to make "engaging/recruiting children for use in armed conflict" a crime punishable by 20 years' imprisonment. Despite these provisions, there had so far been no arrests of cadres of the LTTE or Karuna faction (...) in relation to child recruitment.<sup>504</sup> This was partly because the police often refused to accept complaints from parents of abducted children, despite parents having information about the identity of the abductors."<sup>505</sup>

The report further stated that "President Rajapaksa and other Sri Lankan officials repeatedly promised that the government would investigate the allegations of state complicity and hold accountable any members of the security forces found to have violated the law. HRW repeatedly asked the government for the results of the investigations and, in August 2007, questioned the sincerity of the government's commitment to an investigation. A government committee was established in 2007 to investigate the allegations."

The report also presented "longstanding concerns about the treatment of children who 'surrendered' to the security forces." In December 2006 the government was criticized for not making a distinction between children and adults.<sup>506</sup> The government subsequently appointed a commissioner general for rehabilitation, and as of mid-2007 was developing a rehabilitation program in cooperation with UNICEF. This included setting up a rehabilitation centre for "child surrenders", of whom there had been more than 60, all of whom had been recruited by the LTTE. As of that time, however, no specific program had been established for girls.<sup>507</sup>

The report of the Coalition to Stop the Use of Child Soldiers expressed its particular concern relating to formerly recruited children in the custody of the Sri Lankan security forces and their

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<sup>503</sup> Coalition to Stop the Use of Child Soldiers, Child Soldiers Global Report 2008 - Sri Lanka, 20 May 2008, available at: <http://www.unhcr.org/refworld/docid/486cb131c.html>.

<sup>504</sup> Ibid. See also Communication to Child Soldiers Coalition, Child Soldiers Global Report 2008, from Sri Lanka High Commissioner, 31 July 2007.

<sup>505</sup> Ibid. See also Human Rights Watch, Sri Lanka – Complicit in Crime: State Collusion in Abductions and Forced Recruitment by the Karuna Group, January 2007.

<sup>506</sup> Ibid. See also Report of the UN Secretary-General on children and armed conflict in Sri Lanka, S/2006/1006, 20 December 2006, para. 28-29.

<sup>507</sup> Ibid. See also Child Soldiers Coalition, Child Soldiers Global Report 2008, chapter on Sri Lanka, available at: <http://chilsoldiersglobalreport.org>.

exposure to the media. Concerns were raised that this public exposure resulted in stigmatization and increased the vulnerability of the child and their family.<sup>508</sup>

The problem of child recruitment was also mentioned in the Security Council Reports,<sup>509</sup> and as well as in the Conclusions on children and armed conflict in Sri Lanka of the Working Group on Children and Armed Conflict.<sup>510</sup> According to the Security Council Report S/2007/758, in 2007 "abduction and recruitment of children by the Karuna faction continued to take place from the streets, temples, homes and internally displaced persons camps in the east, mainly in Government-controlled areas. Reports were also received that children were recruited and abducted in areas in close proximity to Sri Lankan security forces offices and checkpoints. All of the TMVP/Karuna faction abduction cases involved forced recruitment, in some cases by armed men who identified themselves as members of the faction". Moreover, "there has been no evidence to date that any measures have been instituted by the police or the security forces to secure the release of the children abducted, recruited and used by the TMVP/Karuna faction despite clear knowledge of the same by the police or the security forces. There is an urgent need for the Government of Sri Lanka to exercise its primary responsibility of protecting its citizens, actively take steps to secure the release of all children abducted by the TMVP/Karuna faction who are being held in Government-controlled areas and ensure their return to their families".

The latest Security Council report highlights that "limited progress has been registered with regard to dialogue with armed groups for action plans to stop the recruitment and use of children.

Though LTTE continued to fail to achieve the necessary requirements of a bona fide action plan throughout, TMVP has prepared an action plan in conjunction with the United Nations country team and the Government of Sri Lanka. However, concrete steps towards the complete release of children and their effective reintegration remain to be fully taken. In addition, allegations of other armed groups engaging in recruitment, most especially in internally displaced persons camps in the north of the country, need to be more aggressively monitored and appropriate action taken to halt all abuses".

As a positive development one should consider the fact that on 1 December 2008 the Government of Sri Lanka, the TMVP and UNICEF developed and signed Action Plan to ensure that the practice

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<sup>508</sup> Ibid. See also SG Report on children and armed conflict in Sri Lanka, 20 December 2006, para. 28-29.

