

SRI LANKA'S HUMAN RIGHTS CRISIS

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TABLE OF CONTENTS

EXECUTIVE SUMMARY AND RECOMMENDATIONS	i
I. INTRODUCTION	1
II. HOW NOT TO FIGHT AN INSURGENCY	2
III. A SHORT HISTORY OF IMPUNITY	4
A. THE FAILURE OF THE JUDICIAL SYSTEM.....	4
B. COMMISSIONS OF INQUIRY.....	5
C. THE CEASEFIRE AND HUMAN RIGHTS.....	6
IV. HUMAN RIGHTS AND THE NEW WAR.....	7
A. CIVILIANS AND WARFARE	7
B. MASSACRES.....	8
C. EXTRAJUDICIAL KILLINGS	9
D. THE DISAPPEARED	10
E. ABDUCTIONS FOR RANSOM.....	11
F. FORCED RECRUITMENT BY TAMIL MILITANTS	12
G. ARRESTS AND DETENTIONS UNDER THE EMERGENCY REGULATIONS	13
H. ATTACKS ON THE MEDIA	14
I. POLITICALLY MOTIVATED ARRESTS/HARASSMENT.....	14
J. FREEDOM OF MOVEMENT	15
V. THE STATE RESPONSE.....	16
A. POLICE INVESTIGATIONS AND THE JUDICIAL SYSTEM.....	16
B. THE POLITICAL RESPONSE	18
C. THE CONSTITUTIONAL COUNCIL AND THE INDEPENDENT COMMISSIONS.....	19
D. AD HOC COMMISSIONS OF INQUIRY	20
VI. THE PRESIDENTIAL COMMISSION OF INQUIRY	22
A. PROBLEMS AND CHALLENGES.....	22
1. Conflicts of interest.....	22
2. Witness protection	23
3. The political context	23
4. Indictments and prosecutions.....	24
B. INTERNATIONAL INDEPENDENT GROUP OF EMINENT PERSONS (IIGEP).....	24
C. PROSPECTS	25
VII. HALTING THE DOWNWARD SPIRAL.....	26
A. THE GOVERNMENT'S CHALLENGE	26
1. The seventeenth amendment.....	27
2. The emergency regulations.....	27
3. Paramilitaries	27
4. Extrajudicial killings and abductions.....	27
5. Longer-term legal and institutional reforms	28
B. THE ROLE OF CIVIL SOCIETY	29
C. INTERNATIONAL RESPONSES.....	29
1. UN mechanisms.....	31
2. Pressure on child soldiers	31
3. Pressuring the LTTE.....	31
VIII. CONCLUSION	32

APPENDICES

A. MAP OF SRI LANKA33

SRI LANKA'S HUMAN RIGHTS CRISIS

EXECUTIVE SUMMARY AND RECOMMENDATIONS

The resumption of war between the Sri Lankan government and the Liberation Tigers of Tamil Eelam (LTTE) has been accompanied by widespread human rights abuses by both sides. While the LTTE has continued its deliberately provocative attacks on the military and Sinhalese civilians as well as its violent repression of Tamil dissenters and forced recruitment of both adults and children, the government is using extra-judicial killings and enforced disappearances as part of a brutal counter-insurgency campaign. The likely results will be the further embitterment of the Tamil population and a further cycle of war, terrorism and repression. Without ignoring or minimising the serious violations of the LTTE, the international community needs to bring more pressure to bear on the government, through UN mechanisms, a reappraisal of aid policies and intensified political engagement. The alternative is a further decline into authoritarianism, violence, terrorism and repression.

Civilians are repeatedly caught up in the fighting. More than 1,500 have been killed and more than 250,000 displaced since early 2006. There have been hundreds of extrajudicial killings, and more than 1,000 people are still unaccounted for, presumed to be the victims of enforced disappearances. Hundreds more have been detained under newly strengthened Emergency Regulations that give the government broad powers of arrest and detention without charge. The security forces have also expelled hundreds of Tamils from Colombo. Forces commanded by the ex-LTTE commander Karuna, leader of the Tamil Makkal Viduthalai Pulikal (TMVP) now aligned with the government, engage in child recruitment, extortion, abductions for ransom and political assassinations.

While many deaths result from military clashes, the army – assisted by pro-government Tamil paramilitaries – is also engaged in a deliberate policy of extrajudicial killings and abductions of Tamils considered part of LTTE's civilian support network. Targeted assassinations have been particularly frequent in Jaffna and parts of the east, often victimising civilians with no connection to the LTTE. Political killings, abductions and disappearances have also spread to Colombo, where abductions for ransom have targeted both Tamils and Muslims.

Tamils are increasingly fearful and alienated from a government that claims to be liberating them from the LTTE but has failed to promote any viable political solution to the conflict. The violence and abuse suffered by many Tamils has ensured increased support and funding for the insurgents.

The counter-insurgency campaign is leading to more authoritarianism in the country as a whole. Officials now routinely brand their political critics and human rights advocates as LTTE sympathisers, while political opponents and journalists have been arrested under the Emergency Regulations. What began as an effort to target LTTE supporters shows disturbing signs of becoming generalised repression of dissent. While routinely attacking moderate, democratic forces, the government has given free rein to Sinhalese nationalist groups.

For the most part the government has responded to criticism with denial, obfuscation and virulent, verbal attacks on its critics. In an attempt to deflect international criticism, it has also established new institutions to investigate allegations of human rights abuses. A Presidential Commission of Inquiry (CoI), backed by a panel of international observers, is investigating a series of atrocities. However, the history of such institutions in Sri Lanka is grounds for scepticism: previous commissions have been ineffective in stopping abuses or prosecuting perpetrators.

In any case, the CoI is no substitute for proper action by the law enforcement agencies and judiciary to investigate and prosecute abuses. The national Human Rights Commission is deeply flawed and has lost all credibility after being stocked by political appointees. Other domestic institutions are increasingly politicised or dysfunctional, leading to calls for an international human rights monitoring mission, which may be the only way to end the present wave of abuses. The international community has responded to the renewed conflict and human rights abuses, however, in a disjointed and lacklustre way. While there has been some public criticism, there is little sign of a coordinated approach that would put real pressure on the government to change course.

If the government does not begin to reassert the rule of law, it may find itself unable to bring under control the violent forces that have been unleashed – including the TMVP, other Tamil paramilitaries and criminal elements. The nature of the campaign against the LTTE has spawned a rise in general lawlessness. Democratic state institutions are increasingly threatened by the development of a regime that is becoming more authoritarian.

RECOMMENDATIONS

To the Sri Lankan Government:

1. Pursue vigorously investigations, indictments and prosecutions against those alleged to be involved in atrocities.
2. End the policy of extrajudicial killings and disappearances and take active measures to prevent abductions, killings and arbitrary detentions in government-controlled areas.
3. Assert effective control over the TMVP paramilitary group by:
 - (a) restricting it in civilian areas to unarmed political activity;
 - (b) arresting and prosecuting all members engaged in criminal activities, including abduction, child recruitment, extra-judicial killings and robbery; and
 - (c) strictly limiting the role of TMVP members in administration, relief and resettlement programs.
4. Prevent, prosecute and end any government facilitation of child recruitment by pro-government paramilitaries.
5. Guarantee the constitutional right to freedom of movement and residence of all citizens and end all threats and harassment by security forces of Tamils visiting Colombo.
6. Appoint the Constitutional Council and allow it to nominate the members of independent commissions, including the Human Rights Commission and National Police Commission.
7. Ensure that the Human Rights Commission publishes accurate data on complaints, and publish the report of the Mahanama Tillakeratne Commission on disappearances and other reports commissioned by the government on human rights issues.
8. Establish and implement safeguards against arbitrary and abusive detentions, including by:
 - (a) repealing those aspects of the Emergency Regulations that are not consistent with international human rights norms;
 - (b) enforcing existing laws and presidential directives providing for transparent arrests and detentions and instituting strong penalties for non-compliance;
 - (c) allowing the Human Rights Commission and the International Committee of the Red Cross (ICRC) to visit all places of detention, including TMVP offices; and
 - (d) prosecuting officers who refuse to identify themselves, take down complaints or give receipts to family members when a suspect is arrested.
9. Give every possible assistance to the Commission of Inquiry, including by:
 - (a) providing sufficient funds to retain private counsel so it need not rely on government lawyers;
 - (b) establishing and properly funding effective witness protection procedures;
 - (c) providing it full documentation and ensuring that officials called to testify cooperate fully; and
 - (d) proceeding expeditiously with prosecutions.
10. Invite the UN High Commissioner for Human Rights and other UN representatives, including the UN Working Group on Enforced or Involuntary Disappearances, to visit Sri Lanka.
11. Allow the Office of the UN High Commissioner for Human Rights (OHCHR) to establish a human rights field operation mandated to monitor abuses by all parties, protect civilians and perform capacity building in support of domestic institutions.
12. Sign and ratify the International Convention for the Protection of All Persons from Enforced Disappearance and renew commitments to other human rights treaties, by new legislation if necessary.
13. Incorporate the concept of command responsibility into law and make forced disappearance a criminal offence.

To the Liberation Tigers of Tamil Eelam (LTTE):

14. Cease all political killings, abductions, extortion and suicide bombings and suppression of dissent.

15. Open all prisons and detention centres to inspection by the ICRC and the Sri Lanka Monitoring Mission (SLMM) and cooperate fully with international bodies, including The United Nations Children's Fund (UNICEF) and the OHCHR.
 16. Cease all forced recruitment, of children and adults, and forced military training of civilians.
 17. End harassment of humanitarian agencies and forced recruitment of their staff.
- To the International Community:**
18. Support a strengthened resolution in the UN Human Rights Council calling for an OHCHR human rights field operation mandated to undertake monitoring, protection, and capacity-building activities.
 19. Maintain political engagement, through high-level contacts and visits, including a visit by senior members of the U.S. Congress and similar visits by delegations from other parliaments.
 20. Maintain pressure on LTTE financing and extortion of the Tamil diaspora.
 21. Encourage the UN Security Council to impose targeted sanctions against both the LTTE and the TMVP if they continue to recruit child soldiers.
22. Support capacity building for domestic human rights protection, including:
 - (a) funding and enabling an effective witness protection program that includes provisions for asylum and assistance to witnesses outside the country;
 - (b) suspending funding for the Human Rights Commission (other than special aid for its effective regional offices) until its members are reappointed on nomination of a new Constitutional Council; and
 - (c) giving more effective support to civil society organisations, particularly those committed to civilian protection and coordinated monitoring, documentation and advocacy initiatives.
 23. Convene a consultation meeting of bilateral and multilateral donors to discuss new approaches that take into account widespread human rights abuses and the renewal of conflict, including significantly limiting aid to the government and increasing support for civilian protection and humanitarian initiatives.

Colombo/Brussels, 14 June 2007

SRI LANKA'S HUMAN RIGHTS CRISIS

I. INTRODUCTION

On Christmas Eve 2005, Tamil parliamentarian Joseph Parajasingham was attending midnight mass at St Mary's Cathedral, Batticaloa. As he returned to his pew after taking communion, two gunmen shot him dead and fled. Since Parajasingham was a strong Tamil nationalist, it was widely assumed the government ordered the killing.

This murder began another cycle of human rights abuses and violence in the decades-old civil war.¹ Since the end of 2005, hundreds of civilians have been killed in military clashes, assassinated for their political affiliations or killed in terror attacks; more than 1,000 have been "disappeared" or abducted for ransom; children have been forced to fight for rival Tamil militant groups; emergency laws have been used to detain hundreds arbitrarily and to harass political opponents of the government. Violent attacks on journalists and de facto censorship are closing down space for criticism of the government and reporting of human rights violations. In June 2007 the government expelled hundreds of Tamils from the capital, Colombo, citing security concerns. The expulsions were quickly reversed by the Supreme Court, however, after strong domestic and international condemnation.

The conflict between the government and the Tamil militant group, the Liberation Tigers of Tamil Eelam (LTTE), has always been accompanied by massive abuses of human rights by all sides. The Sri Lankan Human Rights Commission is still investigating the cases of more than 16,000 "disappeared" from previous stages of the conflict. Tamils were the main victims of successive campaigns against the LTTE, but tens of thousands of Sinhalese died in a brutal crackdown on the nationalist-Marxist Janatha Vimukthi Peramuna (JVP, People's Liberation Front) in the south in 1988-1989. All militant groups have killed ordinary civilians by the thousands.

Embittered victims of government human rights abuses have fuelled the LTTE insurgency, while rebel attacks on civilians have provoked a harder government response. The 2002 ceasefire seemed to offer a chance of ending this vicious circle. Human rights abuses did drop sharply but they were not ended. The LTTE continued to indulge in political killings and refused to allow any pluralism or freedom of expression in areas it controlled.

The military and security forces were markedly restrained, however, until 2006-2007, when a combination of pro-government Tamil militants and elements in the security forces began a series of killings and abductions that continue to strike fear into minority communities. Few of these abuses have been properly investigated. Government commissions to investigate incidents have been ineffective, and no prosecutions have been brought against offenders in these cases.

This report examines the human rights situation in the context of the broader conflict, and analyses the impact of human rights abuses on the state and on society. It does not analyse in detail particular cases, which have been documented elsewhere,² but it provides background on abuses and the failure of the state to establish effective institutions that would promote human rights.

¹ For an overview of the history of the conflict and the failure of the 2002-2006 peace process, see Crisis Group Asia Report N°124, *Sri Lanka: The Failure of the Peace Process*, 28 November 2006.

² For more detailed reporting on individual human rights abuses, see the invaluable reports of the University Teachers for Human Rights (Jaffna) – UTHR(J), at www.uthr.org. See also the reports from Human Rights Watch, at www.hrw.org; the Asian Human Rights Commission, at www.ahrck.net; the Centre for Policy Alternatives, at www.cpalanka.org; and Amnesty International, at www.amnesty.org.

II. HOW NOT TO FIGHT AN INSURGENCY

“Yes, we can beat the Tigers, and no, we ain't headed that-away”, Dayan Jayatilleka, Sri Lankan Ambassador to the UN in Geneva³

Previous government attempts to combat Tamil nationalist militancy have all been accompanied by serious human rights abuses. Not coincidentally, all have failed. From the late 1970s onwards, government policy has been characterised by tough anti-terrorism laws and harsh police action against alleged militants, while successive administrations have ignored underlying political grievances. Government repression fuelled violent reaction and provided popular support to what were initially small and marginal groups in Tamil society.

The cumulative effect has been disastrous. Attempting to defeat the LTTE through exclusively military means has created a strong sense among Tamils of group solidarity and of being under siege. Harsh anti-terrorism laws in the 1980s made it seem rational for many younger Tamil men to join the LTTE. A writer notes: “There was fear just of being an ordinary civilian Tamil aged between sixteen and 40. Young men felt safer as militants in the jungle than at home or at work, where they saw themselves as ‘sitting ducks to be caught by the security forces any time’. Some of them did not wish to join the LTTE, but their parents forced them to leave home for their own safety. The strength of the militants in terms of numbers swelled...”⁴

The LTTE has understood the principles of this cycle of violence much better than successive governments. From its inception, the insurgency used violence against civilians, launching its campaign with the killing of Alfred Duraiappa, the mayor of Jaffna, in 1975. It has used deliberately provocative attacks against the military and Sinhalese civilians to provoke reprisals against Tamils, thus providing more ammunition for its propaganda campaigns and assuring that attention is shifted from its own abuses to those of the government.

It is always tempting for security forces to tackle terror with terror. Policy prescriptions such as “the more force is used, the less effective it is”, or “the best weapons for counter-insurgency do not shoot”, from a recent report on counter-insurgency seem counter-intuitive to many

security officials.⁵ Counter-terrorist efforts within the confines of the rule of law seem to tie the hands of the security forces. And when suicide bombers are attacking civilians, the instinct is to overreact and ignore human rights concerns. Police chief Victor Perera voices a typical sentiment: “It is up to the police to ensure and guarantee the safety and security of normal citizens of this country before addressing the human rights concerns of the terrorists”.⁶

This kind of sentiment, which is widespread in the political and military leaderships, stems directly from the government's repetition of “war on terror” rhetoric and an inability to recognise the political nature of the LTTE insurgency.⁷ Terrorist attacks are only one part of the rebels' arsenal of the LTTE. But by simply labelling them “terrorists”, policy is skewed and the argument that a political approach is more appropriate than a military response is ignored. Recognising an insurgency as political is a crucial step in defeating it.⁸ A central part of such a political strategy is respect for due process and the basic rights of citizens. This kind of respect for human rights is necessary to establish the legitimacy of the state and to undercut the sense of grievance that is at the root of any serious insurgency.⁹ Harsh counter-terrorism and counter-

⁵ “The Paradoxes of Counterinsurgency”, *The New York Times*, 5 October 2007. The quotations are from the draft of a recently released counter-insurgency manual produced by the U.S. Army and Marine Corps, at www.fas.org/irp/doddir/army/fm3-24.pdf.

⁶ Cited in Norman Palihawadane and Harischandra Gunaratna, “Job seeking youth from North and East pose security threat”, *The Island*, 4 June 2007.

⁷ It ignores the difference between terrorism as a tactic used by insurgent groups and terrorism as the defining characteristic of the group as a whole (i.e. “pure terrorist groups”). Central to an insurgency, as opposed to a purely terrorist group, is the attempt to create a counter-state, which of necessity requires control over, or preferably active support from, the larger population. “The key element of terrorism is the divorce of armed politics from a purported mass base, in whose name terrorists claim to be fighting. Little or no meaningful effort goes into construction of a counter-state, which is the central activity of insurgency. In contrast, insurgencies, while also armed expressions of organic, internal political disaffiliation, use terroristic action principally as one weapon among many to facilitate construction of the counter-state”. Thomas A. Marks, “Sri Lanka and the Liberation LTTE of Tamil Eelam”, in *Democracy and Counterterrorism: Lessons from the Past*, Robert J. Art and Louise Richardson (eds.), United States Institute of Peace, (Washington, 2007), p. 483.

⁸ *Ibid.*, p. 495.

⁹ Crisis Group has argued that the same principle holds in the case of the U.S. and NATO attempts to counter the Afghanistan insurgency: “Strict adherence to due process would emphasise that this is a conflict between a legitimate authority and rebels and show the population that no one is above the law”, Crisis

³ Dayan Jayatilleka, “How to Beat the LTTE”, *The Lanka Academic*, vol. 7, no. 81, 25 June 2006.

