



经济及社会理事会

Distr.
GENERAL

E/CN.4/2006/53/Add.5
27 March 2006

CHINESE
Original: ENGLISH

人权委员会

第六十二届会议

临时议程项目 11 (b)

公民权利和政治权利，包括失踪和即审即决问题

法外处决、即审即决或任意处决

特别报告员菲利普·奥尔斯顿的报告

增 编

对斯里兰卡的访问 * **

(2005 年 11 月 28 日至 12 月 6 日)

* 本报告的内容提要以所有正式语文分发。报告本身载于内容提要附件，仅以原文分发。尾注不译。

** 本报告迟交，是为了列入最新资料。

内 容 提 要

特别报告员于 2005 年 11 月 28 日至 12 月 6 日访问了斯里兰卡，当时 2002 年 2 月政府与叛乱组织泰米尔伊拉姆猛虎解放组织(猛虎组织)之间的《停火协定》受到空前的压力。法外处决是造成冲突加剧的一个特别重要的因素。许多泰米尔人和穆斯林平民遭到杀害的主要原因是，他们不支持与政府交战的这派或那派而寻求行使自己的言论、行动、结社和参与自由。还许多人遇害是因为遭到报复，或因为他们被视作是“同情者”。

所有这种法外处决案件几乎都没有得到切实的调查。警方和军方对杀害泰米尔人或普通的在押人员死亡案件的调查往往不得力，而且最终被定罪的人数极少。在叛军方面，猛虎组织经常发表声明否认对各项杀人案件负责，却令人难以置信，而且对符合他们目标的杀人案件也不加谴责。

2004 年 3 月在东方省从猛虎组织分裂出来的“Karuna 派”杀害并恐吓了猛虎组织的核心分子和被怀疑支持他们的人。这种行为成功地削弱了猛虎组织对该地区的控制。政府坚称，“Karuna 派”是猛虎组织内部的问题，而猛虎组织现在则将“Karuna 派”称作是与政府勾结的准军事组织，根据《停火协定》，政府有义务解除他们的武装。双方的立场都是过分简单化的说法，对结束冲突都有害无益。

鉴于局势的复杂性和《停火协定》为猛虎组织规定的作用，报告特别强调的一点是，必须明确说明对各方的行为适用的国际法框架。

报告还讨论了在警方拘押期间死亡的问题，造成死亡的原因有：(a) 从事刑事调查工作的警察受训不足；(b) 为取得嫌犯口供而广泛采用酷刑；(c) 对犯有酷刑行为的警官没有实行切实有效的纪律和刑事制裁。

报告最后说，人权必须成为和平进程和整个治理制度的中心问题。目前，人权没有得到任何有关方面的应有的重视。报告指出，只有证明自己的行动和对未来的设想是牢牢地扎根于人权的，才能赢得斯里兰卡民众的心。主要的结论有：(a) 需要一项广泛的人权协定，包括一项行之有效的国际人权监测机制；(b) 所有各方都必须遵守《日内瓦四公约》共同条款第三条；(c) 政府再次宣布拒绝与 Karuna 派合作；(d) 作出安排对死于冲突的所有非战斗人员家属作出补偿；(e) 对所有法外杀人案件切实开展调查；(f) 培训所有后备警察如何开展刑事侦探和调查；(g) 征募泰米尔人和讲泰米

尔语的警官，特别是在北方和东方开展工作；(h) 立即任命国家警察委员会委员，确认其在警官升迁和惩戒方面的关键作用；(i) 批准《国际刑事法院罗马规约》；(j) 猛虎组织必须采取具体步骤，表明它是认真对待人权问题的，包括毫不含糊地谴责据称是它所犯的、但遭到它否认的杀人案件；(k) 猛虎组织承诺不侵犯人权，避免与武装的平民代理人合作；(l) 在开展更加全面的人权监测行动之前，增强斯里兰卡监测团的人权工作；(m) 有大量泰米尔侨民的联合国各会员国政府与泰米尔侨民开展以人权为基础的对话。

Annex

**REPORT OF THE SPECIAL RAPPORTEUR ON EXTRAJUDICIAL,
SUMMARY OR ARBITRARY EXECUTIONS**

Philip Alston

Addendum: Mission to Sri Lanka

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I. INTRODUCTION

1. This report describes the situation in Sri Lanka in relation to extrajudicial executions.¹ It is based upon in situ visits and extensive interviews undertaken in the districts of Ampara, Batticaloa, and Kilinochchi, as well as in Colombo, from 28 November to 6 December 2005. The Government of Sri Lanka maintained an open and constructive attitude towards my visit, provided useful assistance, and placed no restrictions on my access to all places and persons, including to LTTE representatives. I pay special tribute to the late Foreign Minister, the Honourable Lakshman Kadirgamar, who was himself the victim of a political killing in August 2005. Annex I provides complete details of the visit.