<sup>509</sup> SG Report on children and armed conflict in Sri Lanka 2007, para. 23 and 57, and Report of the Secretary General on children and the armed conflict in Sri Lanka, 20 December 2006, para 16-17 and 58-59.

<sup>510</sup> Working Group on Children and Armed Conflict, Conclusions on children and armed conflict in Sri Lanka, 21 October 2008, S/AC.51/2008/11 and Working Group on Children and Armed Conflict, Conclusions on children and armed conflict in Sri Lanka, 13 June 2007, S/AC.51/2007/9.

of child recruitment by the TMVP would be stopped and all children recruited or used by the armed group are released and provided with reintegration assistance.

The fact of signing the Action Plan by the TMVP confirms that this paramilitary group that operates in government-controlled areas had child soldiers. However, it is unclear to what extent the Action Plan has been implemented so far and whether the child soldiers referred to in the Action Plan represent all those being currently used.

According to Sri Lanka's National Report, which was presented during the UPR in 2008 "Sri Lanka volunteered to work with the United Nations Security Council Working Group on Children and Armed Conflict pursuant to SC Resolution 1612 in setting up a Task Force for Monitoring and Reporting as a means to giving effect to the Government's zero-tolerance policy on child recruitment."<sup>511</sup> This policy was confirmed by the statement made by Mr Suhada Gamalath, Secretary/Ministry of Justice & Commissioner General of Rehabilitation at the Meeting of the Security Council Working Group on Children and Armed Conflict held in New York on 1 July 2009 at present most child combatants have been identified and are in a process of being sent to child rehabilitation centres. According to that statement "these children are being treated as victims and not as suspects in detention for their involvement in terrorist activities. It is a high priority for the Government to see these children returned to their families and to be able to either resume schooling or be gainfully employed in a trade and integrate into normal life in society."<sup>512</sup>

#### *5.10.2. Conclusion*

It has been confirmed that the child recruitment was a serious problem in Sri Lanka in 2005 – 2008, in clear violation of the State obligations under the CRC and its OP. The Government has taken steps to remedy that situation. At present it is impossible to judge if those efforts will prove to be adequate.

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<sup>511</sup> National Report Submitted in Accordance with Paragraph 15 (A) of the Annex to Human Rights Council Resolution 5/1, 2 May 2008, A/HRC/WG.6/2/LKA/1, para. 79, p. 18. Further details are contained in Sri Lanka's report submitted to the UN Committee against Torture on 14 August 2009, para. 4.13.

<sup>512</sup> In addition, on 31 July 2009 a National Framework on the Reintegration of Ex-combatants covering also child-soldiers was adopted.

## **5.11. The rights of minorities and prohibition of discrimination**

### *5.11.1. International standards*

Rights of ethnic, religious and linguistic minorities are regulated in ICCPR Article 27. Prohibition of any form of discrimination based on, inter alia, race, ethnicity, language, religion and any other status, including for example sexual orientation, is formulated also in Article 26. In addition, general equality principles have been formulated in Articles 2 and 3.

### *5.11.2. Domestic implementation*

Rights of minorities are not protected in the Constitution but some aspects of those rights, such as the use of languages and the prohibition of incitements to racial hatred, are protected in different legislative acts. The same may be said as far as prohibition of discrimination on various grounds is concerned. However, implementation of those rights as described below does not meet the ICCPR standard.

From the point of view of rights of minorities, people of Tamil ethnicity remain one of the most vulnerable groups in Sri Lanka. According to the UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka<sup>513</sup> issued in April 2009, "the significant majority of reported cases of human rights violations in Sri Lanka involve persons of Tamil ethnicity who originate from the North and East. These individuals are at risk within these regions, and in other parts of Sri Lanka, from Government actors, the TMVP and other pro-Government paramilitary groups as well as the LTTE, because of their race (ethnicity) and/or (imputed) political opinion."<sup>514</sup>

According to the Guidelines, "The security and human rights situation throughout the North [of Sri Lanka] remains poor. Strict security and anti-insurgency measures implemented by the Government forces to identify LTTE members and suppress LTTE activities in the North have involved increasingly frequent cordon and search operations, arrests, detentions and restrictions on movement of Tamils in and from the region<sup>515</sup>. Tamils who are suspected of having LTTE affiliations are at high risk of suffering harassment, intimidation, arrest, detention, torture,

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<sup>513</sup> Hereinafter referred to as the Guidelines. The Guidelines are posted on UNHCR's Refworld website at <http://www.refworld.org>.