⁴ N. Manoharan, “Counterterrorism Legislation in Sri Lanka: Evaluating Efficacy”, *East West Center Policy Studies*, no. 28, 2006, p. 33.

insurgency efforts aim to deter insurgents and their potential supporters but evidence shows that they often produce an opposite effect.¹⁰

In theory, all this is not lost on the government. In a meeting with relatives of the disappeared in June 2007, President Rajapakse admitted that “the harassment of the Tamil people only made them move closer to Prabhakaran [the LTTE leader], rather than his rejection”.¹¹ Dayan Jayatilleka has argued that the government must “make far reaching concessions to the nationalist grievances that reside at the root of insurgencies characterised by suicide terrorism....[A] package of such concessions will slash support, including recruitment, for the terrorist cause and thereby make it possible for the military to defeat the armed insurgency”.¹²

But the rhetoric is not matched by reality. Instead, the government has merely restarted the familiar cycle of terror and counter-terror. Undermining human rights has a broad, corrosive impact on state institutions and democracy. The government has already used the campaign against the LTTE to target purely political opponents. The inevitable censorship and climate of fear that accompanies such a campaign undermines the ability of average citizens to challenge the premises of the insurgency. In particular, the ability of Tamil moderates to oppose both the government and the LTTE is severely restricted by the closing down of political debate.

Part of the reason for the military's ready adoption of a brutal counter-insurgency campaign is that many in the security forces feel they already used such tactics successfully to defeat insurgencies in the south by the Sinhalese nationalist JVP. First in 1971 and more extensively in 1987-1990, the state was able to defeat the JVP by using great brutality and legal and extra-legal violence, including reliance on disappearances and extra-

judicial killings. At least 2,000-3,000 people were killed in 1971, perhaps as many as 40,000 in the late 1980s.¹³

The JVP, however, posed fundamentally different challenges to the state than the LTTE. The military had advantages that it does not have against the LTTE. Unlike when dealing with the LTTE, no language or cultural barriers prevented the security forces, almost all Sinhalese, from infiltrating, understanding and selectively targeting the JVP leadership. In comparison with the LTTE, the JVP was a relatively amateur, poorly funded and ineffective fighting force.

More importantly, its popular base was very different. The JVP's sense of grievance did not resonate as widely with Sinhalese as the LTTE's version of Tamil nationalism has with Tamils, since only some of the community – the poor and working class – suffered discrimination, disenfranchisement and repression. The state's violence did not trigger ethnic group identification. As a consequence, government repression and lack of respect for due process appeared legitimate, if harsh, not only to many wealthy and middle-class Sinhalese who felt threatened by JVP terror and ideology, but even to many of those the JVP lived among and claimed to speak for.¹⁴

Nevertheless, the brutal repression of the JVP uprising had negative long-term consequences that are not always noted. The JVP is now a parliamentary party, with a major constituency; it continues to be an irritant to the political mainstream, its voters' grievances never addressed. The damage done by the multiple counter-insurgency campaigns against the JVP and the LTTE to legal and policing institutions has been enormous.

Group Asia Report N°123, *Countering Afghanistan's Insurgency: No Quick Fixes*, 2 November 2006.

¹⁰ See, for instance, the comparative research conducted by Gary LaFree and colleagues on legal and military responses to terrorism in Northern Ireland. “Efficacy of Counterterrorism Approaches: Examining Northern Ireland”, National Consortium for the Study of Terrorism and Responses to Terrorism, START Research Brief, October 2006, at www.start.umd.edu.

¹¹ “False complaints hamper investigations in abductions – President”, government press release, 2 June 2007, at www.priu.gov.lk/news_update/Current_Affairs/ca200706/20070602false_complaints_hamper_investigations_in_abductions.htm.

¹² Dayan Jayatilleka, op. cit.

¹³ Mick Moore, “Thoroughly Modern Revolutionaries: The JVP in Sri Lanka”, *Modern Asian Studies*, vol. 27, no. 3 (1993), p. 593, fn. 2.

¹⁴ See N. Manoharan, op. cit.

III. A SHORT HISTORY OF IMPUNITY

"This is just not fair. The victims and the families of past disappearances were cheated. We worked hard...to get the case investigated and prosecuted. We even gave the names of some persons whom we thought were behind the disappearance. But there was no result, no justice". Jayanthi Dandeniya, Families of the Disappeared¹⁵

During the past 25 years of war, with its scores of atrocities and massacres and tens of thousands of killings and enforced disappearances, only a handful of people have been held legally accountable for such crimes.¹⁶ The present human rights crisis represents the re-emergence of established patterns of abuse and impunity from the 1980s and 1990s. The same flawed systems are in place that permitted impunity under previous governments. In some cases, indeed, the situation has worsened.

A. THE FAILURE OF THE JUDICIAL SYSTEM

In the vast majority of massacres and disappearances over the past 25 years, there have been no investigations or legal proceedings at all. Prosecutions in the rare cases that do enter the judicial system can take more than a decade and almost always fail. An outline of some of the cases that have collapsed after indictments gives an indication why there is little confidence in the Sri Lankan judicial process:

- On 9 August 1992, following the assassination of Army Commander Maj. Gen. Denzil Kobbekaduwa in the Jaffna peninsula, an armed gang of soldiers murdered 35 Tamils, including women and children, in the village of Mylanthanai in the Eastern province. Eyewitnesses identified 24 soldiers but legal proceedings were continually postponed, with the trial shifted from Batticaloa, a predominantly Tamil town near the location of the massacre, to Colombo. The attorney general eventually filed indictments in September 1999. At the conclusion of the trial in November 2002, the eighteen accused soldiers were acquitted by an

all-Sinhalese jury, despite eyewitness testimony and other strong evidence. The jury stood by its verdict despite being asked by the judge to reconsider. The attorney general turned down a request by representatives of the victims to appeal.

- In the summer of 1995, just after the war resumed, the bodies of 23 young Tamil men were found floating in and around Bolgoda Lake, outside Colombo. 22 members of the police counter-terrorist unit, the Special Task Force (STF), were arrested on suspicion of the murder but released on bail to resume work in early 1996. When the case went to trial in June 2000, key witnesses failed to appear, and proceedings were postponed multiple times. Eventually, the case was thrown out after the prosecutors repeatedly failed to show up in court.¹⁷
- On 11 February 1996 24 civilians were shot and killed in Kumarapuram, in the eastern district of Trincomalee, apparently in reprisal for the killing of two soldiers by the LTTE a few hours earlier. After initial investigations by a three-person military board of inquiry, the attorney general indicted nine soldiers. Thereafter, the case was continually delayed. In June 2005 all material evidence was destroyed in a fire at the government analyst's office.
- In the Bindunuwewa massacre of October 2000, 41 Tamil men and boys detained in a government rehabilitation centre were attacked by a Sinhalese mob while armed police surrounding the camp did nothing and in some cases even fired on the fleeing inmates. 27 detainees were hacked, burned and shot to death, fourteen survived. 41 local Sinhalese were indicted in early 2002. Five were convicted, including two police officers. The Supreme Court overturned all five convictions in May 2005, citing lack of evidence.¹⁸

Successful convictions are few and far between. In a case in Embilipitiya, more than 50 high school students were detained, tortured and murdered in an army camp in 1989, at the height of the government's counter-insurgency campaign against the JVP in the south. After years of agitations by parents and local politicians, the state charged

¹⁵ Jayanthi Dandeniya lost her fiancé and two brothers in the disappearances of the late 1980s. Cited in "The Launching of a Signature Campaign by Victims of Past Disappearances", Asian Human Rights Commission, 8 November 2006.

¹⁶ For background, see the annual human rights reports issued by the U.S. State Department, Amnesty International, and Human Rights Watch. A useful resource is Priyardarshini Dias, *Disappearances in Sri Lanka and the Available Legal Remedies*, Women and Media Collective (Sri Lanka, 2003).

¹⁷ D.B.S. Jeyaraj, "STF suspects in Trinco youth murder to be released", 3 May 2006, available at transcurrents.com/tamiliana/index.php/archives/date/2006/05/page/4/.

¹⁸ For an analysis of the case, see Alan Keenan, "Bindunuwewa: Justice Undone?", in Sri Lanka: State of Human Rights 2004, Law and Society Trust (Colombo, 2004), and "Making Sense of Bindunuwewa: From Massacre to Acquittals", Law and Society Trust Review, vol. 15, issue 212, June 2005.

nine suspects in the Ratnapura High Court in 1994 with the disappearance of 25 people. In February 1999, five soldiers, including the local brigadier, and the principal of the high school were convicted of abduction with the intent to commit murder and wrongful confinement and sentenced to ten years in prison. After a lengthy appeals process, the convictions of the principal and the lower ranking soldiers were upheld in early 2002. The brigadier, however, was acquitted, for lack of direct involvement.

The only other significant success story is the Krishanthi Kumaraswamy murder trial. The eighteen-year-old Tamil student was abducted at an army check-point in Jaffna peninsula in September 1996. Her mother, brother, and a friend disappeared after making inquiries. The bodies of all four were found in shallow graves the next month. Nine soldiers were arrested for rape and murder, and five were ultimately convicted and sentenced to death in 1998. At the time, it was felt to be a landmark judgment and fed hopes that the tradition of impunity might be weakening.

Upon their convictions, the five soldiers revealed graves in the town of Chemmani, which were said to contain the bodies of hundreds of other Tamils killed by the army.¹⁹ Ultimately only fifteen bodies were discovered, thanks to unfinished exhumations, inconclusive DNA tests and political resistance. Despite initial arrests of a handful of soldiers and police, no indictments were filed. In January 2006, police told the Colombo magistrate that they were unable to proceed in the absence of instructions from the attorney general, despite having handed over the findings of their investigations.²⁰ "Once the case was transferred to Colombo", says one lawyer involved, "the case died".²¹

These cases are the ones that reached the stage of indictment and trial. In thousands of others, nobody was arrested, there were no trials, and no convictions. After a history of massive abuses of human rights and conflict for 25 years, hardly anybody has been held responsible. Not surprisingly, many people have lost faith in the law enforcement and judicial systems as an effective mechanism for justice.

B. COMMISSIONS OF INQUIRY

Rather than pursue proper police investigations and prosecutions, the usual response of governments to

accusations of mass atrocities and abuses has been to initiate commissions of inquiry. President Rajapakse is no exception (see below). The precedents for today's Commission of Inquiry are not encouraging, however. During the last three decades, governments have established countless commissions. Almost none have led to successful prosecutions for human rights abuses.

In the Bindunuwewa massacre, for instance, a commission urged criminal proceedings against nine junior police officers but recommended only disciplinary hearings against the two senior police officers, despite strong evidence of their presence at the scene both before and during the attack. Yet even this limited criticism of the senior police officials was ignored by the attorney general, who chose instead to make the senior officials state witnesses against their junior colleagues. In the end, the commission achieved nothing: its report to President Chandrika Kumaratunga was never made public, no one was convicted of the 27 murders, and no disciplinary proceedings have taken place against any police.²²

The best-known presidential commissions of inquiry were the four appointed by President Kumaratunga in the mid- and late-1990s to investigate the tens of thousands of enforced disappearances in the late 1980s. Together they verified 21,215 cases of enforced disappearances, out of a total of 27,526 complaints their mandates authorised them to investigate. Another 16,305 cases reported to the All-Island Commission remain uninvestigated, bringing the total cases reported to 43,831.²³

The commissions uncovered evidence of systematic state-sponsored violence, and their reports remain valuable historical and political documents. Their findings, however, led to few prosecutions and virtually no convictions.²⁴ Even where the commissions uncovered powerful evidence of crimes committed by identifiable

²² A copy of the report is available, however, at www.brynmawr.edu/peacestudies/faculty/Keenan/srilanka/Documents.html.

²³ For a useful overview of disappearances and impunity, see Wasana Punyasena, "The Façade of Accountability: Disappearances in Sri Lanka", Boston College, *Third World Law Review*, vol. 23, no. 1, 2003, p. 115, at www.ictj.org/static/Asia/SriLanka/facade.eng.pdf.

²⁴ According to one report, the attorney general had by the end of 2003 instituted criminal proceedings against 597 members of the security forces based on evidence from the disappearance commissions. 262 suspects were said to have been indicted in the High Court. Few cases have proceeded to trial, however, and at most there have been a handful of convictions of junior officers. See Kishali Pinto Jayawardena, "A Critical Look at the Relevant Legal Context Pertaining to Sri Lanka's Commission of Inquiry to Investigate Grave Human Rights Violations", advisory opinion for Action Contre La Faim, 1 February 2007.

¹⁹ This led to a series of investigations and legal cases involving hundreds of disappearances and extrajudicial killings that took place on the Jaffna peninsula in 1996. None, however, have so far resulted in successful prosecutions.

²⁰ "No instructions on Chemmani" – CID", BBC Sinhala News, 4 January 2006.

²¹ Crisis Group interview, Colombo, May 2007.

state representatives, prosecutions rarely followed. The detention and subsequent disappearance of 158 Tamil refugees in the eastern town of Vantharamulai in September 1990 was particularly well-documented, first by the government's own Human Rights Task Force and later by the Northeast Disappearance Commission. The victims were taken away by the army, after being singled out by hooded informants, and never seen again. Multiple eyewitnesses identified a number of middle- and senior-level commanders involved but no legal action was ever taken, despite recommendations by the commission to do so.

The commissions' recommendations for legal and institutional reforms have also largely been ignored by successive governments. The commissions argued that the Emergency Regulations, by removing basic legal safeguards, laid the ground for mass disappearances. The preventative measures recommended in the reports remain relevant, and their full implementation would do much to combat ongoing abuses.²⁵

C. THE CEASEFIRE AND HUMAN RIGHTS

This history of abuse and impunity should have been addressed during the relative peace of the 2002-2006 ceasefire agreement (CFA). However, from the start of the process, the LTTE exploited the CFA's terms, sending their cadres into government areas in the north and east to establish "political offices" and impose their rule on the local population. This ranged from a sophisticated system of unofficial taxes and a general prohibition on open political discussion and dissent, to the forcible recruitment of thousands of underage fighters and the assassination of hundreds of their Tamil political rivals. The LTTE also tightened its grip on areas it already controlled.

There seemed little inclination on the part of the government, then led by Prime Minister Ranil Wickremasinghe of the United National Party (UNP), to permit human rights concerns to complicate the peace talks. As a result, law enforcement and judicial institutions that might have responded to the LTTE's violations were largely inactive, and no new mechanisms were developed in their place.

After 2002 the policing system in government-held areas of the north and east in effect collapsed. LTTE crimes were rarely investigated, and the police often refused to accept complaints from victims. This was in part due to fear of

LTTE reactions and in part because the government did not want any LTTE members to be arrested or prosecuted, for fear of complicating negotiations.

The CFA gave the Sri Lanka Monitoring Mission (SLMM), mandated to monitor and report on ceasefire violations from both sides, no enforcement powers, and its personnel were not trained or prepared to be human rights monitors. Initially, the SLMM was reluctant to highlight or pursue investigations into political assassinations and intimidation of civilians, despite the CFA's clear prohibition of these activities. By the time this began to change, it was too late. The SLMM had already let itself look weak and, to many Sri Lankans, biased in favour of the LTTE.

The United Nations Children's Fund (UNICEF) also found itself unprepared to respond effectively to the LTTE's large-scale recruitment of underage fighters. It did broker a deal in which the LTTE agreed to cease recruitment of children and to release those in its custody, but the deal collapsed when the LTTE failed to follow through on its promises. UNICEF has done useful work receiving complaints, assisting individual families and reporting on recruitment trends but its reputation as a neutral party was badly damaged by continued work with the LTTE, even after it had repeatedly gone back on its pledges. It was also widely criticised for the decision to fund the LTTE-linked Tamil Rehabilitation Organisation (TRO) to manage the transitional shelters through which released child soldiers would be processed.

The appointment of a human rights adviser, Ian Martin, to the two negotiating parties was greeted with some hope by those who wished to see human rights given more prominence in the peace process. Unfortunately, while Martin was able to develop a draft agreement on human rights for the two parties to sign, it was never approved.

During the CFA, the ability of independent civil society groups to lobby for human rights protections and to monitor violations systematically was made more difficult by the lack of donor support. Many human rights groups either lost their funding during the peace process or were pushed to shift their focus to peacebuilding and reconciliation. Repeated calls from civil society organisations for a human rights agreement and a formal human rights monitoring mission were ignored by the government, the LTTE and the international community.

Other than a few civil society initiatives, there were no attempts to acknowledge, much less to hold anyone to account for, the decades of human rights violations that had come from many different sides: the LTTE, other Tamil militant groups, government security forces, the JVP and various vigilante groups. Equally important, the

²⁵ See the "Final Report of the All-Island Presidential Commission of Inquiry into Disappearances", 2001, at www.dissappearances.org/mainfile.php/frep_sl_ai/.

government and donors showed no interest in beginning security sector or legal reform so as to prevent the re-emergence of patterns of impunity. This was a wasted opportunity, which is now having a major impact.

The failure to respond to the LTTE's widespread human rights and ceasefire violations contributed to the violence that emerged in 2005-2006. The military and police, as well as the more hawkish elements among Sinhalese political parties, had watched the LTTE act with impunity while they were forced to maintain considerable restraint. Yet, the security forces had been in no way reformed. The old systems of abuse and impunity were still in place, so when the political restraints were finally removed, the response was ferocious, born in part of resentment and a sense of having been victimised by the LTTE and ill-used by the international community.

The relative lack of attention to LTTE abuses during the CFA period has also fuelled unfortunate rhetoric among supporters of the present administration. When criticised by the international community for its failings on human rights, the government argues that international rights groups and others failed to condemn LTTE atrocities in the past.²⁶ This is not only irrelevant and blurs the distinction between an elected government and an insurgent group, but it is also largely untrue: a number of strong reports by groups such as Amnesty International and Human Rights Watch have detailed LTTE abuses.²⁷ But the perception created by downplaying LTTE crimes during the CFA period undoubtedly created a feeling of bias that has fuelled such allegations.