2. My goal is not to provide an inventory of the extrajudicial killings that are taking place. Various other groups are doing that and their figures are generally consistent and reasonably accurate. Rather, my aim is to contextualize these killings and identify measures which might address the underlying causes and lead to an improved situation. The killings reached their peak during and immediately after my mission and the resulting situation is fragile and potentially perilous.

3. The issue of killings, in many respects, provides an important window into many facets of the overall situation in Sri Lanka. They are symptomatic of the widespread use of police torture, of the failure to rein in abuses committed or tolerated by the military, and of the systematic efforts by various armed groups, and particularly the LTTE, to kill Tamils who refuse to support the LTTE and to provoke military retaliation. Endeavours to achieve peace which do not address human rights issues will fail, although the parties to the conflict do not appear to fully appreciate this reality.

II. ENDING THE CYCLE OF KILLING

A. Dynamics and causes of post-ceasefire killings

4. The conflict in Sri Lanka involves the intentional targeting of both combatants and civilians. The 2002 Ceasefire Agreement addressed both kinds of violence, committing the Government and the Liberation Tigers of Tamil Eelam (LTTE) to halt “offensive military operation[s]” as well as “hostile acts against the civilian population”. Until December 2005, the ceasefire between the parties’ armed forces had been largely respected, with only few exceptions. In contrast, the ceasefire in relation to civilians has consistently been broken by a series of so-called “political killings”.

5. The problem of political killings cannot be appreciated through statistics. Those dead since 2002 number in the hundreds, not the thousands, and it could be tempting to speak dismissively of a “high murder rate” or of an “imperfect but workable peace”. The social consequences of these political killings are, however, exponentially more severe than those that would follow from a comparable number of common crimes or random ceasefire violations. The purpose of these killings has been to repress and divide the population for political gain. Today many people - most notably, Tamil and Muslim civilians - face a credible threat of death for

exercising freedoms of expression, movement, association, and participation in public affairs. The role of political killings in suppressing a range of human rights explains why members of civil society raised this more than any other issue.

6. The last days of my visit witnessed what were then the deadliest attacks on Government forces since the ceasefire and even more deadly attacks have followed.² As the Sri Lanka Monitoring Mission (SLMM), established to monitor the ceasefire, has warned, the ceasefire is “in jeopardy” and “war may not be far away”.³ I deplore this turn of events, and reiterate that peace is necessary to fully ensure the right to life in Sri Lanka. I would emphasize, however, that the findings below remain relevant despite these developments: extrajudicial killings were not halted by the ceasefire and appear set to continue regardless of how the conflict develops.

1. The conflict

7. The primary participants in the conflict have been the Government and the LTTE. The latter began fighting the Government in the late 1970s with the aim of establishing the state of Tamil Eelam in the north and east of the island.⁴ Since the February 2002 ceasefire, its control of significant areas in the north and east has been acknowledged. Until December 2005 direct clashes between the Government and the LTTE had been extremely rare, and most post-ceasefire killings were of persons belonging to neither of these parties. Incidents in which LTTE cadres fired on the armed forces were generally understood by the latter as “provocations” designed to elicit a violent response rather than as serious attempts to resume hostilities.

2. The ceasefire and the post-ceasefire killings

8. The conflict-related killings taking place in Sri Lanka today should be seen in the context of the Ceasefire Agreement (CFA) signed by the Government and the LTTE in February 2002. Both parties to the CFA have sought to consolidate and improve their positions by exploiting the ambiguities and opportunities presented by the terms of the agreement as well as weaknesses in its monitoring mechanism, the SLMM. The parties have continued to advance their interests, in significant part, by committing or permitting widespread killing.

9. When I talked with Government officials, members of civil society, and representatives of the LTTE, killings were often discussed as violations of one or another of the CFA’s provisions. It was suggested implicitly that violations of one provision are justified by violations of some other provision by another group. This form of justification is without legal basis, but it is critical to understanding the logic of the post-ceasefire killings.

10. It is impossible to determine with precision the number of such killings. Virtually no deaths have been effectively investigated, and it is not always possible to distinguish common murders from conflict-related political killings. The most credible estimates that I received placed the total number of such in 2005 at over 300.⁵

3. Tamil political parties and “paramilitaries”

11. When the conflict began, there were other Tamil militant groups fighting alongside the LTTE. However, during the 1980s the LTTE repeatedly attacked these groups, killing many of

their members. Some of the groups subsequently cooperated with the Indian Peace Keeping Force (1987-1990) or the Government in fighting the LTTE, and many of them also entered into electoral politics. CFA article 1.8 provides that “Tamil paramilitary groups” shall be disarmed by the Government and that those of their members integrated into the armed forces be transferred away from the Northern and Eastern Province.⁶ Representatives of these groups - notably, EPDP, EPRLF, and PLOTE - informed me that they had been disarmed and now function solely as political parties. Compliance has not been perfect, however. One example, confirmed by a government official, is the continuing operation of armed EPDP cadres in the islands off the Jaffna peninsula. Various Government officials suggested to me that the CFA required only a one-time disarming of these groups by the Government with no obligation to prevent them from rearming.