<sup>514</sup> The Guidelines, p. 21.

<sup>515</sup> "Sri Lanka Government implements new system to identify LTTE Tigers", Colombo Page, 23 February 2009, available at [http://www.colombopage.com/archive\\_09/February23144256RA.html](http://www.colombopage.com/archive_09/February23144256RA.html).

abduction and/or killings at the hands of the military, police and security forces in the North.<sup>516</sup> Throughout the North, targeted acts of violence and human rights violations continue to be committed against individuals of specific profiles by the Government forces, the LTTE and other actors. Members of the pro-Government Eelam People's Democratic Party (EPDP)<sup>517</sup> and People's Liberation Organization of Tamil Eelam (PLOTE)<sup>518</sup> have been implicated in extensive and serious violations of human rights, including, extortion, detention, torture, disappearances and extra-judicial killings in the North and have acted with impunity.<sup>519</sup> Incidents of rape of Tamil women in police or military custody in the North, including women who are held in Government-run IDP camps, are reportedly occurring.<sup>520</sup> A very significant majority of the reported incidents in the North have involved individuals of Tamil ethnicity".

Regarding the situation in the East of Sri Lanka, the majority of the reported incidents of human rights violations have involved young Tamil males. The Guidelines cited above stated, "Tamil civilians, men and women of all ages, have been among those subjected to serious human rights abuses. Many of the reported incidents have been related to the anti-insurgency measures implemented by the SLA and the STF, which have been associated with significant restrictions on freedom of movement and access to land and livelihoods, arbitrary arrests, mistreatment in detention, sexual assaults, extrajudicial killing and disappearances of Tamils. Cordon and search operations are carried out regularly throughout the East, and are very frequently associated with arrests, primarily of Tamils."<sup>521</sup> Furthermore, according to the Guidelines, "As a result of the ongoing LTTE attacks on Government and civilian targets in the country, which have included suicide attacks by Tamil men and women, Tamils, in particular those originating from the North and East have been under suspicion. Wide scale arrests and detention of Tamils have been reported

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<sup>516</sup> Human Rights Watch, *Recurring Nightmare*. The authors of the Guidelines also mentioned that "The European Court of Human Rights is also citing several reports that confirmed the risk of being targeted by the authorities if political affiliation with the Tamils is presumed see *NA. v. The United Kingdom*. Appl. No. 25904/07. Council of Europe: European Court of Human Rights. 17 July 2008, p. 31-35, available at: <http://www.unhcr.org/refworld/docIbid./487f578b2.html>. See also Human Rights Watch, *Sri Lanka: Return to War - Human Rights under Siege*, 6 August 2007, available at: <http://www.hrw.org/en/reports/2007/08/05/return-war> (see also the Guidelines, p. 7, footnote 26).

<sup>517</sup> A pro-Government political party and paramilitary group led by Douglas Devanda, a Minister in President Rajapaksa's cabinet. See United States Department of State, *2008 Country Reports on Human Rights Practices - Sri Lanka*, 25 February 2009.

<sup>518</sup> See the PLOTE's official website at: <http://www.plote.org/>.

<sup>519</sup> Free Media Movement, *Independent media in Jaffna threatened by armed cadre of EPDP*, 29 October 2008, available at: <http://freemediasrilanka.wordpress.com/2008/10/29/independent-media-in-jaffna-threatened-by-armed-cadre-of-epdp/>.

<sup>520</sup> "Colombo's war crimes turn to rape of the fleeing – Jaffna MP, 28 January 2009", TamilNet; see also "Sri Lanka State Terrorism Rape & Murder of Eelam Tamil Women", Lanka Newspapers, 3 April 2008, available at: [http://www.lankanewspapers.com/news/2008/4/26384\\_space.html](http://www.lankanewspapers.com/news/2008/4/26384_space.html).