IV. HUMAN RIGHTS AND THE NEW WAR

"Of course people will die, what can we do about it? Are you asking us to spare them? They are traitors. If these traitors to the nation can't be dealt with through existing laws, we know how to do it. If we can't suppress them with the law we need to use any other ways and means". Champika Ranawake, minister of the environment²⁸

The present crisis in human rights is complex, but goes much deeper than being merely the unfortunate fallout from the conflict and involves deliberate policy decisions by the political and military leadership to use extrajudicial methods to fight a counter-insurgency campaign. While the broad picture is increasingly clear, there is inadequate reporting, few reliable statistics and widespread refusal by victims and witnesses to speak openly about their experiences, for fear of repercussions.

A. CIVILIANS AND WARFARE

At the most basic, civilians are caught up in the conflict between government forces and the LTTE, killed by both sides' artillery or (primarily government) aerial bombardment. With the weaponry being more powerful than in the past, civilians can no longer find safe places near their homes in which to sit out the fighting. Both sides have been accused of shelling schools and hospitals, though each blames the other. Both the LTTE and government forces have repeatedly fired from within civilian areas, putting civilians at risk and violating international law.

According to the SLMM, more than 4,000 people were killed between November 2005 and February 2007.²⁹ Of these, the SLMM estimates that some 1,500 were civilians. Since the end of February, an additional 650 have been killed, of whom more than 290 were civilians. There are no accurate figures for how many were killed as a result of military clashes and how many were victims of politically motivated killings.³⁰

²⁶ For example, see "Major Attacks on Civilians by the LTTE", Secretariat for Co-ordinating the Peace Process (SCOPP), 15 May 2007, at www.peaceinsrilanka.org.

²⁷ See for instance, "Funding the 'final war': LTTE intimidation and extortion in the Tamil diaspora", Human Rights Watch, March 2006, and "Living in fear: Child soldiers and the Tamil Tigers", Human Rights Watch, November 2004, at www.hrw.org. See also "Sri Lanka: Rights groups say LTTE-linked killings continue with impunity", Amnesty International, 7 August 2003, and "Sri Lanka: Tamil Tigers beating up families to recruit child soldiers", Amnesty International, 7 July 2004, at www.amnesty.org.

²⁸ "Thраста virodhaye salakuna kumakda" ["What is the sign of anti-terrorism?"], *Ravaya*, 18 February 2007; see also "Disturbing statement by Government Minister prompts urgent call for clarification", Free Media Movement, 19 February 2007, at www.freemediasrilanka.org/index.php?action=con_news_full&id=468§ion=news.

²⁹ "CFA 5 Years", a statement by the Sri Lanka Monitoring Mission (SLMM), 22 February, 2007, at www.slmm.lk/press_releases/CFA%205%20years.pdf.

³⁰ Shamindra Fernando, "SLMM backs down on breakdown," *The Island*, 12 March 2007.

The deaths and injuries from conventional combat have been accompanied by massive displacement. Some 290,000 people have left their homes due to renewed violence and insecurity since April 2006; most of the more than 100,000 displaced in February and March 2007 were due to the government's renewed offensive in the Eastern province.³¹ Some have lost homes repeatedly, forced from place to place as the military systematically pushes the LTTE from its Eastern areas of control.

Once the IDPs reach the camps run by the government and NGOs, their ordeal is not always over. Government forces have often worked closely with the Tamil paramilitary group, the Tamil Makkal Viduthalai Pulikal (TMVP), led by V. Muralitharan (better known by his alias "Karuna"), whose forces have been used to screen incoming refugees and identify those suspected of being escaping LTTE cadres. The TMVP has been given complete access to some government-controlled camps. There have been numerous cases of children abducted by both Karuna's forces and the LTTE from IDP camps in their respective areas of control.³² Finally, there are several reports of internally displaced people IDPs being forced to return to their homes by government agencies and security forces, in violation of the UN Guiding Principles on Internal Displacement, to which the government has pledged its adherence.³³

The government claims to have improved its resettlement programs, and UNHCR representatives are reported to be more supportive of resettlement plans in May 2007 than those earlier in the year.³⁴ Nevertheless, returnees often

face enormous difficulties, with infrastructure disabled, livelihoods destroyed and houses looted.

B. MASSACRES

In addition to daily political killings, a large number of massacres of civilians and reprisal killings have been committed by both the LTTE and the government. The LTTE is widely assumed to be responsible for bus bombings that have killed scores of civilians, the most devastating being the June 2006 attack in the north central town of Kebithigollewa, in which 68 Sinhalese civilians died. Further attacks blamed on the LTTE killed fifteen in Ampara and seven in Mannar. The LTTE has also been blamed for massacres of Sinhalese civilians in the north-eastern border region that separates LTTE- and government-controlled areas. The murder of thirteen mostly Sinhalese labourers in the north-central village of Omadiyamadu in May 2006, for example, is generally attributed to the LTTE.

There is also ample evidence to implicate security forces in high-profile attacks on Tamil civilians in the north and east, sometimes in apparent retaliation for LTTE attacks.³⁵ All these cases are disputed by the government.

- On 2 January 2006 five Tamil students were murdered in a high-security zone in Trincomalee. First wounded by a grenade thrown from an auto-rickshaw that escaped into the nearby army headquarters, the students were shot dead fifteen minutes later, within an area that was surrounded on all sides by police and navy forces.³⁶
- Eleven Tamil civilians were killed in the town of Allaipiddy in the northern island of Kayts on 13 May 2006. The area is controlled by the navy and

³¹ "Complex Emergencies – Sri Lanka", UN Office for the Coordination of Humanitarian Affairs, at ochaonline.un.org/webpage.asp?ParentID=12977&MenuID=12991&Page=2437. These numbers are in addition to more than 200,000 still displaced by the 2004 tsunami and more than 300,000 displaced from previous rounds of war. Beginning in mid-May, the government and UNHCR began resettling many of those displaced in Batticaloa District. See "Thousands of displaced return to Batticaloa West", IRIN, 24 May 2007, at www.reliefweb.int/rw/RWB.NSF/db900SID/ACIO-73HBYS?OpenDocument&rc=3&cc=lka.

³² "Sri Lanka: Karuna Group and LTTE continue abducting and recruiting children", Human Rights Watch, 29 March 2007, at hrw.org/english/docs/2007/03/28/slanka15584txt.htm.

³³ "Sri Lanka: IDPs in transit centre face uncertain future", IRIN, 18 April 2007; "Sri Lanka: Civilians who fled fighting are forced to return", Human Rights Watch, 16 March 2007; "Fact-Finding Visit to Batticaloa: April 10/11 2007", Centre for Policy Alternatives et al., April 2007.

³⁴ "30,000 returnees in Sri Lanka doing well despite lack of preparation – UN", UN News, 29 May 2007. For a more critical assessment of the government's return policy, see "Batticaloa field mission May 2007", Centre for Policy Alternatives et al., 4 June 2007, at [www.reliefweb.int/rw/RWB.NSF/db900SID/EVOD-73VHFC/\\$File/Full_Report.pdf](http://www.reliefweb.int/rw/RWB.NSF/db900SID/EVOD-73VHFC/$File/Full_Report.pdf).

³⁵ All these cases, except the shooting in Vavuniya, are to be investigated by the Presidential Commission of Inquiry headed by Justice Udalgama. In addition to politically-motivated massacres of civilians, the LTTE and the Sri Lankan military are responsible for two other large attacks. In August 2006, the air force bombed the LTTE-controlled village of Sencholai and killed 51 young people who been attending an LTTE-sponsored training program. The nature of the training and of the centre where it took place remain controversial, with the government claiming it was a military facility and the LTTE it was an orphanage/school. The LTTE is almost certainly responsible for the October 2006 bus bombing near the north-central town of Habarana, in which 98 sailors returning home on leave were killed.

³⁶ "The Five Students Case in Trincomalee", UTHR(J), Special Report no. 24, 19 April 2007. See also "Summary of issues arising from the killing of five (5) youths in Trincomalee on or about 2nd January 2006", Report of a Fact Finding Mission by Law and Society Trust and Rights Now, May 2007.

has long been under the influence of the Eelam People's Democratic Party (EPDP), a pro-government Tamil political party that operates a militant wing. Strong evidence, including eyewitness statements, point to navy personnel as the most likely suspects, possibly with support from elements aligned with the EPDP.³⁷

- ❑ Six Tamil civilians were killed in the north-western town of Pesalai on 17 June 2006, in the immediate aftermath of a battle between the navy and the Sea Tigers. Eyewitnesses report that navy personnel shot dead five Tamil fishermen and then fired on the crowd of civilians that had gathered in the local Catholic church. A grenade thrown into the church killed one and injured many others.³⁸
- ❑ Seventeen Tamil and Muslim workers for the humanitarian organisation Action Contre La Faim (ACF) were killed in Mutur in early August 2006. The execution-style murders took place as the military was in the process of reclaiming the town from the LTTE after a two-day battle. The government has blamed the LTTE but there is significant circumstantial evidence to implicate security forces. The SLMM ruled that it was a government violation of the CFA.³⁹
- ❑ Ten Muslim labourers were hacked to death near the south-eastern town of Pottuvil on 17 September 2006. The government immediately blamed the LTTE for the killings but locals blamed the Special Task Force (STF), with whom the community had recently experienced serious tension. Subsequent reports suggested the government was engaged in a cover-up.⁴⁰
- ❑ On 18 November 2006 soldiers were reported to have fired indiscriminately on agriculture students, in the immediate aftermath of an LTTE claymore mine attack outside the northern town of Vavuniya.

³⁷ "From Welikade to Mutur and Pottuvil", UTHR(J), Special Report no. 25, 31 May 2007, and "The Choice Between Anarchy and International Law with Monitoring", UTHR(J), Special Report no. 23, 7 November 2006; see also D.B.S. Jeyaraj, "Navy-EPDP kill thirteen civilians in Allaipiddy-Velanai", 16 May 2006, at www.transcurrents.com.

³⁸ "Fact Finding Mission to Pesalai", Centre for Policy Alternatives and INFORM, 28 June 2006.

³⁹ "The Choice Between Anarchy and International Law with Monitoring", *op. cit.*; "From Welikade to Mutur and Pottuvil", *op. cit.*

⁴⁰ "The Choice Between Anarchy and International Law with Monitoring", *op. cit.*; also "Summary of issues arising from the killing of ten Muslim villagers at Radella in Pottuvil Police Area on 17 September 2006", Report of a Fact Finding Mission by Law and Society Trust, INFORM, and Rights Now, May 2007.

According to the SLMM, five students were killed and at least ten others injured. Eyewitnesses reported that all were shot from close range.⁴¹

Political killings have also taken the form of communal clashes. In mid-April 2006, in response to an LTTE bomb in the Trincomalee market that killed about a dozen people from all three ethnic communities, Sinhalese mobs, with the apparent support of at least some in the security forces, attacked Tamil shops, houses and civilians. The "riots" triggered reprisal killings of Sinhalese, and then Tamils, in the neighbouring towns, which eventually sparked the exodus of thousands of Tamils from the Trincomalee area, many of whom emigrated to southern India.

C. EXTRAJUDICIAL KILLINGS

The LTTE has from its inception used assassination of its Tamil opponents as a way of suppressing rival nationalist movements. It also has a long history of assassinations and attempted assassinations against political and military leaders. On 12 August 2005 Foreign Minister Lakshman Kadirgamar was killed at his home by a sniper. Exactly a year later, the deputy secretary general of the government's Peace Secretariat, Kethesh Loganathan, was shot dead. He was a former member of a rival Tamil political party and a well-known human rights activist and critic of the LTTE, which was widely suspected in both killings. In December 2006 the LTTE tried to kill Gotabhaya Rajapakse, the defence secretary, with a suicide attack. It has continued a string of murders in the north and east, primarily targeting those it accuses of collaboration with the military. One alleged victim was a Hindu priest, killed in Vakaraai after he was apparently forced to perform a traditional blessing for President Rajapakse during a visit.⁴²

The response of the military to LTTE terror has been to resort to its own dirty war. As there has been no adequate investigation into any cases in which government forces and their proxies are implicated, it is hard to be definitive about the identity of the culprits. But it is clear that the problem goes beyond a few undisciplined soldiers or out-of-control paramilitaries and is part of a policy devised and conducted by senior military officials.

As noted, on 25 December 2005 Tamil National Alliance (TNA) parliamentarian Joseph Pararajasingham was

⁴¹ "Sri Lankan troops 'open fire on students'", Reuters, 19 November 2006, at www.abc.net.au/news/newsitems/200611/s1792266.htm.

⁴² D.B.S. Jeyaraj, "Pathetic plight of eastern Pillaiyaar Temple priest", 16 February 2007, at www.transcurrents.com/tamiliana/archives/date/2007/02/.

murdered in Batticaloa. On 10 November 2006 another TNA member, Nadarajah Raviraj, was murdered in broad daylight in Colombo. Most suspicions point to pro-government paramilitary groups in both cases.⁴³

Beyond these high-profile murders, hundreds of alleged LTTE sympathisers or supporters have been killed, particularly in Jaffna, Vavuniya, and Batticaloa districts. Intelligence officers are reported to have carefully studied video and photographic material from the ceasefire period, when the LTTE was able to operate openly, and systematically targeted persons in attendance at parades or demonstrations,⁴⁴ even though many people were forced to attend these kind of events.⁴⁵ Many with no connections to the LTTE have been killed.

In the Eastern province, the military has primarily used the TMVP paramilitaries to carry out its dirty work. Killings have also targeted LTTE sympathisers, particularly those termed “messengers”, who take food and supplies to the rebels, and those who may report on military movements or other strategic information. But in many cases, this campaign has become repression against anybody who goes against the TMVP, which is carrying on the LTTE tradition of eliminating those who protest its excesses.

In Jaffna, where the TMVP is not active, the killings seem to be the work of what one analyst calls “hybrid groups”, which comprise military intelligence cadres with Tamil militants, some of whom may be from the EPDP.⁴⁶ Other sources suggest these are former, but no longer active, members of the EPDP now working closely with the military.⁴⁷ Either way, there is little doubt the security services are actively involved in these extra-judicial killings.

Shadowy gunmen from these groups seem able to travel around the city after the night curfew, unfazed by the ubiquitous roadblocks and patrols. By September 2006, the human rights group University Teachers for Human Rights (UTHR) was reporting between three and eight killings per day in Jaffna. “Killer units of the state go about in white vans and with masks on motorcycles and are by now unconcerned about hiding their affiliations”,

the activists claimed.⁴⁸ The army commander asserts: “We have done a lot of operations, and a lot of terrorists have been eliminated in Jaffna”.⁴⁹

There seemed to be a lull in the killings in May 2007, raising hopes that international pressure had brought some change in tactics. But in early June there were further reports of unexplained murders in Jaffna. Sothirajah Nishanthan, Sothirajah Sutharsan, and Chandrakanthan Chandru were all shot dead on 4 June. The previous day Subramaniam Santheepan, a postmaster and father of two, was killed by gunmen on a motorbike.⁵⁰

D. THE DISAPPEARED

While many people were simply killed, primarily by shooting, the practice of abduction and enforced disappearance has perhaps been more common.⁵¹ The number of “disappears” over the last eighteen months is hard to determine with certainty. Various reliable sources suggest there have been more than 1,500 complaints of enforced disappearance in 2006 and 2007, with at least 1,000 still unaccounted for, meaning they have not returned, been discovered in detention or that their bodies have not been found.⁵² These figures do not include children abducted by the LTTE or the TMVP. This is backed up by partial statistics gathered by the Jaffna and Batticaloa offices of the Human Rights Commission, combined with reports from the non-governmental Civil Monitoring Committee, which suggest that more than 1,000 people were verified as abducted or

⁴³ “Before Time Obscures the Mouldering Heap – I”, UTHR(J), Supplement to Special Report no. 23, 13 December 2006.

⁴⁴ D.B.S. Jeyaraj, “An Overview of the Enforced Disappearances Phenomenon”, 13 April 2007, at www.transcurrents.com.

⁴⁵ “Disillusionment with the State and the Perils of Unity in Grievance”, UTHR(J), Bulletin no. 24, 13 December 2007.

⁴⁶ “The Choice between Anarchy and International Law with Monitoring”, op. cit.

⁴⁷ Crisis Group interview, diplomat, Colombo, May 2007.

⁴⁸ “The Wider Implications of the Human Rights and Humanitarian Crisis in Jaffna”, UTHR(J), Information Bulletin no. 41, 14 September 2006.

⁴⁹ “We will continue fight against terrorism”, *Daily News*, 4 June 2007, p. 9.

⁵⁰ “Postmaster shot dead in Chaavakachcheeri”, *Tamilnet*, 4 June 2007; “3 civilians killed in Jaffna”, *TamilNet*, 4 June 2007.

⁵¹ Under international law, an enforced or involuntary disappearance occurs whenever a person is arrested, detained, abducted, or otherwise deprived of their liberty, followed by a refusal to disclose the fate or whereabouts of the person or to acknowledge the deprivation, with the effect of placing the person outside the protection of the law. See “General Comment on the Definition of Enforced Disappearance”, UN Working Group on Enforced or Involuntary Disappearances, March 2007. Under most legal definitions, the perpetrator must be a state or a group working with the acquiescence of the state. In Sri Lanka, this would apply to Karuna and other Tamil paramilitaries but not the LTTE. Disappearances committed by the LTTE would be covered under the Rome Statute that established the International Criminal Court, in the unlikely event that Sri Lanka ratifies that statute or the UN Security Council refers the issue to the ICC.

⁵² Crisis Group interview, Western diplomats, Colombo, May 2007.

disappeared from December 2005 through March 2007.⁵³ The largest number has been in government-controlled Jaffna, where the Human Rights Commission received complaints of 731 disappearances between December 2005 and February 2007, of which 512 were still unaccounted for in March.⁵⁴ In March and April of 2007 alone, 245 disappearances and abductions were reported to the Human Rights Commission from across the island – an average of four per day.⁵⁵

Given the hidden and violent nature of involuntary disappearances, it is difficult to gather a full picture of the motives behind specific cases. Some turn out in fact to be extrajudicial killings done in secret, perhaps after the victim was interrogated; others are meant to allow the victim to be interrogated more freely and with deniability, without risk to the interrogator's identity. Often the abduction and detention are intended to place the victim in limbo and produce a particular form of terror in the victim, the family and the community at large.