12. While that position is untenable, there is little evidence that most members of these groups do other than non-military, political work. Thus, reflexive references to “paramilitaries” rather than “political parties” dangerously distort the facts. As long as these groups continue to be targeted, they will require protection from the military, which is facilitated by locating their residences and political offices near military posts. This protection unavoidably results in the appearance of cooperation with the military, but this cannot be generally assumed. Nor can particular allegations of cooperation be too readily discounted.

13. Post-ceasefire killings of members of these groups have continued, and most circumstantial evidence points to the LTTE. While some killings may have been motivated by the quest for military advantage, many appear to have been aimed only at upholding the LTTE’s proclaimed role as the “sole representative” of the Tamil people. Members of these groups are justifiably concerned that CFA article 2.1, prohibiting hostile acts against the civilian population, has not provided greater protection to them.

4. The Karuna split

14. In March 2004 the LTTE commander of the Eastern Province, Colonel Karuna, split with the LTTE leadership in the Northern Province, initially taking with him perhaps one fourth of the LTTE’s cadres. Terminology varies widely, but this new force may be termed the “Karuna group”. While the LTTE continues to control most of the territory it did at the time of the ceasefire, the Karuna group has conducted many ambushes and killings of LTTE cadres, political representatives and supporters. This has weakened the LTTE’s position in Government-controlled areas and has led the LTTE to close its offices and end most political work in those areas.⁷ Since the LTTE has long stated its aim to create the state of Tamil Eelam out of most of the territory of the Northern and Eastern Provinces, there is now a crucial battle for control in the east, accounting for many of the most recent killings.⁸

15. The LTTE’s characterization of the Karuna group has evolved. When the split first occurred, the LTTE maintained that it was a purely internal matter. However, when I spoke with LTTE representatives, their position was that the Karuna group was a “Tamil paramilitary” within the meaning of the CFA, that it received assistance from the Government, and that it must be disarmed by the Government. As evidence, the LTTE representatives pointed to statements

made by alleged defectors from the Karuna group. These persons stated that logistical support, arms, and ammunition were being provided by Sri Lankan Army Intelligence, that funding was being provided by an “external source”, and that the leadership of the Karuna group was in close contact with several Government ministers.⁹ Regardless of the veracity of these allegations (see below), the LTTE’s position on the Karuna group is untenable. Notwithstanding any support it may be providing, it is far from clear that the Government would be capable of disarming the Karuna group, and any future attempt at a comprehensive revised agreement would have to address the realities created by the Karuna group.

16. The Government’s position on the Karuna group is also problematic. I was informed by a number of military personnel that ex-President Chandrika Kumaratunga had issued an order prohibiting any links with Karuna except by intelligence officers. I unsuccessfully requested a copy of that order. While I found no clear evidence of official collusion, there is strong circumstantial evidence of (at least) informal cooperation between Government forces and members of the Karuna group. I received credible reports from civil society groups of persons abducted by the Karuna group being released at military bases, a credible account of seeing a Karuna group member transporting an abductee in view of a Sri Lanka Army (SLA) commander, and equivocal denials from SLA personnel. Moreover, the stock line that members of both factions of the LTTE (Vanni or Karuna) were terrorists, between whom the Government does not distinguish, is disingenuous. Many of the people I spoke with in the Army and the Police Special Task Force (STF) candidly noted that the split had been beneficial for the Government, because the Karuna group was undermining the LTTE. (There has been a notable increase in the number of LTTE cadres killed since the split.) The strategic logic is undeniable, but it imperils the ceasefire and shows a dangerous indifference to the many civilians in the East who have been killed as a consequence of the low-intensity conflict between the LTTE and the Karuna group.

17. The 18 November 2005 attack on a mosque in Akkairapattu exemplifies the manner in which civilians are being caught in the crossfire. During morning prayers, two people rolled grenades to the front of the mosque, where they exploded, killing 6 persons and seriously wounding 29 others.¹⁰ I visited the mosque, met with victims and community representatives, and discussed the attack with Government officials and LTTE representatives.

18. While accounts differ widely, the conflict between the LTTE and the Karuna group figure in almost all. One explanation, attributed to two defectors from the group, is that the Karuna group was responsible as part of an effort to create dissension between the Tamil and Muslim communities.¹¹ Another explanation suggests that the attack was part of a cycle of retaliation. Two days earlier, the bodies of two LTTE members had been found on a road marking the unofficial boundary between the predominantly Tamil and predominantly Muslim areas of the town. Muslim community members suggested to me that the two LTTE cadres may have been killed by Muslim individuals cooperating with the Karuna group. While the Muslim community as a whole has avoided alignment with either group, many speculate that the LTTE attacked the mosque in retaliation and to deter further instances of cooperation.