<sup>521</sup> See the Guidelines, p. 8 and the sources cited there.



throughout the country. As in the North and the East, they are frequently associated with cordon and search operations and frequently follow bombings or other attacks by the LTTE. Tamils who are without proper identity documents are more likely to be arrested and detained in these operations."<sup>522</sup>

Inter-ethnic and political tensions in the East of Sri Lanka continue to result in violent clashes and are affecting individuals not only from Tamil but also from Sinhalese and Muslim communities. According to the Guidelines, "Sinhalese residents of the East have experienced ethnic backlash resulting from resentment and fear within the Tamil and Muslim communities of a Government population policies designed to establish a Sinhalese ethnic majority in the region. Ethnic tensions, largely related to land disputes, also exist between the Muslims and Sinhalese in the Ampara, in particular, where Muslims represent 40% of the population but where Sinhalese hold 75% of the available land. LTTE cadres are reported to have recently attacked a predominantly Sinhalese village in Inginiyagala in Ampara hacking to death 8 Sinhalese farmers, killing a total of 21 people, including three children and injuring several others. The LTTE has denied responsibility and suggested that pro-Government paramilitary may be responsible."<sup>523</sup>

In the context of the inter-ethnic and political tensions, Muslims have experienced targeted violence and other human rights violations by Government actors as well as pro-Government Tamil groups, in particular in the North and East. In addition, Muslims who are perceived to oppose Government policies or to be outspoken against the LTTE or other Tamil groups, in particular those who are humanitarian workers and human rights advocates, journalists etc., are considered to be at greater risk of harassment, threats and violence<sup>524</sup>.

While targeted incidents involving Sinhalese are less common than those involving Tamils and Muslims, as noted above, ethnically motivated attacks against Sinhalese have been reported, in the East and the North in particular. Sinhalese who are perceived to oppose Government policies or to be outspoken against the LTTE or other Tamil groups are considered to be at greater risk of harassment, threats and violence.<sup>525</sup>

On 13 December 2007, Minority Rights Group (MRG) International issued a report entitled "One year on: counter-terrorism sparks human right crisis for Sri Lanka's minorities."<sup>526</sup> The report concluded: "Sri Lanka's human rights situation is deteriorating. There are daily reports of extra-

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<sup>522</sup> See the Guidelines, p. 13 and the sources cited there.

<sup>523</sup> See the Guidelines, p. 10 and the sources cited there.

<sup>524</sup> See the Guidelines, p. 24 and the sources cited there.

<sup>525</sup> Ibid.

<sup>526</sup> Minority Rights Group International Report, op. cit.

judicial killings, disappearances and abductions. Human rights in Sri Lanka have reached a crisis point and the violations occur in a climate of impunity with little or nothing done by the government."

During the Universal Periodic Review (UPR) for Sri Lanka in 2008 the International Displacement Monitoring Centre of the Norwegian Refugee Council (IDMC) noted fears among minority communities of state-sponsored programmes aimed at changing the ethnic demography of Eastern Province. Tamil and Muslim residents in the Eastern Province provided examples of this to IDMC. These include the Government-sponsored movement of Sinhalese settlers into Tamil and Muslim areas, the movement of administrative boundaries seeking to reduce the size of minority populations in certain areas, as well as the declaration of minorities' land as sacred for construction of Buddhist temples.<sup>527</sup> People for Equality and Relief in Lanka (PEARL) reported the eviction of nearly 400 Tamil civilians from Colombo by the police in June 2007, allegedly because they could not provide valid reasons for being in Colombo in June 2007.<sup>528</sup>

During the UPR the Islamic Human Rights Commission (IHRC) reported that Muslim minorities have increasingly been alienated by Government policies and yet the armed separatists have deliberately targeted them on account of their supposed role in the conflict. According to IHRC, the government has employed Muslim troops in action against the LTTE during combat operations with allegations of anti-Tamil civilian violence.<sup>529</sup> The Asian Centre for Human Rights (ACHR) added that 130,000 Muslims continue to languish in refugee camps in abject poverty, unemployment, and with a lack of basic facilities including health and education.<sup>530</sup> The Sri Lanka Democracy Forum (SLDF) urged the LTTE to allow the Tamil and Muslim populations to exercise their rights to freedom of movement, expression, association and assembly, to take part in public affairs and to vote, and to family life, including the right to marry.<sup>531</sup>

During the UPR, a joint submission of eight NGOs (JS1) was presented regarding the situation of Up-Country Plantation Tamil People.<sup>532</sup> JS1 noted that many of about 200,000 persons who were registered citizens under the Citizenship Act No 35 of 2003 and other acts face difficulty with the

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<sup>527</sup> International Displacement Monitoring Centre of the Norwegian Refugee Council, p.1-2.