Like those being killed, most of those targeted have been young Tamils suspected of working with the LTTE, although as usual many people with no connection to militant politics have also been "disappeared". In Jaffna, the military, sometimes with assistance from former Tamil militants, is the prime suspect. In the Eastern province the TMVP is suspected in the bulk of abductions, either with the active support or passive complicity of the military. Despite vehement denials by government and military officials, there is eyewitness evidence that at least some of those who later disappeared were initially abducted or arrested by the police or military.⁵⁶

There have also been more than 70 reported abductions and disappearances in the Colombo area.⁵⁷ There was some hope that this wave was starting to subside in May 2007 but on 1 June two Tamil staff from the Sri Lankan Red Cross were abducted at Fort Railway station by men claiming to be police. Their bodies were found one day later in Ratnapura district, a few hours south of Colombo.

While most of the current wave of disappearances are carried out by pro-government forces, the LTTE, which has a long history of "disappearing" its political opponents – often abducting and detaining and then killing them in its secret prisons – is clearly still in the business.

E. ABDUCTIONS FOR RANSOM

Since mid-2006, there has been a wave of abductions for ransom in Colombo, generally targeting Tamil but lately also Muslim business owners. Few victims have anything to do with politics; in most cases the abductions seem to have been designed to extract money to fund Tamil militant groups, primarily the TMVP. Most remain missing; some have been found dead; others were released after paying large ransoms. Given that many of the abductions are done in the day amid very tight security, the assumption is that most are committed with the knowledge or connivance of security forces. According to a journalist:

The actual abductions are generally done by the Karuna or EPDP group or in a few cases by both. There is close collaboration by sections of the police and armed forces and intelligence personnel. Some top "security" guy is usually at hand to help out if something goes wrong.⁵⁸

There has long been an extensive web of LTTE extortion among Tamils in parts of Colombo. Some businessmen have been forced to pay illegal taxes, as have those in the north and east. There has never been a serious government response to this mass extortion, and there is little recourse for any targeted businessman. The pro-government TMVP has tried to take over many LTTE tax networks, forcing businessmen to pay both militant groups. It also may have targeted many who had before managed to avoid these taxes.

The reliance on paramilitaries to fight the government's war, while refusing to pay them for it, has blurred the lines between political and criminal violence. What may have started out as an attempt to establish an extra layer of militant taxation or undermine LTTE taxation networks has descended into increasing lawlessness and insecurity for all minority businessmen. Any rich entrepreneur from the Tamil or Muslim communities is now a potential target. In May 2007 there were reports of more than a dozen Muslim businessmen abducted for ransom. Some

⁵³ "Human Rights Council: Act to End Serious Abuses in Sri Lanka", Human Rights Watch, 13 March 2007.

⁵⁴ Dharisha Bastians and Gihan Indraguptha, "Anarchy unlimited", *The Nation*, 11 March 2007.

⁵⁵ As reported in "Program on interventions by PAFFREL on abductions, disappearances and killings, etc.", People's Action for Free and Fair Elections, June 2007.

⁵⁶ "Letter to the Human Rights Council", Human Rights Watch, 13 March 2007. Human Rights Watch recently interviewed more than one dozen families of persons missing from Colombo and other parts of the country who were last seen being taken away by the military or police.

⁵⁷ Crisis Group interview, Mano Ganeshan, convenor, Civil Monitoring Committee, Colombo, May 2007.

⁵⁸ Jeyaraj, "An Overview of the Enforced Disappearances Phenomenon", op. cit.

were reportedly released after paying 50 million SLR (\$500,000).⁵⁹

Although this may indicate a general descent into criminality from earlier, more politically motivated abductions, there is widespread concern in minority communities that the abductions are part of a broader plan by Sinhalese extremists to drive Tamils and Muslims out of key economic sectors. A Tamil lawyer claims that "there is a more subtle targeting of Tamil business now than in 1983. Now they are snuffing out the economic lifeline. What they failed to do in the 1983 riots, the JHU and the JVP together, with the help of security forces, are succeeding in today."⁶⁰

Certainly many Tamil businessmen have left the country, deciding it is too risky to remain in Colombo. There is no protection in these cases: the police have not followed up any leads provided to them.

F. FORCED RECRUITMENT BY TAMIL MILITANTS

Some of those reported as missing or abducted to the police and the Human Rights Commission are children who have been forcibly recruited by either the LTTE or the TMVP. While these abductions are sometimes reported in the press as having been committed by "unknown armed groups", in most cases the families know exactly which group took them and why. Often they know exactly in which camp they are being held. According to UNICEF, there have been 6,241 reported cases of child abduction from the start of the ceasefire in 2002 to January 2007 – 6,006 by the LTTE and 235 by the TMVP. Of these, 1,710 children are still being held by the LTTE and 169 by the TMVP.⁶¹

The LTTE has recruited underage fighters for many years. The practice continued on a large scale during the peace process, despite national and international outcry. An action plan negotiated with the government and the LTTE by UNICEF was designed to stop further child recruitment and release those already with the LTTE. It

was a singular failure, as the LTTE consistently failed to abide by its terms.

Allan Rock, the special adviser to the UN Special Representative on Children and Armed Conflict, confirmed in a recent report that the LTTE continues to recruit children, often forcibly, and has failed to abide by its international obligations.⁶² The UN Secretary-General recommended to the Security Council's Working Group on Children and Armed Conflict that targeted sanctions be imposed on the LTTE in light of its refusal to cease recruitment and use of children, to release children in its custody or engage in transparent procedures for release and verification.⁶³

Since June 2006, the LTTE has reportedly been forcibly recruiting fighters, with as many as 10,000 new recruits taken on in six months. Most of these are reportedly over the age of seventeen but few seem to have joined willingly. While the focus has always been on LTTE child recruitment, much less attention is paid to the plight of unwilling adults. Some people tried to get around the recruitment drive by marrying – previously the LTTE had not recruited married men. In response, the LTTE simply announced that all marriages after August 2006 were null and void. Where people have gone into hiding to avoid recruitment, the LTTE has sometimes taken other members of the family.⁶⁴ Among those forcibly recruited have been staff of humanitarian agencies and international NGOs.⁶⁵ Two UN employees were reportedly detained by the LTTE in April 2007 after they helped some people flee from rebel-controlled areas.⁶⁶

Rock's report confirmed that the TMVP also continues to recruit and use children. Karuna broke away from the LTTE in March 2004 with an estimated 5,000-6,000

⁵⁹ "Muslim businessman abducted", *The Nation*, 27 May 2007.

⁶⁰ Crisis Group interview, Colombo, May 2007.

⁶¹ The actual number of cases is likely to be much higher, as UNICEF estimates that only about a third of the cases of forced recruitment are reported to it or other authorities. Some underage fighters originally recruited by the LTTE were released by Karuna after he was defeated militarily by the LTTE in April 2004. Since then, some have been forced to rejoin the LTTE, some have rejoined Karuna, and many are no longer under eighteen.

⁶² The text of Allan Rock's report to the Secretary-General remains confidential but its findings informed the Secretary-General's December 2006 report to the Security Council's Working Group, in advance of their meeting on 9 February 2007. The Secretary-General's report is at daccess-ods.un.org/TMP/3798466.html.

⁶³ The Security Council's Working Group was set up under the terms of Resolution 1612 (26 July 2005). The Working Group met on 10 May 2007 and issued a strong condemnation of the LTTE but stopped short of recommending the Security Council impose sanctions. It also criticised the Karuna faction's child recruitment. See www.franceonu.org/article.php3?id_article=1464.

⁶⁴ D.B.S. Jeyaraj, "People perturbed as Tigers intensify conscription", 20 February 2007, at transcurrents.com/tamiliana/archives/290.

⁶⁵ Crisis Group interviews, international NGO staff, Colombo, May-June 2007.

⁶⁶ Shamindra Ferdinando, "UN workers in LTTE custody: Lanka urges UN not to shield Tigers", *Island*, 26 April 2007.

fighters, many of them underage. On the verge of defeat at the hands of the main branch of the LTTE in April 2004, Karuna disbanded his troops and sent thousands of underage fighters home. Over the next two years, as he slowly regrouped and began to wage more effective attacks on LTTE forces in the east, he resumed forcibly recruiting children. By the middle of 2006 this was occurring on a large scale.

Rock “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”.⁶⁷ These findings have been confirmed at greater length by other groups.⁶⁸ The government has denied any knowledge of TMVP child recruitment, asked for evidence and suggested Rock is an LTTE sympathiser.⁶⁹ Human rights groups are understandably reluctant to compromise confidential sources but any visitor to the Eastern province in 2006–2007 could see clearly underage boys toting guns on the streets of Batticaloa.

G. ARRESTS AND DETENTIONS UNDER THE EMERGENCY REGULATIONS

The Emergency Regulations are the legal framework for the government's counter-terrorism and counter-insurgency strategy.⁷⁰ Since their re-enactment following the assassination of Foreign Minister Kadirgamar in August 2005, they have been used to detain hundreds, mostly Tamils. Suspects are often arrested in mass “cordon and search” operations in Tamil neighbourhoods and often purely on suspicion. No warrants or evidence of terrorist involvement is required. Many are quickly released once their identity is proven but hundreds have remained in prison for long periods. The Emergency Regulations allow detention without charge for 90 days, following which a suspect can be charged and held without bail indefinitely. Suspects can also be held for up to a year under “preventive detention” orders issued by the defence secretary.

⁶⁷ Statement by Allan Rock, United Nations Special Advisor on Children and Armed Conflict, Colombo, 13 November 2006.

⁶⁸ See “Complicit in Crime: State Collusion in Abductions and Child Recruitment by the Karuna Group”, Human Rights Watch, 24 January 2007.

⁶⁹ “Govt expects credible evidence from Allan Rock – Defence Spokesman” *Daily News*, 23 November 2006, at www.defence.lk/new.asp?fname=20061123_02; and “The allegation of Mr. Alan Rock is baseless and highly biased – Defence Spokesman”, Media Centre for National Security, at www.defence.lk/new.asp?fname=20061116_07.

⁷⁰ Promulgated by the president under Public Security Ordinance no. 25 (1947), the Emergency Regulations must be renewed by parliament each month in order to remain in force.

Under regular law, a suspect must be produced before a magistrate within 24 hours but a suspect detained under the Emergency Regulations can be kept incommunicado for up to 30 days. Places of detention are at the discretion of relatively low-level police officers and do not have to be made public. The normal laws relating to inquests and disposal of dead bodies are also inapplicable. Not only police officers and soldiers, but also other “public officers” and those specifically authorised by the president are allowed to make arrests under the Emergency Regulations. The military have also been given police powers, a move that Tamil political leaders warn could lead to even more widespread abuses.⁷¹

All this poses grave risks that arrest under the Emergency Regulations can be the first step to being “disappeared”, as happened in thousands of cases in the 1980s and early 1990s.⁷² Indeed, arrests under the Emergency Regulations are sometimes hard to distinguish from enforced disappearances, as when non-uniformed government agents arrest people without announcing under what authority they are acting, the reason for the arrest or where the arrested person is being taken.⁷³

In principle, some safeguards exist against abuse. For some forms of detention under the Emergency Regulations, police officers and members of the security forces are required to issue receipts to family members.⁷⁴ The Human Rights Commission must be informed of all detentions and has legal authority to visit detainees wherever they are held. Recently republished “directives” from the president to the police and security forces require that detentions

⁷¹ Saliya Edirisinghe, “Police power to the armed forces under emergency law: Reflections on recent protests”, *The Island*, 11 May 2007.

⁷² See the Final Report of the “All-Island” Presidential Commission of Inquiry into Disappearances, published in 2001, at www.disappearances.org/mainfile.php/frep_sl_ai/.

⁷³ A recent case was the abduction-like arrest in February 2007 of several Sinhalese trade union activists accused of receiving military training from the LTTE and involvement in terrorist activities. These so-called “Sinhala LTTE” were first reported abducted by armed men in the middle of the night. After initially denying any knowledge, officials announced two days later that the men were in their custody and had confessed to involvement with the LTTE. All told, 24 suspects have been arrested as part of this case, but by mid-April, only seven had been produced in court.

⁷⁴ If they fail to do so, and fail to explain in writing why they were unable, they are liable to a fine and imprisonment, though there is no available record of anyone ever being charged with this offence. The Emergency Regulations impose no obligation to issue receipts in the case of preventive detentions or when detentions are carried out by those authorised directly by the president to arrest and detain. See Saliya Edirisinghe, “Emergency Rule 2005”, in *Sri Lanka: State of Human Rights 2006*, Law and Society Trust (Colombo, 2007).

under the Emergency Regulations follow certain safeguards and reaffirm the powers of the Human Rights Commission. These directives, however, have no independent legal force and carry no penalties for non-compliance, and there continue to be numerous reports of arrests and detentions that have not followed the stated procedures.⁷⁵

H. ATTACKS ON THE MEDIA

The climate for critical journalism has declined dramatically since early 2006.⁷⁶ In May 2007 U.S. Assistant Secretary of State Richard Boucher expressed concern over the deterioration in press freedom: "We've seen reports of intimidation, reports of government power being used on newspapers and journalists...we've seen killings and violent acts committed against newspapers and journalists".⁷⁷

Journalists, editors, and publishers are now regular targets of intimidation and violent attacks by various groups. Since January 2006 at least seven have been murdered. Numerous other journalists have been abducted, physically attacked, threatened or forced into exile.⁷⁸ Most seem to be targeted because they are seen as actively supporting the LTTE,⁷⁹ have criticised the government too strongly or revealed information the government did not like,⁸⁰ or are linked to opponents of the government.⁸¹ No one has been arrested for any of the violent attacks, with the

exception of the murder of the pro-LTTE journalist Dharmaratnam Sivaram in April 2005.⁸²

The LTTE has murdered numerous journalists in the past and forced critical Tamil newspapers to close, and it continues to be dangerous for Tamil journalists to speak out against the movement. The TMVP has prevented distribution in the Batticaloa area of Tamil newspapers critical of its activities and has allegedly threatened critical journalists.⁸³

In April 2007 Defence Secretary Gotabhaya Rajapakse is alleged to have threatened the editor of the independent newspaper *The Daily Mirror* after it published articles seen as critical of TMVP activities. Rajapakse is reported to have said the stories had angered the Karuna faction and could provoke a violent response, in which case the editor should not expect any security from the government.⁸⁴

The Emergency Regulations have been used to detain journalists and newspaper operators. On 23 November 2006, a Tamil journalist with *Mawbima* was arrested and detained under them without charge for four months until released on order of the attorney general as the Supreme Court was entertaining her civil suit claiming violation of her constitutional rights.⁸⁵

I. POLITICALLY MOTIVATED ARRESTS/HARASSMENT

On 9 February 2007 Foreign Minister Mangala Samaraweera and his colleague Sripathi Sooriyarachchi were dismissed by President Rajapakse. Both men subsequently accused the political leadership of corruption, human rights abuses and nepotism. Sooriyarachchi claimed to have knowledge of a secret deal between the government and the LTTE to allow the president to win the November 2005 election.

In response, the presidential administration conducted a political witch hunt against Samaraweera's business and political network. On 26 February, the financial director of the Sinhala language weekly *Mawbima*, Dushantha Basnayake, was arrested by the Terrorism Investigation

⁷⁵ Crisis Group interviews, human rights advocates, Colombo, May 2007. The presidential directives can be found at www.peaceinsrilanka.com/peace2005/Insidepage/PressRelease/GOSLreleases/MediaRel050706.asp.

⁷⁶ In the 2006 Worldwide Press Freedom Index, Sri Lanka ranked 141st, between Zimbabwe at 140 and the Democratic Republic of Congo at 142, www.rsf.org/article.php3?id_article=19388.

⁷⁷ "Remarks by U.S. Assistant Secretary of State for South and Central Asian Affairs Richard Boucher at the Press Conference in Colombo", 10 May 2007, at colombo.usembassy.gov/bouchermay07.html.

⁷⁸ "The war on the media", *The Sunday Leader*, 22 April 2007.

⁷⁹ For example, the killing of two in an armed attack on the offices of the Uthayan newspaper in Jaffna, in May 2006, carried out in broad daylight in a government controlled area, "Uthayan attack condemned", www.bbc.co.uk/sinhala/news/story/2006/05/060503_cpj_uthayan.shtml.

⁸⁰ The murder of Sinhala journalist Sampath Lakmal de Silva seems likely to have been connected to his writings on sensitive military and criminal topics, Dharisha Bastians and Santhush Fernando, "Messenger killing: shrouded in mystery", *The Nation*, 9 July 2006.

⁸¹ This seems clearly to be the case with the government's harassment of those associated with the *Mawbima* newspaper.

⁸² "Sivaram murder trial before Sinhala speaking Jury", *Tamilnet*, 16 January 2007. The accused is reportedly a member of the People's Liberation Organisation of Tamil Eelam (PLOTE), a small anti-LTTE paramilitary group.

⁸³ Crisis Group interviews, Batticaloa, Ampara districts, March-April 2007.

⁸⁴ "Sri Lanka's Defence Secretary threatens editor", Free Media Movement, press release, 17 April 2007. The defence secretary denied that he had made any threat.

⁸⁵ Amantha Perera, "Female journalist's imprisonment shows signs of repression in Lanka", *Dawn*, 29 March 2007.

Division (TID) of the police. The Emergency Regulations were used to freeze the paper's bank accounts, forcing it and its English language sister paper to close on 28 March.⁸⁶ The paper is owned by Tiran Alles, a businessman and political ally of Samaraweera.

Sooriarachchi was then arrested on politically motivated charges and remanded to prison. On 30 May, after unsuccessful negotiations with Samaraweera to return to the cabinet, Tiran Alles was arrested by the TID on charges of financing terrorism.⁸⁷

This repression of political opponents fits into a pattern of growing authoritarianism. Opposition parliamentarians have reported death threats. The killings of two TNA parliamentarians has had a chilling effect on Tamil members, most of whom are now unable to visit their constituencies for security reasons. Human rights and peace activists have also received threats.⁸⁸ The use of abusive language to describe those who opposed the war or are concerned about human rights is now commonplace. An activist group pointed out that "a recent *Daily News* editorial [alleging] that those who raise Sri Lanka's human rights concerns at the UN Human Rights Council are 'traitors' is only mirroring the LTTE's use of the abominable term 'traitor' to characterise those of the dissenting community".⁸⁹

The environment for humanitarian organisations and NGOs has become much more difficult. There have been mob attacks on offices of the former in Colombo and armed attacks on their personnel in the Eastern province. Several international NGOs have been the targets of extortion attempts, apparently by the TMVP. Since April 2006 at least 30 people working for local and international humanitarian NGOs have been killed.⁹⁰

J. FREEDOM OF MOVEMENT

The government faces a serious terrorist threat, and security officials are under considerable political and public pressure to prevent further bombings. Upgraded

security, more vigilant policing and active intelligence work are all understandable responses. However, the government has gone further and expelled from Colombo hundreds of Tamils from the north and east.