19. Without an effective investigation, it is impossible to assign definitive responsibility for the attack. Sources close to the LTTE did, however, confirm to me that the LTTE engages in retaliatory killings, and the dynamics of retaliation can serve to explain much of the killing

taking place in the East. Failure to clarify responsibility in such situations fuels tensions. Thus, in the course of my visit, the mosque attack provoked further convulsions of violence in the East. The conclusion is that unless crimes of this kind are properly investigated, and those responsible held to account, they will inevitably fuel the cycle of bitterness, retaliation and violence.

5. The use of civilian proxies by the Liberation Tigers of Tamil Eelam

20. The day before I visited Kilinochchi to meet with LTTE leaders, six Sri Lankan Army soldiers were killed in a claymore mine attack in Jaffna. (Such attacks have escalated since my departure.) While in Kilinochchi, I expressed serious concern about these killings, and the role that might have been played by civilians recently trained by the LTTE was not ruled out. The LTTE has recently called Tamil civilians living in Government-controlled Jaffna to the LTTE-controlled area around Kilinochchi to receive civil defence training. While it was denied that the LTTE gives commands to these civilians, it was acknowledged that it does have substantial “influence” over them. A senior LTTE official informed me that the frustration of the Tamil people with the slow progress in the peace process made such attacks inevitable. He added that the Jaffna peninsula is uncontrollable because the LTTE has had to withdraw its political cadres and is thus unable to exercise its calming influence on the people. The LTTE’s apparent use of surrogate groups is a dangerous escalation.

6. Killings to control the Tamil population

21. One of the most disturbing aspects of post-ceasefire violence has been the use of killing to control the Tamil population. CFA article 2.1 requires that the parties “in accordance with international law abstain from hostile acts against the civilian population” and, indeed, such killings are prohibited by international human rights and humanitarian law apart from the CFA. However, the LTTE and, to a lesser extent, other groups have elected to reinforce their political and financial support from the Tamil population through the use of violence.

22. The LTTE’s classification of its political opponents within the Tamil community as “traitors” and its efforts to enforce obedience with killings constitute fundamental violations of human rights. Governments as well as armed opposition groups are generally constrained to take account of human rights by the need to retain popular support within their constituencies. The LTTE has, however, been able to circumvent many of these constraints by relying so heavily for its financial and political support on a constituency that is largely exempted from its violence. This is the Sri Lankan Tamil diaspora, which numbers more than 800,000 and is centred in Australia, Canada, India, the United Kingdom and the United States of America.¹²

23. For members of the diaspora the problem is to distinguish between, and seek to reconcile, the two dramatically different faces of the LTTE. In Kilinochchi the apparatus it has established might appear an interesting experiment in governance, with its own judiciary and police force. It is endeavouring to promote some degree of human rights consciousness through the North-East Secretariat on Human Rights (NESOHR). Elsewhere, however, and especially in the East, its modus operandi inflicts intimidation, coercion and violence on a large population that is otherwise uninvolved in the conflict. The diaspora must accept the responsibility that comes

with influence and insist on being a positive force for human rights. Even those who view the issue in unidimensional terms as a liberation struggle must reject unequivocally the killing of all innocent civilians and non-combatants.¹³ To the extent that the diaspora is funding the ongoing killing and terrorizing of innocent civilians, the Governments of the states in which they live should enter into a serious dialogue with them on the findings in this report and the opportunities they might have to promote respect for human rights.

B. The international legal framework governing the use of lethal force

24. Within Sri Lanka the recent political killings have been discussed primarily in terms of the CFA. Insofar as the Government and the LTTE endeavour to comply with the agreement, it is an appropriate frame of reference. But international human rights and humanitarian law continue to apply and in some cases impose more exacting obligations.

25. Human rights law affirms that both the Government and the LTTE must respect the rights of every person in Sri Lanka. Human rights norms operate on three levels - as the rights of individuals, as obligations assumed by States, and as legitimate expectations of the international community. The Government has assumed the binding legal obligation to respect and ensure the rights recognized in the International Covenant on Civil and Political Rights (ICCPR). As a non-State actor, the LTTE does not have legal obligations under ICCPR, but it remains subject to the demand of the international community, first expressed in the Universal Declaration of Human Rights, that every organ of society respect and promote human rights.¹⁴

26. I have previously noted that it is especially appropriate and feasible to call for an armed group to respect human rights norms when it “exercises significant control over territory and population and has an identifiable political structure”.¹⁵ This visit clarified both the complexity and the necessity of applying human rights norms to armed groups. The LTTE plays a dual role. On the one hand, it is an organization with effective control over a significant stretch of territory, engaged in civil planning and administration, maintaining its own form of police force and judiciary. On the other hand, it is an armed group that has been subject to proscription, travel bans, and financial sanctions in various Member States. The tension between these two roles is at the root of the international community’s hesitation to address the LTTE and other armed groups in the terms of human rights law. The international community does have human rights expectations to which it will hold the LTTE, but it has long been reluctant to press these demands directly if doing so would be to “treat it like a State”.