<sup>528</sup> See submissions to the UPR of Sri Lanka 2008 by People for Equality and Relief in Lanka, p. 2, and Interfaith International/Tamil Centre for Human Rights, joint submission, p. 2.

<sup>529</sup> Islamic Human Rights Commission, submission to the UPR of Sri Lanka 2008, p. 2.

<sup>530</sup> Asian Centre for Human Rights, submission to the UPR of Sri Lanka 2008, p. 5.

<sup>531</sup> Sri Lanka Democracy Forum, submission to the UPR of Sri Lanka 2008, p.10.

<sup>532</sup> Submission to the Second UPR of Sri Lanka, 2008, by IMADR Asia Committee, Human Development Organization and other Civil Society Organizations in Sri Lanka on minority rights of the Up-Country Plantation Tamil People in Sri Lanka, p. 2, available at: [http://lib.ohchr.org/HRBodies/UPR/Documents/Session2/LK/HDO\\_LKA\\_UPR\\_S2\\_2008\\_HumanDevelopmentOrganization\\_uprsubmission.pdf](http://lib.ohchr.org/HRBodies/UPR/Documents/Session2/LK/HDO_LKA_UPR_S2_2008_HumanDevelopmentOrganization_uprsubmission.pdf).

respective authorities denying them the right to have their names registered in the voters list. JS1 further noted that many of the arrests and detentions of the Up-country Tamil youths are attributed to their inability to prove their identity by producing their National Identity cards, which is rooted in the absence of a proper mechanism on the plantation where most of them were born. JS1 further explained that Government officials in the Up-country plantation areas do not speak Tamil, though it is recognized as an official language. This makes it difficult for Tamil people to interact with officials.<sup>533</sup> JS1 also highlighted the growing poverty among the plantation people, the low literacy rate, and the absence of or poor basic health facilities in the plantation sector.<sup>534</sup> It also noted that on many plantations women are involved in compulsory family planning and sterilization violating their reproductive rights.<sup>535</sup>

According to recommendations given as an outcome of the UPR, Sri Lanka has to "Continue to strengthen its activities to ensure that there is no discrimination against ethnic minorities in the enjoyment of the full range of human rights..."<sup>536</sup>

### *5.11.3. Other grounds for discrimination*

#### *5.11.3.1. Gender based discrimination*

The areas of discrimination in Sri Lanka are not limited only to ethnicity. It is possible to mention other grounds for discrimination. As it was described during the UPR,<sup>537</sup> and based at the joint submission of three NGOs (JS2),

"women may be seen as an especially vulnerable group with ethnic, caste, class and gender discriminations simultaneously impacting on them. Unemployment rates are particularly high among women and some have responded to this situation by joining the stream of migration abroad.<sup>538</sup> Women and Media Collective (WMC) noted that the Women's Rights Bill has yet to be finalized and approved by Parliament; and that marital rape is only recognized in cases of judicial separation.<sup>539</sup> The Centre on Housing Rights and Evictions (COHRE) urged Sri Lanka to review all laws which discriminate against women, and repeal or reform them in order to ensure compliance with internationally accepted human rights standards.<sup>540</sup>

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<sup>533</sup> Ibid.

<sup>534</sup> Ibid., p.2-3.

<sup>535</sup> Ibid., p.3-4.

<sup>536</sup> Report of the Working Group on the Universal Periodic Review Sri Lanka, A/HRC/8/46, 5 June 2008, recommendation no. 38, in para. 82 p. 20. Such recommendation enjoyed the support of Sri Lanka.

<sup>537</sup> Summary prepared by the Office of the High Commissioner for Human Rights, in accordance with paragraph 15 (c) of the annex to Human Rights Council resolution 5/1, A/HRC/WG.6/2/LKA/3, para. 9–10.

<sup>538</sup> Joint submission by the IMADR Asia Committee, Human Development Organisation and the International Dalit Solidarity Network to the UPR of Sri Lanka 2008, p. 4.

<sup>539</sup> Women and Media Collective, submission to the UPR of Sri Lanka 2008, p.1, 4-5.