In late May 2007, following a claymore attack in southern Colombo, police visited small hotels and guesthouses ("lodges") where short- and long-term visitors stay, and told Tamils they would have to leave immediately. The police told one manager that henceforth Tamils would have to do their business in the capital and depart the same day.⁹¹ The government initially tried to claim the expulsions only applied to visitors with no explanation of their business.⁹² The informal ban appeared to apply equally, however, to up-country Tamils, who have never previously been involved in any violent attacks.⁹³ Some Muslims also were told that they had to restrict their visits.⁹⁴ A lodge resident complained, as he packed, "they are treating us all like terrorists".⁹⁵

On 7 June, police swept through Tamil areas of Colombo, rounded up 376 residents without "proper" identification or "valid reasons" for their stay and sent them on buses north to Vavuniya and east to Trincomalee.⁹⁶ These forced expulsions provoked local protest and international condemnation; human rights activists and opposition members of parliament accused the government of engaging in "ethnic cleansing". Acting quickly in response to a civil suit filed by an advocacy group, the Supreme Court halted the expulsions on 8 June and ordered the government to return the lodge-dwellers to Colombo.

Over the next few days, the majority of those expelled returned to Colombo. The prime minister made an unprecedented public expression of regret and promised there would be no repeat of the expulsions but the damage to the government's reputation among Tamils was already done. Far from improving security, this kind of approach merely fuels antagonism and replenishes LTTE ranks.

⁸⁶ See "SLDF concerned by emerging authoritarianism in Colombo", Sri Lanka Democracy Forum, 1 May 2007.

⁸⁷ "TID arrests Tiran Alles", *Daily News*, 31 May 2007. The government denies any political motivations for the arrests of those associated with *Mawbima*. See "FM clarifies arrests of Basnayake and Parameshwari", *Daily Mirror*, 1 June 2007.

⁸⁸ Crisis Group interviews, a range of human rights defenders, February and March 2007.

⁸⁹ "SLDF Concerned by the Emerging Authoritarianism in Colombo, Attacks on Dissent and the Continuing Humanitarian Crisis in the East", Sri Lanka Democracy Forum, 1 May 2007, at www.lankademocracy.org.

⁹⁰ Statistics compiled and provided by the Consortium of Humanitarian Agencies, Colombo, 7 June 2007.

⁹¹ Crisis Group interview, lodge manager, Pettah, Colombo, June 2007.

⁹² "Concerted efforts to discredit President and Govt. and tarnish Sri Lanka", *The Island*, 5 June 2007.

⁹³ Up-country Tamils are the descendants of Tamils brought from southern India in the mid-nineteenth century by the British to work on Sri Lanka's coffee and tea plantations. Most continue to work in the hill country plantations and form a distinct community from Tamils from the Northern and Eastern Provinces. About 5 per cent of the population, they are also known as Plantation or Indian Tamils.

⁹⁴ Crisis Group interview, Pettah, Colombo, June 2007.

⁹⁵ Crisis Group interview, Pettah, Colombo, June 2007.

⁹⁶ Crisis group interview, human rights advocates, Colombo, June 2007. Also see "SL Police expel Tamils from Colombo lodges", *Tamilnet*, 7 June 2007.

V. THE STATE RESPONSE

A. POLICE INVESTIGATIONS AND THE JUDICIAL SYSTEM

In the face of this explosion of political crimes and rights violations, law enforcement agencies and the judicial system have failed almost completely. There have 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. Of the sixteen high-profile cases to be investigated by the Presidential Commission of Inquiry into Serious Human Rights Violations, for instance, the police have filed indictments in only one – the assassination of Lakshman Kadirgamar.⁹⁷ The public position of the police and the attorney general's department is that there are no suspects or insufficient evidence in the other cases. The government claims to have arrested some soldiers and police under the Emergency Regulations in connection with recent abductions and disappearances but it has given no information about the arrests, and no charges have been filed.⁹⁸

The UN's Special Rapporteur on Extrajudicial Killings, Philip Alston, noted after visiting Sri Lanka in November–December 2005 that police investigations of political killings and disappearances had ground to a halt during the peace process. Many people have been too scared or demoralised to report crimes, whether committed by the LTTE, the TMVP, or government forces. "Almost none of the [many] extrajudicial executions has been effectively investigated. Police and military investigations into the killing of Tamils or the broader range of deaths in custody have too often been poorly handled and remarkably few convictions have resulted".⁹⁹ Since his visit, the situation has worsened.

According to UN Special Adviser Rock, the police have failed to investigate or prevent abductions of children by the TMVP, with the local police sometimes

⁹⁷ Crisis Group interview, Justice N.K. Udulagama, Colombo, March 2007. The police investigations in this case have come under much criticism, and there is some doubt that those indicted are actually the central figures.

⁹⁸ The government's cabinet spokesman on defence, Minister Keheliya Rambukwella, announced on 8 March 2007 that of the 452 persons in detention under the Emergency Regulations, there were fifteen soldiers, five policemen, and one former policeman. "Sri Lanka Human Rights Update", INFORM and Law and Society Trust, 15 March 2007.

⁹⁹ "Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions", United Nations Commission on Human Rights, 27 March 2006, E/CN.4/2006/53/Add.5.

refusing even to receive complaints from parents and relatives.¹⁰⁰ After meeting Rock at the end of his visit and hearing his initial findings, President Rajapakse publicly promised an immediate and thorough investigation into alleged government complicity with TMVP recruitment of underage fighters.¹⁰¹ On 15 March 2007, as the UN Human Rights Council was considering the Sri Lanka situation, the government announced yet again investigations into such complaints, as well as political killings.¹⁰²

To date, however, there is no evidence of real investigations, even as Karuna's forces operate openly throughout Batticaloa district and the rest of the Eastern province. The police in the Eastern province are largely powerless to intervene, given pressure from Colombo to allow Karuna to operate freely in the east.¹⁰³ When they have tried to act against TMVP cadres, they have

¹⁰⁰ Easwaran Rutnam, "Full probe on shocking UN report", *Daily Mirror*, 14 November 2006. Human Rights Watch reports that even when the police did accept complaints, they generally did so reluctantly, often expressing outright hostility to the families reporting the crime. There have been no successful cases of arrests of Karuna faction members for child abduction or any other crimes, despite the public nature of their operations in the Eastern Province.

¹⁰¹ "Mr. Rock also received assurances from President Rajapakse concerning the allegations that elements of the Sri Lankan security forces have been complicit with the Karuna faction in its child recruitment, and that they participated in or facilitated child abductions. The President made clear to Mr. Rock that he will order an immediate and thorough investigation to determine whether such things have occurred and, should the evidence support that conclusion, he will take action to hold accountable those who are responsible". See "Statement of the Special Advisor on Children and Armed Conflict", Colombo, 13 November 2007.

¹⁰² "The Karuna cadres are carrying out political work in the area but at the same time there are complaints they are doing other activities as well, and we are investigating those complaints. We will reveal the outcome in due course", Minister Rambukwella, quoted in Easwaran Rutnam, "Govt. probes Karuna group's activities", *Daily Mirror*, 15 March 2007. Earlier, as a Working Group of the UN Security Council was considering the Rock report, Sri Lanka's Permanent Representative to the UN said that "as a responsible member of the international community, the Government has decided to adopt necessary measures to cause an independent and credible investigation into these allegations". See "Lanka to UN Security Council: Child abduction allegations based on hearsay material", *Sunday Times*, 11 January 2007. Police officials in the Eastern province recently announced that anyone found carrying guns would be arrested and dealt with according to the law. Easwaran Rutnam, "Only Govt. forces can carry weapons: FM", *Daily Mirror*, 25 May 2007.

¹⁰³ Easwaran Rutnam, "'Karuna' attempting to rule Batticaloa", *Daily Mirror*, 15 January 2007.

been reportedly blocked by orders from senior figures in the capital.¹⁰⁴

The police are accused not only of a failure to act, but of active obstruction of justice in order to cover up the role of government forces in right violations:

- In one abduction case in Colombo, police acted on a tip from family members and arrested the person to whom they had been instructed to hand over the ransom money. The suspect admitted being a TMVP member and was later identified by two witnesses as the person to whom they, too, had handed over a ransom in an unsuccessful attempt to gain the release of relatives. While the suspect remains in detention, he has not been charged, and family representatives fear he will eventually be released.¹⁰⁵
- In the murder of TNA parliamentarian Pararajasingham, police released the prime suspect, despite multiple eyewitnesses who identified him as the killer.¹⁰⁶
- There have been numerous irregularities with government responses to the September 2006 massacre of ten Muslim labourers near the south-eastern town of Pottuvil. The ambulance carrying the sole survivor was prevented by the police from going to the hospital in the predominantly Muslim town of Kalmunai and diverted to the hospital in Sinhalese-dominated Ampara. There he was held incommunicado under armed guard for days, while the SLMM was prevented from interviewing him. Despite widespread local accusations that the STF was responsible for the killings, investigations have focused solely on the LTTE. Eyewitnesses report that the police destroyed crime scene evidence.¹⁰⁷
- In the case of the five Tamil students killed in Trincomalee, extensive evidence implicates the security forces in the killings and a subsequent cover up. Many witnesses have been threatened¹⁰⁸

¹⁰⁴ Crisis Group interviews, Batticaloa, March 2007.

¹⁰⁵ Crisis Group interview, Mano Ganeshan, Colombo, May 2007; see also "There is state complicity in murders and abductions", *Sunday Leader*, 11 March 2007.

¹⁰⁶ Crisis Group interview, diplomat, Colombo, March 2007.

¹⁰⁷ "Summary of Issues Arising from the Killing of Ten Muslim Villagers at Radella in Pottuvil Police Area on 17th September 2006", LST/INFORM/Rights Now, May 2007.

¹⁰⁸ "Protect Witnesses in Trincomalee Killings: Murder of Five Youths Highlights Need to End Impunity", Human Rights Watch, 28 June 2006, at hrw.org/english/docs/2006/06/27/slanka13628_txt.htm; see also "Flight, Displacement and the Two-fold Reign of Terror", UTHR, Information Bulletin no. 40, 15 June 2006, sec. 2.0.

and some have left the country in fear of reprisals. Initial attempts by officials to force parents of those killed to sign statements that their sons were involved with the LTTE were unsuccessful, as were efforts by the navy and police to present the deaths as a result of a hand grenade thrown at the police, rather than gunshots. With witnesses afraid to testify, the twelve STF officers arrested have been released for "lack of evidence".¹⁰⁹

- A month into the investigation of the murder of seventeen ACF humanitarian workers in Mutur in August 2006, the case was moved – in violation of judicial rules – from the jurisdiction of the local [Tamil] magistrate in Mutur to the [Sinhala] magistrate in Anuradhapura, several hours away. Families were pressured not to allow the bodies of the victims to be exhumed for proper autopsies. Eleven bodies were eventually exhumed and a second round of post-mortems was conducted, with Australian doctors observing. Previously unremarked bullets were detected in the bodies. At the inquest in March 2007, the magistrate publicly criticised police investigators for ignoring crucial evidence and conducting their own ballistics tests despite an agreement that these would be carried out only in the presence of an Australian ballistics expert.¹¹⁰ The ballistics evidence was irreparably damaged when the chain of custody was broken.¹¹¹

The transfer of the ACF murder inquest while the case was underway was highly unusual. Magistrates have wide powers to direct police investigations in criminal cases, but in a number of other recent cases they have been removed by the Judicial Services Commission (JSC) after showing too much independence.¹¹²

¹⁰⁹ For the definitive account of the case to date, see "The Five Students Case in Trincomalee", op. cit.; also D.B.S. Jeyaraj, "The terrible truth of the Trincomalee tragedy", 23 January 2006, at transcurrents.com/tamiliana/archives/34.

¹¹⁰ At the conclusion of the inquest, an observer representing the International Commission of Jurists stated that "[t]he Sri Lankan government needs to dispel serious concerns about whether the justice system is now able to carry out independent and credible investigations into who was responsible for these killings and to mount effective prosecutions", and urged the government "to entrust the investigation to a national body that has the trust of all Sri Lankans and if that is not possible, then the government should look elsewhere for assistance in the investigation", "Sri Lanka: ICJ Calls for Justice as Inquest into Killing of 17 Aid Workers Concludes", International Commission of Jurists, 9 March 2007.

¹¹¹ Crisis Group interview, K.S. Ratnavale, Colombo, May 2007.

¹¹² As detailed in a recent report by UTHR(J), the magistrate investigating both the Allaipiddy massacre in May 2006 and

The JSC, which is responsible for the appointment, promotion, dismissal, and disciplining of judges, consists of the chief justice of the Supreme Court, Sarath Nanda Silva, and two other Supreme Court justices. In recent years, it has in effect been under the control of the chief justice, who has maintained close political relationships with both the present and former presidents.¹¹³ In January 2006 the other two members of the JSC resigned, “in accordance with their conscience”, after frequent differences with the chief justice. With the Constitutional Council’s demise in 2005, the president appointed the replacement members of the JSC directly. This led to assertions that the JSC has become too politicised. According to a recent report, “judges perceived as problematic by the powerful can be reassigned from sensitive positions or have control of sensitive cases transferred to more pliable judges”.¹¹⁴

The chief justice also has a large degree of control over Supreme Court decisions. Critics argue that the Court has become too politicised.¹¹⁵ Human rights advocates and public interest lawyers complain cases involving fundamental rights are increasingly refused hearings, and judgements have become consistently less favourable to claimants.¹¹⁶

B. THE POLITICAL RESPONSE

The failure of the police and judiciary is not simply the result of inadequate training or lack of resources. It is the direct result of a lack of political will and a refusal by the government to acknowledge the extent of the problem. Throughout 2006–2007, the official response to allegations of abuses has been denial,

the disappearance of the Allapiddy priest, Fr. Jim Brown, was transferred in August 2006 and in effect demoted in January 2007. The Trincomalee magistrate was transferred in a politically charged 2005 case. “From Welikade to Mutur and Pottuvil”, op. cit.

¹¹³ The appointment of the chief justice in 1999 was marked by controversy and allegations of misconduct and conflict of interest. Attempts to impeach him in 2001 and 2003 were blocked when President Kumaratunga prorogued, then dismissed, parliament.

¹¹⁴ “Corruption in Sri Lanka’s Judiciary”, in “Global Corruption Report 2007”, Transparency International, June 2007.

¹¹⁵ The resignation in 2004 of the most senior Supreme Court justice, Mark Fernando, was widely understood as a protest against political manipulation of the court by the chief justice. See “Sri Lanka: Serious Concerns Affecting Sri Lanka’s Judiciary”, Asian Legal Resource Center, 31 May 2007.

¹¹⁶ “Sri Lanka: Failing to protect the rule of law and the independence of the judiciary”, International Bar Association, November 2001; also “Corruption in Sri Lanka’s Judiciary”, op. cit., and “Sri Lanka: Serious concerns affecting Sri Lanka’s judiciary”, op. cit.

obfuscation, ad hominem attacks on its critics and threats against activists and journalists. In an attempt to counter international pressure, the government has established a number of institutions to investigate human rights abuses but these have been singularly ineffective.

The government has been particularly quick to downplay disappearances and abductions, not only dismissing the possibility of involvement by state agents but also arguing that many are carried out by the LTTE or are simple mistakes, caused by young people eloping or going abroad for employment.

In a meeting with newspaper editors and media officials on 27 March, President Rajapakse is reported to have presented a list of 116 cases of reported disappearances from six police divisions, from September 2006 through February 2007. Of these, he claimed, 95 had returned home, two had been killed and one abducted. In a recent case, the president was reported to have said, a Tamil woman alleged to have been abducted was found to be on honeymoon.¹¹⁷ At a meeting with relatives in late May 2007, the president announced that 90 per cent of all abductions and disappearances had been solved.¹¹⁸ These figures are very different from those presented to the president by the Civil Monitoring Commission, which arranged the meeting.

The government Peace Secretariat published a report which claimed to “substantiate the fact that neither the Security Forces, nor the Police, have been involved, directly or indirectly, in the alleged abductions and disappearances”. On the basis of the investigations of just eight of the more than 1,500 complaints, it claimed that “many of the cases ... were clearly and intentionally manipulated, with the ulterior motive of gaining some personal advantage”. Others “reveal the negligence on the part of those who were allegedly abducted, of not informing their parents or guardians about their fate or whereabouts”. On the basis of its cursory examination of these eight cases, the Peace Secretariat argued that one is “led to the inescapable conclusion that much of the accusations were stage managed for mere propaganda purposes”.¹¹⁹

Exploiting the lack of conclusive evidence in cases of forced disappearances and political killings, the

¹¹⁷ “The government won’t be cowed – President”, *The Island*, 28 March 2007.

¹¹⁸ “Most of those abducted have returned, says President”, *The Sunday Times*, 3 June 2007, at www.sundaytimes.lk/070603/News/news16.htm.

¹¹⁹ “Baseless Allegations of Abductions and Disappearances”, Report by the Secretariat for Co-ordinating the Peace Process, 8 March 2007, at www.peaceinsrilanka.org/peace2005/Inside/page/SCOPPDaily_Report/SCOPP_report080307.asp.

government has been particularly harsh in its attacks on critics since the visit of UN envoy Rock and his allegations that the TMVP was abducting children with the cooperation of at least some elements of the security forces. While initially promising an investigation, it has been unrelenting in criticism of Rock and his supposed LTTE sympathies.¹²⁰ Rather than accepting the seriousness of the situation, the government has proposed ad hoc remedies which show no signs of being effective, while regularly accusing those who raise human rights issues of political bias.