27. It is increasingly understood, however, that the human rights expectations of the international community operate to protect people, while not thereby affecting the legitimacy of the actors to whom they are addressed. The Security Council has long called upon various groups that Member States do not recognize as having the capacity to formally assume international obligations to respect human rights.¹⁶ The LTTE and other armed groups must accept that insofar as they aspire to represent a people before the world, the international community will evaluate their conduct according to the Universal Declaration’s “common standard of achievement”.

28. Human rights law contributes two critical elements to the legal framework regulating the use of lethal force in this context. The first is that lethal force may never be used to suppress human rights. It violates human rights law to kill people for exercising their rights to freedom of expression, to peaceful assembly, to freedom of association with others, to family life, or to participate in public affairs and to vote. While the illegality of killing to suppress rights may appear obvious, it goes to the heart of many of the violations occurring in Sri Lanka.

29. The other element contributed by human rights law is that the intentional use of lethal force in the context of an armed conflict is prohibited unless strictly necessary. In other words, killing must be a last resort, even in times of war.

30. In an armed conflict, human rights law is complemented by the additional regime of humanitarian law. In 1959 the Government ratified the Geneva Conventions of 12 August 1949, and the LTTE has formally taken upon itself obligations under the Geneva Conventions and its Additional Protocols.¹⁷ All parties to the conflict are bound to comply with the terms of common article 3 of the Geneva Conventions of 1949 and of customary international humanitarian law. The Karuna group is a party to the conflict within the meaning of humanitarian law, regardless of whether it constitutes a paramilitary within the meaning of CFA article 1.8 and regardless of any support the Government may be providing. However, depending on the character of such support, the Government could also bear legal responsibility for its violations of humanitarian law.

31. Common article 3 prohibits the murder of persons taking no active part in hostilities. This prohibition is both more limited than sometimes hoped and more expansive than sometimes realized. It leaves the use of lethal force in the midst of combat - the "conduct of hostilities" - largely unregulated. However, in other contexts, it protects combatants as well as civilians, prohibiting the murder of all "[p]ersons taking no active part in hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause". The killings that have taken place in which a person is abducted and subsequently killed violate this rule without exception. The bedrock legal principle that persons who are captured have a right to humane treatment should not be obscured by any implication that their execution is worse if they are civilians.

32. Motorcycle drive-by shootings have been a common tactic. It might be argued that when such a shooting occurs in territory controlled by an opposing party, it is governed by the principle of distinction whereby soldiers and military members of armed groups may be targeted but civilians may not be.¹⁸ In most of these incidents, however, the persons killed have been going about their daily lives rather than taking part in combat, and it is more appropriate to view such killings as murders within the meaning of common article 3. Moreover, regardless of how these killings might be conceptualized in humanitarian law, the prohibition on killing unless it is strictly necessary continues to apply under human rights law. The grenade attacks that became increasingly common in late 2005 raise further issues. While these too have generally constituted murders violating common article 3, they would often violate the prohibition of indiscriminate attacks even were they considered to fall within the conduct of hostilities.

33. The CFA has played a crucial role in ensuring the right to life in Sri Lanka. This role should not, however, lead to a de-emphasis of the requirements of human rights and humanitarian law. This is partly because the CFA binds only the Government and the LTTE; whereas, human rights and humanitarian law apply to all armed groups. It is also because the CFA affirms the international legal obligations of the parties only with respect to “civilians”. In contrast, the right to life of “combatants” is only indirectly protected by the prohibition of offensive military operations.¹⁹ Under international law, all Sri Lankans, regardless of whether they are civilians, are bearers of the right to life. This right must be respected by all the parties quite apart from the obligations of the Government and the LTTE to each other. Human rights law, humanitarian law, and the CFA are overlapping and mutually-reinforcing frameworks that together serve to protect human lives.

C. The failure of police investigation in the context of the ceasefire

34. The Government has failed to effectively investigate most political killings. This is due both to the police force’s general lack of investigative ability and to other impediments. When I asked police officers why a particular killing had not been resolved, I generally received the same answer: the suspect escaped into an LTTE-controlled area. While it is true that the police are unable to enter these areas,²⁰ two observations are in order. First, in many cases the belief that the suspect was in an LTTE-controlled area was speculation inasmuch as no investigation had been carried out. Second, the police have lost much of their appetite for serious investigations of political killings. Many officers operate under the impression that investigating any crime presumed to involve the LTTE would imperil the ceasefire. These cases are simply too hot to handle. The Government should unambiguously instruct the police that, while they are obligated not to violate the CFA, they continue to be obligated to investigate crimes and apprehend suspects within the terms of the law, regardless of who those suspects might be.