<sup>540</sup> Centre on Housing Rights and Evictions, submission to the UPR of Sri Lanka 2008, p. 8.

According to WMC, state land distribution policy awards property in the name of the head of household; customarily only men are viewed as heads of households, unless the man is dead or missing. Muslim women in the East owned almost 95% of the houses that were destroyed by the Tsunami and have been deprived of ownership to replacement houses which were registered in the name of the adult male in the family."<sup>541</sup>

Moreover, "JCSR reported that acts of violence against women are growing.<sup>542</sup> ACHR added that women have been specific targets during the war because of their gender. In 2005, the Sri Lankan Parliament passed the Prevention of Domestic Violence Act yet domestic remedies are insufficient.<sup>543</sup> WMC explained that there are often delays of between five and twelve years before cases of sexual violations are concluded. Regarding domestic violence, the majority of police complaints are resolved through police mediation or referral to Mediation Boards and there is very limited use of the Domestic Violence Act."<sup>544</sup> WMC also reported that women held under the public security laws have complained that they are not afforded basic safeguards. Regarding detention centres for girls, there is no separation between girls who have come into conflict with the criminal law and girls in need of care and protection. Sexually abused girls are held in custody until cases against perpetrators have been completed.<sup>545</sup> WMC further reported that Muslim women have unequal rights in marriage and divorce under Muslim personal law; there is no minimum age of marriage, and polygamy is recognized in the Muslim Personal Law. WMC further noted that, whilst in theory a women's consent is necessary for marriage, in practice, they could be married off without their consent. Men could divorce without giving a reason or compensation, whereas women have to prove fault. Muslim women cannot be appointed as family court judges or registrars of marriages.<sup>546</sup> WMC noted that there is fear amongst families, both within and outside IDP camps, about the security of, and sexual violence against young women, resulting in families arranging 'marriages' for their teenage daughters. Young girls are not sent to school due to the increased number of checkpoints. At many camps and welfare sites facilities are minimal with regard to health issues, such as family planning, child bearing and feeding infants. Single women or widows responsible for family welfare among the displaced, are particularly at a disadvantage with regard to accessing services and provisions.<sup>547</sup>

According to recommendations given as an outcome of the UPR, Sri Lanka has to "Give special attention to the rights of women and further promote education and development and their

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<sup>541</sup> Women and Media Collective, submission to the UPR of Sri Lanka 2008, p.3.

<sup>542</sup> Joint Civil Society Report, joint submission to the UPR of Sri Lanka 2008, p.5.

<sup>543</sup> Asian Centre for Human Rights, submission to the UPR of Sri Lanka 2008p.4.

<sup>544</sup> Women and Media Collective, submission to the UPR of Sri Lanka 2008, p. 2, para. 20 of the Summary.

<sup>545</sup> Ibid. Summary, para. 22.

<sup>546</sup> Ibid., p. 1, 4-5, para 28.

<sup>547</sup> Ibid., p.3.

representation in politics and public life..."<sup>548</sup>

### 5.11.3.2. Discrimination of LGBTIQ persons

"Equal Ground (EG) highlighted some of the major challenges that the Lesbian, Gay, Bisexual, Transgender, Intersex and Questioning (LGBTIQ) community of Sri Lanka is currently facing in relation to their human rights, such as state sanctioned hate speech on the basis of sexual orientation, use of the legal system to harass human rights defenders working for LGBTIQ rights, impunity for crimes committed against LGBTIQ people, violence, death threats and extrajudicial killings based on sexual orientation, marginalization and wide-spread persecution of LGBTIQ individuals.<sup>549</sup> JCSR added that LGBTIQ individuals are denied access to health services, education and employment and the ability to participate in social and public life.<sup>550, 551</sup>

JCSR reported that consensual sexual activity between adults of the same sex remains a crime under Article 365 and 365A of the 1883 Penal Code. 74 ILGA and Equality Ground (EG) raised similar concerns.<sup>552</sup>

### 5.11.4. Conclusion

In Sri Lanka protection against any form of discrimination is a very sensitive issue. In the main there is no reason to question the legislative framework of those rights. However, the present situation leads to the conclusion that rights of persons belonging to national minorities, in particular Tamil population from East and North parts of the country, have not been protected effectively. Those categories of people have been subjected to various forms of discriminations contrary to the country obligations under the ICCPR.