This lacklustre response to the re-emergence of systematic human rights violations was criticised by then Foreign Minister Samaraweera in his December 2006 letter to the president. "Due to various 'omissions and commissions' on our part as the government, our image internationally is deteriorating rapidly, which may lead to serious repercussions for the country in the coming year". Citing "persistent reports about alleged abductions and extra-judicial killings attributed to government forces as well as the Karuna faction and the LTTE" and a "paucity of investigations and prosecutions" into these and other allegations, he urged prompt and meaningful action to restore government credibility.¹²¹

C. THE CONSTITUTIONAL COUNCIL AND THE INDEPENDENT COMMISSIONS

There are supposed to be a number of independent institutions to act against abuses. However, they have lost much of their independence because of the president's handling of a complex problem relating to the seventeenth amendment to the constitution. According to this amendment, passed unanimously by parliament in 2001, the Constitutional Council is to nominate members of several bodies, notably the Human Rights Commission, the National Police Commission, the Public Service Commission and the Bribery Commission.¹²² Upon receiving the recommendations, the president is mandated to appoint the members.

¹²⁰ "Charges repulsive: Army", *Daily Mirror*, 14 November 2006; "UN's Allan Rock ridiculed in Sri Lanka", *Toronto Star*, 23 November 2006.

¹²¹ "President hit by human rights bombshell", *The Sunday Leader*, 25 February 2007.

¹²² Prior to the seventeenth amendment, the president appointed the Human Rights Commission directly. The National Police Commission was established by the amendment. The idea behind the amendment was to keep these commissions politically independent by making appointments the responsibility of a body free from party or office control. Judicial Services Commission members are the chief justice and two sitting judges recommended by the president and approved by the Constitutional Council.

In March 2005 the terms of six of the ten members expired, depriving the Constitutional Council of its quorum. After President Rajapakse was elected in November 2005, and after months of haggling, the prime minister and the leader of the opposition decided on the names of five persons they were jointly authorised to recommend to the president for appointment to the Council.¹²³ Rather than immediately appointing these, the president argued that the Council could not be operational without its tenth member, who is to be determined by majority vote of the smaller parliamentary parties.¹²⁴

When the terms of office of the members of the Human Rights Commission expired in April 2006, the president appointed new members directly, arguing that this was required due to the non-functioning of the Constitutional Council. He also appointed new members to the National Police Commission. He continues to refuse to allow the Council to be formed and to resume its duties.¹²⁵

The Human Rights Commission has broad powers to investigate and report on human rights violations. It can visit police stations and detention centres and issue summons to government officials in order to raise issues of concern and encourage their respect for human rights.¹²⁶ In practice, these powers have rarely been used effectively in its eleven-year existence, owing to lack of independence and inadequate funding and staffing.

However, performance improved in 2003 with the appointment of the first Commission nominated by the Constitutional Council under the seventeenth amendment. It took the initiative on a number of issues, such as police

¹²³ Three members of the Constitutional Council are ex-officio: the prime minister, the leader of the opposition and the speaker of parliament. Of the other seven, one is chosen by the president, five jointly by the prime minister and leader of the opposition and one by majority vote of parliamentarians from the smaller parties in parliament.

¹²⁴ The smaller parties have been unable to decide on an appointee, ostensibly due to disagreement over the selection process.

¹²⁵ While some constitutional experts agree with the president on the need for a tenth member, most contacted by Crisis Group believe the Council can function with nine, as it did for a time following a resignation. If he chooses not to appoint the Council, the president could request the Supreme Court's opinion on this and on selection of the remaining member by the smaller parties.

¹²⁶ Established in 1997 under the Human Rights Commission Act No. 21 of 1996, the Human Rights Commission receives complaints of violations of constitutional rights, most related to job dismissals and promotions, police torture, and arbitrary arrest and detention. See Ambika Satkunanathan, "The Human Rights Commission", in *Sri Lanka: State of Human Rights 2000*, Law and Society Trust, Colombo, 2000, pp. 296-315.

torture, and produced valuable reports on the deterioration of human rights during the peace process. With the expiry of the commissioners' terms of office in April 2006, however, and the president's decision to treat the Constitutional Council as non-functioning and to make unilateral appointments, its willingness to call the government to account has disappeared.

Since its appointment in May 2006, the present Human Rights Commission has issued no reports on high-profile human rights violations, disappearances, the Emergency Regulations or any other matter. It has occasionally published some figures on complaints but these are incomplete or contradictory.¹²⁷ The commissioners downplay the many reports of disappearances and abductions received, arguing that in the majority of cases the person has returned¹²⁸ and that media reports are "highly exaggerated, unfounded, and malicious" and are "being made to tarnish the image of the country".¹²⁹ Commissioner Jayawickrama claims that since May 2006, there have been "no cases of torture" by the police. This contradicts the Commission's own statistics, which show 528 complaints of torture in 2006 and another 159 through April 2007.¹³⁰ Its latest three-year strategic plan offers no clear response to the impunity crisis and ignores the recommendations of a recent evaluation sponsored by its chief international funder, the UN Development Program (UNDP).¹³¹ Some regional Human Rights Commission offices reportedly do much more effective work in difficult circumstances, with little support from Colombo.

The Human Rights Commission needs to be properly constituted, with respected, independent commissioners. It should resume publishing statistical data and receive sufficient funds and staff from the government to carry out its work. Likewise, it should develop an action plan to reach the standards for national human rights commissions

¹²⁷ According to staff at the Colombo head office, the Commission statistics on complaints of abductions, disappearances and political killings will no longer be provided to NGOs. Staff based in the Human Rights Commission's ten regional offices said they had been instructed not to provide such information without written approval from the head office. Crisis Group telephone interviews, Colombo, May 2007. Crisis Group requests for statistics from regional offices were denied, with the exception of March 2007.

¹²⁸ Crisis Group interview, S. Anandacoomaraswamy, Dharmasiri Jayawickrama, and Mahanama Tillakeratne, Colombo, May 2007. To date the Human Rights Commission has provided no evidence to substantiate these claims.

¹²⁹ Ibid.

¹³⁰ Crisis Group interview, D. Jayawickrama, Colombo, May 2007.

¹³¹ Crisis Group interview, Western diplomat, Colombo, March 2007.

laid out by the Paris Principles.¹³² Unless it is properly constituted and reformed, it should lose its accreditation with the International Coordinating Committee of the National Institutions for the Promotion and Protection of Human Rights, which oversees the Paris Principles.¹³³ For now, donors should provide only targeted support for effective regional offices and special projects.

The ministry of disaster management and human rights, established by President Rajapakse in February 2006, is no substitute for a politically independent, well-financed Human Rights Commission. The minister, Mahinda Samarasinghe, is well-respected and one of the few government officials willing to publicly admit serious human rights violations. Nonetheless, his ministry lacks independence and has no investigative powers. With limited staff and resources, it acts largely as a coordinating body for other agencies involved in humanitarian issues and liaison between the government and donors on humanitarian and human rights issues.

D. AD HOC COMMISSIONS OF INQUIRY

At the same time as the independence and effectiveness of the Human Rights Commission has been severely undermined, the president has appointed a series of ad hoc commissions of inquiry to investigate and report on high-profile incidents. None have had an impact.

- A commission of inquiry headed by Retired Appeals Court Judge Dharmasiri Jayawickrama, also a member of the Human Rights Commission, was appointed to look into incidents of political violence in the north and east in the months immediately after the November 2005 presidential election. Its report was given to the president on 20 October 2006 but has not been made public, and no public statements about its findings have been released.
- A commission of inquiry was appointed to investigate the Pararajasingham murder. Headed by Human Rights Commissioner and Retired High Court Judge Mahanama Tillakeratne, it completed its work in March 2007 and has submitted its report to the president. But its findings have not been made public.

¹³² The text of the Principles, endorsed by UN General Assembly Resolution 48/134 (20 December 1993), can be found at [www.unhchr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/A.RES.48.134.En?Opendocument](http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/A.RES.48.134.En?Opendocument).

¹³³ The HRC's accreditation is due to be reviewed in October 2007. For details, see www.nhri.net/2007/Sub_Committee_Report_March07_EN.pdf.

- On 15 September 2006 Tillakeratne was also appointed to head a commission of inquiry into disappearances, abductions and unexplained killings. Two interim reports have been delivered to the president, and the final report is due to be submitted in June. Describing his visits to the Tamil towns of Jaffna and Batticaloa, Justice Tillakeratne claimed that “some invisible hand” is responsible for abductions, and “no one said a single word against anyone in the army or police”.¹³⁴
- Other investigations have disappeared off the radar. Two separate Human Rights Commission inquiries into recent incidents – including some that the new Presidential Commission of Inquiry (CoI) is to look into – have been completed but not released.¹³⁵ There has been no news on the promised military investigation into the June 2006 killings in Pesalai.¹³⁶

cases. Unfortunately, these are merely sporadic acts by small parts of the state apparatus, with little impact on the climate of impunity. Overall, the system is broken, and respect for human life and human rights are the exception rather than the rule.

Despite the weight of official inertia and resistance to full investigations and protection of rights, some remnants of independent institutions have struggled to respond to the crisis. As noted, regional Human Rights Commission offices, especially in Jaffna, continue to accept and publicise complaints from the local community and are an indispensable source for what little public information is available. Some magistrates in Jaffna, Vavuniya and elsewhere in the north – and in the Muttur case – continue to challenge the police to conduct proper investigations. And some avenues of judicial redress, such as habeas corpus and fundamental rights application to the Supreme Court, continue to have the potential to assist in individual

¹³⁴ Crisis Group interview, Colombo, May 2007.

¹³⁵ Reacting to the escalation of violence and attacks on civilians after the presidential election in November 2005, the HRC appointed a special rapporteur to investigate and recommend responses. Pressed for time and with severe staff and financial shortages, his office, headed by a retired judge and assisted by two prominent human rights activists, was able to investigate only five of the 30 cases on its list. Among those was the murder of five Tamil students in Trincomalee in January 2006, allegedly by members of the police Special Task Force. The special rapporteur handed in this report three days before the expiration of the terms of office of the Human Rights Commissioners, on 3 April 2006. For reasons that remain uncertain, it was not made public before the commissioners' terms expired. The newly appointed HRC members have not chosen to make the report public. It was leaked to the press and a substantial excerpt published; see “HRC sheds light on HR violations”, *The Morning Leader*, 26 July 2006. More recently, the HRC launched an investigation into the deaths of 51 young people killed when the Air Force bombed what it said was an LTTE training camp for child soldiers (see fn. 35 above). The HRC report has not been released.

¹³⁶ “Fact Finding Mission to Pesalai”, *op. cit.*

VI. THE PRESIDENTIAL COMMISSION OF INQUIRY

"We have no faith in the attorney general's department. It is biased, prejudiced, and all out to help the perpetrators".
Human rights lawyer, May 2007

Under considerable international pressure after the killings of the seventeen ACF workers in August 2006, President Rajapakse announced the formation of a Presidential Commission of Inquiry (CoI), headed by retired Supreme Court Justice N. K. Udalgama.¹³⁷ Other commissioners include several well-known for their human rights activism. Alongside the CoI is a panel of international observers, the International Independent Group of Eminent Persons (IIGEP), with eleven members headed by Retired Indian Supreme Court Chief Justice P. N. Bhagwati.¹³⁸

The CoI is instructed to investigate sixteen specific "incidents involving alleged serious violations of human rights" since 1 August 2005,¹³⁹ to identify those responsible and recommend measures, including criminal proceedings and to examine "the adequacy and propriety of the investigations already conducted pertaining to such incidents". It operates under a fairly restrictive mandate, however. It is not an independent commission; it is appointed by the president and exists at his discretion: he can dissolve it or reconstitute it at will. As with similar commissions, it can gather evidence and hear testimony but has no independent prosecutorial or enforcement powers, and its findings cannot be used directly as the basis for prosecutions. The police must conduct their own

investigations, and the attorney general has to approve prosecutions. Previous commissions of inquiry have led to only a handful of prosecutions, few of them successful.

A. PROBLEMS AND CHALLENGES

After an agonisingly slow start, the CoI began work in May 2007, having spent six months dealing with innumerable bureaucratic and procedural issues, such as hiring staff, translating documents and devising policies and procedures. Given the urgency of the cases, the delay seems inexcusable, but more worrying are issues relating to its freedom of action, ability to protect witnesses and impact on the broader human rights situation.

1. Conflicts of interest

Lawyers from the attorney general's department are closely involved in framing the commission's inquiries, collecting and preparing the evidence and leading the questioning of witnesses. At least one of the lawyers for the CoI is reported to have advised some of the original police investigations that are to be examined, an obvious conflict of interest.¹⁴⁰ In the words of a source close to the CoI, "you can't expect the A[ttorney] G[eneral] to help the CoI see what it didn't do in its own investigations. He'll be leading them by the nose".¹⁴¹ The IIGEP has complained and requested that the CoI hire private lawyers. According to Justice Udalgama, the CoI has "no objection to using private counsel for leading questioning. But this will cost money. Good people cost good money".¹⁴² The CoI has retained two private counsel but so far has continued to rely on the attorney general's lawyers for most of its work. This is unacceptable if the CoI is to be taken seriously. The CoI should be given the necessary funds to retain private lawyers and end its reliance on lawyers from the attorney general's department.

¹³⁷ For more details, see Kishali Pinto Jayawardena, op. cit.; "A Commentary on the Commission of Inquiry and the International Independent Group of Eminent Persons", Centre for Policy Alternatives, February 2007, at www.cpalanka.org; "Sri Lanka: Observations on a Proposed Commission of Inquiry and International Independent Group of Eminent Persons", Amnesty International, 17 November 2007; "Sri Lanka: Why a Presidential Commission Cannot Ensure Protection of Human Rights...", Asian Human Rights Commission, 4 October 2006; and "Sri Lanka: Letter to Human Rights Council", Human Rights Watch, 24 November 2006.

¹³⁸ In addition to one member invited directly by the government, the IIGEP consists of one person selected from lists prepared by OHCHR and the Inter-Parliamentary Union, and one nominee each from seven governments: Japan, the U.S., the EU, UK, Australia, the Netherlands, and Canada.

¹³⁹ Warrant establishing the Presidential Commission of Inquiry, 3 November 2006, available at www.pchrv.gov.lk. The original warrant listed fifteen cases. Upon the Commission's request, the president added the November 2006 assassination of parliamentarian N. Raviraj. See the CoI's website, at www.pchrv.gov.lk/Index.htm.

¹⁴⁰ While police investigations are formally independent from the attorney general's department, in practice it is closely involved in most high-profile political and human rights cases. The police criminal investigation department receives legal advice from it, sometimes including specific directions for lines of investigations.

¹⁴¹ Crisis Group interview, Colombo, March 2007.

¹⁴² Crisis Group interview, Justice Udalgama, 19 March 2007. He claims lawyers from the attorney general's department will not dictate to the commissioners. "Just as judges in legal cases listen not only to state counsels, but also other lawyers and to defence counsel, the same will be true of the commission...there's no reason to assume that state counsels will necessarily take the army's or the police's point of view". He added that government representatives on the IIGEP secretariat, as with these lawyers, are simply resources for specific tasks.

2. Witness protection

Numerous reports by human rights groups suggest there are key witnesses to many of the cases being examined by the CoI but not a single witness has come forward and offered to testify. The reason is fear of reprisals.¹⁴³ A prominent human rights lawyer says that “victims won’t come forward as witnesses to the CoI. After so many years of failed investigations and failed commissions, they have lost faith in the system”.¹⁴⁴

There is no witness protection program, so the CoI is trying to establish its own. The unit is headed by a deputy inspector general of police and is to offer physical protection to witnesses as they travel to and from their homes to testify before the CoI in Colombo.¹⁴⁵ Given that the proposed unit will rely on existing police personnel and other state agencies, few witnesses are likely to feel comfortable even with these new procedures in place. It appears that the provisions of the witness protection scheme will have no legal validity until enabling legislation is passed, and it is unclear how such a system could protect witnesses from agents who may be working on behalf of powerful state or military officials. The CoI argues that it lacks the financial resources to establish a system that meets international standards.¹⁴⁶ Nevertheless, Justice Udagama publicly asserted that witnesses could now come forward and “testify without any fear of retaliation, threat or inducement”,¹⁴⁷ a statement that one diplomat dismissed as “totally outrageous”.¹⁴⁸

There are still some things that could be done, however, especially with international assistance. A diplomat argues: “Witness protection isn’t the insurmountable problem people say it is. There may not really be that many people who need protection”.¹⁴⁹ The IIGEP sponsors

and other donors should consider focusing on four or five cases before the CoI where there are available witnesses and survivors. In these cases, there are a range of options for useful assistance: testimony could be delivered to the CoI by video from undisclosed locations; affidavits could be filed from witnesses who have already sought protection outside Sri Lanka; witnesses and family members could be offered temporary asylum, or visas for professional training or education.¹⁵⁰ The CoI has already expressed interest in receiving support for such initiatives from foreign governments.

Ad hoc protection can only go so far, however. In the long term Sri Lanka needs a proper witness protection program. As one observer argued, “there is no point in the commission developing its own witness protection unit if it will simply expire at the end of the commission’s term. Some witnesses will need protection long after it has completed its work”.¹⁵¹ The government’s Law Commission is reportedly close to finalising draft legislation which would establish the first ever government-wide witness protection program.¹⁵² The government should invite foreign experts to help develop a more comprehensive bill that meets international standards.¹⁵³

3. The political context

Officials have repeatedly cited the existence of the CoI and IIGEP as justification for inaction. All those involved in the investigations need to emphasise repeatedly that the CoI is not a substitute for proper human rights protection and a fundamental shift in policing and military policy. Nevertheless, the CoI can consider the broader context of the violations it is investigating in its reporting, as the commissioners have committed to do.¹⁵⁴ This echoes a point made by the UN High Commissioner for Human Rights: “It will be critically important for the commission to establish not only individual responsibility for crimes, but the broader patterns and context in which they occur”.¹⁵⁵

of whom have previously expressed a willingness to testify if protected.

¹⁵⁰ “Sri Lanka: ICJ calls for justice as inquest into killing of 17 aid workers concludes”, International Commission of Jurists, press release, 9 March 2007.

¹⁵¹ Crisis Group interview, Colombo, May 2007.

¹⁵² Ayesha Zuhair, “A constitution is a testament of a nation”, *Daily Mirror*, 16 May 2007.