35. This has interfered with criminal investigations. Government officials brought several instances to my attention. In September 2005, government police entered an LTTE-controlled area in Mannar in pursuit of a suspected paedophile. The police officers were captured by the LTTE, and three were still being held in early January 2006. In the meantime, the suspect escaped and was detained only when he turned himself in to the police in Colombo. A more prosaic incident was raised by the police in Welikanda: they had reason to believe that a man had robbed at least five cars, but he escaped into an LTTE-controlled area, ending the investigation. A representative of the “Tamil Eelam Police” provided me with another example. He related that two years ago there had been a murder in an LTTE-controlled area of Mannar. The persons suspected of having committed this murder escaped into Government-controlled territory and were subsequently captured by the government police. It was his understanding that, for lack of evidence, the suspects were released by the Government within a month. Other similar cases were brought to my attention by victims, and the lack of cooperation in policing appears to be a persistent problem that adversely affects the protection accorded the population from crime.

36. The parties have a common interest in controlling crime and, as a confidence-building measure, the Government and the LTTE should initiate and regularize contact between the government police and the policing forces that operate in LTTE-controlled areas. This contact

would allow access to evidence, information, and detainees. I raised this possibility with the Inspector General of Police (IGP) and the head of the “Tamil Eelam Police”, himself a former government police officer. I sensed that both had political reservations but also understood the limitations the current arrangement imposed on their work. It is my view that such contact might be quickly and helpfully initiated as a pragmatic confidence-building measure. If appropriate, the Sri Lanka Monitoring Missions (SLMM) could assist in facilitating this dialogue.

37. The police also lack sufficient linguistic ability and cultural sensitivity to interview witnesses and gather the information required to effectively investigate killings that occur within the Tamil and Muslim communities.²¹ The political killings have disproportionately affected these communities, both of which speak Tamil. The police force, however, is only 1.2 per cent Tamil and 1.5 per cent Muslim, and Sinhala officers seldom speak Tamil proficiently. The only practical way for the police to acquire a larger number of fluent Tamil speakers is to recruit Tamil and Muslim officers.²² While it was sometimes argued that the low proportion of Tamils in the police force was inevitable, given the fear that the LTTE would target Tamil officers, it was acknowledged by informed actors that if the Government made such recruitment a priority, it could be achieved with meaningful financial incentives and preferences for promotion.

D. Problems and possibilities in the role of the Sri Lanka Monitoring Mission

38. The CFA established the Sri Lanka Monitoring Mission (SLMM) to verify compliance with the terms of the ceasefire. It has played a difficult but vital role in maintaining the confidence of the parties. However, the public does not share this confidence. In numerous meetings, members of civil society expressed frustration with the SLMM for at least three reasons: (a) its narrow interpretation of its verification mandate to exclude investigation; (b) the conflict of interest inherent in its link to the facilitator of the peace process; and (c) the inadequate information about violations that it makes public.

39. The SLMM draws a strong distinction between “monitoring” and “investigation”. It forwards complaints to the parties, elicits their responses, and attempts to determine whether a violation of the CFA occurred. However, as the SLMM has stated publicly, it “is not here to conduct police investigations”.²³ The SLMM explained to me that it continually presses the police to conduct effective investigations but is aware that these remain ineffective. The SLMM understands this limited role to reflect the parties’ tacit consensus on its mandate. However, the CFA does not preclude a broader investigative role for the SLMM and it makes the Head of the SLMM “[t]he final authority regarding interpretation of this Agreement”.²⁴ It would behove the SLMM to advance a less restrictive interpretation of its mandate, as a means of shoring up the ceasefire with more comprehensive and public monitoring and reporting.

40. The SLMM steadfastly insists that it is completely independent of the peace process’s facilitator, Norway. This is not borne out by the perception of the public, the experience of the parties, or the terms of the CFA. Under the CFA, the Government of Norway appoints the head of the SLMM, who in turn reports to that Government.²⁵ This arrangement gives Norway a conflict of interest. On the one hand, in its relationship with the SLMM it is charged with ensuring the disinterested verification of violations; on the other hand, as facilitator of the peace

process, it has an interest in preventing ceasefire implementation issues from disturbing the broader peace process. For a public that needs accountability, this conflict of interest is disturbing. For the Government of Norway which has contributed so much, it is unnecessary.