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<sup>548</sup> Report of the Working Group on the Universal Periodic Review Sri Lanka, A/HRC/8/46, 5 June 2008, recommendation no. 36, in para. 82 p. 20. Such recommendation enjoyed the support of Sri Lanka.

<sup>549</sup> Equal Ground, submission to the UPR of Sri Lanka 2008, p. 1. See also International Lesbian and Gay Association, joint submission to the UPR of Sri Lanka 2008, p.1.

<sup>550</sup> Joint Civil Society Report, joint submission to the UPR of Sri Lanka 2008, p. 6.

<sup>551</sup> Summary prepared by the Office of the High Commissioner for Human Rights, in accordance with paragraph 15 (c) of the annex to Human Rights Council resolution 5/1, A/HRC/WG.6/2/LKA/3, para 12.

<sup>552</sup> International Lesbian and Gay Association, joint submission to the UPR of Sri Lanka 2008, p. 1. See also Equal Ground, submission to the UPR of Sri Lanka, 2008, p. 1.

## 6. *Conclusion*

On the basis of the material before it the Panel is forced to conclude that the three Conventions under scrutiny have not been effectively implemented in Sri Lanka. That is the case even if the Government of Sri Lanka has consistently asserted its effective implementation<sup>553</sup> and denied non-compliance in all its public statements. However, the Government has mainly done that in general terms and mostly without providing sufficient evidence in order to rebut specific allegations made by many sources.<sup>554</sup>

In some of the submissions made in response to the invitation by the European Commission it has been held that the legal system in Sri Lanka adequately meets the legislative requirement of the Conventions. The Panel cannot fully agree with that assessment. Some of the provisions of the Conventions have not been transposed at all, while the provisions in the domestic legislation on other points are more restrictive than the corresponding provisions in the Conventions. The Sri Lankan legislation does also contain provisions which are not in compliance with the Conventions. Under these circumstances effective implementation of the Conventions has not been, and cannot, be achieved by means of the case law of the Sri Lankan courts without setting aside legislation.

The emergency legislation poses a number of problems. That legislation overrides provisions elsewhere in the legislation, including the Constitution. In the emergency legislation human rights are restricted beyond that which is permitted according to the Conventions and sweeping powers are given to the authorities. Criminal offences are vaguely defined and the regulations contain provisions that excessively limit, or eliminate, the accountability of State agents. Basic fair trial rights are undermined in the emergency regulations.

Many of the State authorities in Sri Lanka entrusted with the task of protecting human rights have lost their legitimacy and credibility because of the non-application of the 17<sup>th</sup> Amendment to the Constitution. In the assessment of the Panel this is a result of political decisions.

The evidence shows that the police are unable or unwilling to investigate human rights violations. It also indicates that torture in police custody is at least widespread. The absence of a witness protection programme and harassment of witnesses discourages witnesses from appearing and operates as a disincentive to make complaints.

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<sup>553</sup> See Status Report 2008, p. 1.

<sup>554</sup> A large number of these have been reviewed in this report.

The Attorney General and his department influenced adversely the work of the recent Commission of Inquiry while being initially an object of its investigation.

The court system has failed. There are strong indications that it has been politicized. The former Chief Justice of the Supreme Court has misused his position by putting pressure on judges who has acted to his disliking. Judges have been removed by the Judicial Service Commission when they have demonstrated too much independence.

There are severe restrictions on access to justice. The Supreme Court, which is the first and the last instance in human rights cases, is not easily accessible from the north and east of Sri Lanka. Provisions in the emergency regulations shield actions against officials from the courts. There is a fear of bringing suits regarding human rights violations, creating a chilling effect which discourages victims from seeking redress before a court. Cases have been transferred from one court to another which has complicated the situation for parties. The court system is particularly slow which makes the protection of human rights in Sri Lanka illusory.

The enforcement capacity of the National Humans Rights Commission has been questioned. The Commission is not seen as having the will or power to address the more serious issues.

The recent Commission of Inquiry has been seen as not meeting international norms and standards. There was a lack of proper funding and independent support staff. There was a climate of threat to anyone who might identify persons responsible for human rights violations. There was a lack of political will to inquire into the cases before the Commission.

Whilst the politicization of judicial and quasi-judicial bodies is of recent origin, there were not previously adequate structures in place to prevent that from occurring. The inadequate functioning of the process of criminal investigation is a long-standing problem, with knock-on consequences for the operation of the criminal justice system as a whole. Throughout the period in issue broad concern about the human rights situation in Sri Lanka has been expressed.