¹⁵³ For instance, according to one international expert who has studied the draft legislation, it contains no penalties for those who fail to comply with the safeguards it establishes. Crisis Group interview, Colombo, May 2007.

¹⁵⁴ Public meeting, Colombo, 8 March 2006.

¹⁵⁵ “High Commissioner for Human Rights Hopes New Inquiry Commission on Killings and Disappearances in Sri Lanka Will Prove Effective”, 6 November 2006, at www.ohchr.org.

¹⁴³ There are credible reports of witness intimidation in cases before the commission. In 2004 a High Court judge known for independence, Sarath Ambepetiya, was murdered; Gerald Perera, a witness in a rare trial of police on torture charges, was killed in 2005. “A Further Killing in Colombo and Possibility of Escalation of Violence”, Asian Human Rights Commission, 31 May 2005.

¹⁴⁴ Crisis Group interview, Colombo, May 2007.

¹⁴⁵ Public meeting with CoI, 8 March 2007.

¹⁴⁶ *Ibid.*

¹⁴⁷ Address to “Inauguration of Sessions of the Presidential Commission of Inquiry”, 1 May 2007, available at www.peaceinsrilanka.org.

¹⁴⁸ Crisis Group interview, Colombo, May 2007.

¹⁴⁹ Crisis Group interview, Colombo, March 2007. In some cases known witnesses number less than a dozen and could, in principle, be protected without too much expense. In other cases – for instance the attack on the church in Pesalai, the murders of the five students in Trincomalee and the Pararajasingham assassination in Batticaloa – there are many witnesses, some

The CoI should be able to assess political and military policies that have contributed to human rights abuses, and seek out the chain of command that led to incidents. It should, as its mandate allows, consider additional incidents when this would help draw out patterns and context more clearly. It should also consider aspects of command responsibility, the principle increasingly recognised in international law that allows those in effective command of security forces to be held liable if they fail to prevent or punish abuses they know of or have good reason to know of. The lack of explicit incorporation of this concept in Sri Lankan law has helped block conviction of commanding officers in previous prosecutions for serious human rights violations.¹⁵⁶ Nonetheless, in a number of recent civil cases courts have held commanding officers liable for the violation of the complainant's fundamental rights, simply by virtue of their position as commanding officer.

4. Indictments and prosecutions

The CoI will be pointless unless it results in indictments and prosecutions. This may be difficult. The CoI has announced its intention to make recommendations for prosecutions and other remedial actions in any interim reports it might make.¹⁵⁷ This is an important and welcome decision, and the attorney general should act immediately on such recommendations. In the warrant officially establishing the CoI, the president "declares his intention" to forward the CoI's report(s) and other material "within two months of receipt" to the relevant authorities, including the attorney general. The attorney general, in turn, shall "as soon as possible, consider ... and where appropriate institute necessary criminal proceedings against persons found responsible for committing serious violations of human rights." It is easy, however, to imagine the attorney general declining, arguing either insufficient evidence for a prosecution or no legal basis under Sri Lankan law.¹⁵⁸

¹⁵⁶ The court in the Embilipitiya disappearances trial, for instance, acquitted the commander of the army camp where the victims were last seen alive for lack of evidence of his direct knowledge of and involvement in their deaths. See Kishali Pinto Jayawardena, *op. cit.*

¹⁵⁷ The Commission is required to submit its report and recommendations – or interim reports – to the president within one year of its establishment (i.e. by 3 November 2007) or within whatever extended period of time the president later mandates.

¹⁵⁸ Commissions operate under less restrictive rules of evidence than criminal investigations; they can accept hearsay evidence, for example. What constitutes the "credible evidence" necessary for a commission to find that a given suspect was involved in a crime might not be enough for a court. There are also potential legal loopholes. Sri Lankan law does not always incorporate international standards of human rights law. The ability of previous commissions to generate successful prosecutions has,

It remains unclear how much of the CoI's work will be made public. The president is to publish the reports in the Government Gazette and present them in parliament – but only "after the competent authorities...including the AG...institute necessary legal action" and after "excluding any material which in my [the president's] opinion may be prejudicial to or absolutely necessary for the protection of, national security, public safety or well-being..." These two caveats provide ample opportunity to delay publication or exclude key materials.¹⁵⁹

B. INTERNATIONAL INDEPENDENT GROUP OF EMINENT PERSONS (IIGEP)

In order to forestall calls for a fully international enquiry, the government agreed to the present hybrid, with an observer group of independent "eminent persons" attached to the CoI. It is largely the IIGEP that has given some people hope that the CoI will break the cycle of investigative failures.¹⁶⁰ Its limited mandate, however, poses major challenges. It is not permitted to conduct its own investigations, only to observe the CoI's and report to the president on them. The IIGEP does in principle have access to all documents that come to the CoI and has a limited right to interview witnesses.¹⁶¹ If it is to fulfil its role of ensuring the transparency of the CoI's work, it must be able to:

- assist in questioning witnesses during hearings and also to meet with and question them outside the formal hearings;¹⁶² and

for instance, been hampered by the lack of clear acceptance of the principle of command responsibility. The lack of a specific offence of disappearance in the criminal code has made it difficult to gain convictions in more than a few cases from the 1980s and 1990s.

¹⁵⁹ Warrant establishing the Presidential Commission of Inquiry, *op. cit.* In the letter of invitation to members of the IIGEP, the president promises to publish the commission report within three months of its submission. He also states his intention to exclude from the report only material which may be "prejudicial to, or absolutely necessary for the protection of, national security and public order". There is no mention of "public well-being".

¹⁶⁰ The members of IIGEP are authorised to "observe jointly or severally the investigations and inquiries conducted by the Commission of Inquiry, with the view to satisfying that such inquiries are conducted in a transparent manner and in accordance with basic international norms and standards". See "Invitation to serve as a Member of the International Independent Group of Eminent Persons", letter dated 8 January 2007, signed by Lalith Weeratunga, Secretary to the President of Sri Lanka, at www.iigep.org/mandate.html.

¹⁶¹ They are given access through and with the concurrence of the commission when witnesses are called upon to testify.

¹⁶² There seems to be preliminary agreement within the commission that both are permitted.

- observe directly those police and judicial investigations that the CoI is mandated to analyse and judge, for example, attending inquests.¹⁶³

The IIGEP's main power is to issue reports every three months to the president. Its members are also entitled to state their views publicly on "the manner in which the investigations and inquiries of the CoI are being and have been carried out".¹⁶⁴ These regular public statements will be extremely important for maintaining pressure on the authorities and attracting attention to flaws in the process.¹⁶⁵

On 11 June, the IIGEP released its first public statement, summarising its first quarterly report submitted to the President ten days earlier. The statement:

- criticised the "unnecessary delays" in establishing the CoI, noting that it had made "hardly any noticeable progress in investigations and inquiries since its inception in November 2006";
- expressed concern with the continued absence of a functioning witness protection unit due to lack of funding and lack of national witness protection legislation;
- raised alarms at the role played by the attorney general's department as legal counsel to the Commission, which has resulted in "serious conflicts of interest, which lack transparency and compromise national and international standards of independence and impartiality that are central to the credibility and public confidence of the Commission"; and
- emphasised that "it is critical that the Commission and the IIGEP not be portrayed as a substitute for robust, effective measures" to deal with ongoing human rights violations, "including national and international human rights monitoring".¹⁶⁶

¹⁶³ For example, in March 2007 the EU nominee to the IIGEP, Bernard Kouchner, and a number of IIGEP assistants attended the inquest hearings into the August 2006 murders of the ACF workers.

¹⁶⁴ "Invitation to serve as a Member of the International Independent Group of Eminent Persons", op. cit.. This right is restricted only by the requirement that the chairman of the commission and the attorney general be given two weeks prior to publication to respond and possibly raise objections if they feel a statement is prejudicial to the commission's work or "national security and public order." If no agreement is reached within the two weeks, the statement is to be released, accompanied by the chairman's or attorney general's objection.

¹⁶⁵ If the final CoI report is not released in a timely fashion, the IIGEP should summarise it and cite it extensively in its own final report.

¹⁶⁶ "Public statement", International Independent Group of Eminent Persons, 11 June 2007, at www.iigep.org/epress.html.

In the CoI's official reply to the IIGEP statement, Chairman Udalgama defended the body's independence. The CoI, he wrote, is satisfied with "the professional abilities and integrity" of the lawyers assigned to them from the attorney general's department. In any case, they have only "a limited function ... to be exercised in accordance with directions and under the supervision of the CoI". Udalgama defended the delays in beginning investigations as result of the CoI's need first to establish clear and effective "internal working structures", notably with respect to investigations and witness protection.¹⁶⁷ In a separate reply, the attorney general expressed satisfaction with the work of the CoI and a commitment to enact legislation on witness and victim protection, to grant the CoI greater operational and budgetary flexibility through amendments to the Commissions of Inquiry Act and to provide the CoI with all "necessary financial and other resources".¹⁶⁸

To maximise its potential, the IIGEP needs to establish a respectful partnership with the CoI, rather than adopting an adversarial or overly critical stance.¹⁶⁹ Similarly, the CoI should aim to make maximum use of the IIGEP. One option is to invoke the clause in the IIGEP's terms of reference that allows it to request a member to provide technical and other advice. The CoI might also consider establishing a joint subcommittee with the international group that focuses on particular issues, such as developing the legal concept of command responsibility, devising other long-term legal reforms, identifying obstacles to effective investigations and prosecutions and analysing investigations of particular cases.

C. PROSPECTS

Many human rights advocates say they would prefer to see the CoI die a quick death, so the government could no longer use it to block stronger measures, such as an international human rights monitoring mission. One says: "Right now, the commission is more than anything an obstacle, in terms of our wanting to push for a process in

¹⁶⁷ "Response from the chairman of the commission of inquiry to the IIGEP's public statement", 11 June 2007.

¹⁶⁸ "Response from the Attorney General to the IIGEP's public statement", 11 June 2007.

¹⁶⁹ There is little it can accomplish if its relationship with the CoI is routinely adversarial or if it fails to establish clear ground rules for their respective roles and clear lines of communication and decision-making. Unfortunately, given the unwieldy nature of the two bodies and that the "eminent persons" will be in Sri Lanka only occasionally for brief visits, much of the relationship-building will have to be done by their assistants. Both the commissioners and the attorney general's department have complained that the eminent persons have not spent more time in the country.

which people could speak about what they have suffered and receive some redress".¹⁷⁰

The severe limitations on their powers mean the CoI and the IIGEP cannot provide an adequate response to the lack of human rights protection. If investigations continue at the present pace, and the limitations on the independence of the CoI and on its ability to protect witnesses remain in place, it is hard to see how it can be truly effective. A long, drawn-out series of investigations with limited results would inevitably lead to reduced international support, including for the IIGEP, which in turn would mean, in effect, the collapse of the CoI.

Nonetheless, the process should not be abandoned just yet. With the proper support from the IIGEP and other international bodies, the CoI could play a catalytic role vis-à-vis normal government mechanisms. Because the government has staked so much of its credibility on the CoI and the IIGEP, their existence offers an opportunity to maintain continual pressure on it to take more serious action.

If the CoI can gather enough new evidence and witness statements, it could still have an important impact by raising the political cost to the government of any continued failure to pursue prosecutions. Judicious use of public hearings and public statements can maintain pressure on the government to respond to continuing human rights violations. By regularly pointing out the inadequacy of their own powers and the structural inability of the government to handle the crisis, CoI and IIGEP statements can also lobby for international monitoring and other ways of enhancing human rights protection.¹⁷¹

No matter how effective the CoI might be in tracking down the perpetrators in the limited number of cases it is considering, the legal, institutional and political obstacles that have consistently prevented effective investigations and prosecutions of serious human rights violations, under the present government and also under its predecessors, will remain. Consequently, the CoI and the IIGEP should look to leave an institutional legacy, for example by establishing an effective witness protection program. A clear analysis of the patterns of violations and structures of impunity and what is needed to overcome them could also help to push a longer-term reform agenda.

VII. HALTING THE DOWNWARD SPIRAL

The [Tamil] community is seeing things very clearly. Tamils in the east are very upset at the government using Karuna to foment internal Tamil battles. They are more alienated than before and increasingly distrust the ...government. Government policies have only increased demands for greater devolution. Sri Lanka humanitarian worker, February 2007

A. THE GOVERNMENT'S CHALLENGE

The government is caught in a vicious circle of its own making. The stronger the military offensive against the LTTE in the north and east, the greater the likelihood of LTTE terrorist attacks in Colombo and counter-strikes against the military. The more attacks by the LTTE, the more the security forces are likely to use extra-judicial methods to combat the threat, which in turn would provoke more financial and political support for the rebels.

The only viable exit from this spiral of despair is to change policy and try and win support among the Tamil population by ending human rights abuses by state forces and their proxies and offering a serious political package to northern and eastern Tamils. This would not automatically produce a solution: there would still be the problem of LTTE intransigence to deal with. But it is the first, necessary step towards a broader political solution. Unless the government can gain some support from moderate Tamils, there is little point considering talks with the LTTE.

The main responsibility for reversing the trend towards lawlessness lies with the government. No international pressure or human rights monitoring can compensate for a political culture that permits the present level of impunity or that uses extra-legal methods, including disappearances and killings, in counter-insurgency operations. But if the government does not act, it will face increasing pressure, including censure at the UN Human Rights Council and calls for UN human rights monitors to be deployed. Bilateral donors have already cut some financial assistance, and there will be growing reluctance to commit new funds.

The best option for an improvement in the human rights situation is for a fundamental policy change to permit existing institutions to function properly. That means proper police investigations, a judiciary that is allowed to act independently and an attorney general's department that is not politicised. All that is a long way off but initial steps are needed.

¹⁷⁰ Crisis Group interview, Colombo, 16 March 2007.

¹⁷¹ The reply from the attorney general to the IIGEP's first public statement in June was sharply critical of the IIGEP for noting the need for international human rights monitoring.

1. The seventeenth amendment

The president should immediately constitute the Constitutional Council, even without its tenth member. The Constitutional Council should then make fresh nominations to all the relevant independent commissions, beginning with the Human Rights Commission and the National Police Commissions. Once these have been reformed and their independence guaranteed, donors should assist in making sure that the Human Rights and Police Commissions are adequately funded. Special consideration should be given to expanding the capacity of the Human Rights Commission's regional offices in the north and east, which have been doing important work under extreme pressure.

The seventeenth amendment clearly needs revising to avoid new constitutional impasses. The government should expedite deliberations by the parliamentary select committee mandated to consider changes, with the aim of removing the ambiguities that have been used to stymie its proper functioning. The existence of the parliamentary select committee should not be used to delay further the immediate revival of the Constitutional Council.

2. The emergency regulations

The government should consider revising sections of the Emergency Regulations promulgated in December 2006. Imprecision opens many of them to abuse. In particular, the government should consider:

- ❑ repealing Regulation 16, which defines as "terrorism", with much increased punishments, a series of already illegal acts when committed in the course of urging "political or governmental change or compelling the government to do or abstain from doing any act...";
- ❑ removing the provision that makes possible convictions of those who have unknowingly or unintentionally assisted suspected terrorists;
- ❑ establishing safeguards against legitimate relief activities by humanitarian organisations in LTTE-controlled areas becoming the basis for terrorism charges;
- ❑ removing the blanket immunity for government officials who commit wrongful acts in the course of implementing the regulations; and
- ❑ guaranteeing that the appeals tribunal established under the regulations is fully independent of the executive.

Other important steps to assert the rule of law would include:

- ❑ making presidential directives on arrest procedures legally binding, with specified punishments for officials who do not comply;
- ❑ publicising all places of detention and releasing the names of all detained; and
- ❑ permitting the Human Rights Commission and the International Committee of the Red Cross (ICRC) to visit all places of detention and those places – such as TMVP offices – where there are reported detentions

3. Paramilitaries

The state needs urgently to take the TMVP (including its factions) under firm control. There is no doubt that TMVP forces are operating openly, extensively, and illegally in the Eastern province and in Colombo and that elements in the government are either facilitating their work or refusing to prevent it. The TMVP must no longer be allowed to abduct and conscript children, administer a parallel and unaccountable policing and taxation system in the Eastern province, and harass and intimidate Muslims. Their involvement in at least some of the abductions in Colombo and elsewhere is widely suspected; the police need to investigate, arrest and charge suspects.

If the TMVP wants to carry and use guns, it should come under military control and be subject to military discipline. If it wants to be a political party, it should be made to give up guns while receiving effective police protection against LTTE attacks. The government has announced that nobody in the Eastern province will be permitted to carry arms except for the police and the military.¹⁷² It should regularly invite journalists and human rights activists to see for themselves whether these orders are being followed. The police should be required to apply the law to TMVP cadres as to the rest of the population, arresting and prosecuting militants engaged in criminal activity.

4. Extrajudicial killings and abductions

The military should disband any so-called "hybrid groups" involving elements such as military intelligence working alongside former Tamil militants or other non-military cadres. There needs to be a reassertion of the military chain of command and proper disciplinary procedures. An analyst writes:

The existence of these killer squads means that the normal command structures of the security forces have been tampered with. Certain personnel have been in effect removed from the authority of their

¹⁷² Easwaran Rutnam, "Only government forces can carry weapons: FM", *Daily Mirror*, 25 May 2007.

service commander and are obviously no longer answerable to their respective commanders for their actions. The persons so removed function in hybrid groups answering to a power above their service commanders, so powerful that there is hardly any pretence of the police investigating the crimes they commit.¹⁷³

This complete lack of accountability must be ended if the military chain of command, already subverted by the use of paramilitaries, is not to be further damaged. The use of extra-legal military means is another step in the degeneration of state institutions and state accountability and is fraught with unintended consequences.

The police have frequently been given leads and evidence to arrest and prosecute criminals involved in abductions for ransom in Colombo and elsewhere¹⁷⁴ but they seem to have been unwilling to act on them. Since there is enough circumstantial evidence to suggest that security officials are heavily implicated in the abduction business, the police may need to set up an independent unit charged with tackling this phenomenon. But this requires a political signal that official tolerance and complicity in abductions is at an end. A good step would be for the Human Rights Commission and government agencies to submit their statistics on disappearances and killings to public scrutiny.