41. Since it is the general public that has borne the brunt of the ceasefire violations it is unsurprising that so many complaints to the SLMM come from private individuals. The SLMM does not, however, provide public accountability. The complaints are confidential, going only to the parties, and the SLMM communicates to the public only aggregate statistical data. Most ceasefire violations implicate human rights and an effective monitoring arrangement must provide accountability for the victims as well as for the parties. This need is felt deeply by victims, civil society organizations, and politicians across the political spectrum.

E. Options for international monitoring

42. Many representatives of civil society pressed on me the need for international human rights monitoring. This proposal was motivated by dissatisfaction with the accountability provided by the SLMM and the police. Some favoured a strengthened SLMM while others made the case for a completely new mechanism.

43. Arguments made by the latter group included:

- Ceasefire monitoring is inherently bound up in the peace process and even de-linking the facilitator from the SLMM cannot remove this conflict of interest;
- Public findings of responsibility for violations have little impact on the LTTE or the support it enjoys;
- Conflict-related human rights violations occur frequently throughout the country, but SLMM field offices are located only in the north and east;²⁶
- The SLMM's institutional inertia and low public standing call for an entirely new initiative;
- Human rights violations by the Karuna group must be investigated and exposed, but it is not bound by the CFA.

44. A range of candidates was identified as possible providers of a new human rights monitoring role. Foremost among these was the United Nations, which has both an established expertise in human rights monitoring and a lack of political involvement in the peace process. Other candidates were the Sri Lanka Donor Co-Chairs, some unspecified but non-Nordic country, and a "high-level panel" of human rights experts. There was a general consensus that, even were its resources greatly increased, the Sri Lanka Human Rights Commission would not be an appropriate body to investigate political killings countrywide.²⁷ Few of my interlocutors felt that effective monitoring could be conducted without the participation of the LTTE.

45. A strengthened SLMM could achieve the following goals:

- Effective monitoring requires some investigative capacity, involving at least expanded SLMM staffing, the addition of persons with police training, and a significant number of Sinhala and Tamil interpreters;
- Effective investigations will involve protection for witnesses;
- The publication of information is indispensable. The current practice of publishing aggregate statistics and occasional press releases is insufficient and conducive to rumours and misinformation. The details of the alleged incidents, the results of investigation, and the basis for the monitoring mechanism's determination of responsibility must be made public (even if information is redacted to protect individuals);
- The inclusion of more human rights experts in the SLMM especially to assist in evaluating compliance with CFA article 2.1. The designation of such an official in each field office and in headquarters would have important symbolic and practical value.

46. These priorities may be realized by strengthening the SLMM without renegotiating its mandate under the CFA. Government officials and LTTE representatives alike emphasized that they would prefer this option. It would constitute an important and immediate confidence-building measure, but could not be achieved without significantly increased resources provided by the international community and a commitment by the parties to more effective monitoring.

47. From a human rights perspective, the goal of strengthening SLMM's human rights role is clearly not sufficient in itself in the medium-term.²⁸ For pragmatic reasons it seems to be the best interim measure, but before long significantly more will be needed. If the ceasefire fails, and that now appears to be an all too real possibility, the SLMM's role will be in question and there will be an urgent and pressing need to establish a full-fledged international human rights monitoring mission. Equally, if progress is made towards a longer-term settlement, more comprehensive monitoring will be needed of its human rights dimensions.

F. Violations must be unequivocally denounced

48. In my discussions with Mr. Thamilchelvan, chief of the LTTE political wing, I stressed the difference between denying responsibility and denouncing attacks, and called on the LTTE to signal unequivocally its rejection of acts of violence. He responded by arguing that the LTTE is a movement of the Tamil people and that it cannot rightly denounce the actions of pro-LTTE civilians. This view is simply not compatible with the leadership role claimed by the LTTE. If it is serious about bringing an end to the widespread violation of the right to life, it must unequivocally denounce and condemn killings. This is a confidence-building measure that is essential if the CFA is to be understood to contain the essential aspects for ensuring human rights.

49. The Government's ambivalence toward the Karuna faction must also be addressed. It must fully accept that killings violate fundamental human rights that the Government is legally

obligated to ensure. As confidence-building measures to that end, the Government should both publicly renounce any involvement with the Karuna group, unequivocally denounce and condemn those killings for which the Karuna group is alleged to be responsible, and demonstrate its determination to investigate and prosecute such cases.²⁹

III. DEATHS IN CUSTODY AND IMPUNITY

A. Introduction

50. Significant levels of police brutality and impunity were reported to me by a wide range of sources. The underlying causes are not difficult to discern. In the course of more than three decades of civil strife and violence, the police force has been transformed into a counter-insurgency force. More than two thirds of today's police officers belong to the "reserve" rather than the regular force and most of these have never received significant training in criminal detection and investigation.³⁰ One government official told me bluntly, "Police officers holding positions today were recruited as manpower - they do not do or know how to do police work."³¹ To make matters worse, police operations during the armed conflict were subject to "emergency" legislation that permitted prolonged detention without habeas corpus, the admission into evidence of confessions which would be inadmissible under the ordinary law of evidence, and the disposal of the bodies of persons killed by the armed forces or the police without a formal inquest. It is regrettable that many of these provisions are now back in force in emergency regulations promulgated since the assassination of Foreign Minister Kadirgamar.³² Today, too many police officers are accustomed to "investigating" by forcibly extracting confessions and to operating without meaningful disciplinary procedures or judicial review.