Unlawful killings are a major problem in Sri Lanka, perpetrated by soldiers, police, paramilitary groups or others, not only during the course of active hostilities. There was a significant level of unlawful killings, particularly of civilians, during the period covered by the investigation. There is overwhelming evidence to suggest that during the final months of the conflict significant numbers of civilians were unlawfully killed in military operations. In general, there are also concerns regarding the lack of investigative ability on the part of the police.

While Sri Lanka has an impressive record on passing legislation to criminalize torture and to provide safeguards against torture, in practice such treatment remains widespread. This is in part because the Prevention of Terrorism Act and the emergency regulations are not subject to legislative protections. Such protection as exists in legislation appears to be routinely ignored in practice. Complaints are investigated neither effectively nor expeditiously. The prohibition of torture is not implemented in practice in Sri Lanka.

Some of the safeguards attaching to arrest and detention in normal circumstances are recognized in the Sri Lankan legislation. There are nevertheless certain missing protections. The operation in practice of the safeguards appears to be problematic. There appears to be no means in practice of obtaining effective redress.

A more significant problem is detention related to emergency. The powers of detention result in both arbitrary arrests and mass detention and there appears to be no effective possibility of review of lawfulness. Virtually all safeguards against arbitrariness are missing. The prohibition of arbitrary detention is not implemented in Sri Lanka, particularly in relation to detention under emergency powers.

Sri Lanka has failed to implement its obligation to prevent enforced disappearances by State agents and other forces for which it is responsible. Such forces are implicated in the increase of disappearances between 2005 and 2009. It has also failed to prevent disappearances at the hands of third parties. It has also failed its obligation to carry out effective investigation into alleged disappearances. That result in complete or virtually complete impunity.

The principal problem posed by the general restrictions on freedom of movement in Sri Lanka is that they appear to be imposed and enforced in an arbitrary and disproportionate manner. In relation to the recently established camps, it must be recognized that the government does have legitimate security concerns. The screening of internally displaced persons in order to identify LTTE fighters is legitimate. The mass internment of the civilian population in the North is both arbitrary and disproportionate.

The law provides for freedom of association and assembly. Restrictions exist under the emergency legislation. Available information does not enable firm conclusions as to whether an effective implementation of these rights is concerned. The emergency regulations have a negative impact on the practical implementation of the right to assembly.



The practical implementation of the freedom of expression is one of the most serious problems in Sri Lanka.

The legislation, in particular the antiterrorist legislation, imposes limitations on the freedom of expression which are not compatible with the obligations under the ICCPR. The policy of the government and its propaganda against all critics of its policy effectively destroys the freedom of the press. The culture of impunity prevails as far as physical assaults and more serious attacks against journalists are concerned which *de facto* seriously limits that freedom.

In general Sri Lanka is complying with its obligations under the provisions in the ICCPR on freedom of religion.

The criminal justice system of Sri Lanka has critical shortcomings that obstruct justice for victims of human rights violations. The biggest problem is the complete inadequacy of the system of criminal investigation. Whilst this is a problem of long standing duration, it has been aggravated by the fact that the police have increasingly been given a quasi-military role in the insurgency, during which they have become, along with the armed forces, significant perpetrators of violations, rather than investigators. The criminal justice system is subject to political pressure, lacks effective witness protection and is slow. The right to a fair trial is hampered by the harassment of parties and witnesses and by the transfer of trials from one court to another. Access to justice is limited both in geographical terms and, in particular, by the emergency legislation.

Child recruitment was a serious problem in Sri Lanka during 2005-2008. Although the main offender was the LTTE, paramilitary groups in Government-controlled areas were also involved in child recruitment. The government has taken steps to remedy the situation. At present it is impossible to assess if these steps will be adequate.

The legislative framework concerning the protection of minorities does not raise problems. In practice, however, rights of persons belonging to national minorities, in particular to the Tamil population from in the East and North, have not been adequately protected.

On the basis of the preceding findings, the Panel has come to the conclusion that neither the ICCPR, the CAT nor the CRC, nor the Sri Lankan legislation incorporating the obligations under these Conventions have been effectively implemented in Sri Lanka during the period covered by the investigation.