The government should sign and ratify the recently adopted International Convention for the Protection of All Persons from Enforced Disappearance and enact domestic legislation that gives full force to its provisions, including making forced disappearances a criminal offence.¹⁷⁵ This would substantially improve the chances of successful prosecutions.¹⁷⁶ Additionally, the government should immediately invite the UN Working Group on Enforced or Involuntary Disappearances to visit Sri Lanka.

5. Longer-term legal and institutional reforms

Any serious challenge to Sri Lanka's institutionalised impunity will require additional reforms, which will take

longer to formulate and implement. The law enforcement agencies need fundamental changes, and the judiciary needs to regain its former independence. These are lengthy projects that the government shows no interest in pursuing. Other long-term structural and legal reforms might include a new mechanism, independent of the attorney general's department, to handle prosecutions of serious human rights violations, especially those in which the accused are representatives of the state. As long as the attorney general handles such prosecutions, there will be a problem of conflict of interest. The preferred solution would be to establish an independent prosecutor for serious human rights violations, along the lines of the existing independent commissions, ideally with its own investigative staff independent of the police. An alternative would be to house the independent prosecutor within a reformed Human Rights Commission, suitably empowered with an expanded investigative staff and new legislation granting it the right to file its own actions in court.

Legal changes are also needed. The concept of "command responsibility" should be incorporated into domestic criminal law, the code of military justice and the police disciplinary code so that a military commander, high-ranking police officer and even political leader can be held criminally liable for actions of his or her subordinates even without having directly ordered those actions.¹⁷⁷ If the political will to enact such legislation is lacking, the Supreme Court should establish the principle through its powers to review and interpret fundamental rights. The government should also take concrete action to confirm that its international treaty commitments continue to have validity within domestic law. In September 2006 a Supreme Court judgement raised doubts on this point.¹⁷⁸

¹⁷³ "The Choice Between Anarchy and International Law with Monitoring", *op. cit.*

¹⁷⁴ Crisis Group interview, Mano Ganeshan, Colombo, May 2007.

¹⁷⁵ Adopted by the United Nations General Assembly on 20 December 2006, the convention has been signed by 57 states, though none have yet ratified it. The full text is at www.ohchr.org/english/law/disappearance-convention.htm.

¹⁷⁶ For a valuable treatment of the definitions of enforced disappearances under international law, see the "General Comment on the Definition of Enforced Disappearance" from the United Nations Working Group on Enforced or Involuntary Disappearances, 20 March 2007, at www.ohchr.org/english/issues/disappear/index.htm.

¹⁷⁷ Increasingly well-established in international law, command responsibility exists in cases where the commanding officer, either knowing or having reason to know that those under his "effective command and control" were carrying out, or had carried out, war crimes, fails to take all "necessary and reasonable" measures to prevent the crimes or report them to authorities for punishment. For a useful short treatment, see "Annex – A Note on Command Responsibility", in "Getting Away With Torture? Command Responsibility for the U.S. Abuse of Detainees", Human Rights Watch, April 2005, at hrw.org/reports/2005/us0405/10.htm#_Toc101408106. A longer study is A.P.V. Rogers, "Command Responsibility Under the Law of War", at www.lcil.cam.ac.uk/lectures/lecture_papers.php.

¹⁷⁸ The ruling was a response to a determination by the UN Human Rights Committee that Sri Lanka had violated the International Convention on Civil and Political Rights. The Sri Lankan Supreme Court declared that for a treaty or convention to be binding, it would not only have to be signed by the president but also approved by parliament and endorsed in a nation-wide referendum. Except for the small number of

These measures require a level of political will that has so far been absent. There has been no sign of a willingness even to admit the scale of the problem, let alone address it. With the government unwilling to take serious steps to halt the decline, victims are forced to seek help elsewhere, in civil society and the international community.

B. THE ROLE OF CIVIL SOCIETY

Sri Lankan human rights NGOs and activists have struggled to respond to the hundreds of disappearances, detentions, massacres, and political killings that have occurred since late 2005. A number of organisations have offered legal assistance to the survivors and families of the victims but few lawyers are willing to handle politically charged cases.

In addition to the reports from the UTHR group, which have regularly uncovered important information in high profile cases, a number of Colombo-based human rights organisations have published valuable reports based on fact-finding missions to the locations of incidents.¹⁷⁹ Some of these groups have also engaged in international lobbying. Their advocacy efforts have raised the profile of Sri Lanka in policy debates but they have been hampered by difficulties in documenting cases quickly and with enough detail, and in disseminating the information widely enough. Coordinated action remains very difficult for NGOs for a variety of complex reasons, including their reliance on project-based funding.

Given the ethnic and political divisions that have deepened throughout society with the return to war, activists have had trouble generating wider popular support for their efforts. Government attacks on critical media have led to extensive self-censorship, with the result that most of the Sinhalese public remains unaware of the true extent of human rights violations. As well-known peace and human rights activists continue to be attacked in the media and by ministers as pro-LTTE and traitors to the nation, even prominent people are afraid of incurring the government's wrath. After much criticism for its long silence, the Bar Association issued a statement in May 2007 condemning the rash of disappearances and abductions and unexplained killings. But the Chamber of Commerce has yet to speak

conventions that have been incorporated into domestic law, treaty obligations would seem to have been rendered null and void by the decision. The government has not responded to the Court's judgment.

¹⁷⁹ The Centre for Policy Alternatives, INFORM, Law and Society Trust, Women and Media Collective, IMADR, and Rights Now are among those involved in field investigations and reporting. Some of their joint reports are at www.cpalanka.org.

out on the many abductions of businessmen in Colombo, and there have been no protests from other professional associations. Trade unions, all but a handful of which are controlled by political parties, have largely remained silent.

One positive development has been the work of the Civil Monitoring Committee (CMC), a multiethnic initiative by a small number of parliamentarians. Since mid-2006 it has been documenting and investigating abductions in Colombo. More recently it has started receiving complaints from other parts of the country. In May 2007 it sent a first batch of eleven disappearance complaints to the UN Working Group on Enforced or Involuntary Disappearances. It has organised protests and public meetings and done much to keep the problem of disappearances in the public spotlight.

Since April 2007 the main opposition party, the UNP, and its leader Ranil Wickremasinghe, have begun to speak out more loudly, at home and abroad, in protest at human rights violations. Their efforts are still limited, however, and have been hampered by public memories of the UNP government's responsibility for tens of thousands of disappearances and political killings in the late 1980s.

C. INTERNATIONAL RESPONSES

The international response to Sri Lanka's human rights problems has been disjointed, lacklustre and tardy. Gradually concern has mounted, spurred by the widely publicised murders of the ACF workers and the continuous stream of news of abductions and killings. By September 2006, the government faced the prospect of being at the centre of debate in the UN Human Rights Council (UNHRC) in Geneva. In response, the president announced the formation of the Commission of Inquiry and the IIGEP.

The IIGEP idea bought the government some time and undercut support for a resolution the EU was threatening to introduce at the UNHRC. Since October 2006 the EU draft resolution has remained in limbo but European diplomats continue to express their commitment to it.¹⁸⁰ In the words of a Colombo-based diplomat, it should be seen as a sword of Damocles, ready to come down on the Sri Lankan government if its own investigations and behaviour over the coming months are insufficient.¹⁸¹ There is growing sentiment among EU member states that the resolution should be strengthened and formally introduced at the September 2007 session of the UNHRC.

¹⁸⁰ Crisis Group interviews, February 2007.

¹⁸¹ Crisis Group interview, November 2006.

Other international reaction has focused on development aid. Until recently, even the most outspoken donors have chosen at most to offer “friendly criticism” and remain engaged.¹⁸² This is particularly true of the U.S. and UK, although both are beginning to harden their stances. However, the potential contradictions of the U.S. position – frequent reference to both the “war on terror” and human rights and a political solution – is not lost on the Sri Lankan government. The U.S. needs to ensure that the Department of Defence and the State Department are both taking a strong position on human rights.

Growing dissatisfaction with the government's military strategy and human rights record has pushed some EU donors to take stronger measures. In October 2006, Germany announced it was cancelling some promised aid and freezing new aid in light of the renewed warfare and decline in human rights protection.¹⁸³ In early May 2007, the UK announced it was suspending some debt relief payments until human rights and defence spending commitments were met.¹⁸⁴ None of this has been strongly coordinated, and it has seldom been accompanied by a public message. It has, however, evoked a furious response from the government, which is extremely sensitive to potential cuts in financial support.

For the most part, the international community has failed to use what leverage it has. In theory, the co-chairs of the Tokyo donors conference – Japan, Norway, the EU and the U.S. – which allocated \$4.5 billion to Sri Lanka during the peace process, are in a good position to promote a more united stance on aid but they seem to be too disunited to reach a common position. Japan, the biggest donor, has continued to provide support at previous levels. The co-chairs have not even managed to issue a public statement since November 2006.

Another case in point is the U.S. government's Millennium Challenge Account process. Aid due to be released to Sri Lanka by the Millennium Challenge Corporation (MCC), whose funds are meant to reward developing countries that meet a series of governance, liberalisation, and rights-related criteria has been indefinitely put on hold.¹⁸⁵ This

came after the U.S.-based Freedom House, whose reports are used by the MCC to help determine eligibility for funds, released a report in April 2007.¹⁸⁶ However, the MCC itself has still not issued a statement, visited the country this year to see the problems for itself or not put forward any criteria that the government must meet to regain its eligibility for funding.

There is interest among some members of the U.S. Congress for greater pressure on the government. In February 2007, 38 members called for a U.S. special envoy to be appointed.¹⁸⁷ A better option might be for a senior congressional delegation to visit Sri Lanka as soon as possible. Legislation recently introduced in the Congress would restrict military assistance to any country with child soldiers in its armed forces or in government-linked militias. Given that the most recent State Department report on human rights in Sri Lanka notes the use of child soldiers by the TMVP and its links to the army, U.S. military training programs could be at risk.¹⁸⁸

Most of Sri Lanka's foreign aid comes from the World Bank, the Asian Development bank and the Japanese government.¹⁸⁹ All three have issued statements that emphasise the incompatibility of renewed warfare with sustainable economic development and have called for a return to negotiations and respect for the ceasefire. However, this seems to have had little impact on overall aid.

There has also been a lacklustre response to the mounting pressure on international NGOs and aid agencies. In both LTTE and government areas, there has not been enough coordination to mount successful challenges to restrictions on operations and attacks on staff. Donors and agencies need to work more closely with each other and be more willing to make public statements and even suspend programs in response to harassment. Both the government and the LTTE desperately need aid agencies to work in

greater prospect for success of our mission”, www.mcc.gov/countries/csr/Sri_Lanka_CSR.pdf.

¹⁸⁶ “MCC Should Withhold Funding from Sri Lankan Government”, Freedom House, 6 April 2007, at www.freedomhouse.org/template.cfm?page=70&release=483.

¹⁸⁷ “Moves for mediation here by U.S. special envoy”, *Daily Mirror*, 7 February 2007.

¹⁸⁸ Easwaran Rutnam, “Rights groups call for limiting military aid to Lanka”, *Daily Mirror*, 27 April 2007.

¹⁸⁹ From 2003 to 2005, Japan, the Asian Development Bank and the World Bank together accounted for nearly 70 per cent of foreign aid to Sri Lanka. In 2000–2001, these three contributed almost 90 per cent. See Sunil Bastian, *The Politics of Foreign Aid in Sri Lanka: Promoting Markets and Supporting Peace* (Colombo, 2007), p. 52; and “The Economic Agenda and the Peace Process”, *Sri Lanka Conflict Assessment 2000-2005*, Asia Foundation (2005), p. 32.

¹⁸² Crisis Group interview, senior Western diplomats, Colombo, March 2007.

¹⁸³ “Germany suspends Sri Lankan aid”, BBC, 25 December 2006, at news.bbc.co.uk/2/hi/south_asia/6208517.stm.

¹⁸⁴ P.K. Balachandran, “Pro-Active UK holds back aid to Lanka”, *Hindustan Times*, 3 May 2007. The UK had already paid half its promised \$5.9 million in debt relief for 2006. It suspended payment on the remaining half.

¹⁸⁵ “Resumption of due diligence activities in Sri Lanka will occur following an improvement of conditions there in terms of security and stability. MCC will continue to monitor events closely, and consider a resumption of activities when there is a

their areas of control but have become adept at dividing donors and playing them off against each other.

Donors should set up a more formal consultative process, including a conference to discuss aid in light of the renewal of conflict and the mounting human rights problem. There may be case-by-case exceptions but as a general rule and unless there is a significant shift in government policy, donors should be funding only humanitarian assistance and institutions and NGOs that are promoting good governance, human rights and communal tolerance.

1. UN mechanisms

UN agencies have been slow to react to the worsening situation of the past eighteen months. The UN Office of the High Commissioner for Human Rights (OHCHR) has tried to engage in quiet diplomacy, training of government officials and "capacity building" projects. None of this is likely to have much impact in the present environment. In September 2006 calls for a UN monitoring mission were endorsed by the High Commissioner. This has become a central demand of human rights groups and now of the official opposition party, the UNP. Several key states are still lukewarm, primarily the U.S., the UK and India. The government is certain to reject any such proposal unless it is under considerable international pressure. Sinhalese nationalist parties, notably the JVP, are virulent in opposition to any significant UN presence, believing it would be the first step towards a separation of Tamil areas along the lines of Kosovo.¹⁹⁰ Any monitoring mission would face the same problems of security as the SLMM. There may need to be significant de-escalation in the war, and with that a de-escalation in political rhetoric, for UN human rights monitoring to become a real possibility.

Nevertheless, given the failure of domestic institutions to protect the civilian population, it is hard to see what alternative might be conceived that would produce a significant improvement in the human rights situation. At the very least, OHCHR should be more active in pushing the government for serious change. The UN Department of Political Affairs (DPA), which played an essential role in laying the ground work for the OHCHR mission to Nepal, should also be more closely involved. Negotiations with the government might well begin with a visit to Sri Lanka from the High Commissioner, Louise Arbour.

In the meantime, other UN mechanisms should become more active. Among other things, the government should invite the UN Working Group on Enforced or Involuntary Disappearances to return to the country to continue its work, which has been valuable in the past. The government should also expedite its invitation to the UN special rapporteurs on torture and the internally displaced.

2. Pressure on child soldiers

The UN Security Council also offers an important arena for maintaining pressure on both the LTTE and the government through the mechanisms established under Resolution 1612 for reporting on groups that recruit child soldiers. As already noted, in February 2007 the Secretary-General recommended to the Security Council Working Group on Children and Armed Conflict that targeted sanctions be placed on the LTTE. The Office of the Special Representative on Children and Armed Conflict should continue to monitor TMVP activities and allegations of government complicity. UNICEF should continue to press Karuna's forces to establish procedures to release his underage fighters and guarantee there will be no more such recruitment. Given the TMVP's continued lack of cooperation with UNICEF, the Secretary-General should consider recommending sanctions against it in his next report to the Security Council Working Group. The Secretary-General and the Working Group should also closely monitor the role of the Sri Lankan government in permitting and/or facilitating the TMVP's activities.

3. Pressuring the LTTE

The government's human rights abuses have tended to take some attention away from LTTE violations. The lack of media access to LTTE areas also plays a part. However, there is a need for continued pressure on the rebels to change their behaviour and begin accepting fundamental human rights, including freedom of expression and movement. Pressure should continue to be placed on the LTTE's foreign fundraising efforts and intimidation of the Tamil diaspora. After many years of inaction, some governments have finally begun to move against the LTTE.

In the present environment, with sympathy for the LTTE growing among Tamils as a result of the government's actions, it is more difficult to clamp down on fundraising. Nevertheless, this is important, not only to encourage the LTTE to change, but also as a way of opening up space within expatriate Tamil communities for non-LTTE voices and organisations. Recent arrests of LTTE-affiliated Tamils in France, the U.S, and Norway, as well as pressure on LTTE-affiliated organisations in Canada and Australia, are positive steps.

¹⁹⁰ In March 2007, JVP leader Somawansa Amarasinghe cited the precedent of Kosovo when writing to the UN Secretary-General to oppose any UN peacekeeping or human rights monitoring mission to Sri Lanka. Suranga Gamage, "UN must keep off Lankan conflict – JVP", *The Island*, 5 March 2007.

VIII. CONCLUSION

Human rights abuses are for the most part the result of deliberate policy decisions by the government and the LTTE. On the part of the government, these policies, far from bringing an end to the conflict through the defeat of the LTTE, seem likely to prolong the war, engendering a new generation of embittered and damaged youth in all communities. The broad impact of human rights abuses on society is already evident, with rising crime and lawlessness apparent throughout the country. Far from weakening the LTTE, the government's "dirty war" seems likely to strengthen its support and stimulate more funding from the Tamil diaspora. The LTTE's abuses further undermine any claims to represent the Tamil people.

Limitations on human rights are also having a significant impact on Sri Lanka's remaining democratic institutions: on parliament, the media, law enforcement agencies and the judiciary. As the state decays, corruption and criminal influence on the political system have increased. While attacking moderates who are critical of the government's approach, the administration has given space to nationalist extremists, who provoke further inter-communal strife.

The government faces a severe security threat, which it has a legitimate right to address. However, its policies are doing little to improve security and are fuelling antagonism among moderate Tamils and other minorities towards the

state. Many moderate voices are being silenced through coercion and fear, while extremists on both sides are encouraged. Without protection of basic rights, there can be none of the freedom of discussion and opinion through which a durable solution might emerge.

Officially approved impunity makes all communities insecure and further undermines law enforcement and the judicial system. Unless atrocities and political crimes begin to be investigated, and the perpetrators are successfully prosecuted, there is little chance of resolving the crisis. Human rights protections need to be made a central part of the government's political strategy for ending the conflict. If the government fails to address the growing human rights crisis, it will inevitably face international pressure for the introduction of an international monitoring mission, cuts in donor funding and possibly more severe sanctions.

The international community can no longer afford simply to repeat formulaic criticisms of the government's human rights violations and express hope that political proposals will be forthcoming. More urgent action is needed, including support for a resolution in the UN Human Rights Council, an across the board reassessment of aid policies and support for more international involvement in monitoring abuses. Until that action is forthcoming, the victims of violence perpetrated by the state, the LTTE, and other armed groups have nowhere to turn.

Colombo/Brussels, 14 June 2007