51. The lessening of tensions following the February 2002 ceasefire provided an ideal opportunity to transform the police force and introduce effective accountability measures. This has happened to some extent. In 2002 the Constitution was amended to establish an independent National Police Commission (NPC) with power over police discipline and a mandate to respond to public complaints. The NPC and the Human Rights Commission (HRC) have undertaken promising initiatives - but their efforts will be thwarted without political support and adequate resources. The other half of the problem is the broader deficiency of the Sri Lankan system of criminal justice. Progress requires transforming the culture and practices of police, prosecutors, and the judiciary. This is a daunting but not a hopeless task - these institutions have functioning bureaucracies with no small number of sophisticated and well-intentioned officials.

52. In Sri Lanka no single sweeping reform will transform the system of justice; instead, many relatively small problems must be solved. Such incremental reforms will be achievable only once their necessity is recognized. Today most Sri Lankans - in and out of Government - are complacent about the criminal justice system. Reform will require the recognition of uncomfortable truths. A single-digit conviction rate is unacceptable. And the conviction of only a handful of government officers implicated in the killing of Tamils is a travesty that has deeply

corrosive effects. Recording confessions extracted with torture bears no relation to criminal investigation. An ineffective justice system creates a climate of public opinion conducive to condoning police torture and the summary execution of suspects. If these principles are recognized, and if the current sense of complacency is replaced with a sense of urgency, Sri Lankans face no insuperable obstacles to expeditiously establishing an effective system of democratic policing and criminal justice.³³

B. Deaths in police custody

53. The police are now engaged in summary executions, which is an immensely troubling development. Reports, unchallenged by the Government, show that from November 2004 to October 2005 the police shot at least 22 criminal suspects after taking them into custody. It is alleged that the use of force became necessary when, after having been arrested, presumably searched, and (in most cases) handcuffed by the police, the suspects attempted either to escape or to attack the officers. In all cases the shooting was fatal, and in none was a police officer injured. The Government confirmed that in none of these cases had an internal police inquiry been opened. The reason proffered was that no complaints had been received.³⁴ The pattern of summary executions that emerges demands a systematic official response that brings those responsible to justice and discourages future violations.

54. The other main cause of deaths in police custody is torture.³⁵ (Deaths are an inevitable side-effect of the widespread use of torture.)³⁶ Government officials were generally candid in recognizing that torture is widespread. While some officials said that the problem's magnitude had been exaggerated, they did not dispute that in Sri Lanka's police stations physical mistreatment is frequently used to extract confessions from suspects, sometimes resulting in death. However, this recognition of torture's prevalence was often accompanied by a complacent and fundamentally tolerant attitude. One high-ranking official acknowledged to me that torture was widespread and problematic but then proceeded to note that while he could understand why police tortured "in the line of duty", he felt it was completely inexcusable for police to torture in pursuit of private ends. This casual acceptance of torture is highly problematic. It also downplays the systemic nature of the problem. There is a nationwide pattern of custodial torture in Sri Lanka, and the Government has a legal responsibility to take measures to bring that pattern to an end. The vast majority of custodial deaths in Sri Lanka are caused not by rogue police but by ordinary officers taking part in an established routine. It is essential that government officials accept that disrupting this pattern of custodial torture is a necessary step not only in ensuring the human rights of those arrested but of retaining public trust and confidence.

55. Reforms to prevent deaths in custody must take account of the systemic causes. Those include, in particular, the lack of regular police training given to many officers, the credibility still accorded to coerced confessions, the preference for delivering instant "justice" given the weak investigative capacities and proclivities of the police, and the near-complete failure to prosecute or even discipline police who commit serious human rights violations.³⁷

56. The lack of investigative capacity is due to a lack of police training and resources, ineffective forensics, and an unwillingness to ensure the security of witnesses. The Judicial Medical Officers (JMOs) who carry out most autopsies typically lack the requisite vehicles, equipment and specialized training. The range of obstacles to a prompt and effective examination means that too much evidence simply bleeds out onto the floor. Investigations are also impeded by the lack of effective witness protection. This makes witnesses especially reluctant to provide evidence on crimes committed by police officers, and led several interlocutors to joke that it would be better to be a victim than a witness. Inadequate investigations result in evidence insufficient to sustain a conviction. Various police and forensic training programmes have been supported through development assistance initiatives. In the absence of any detailed evaluations, my impression is that they have been worthwhile but regrettably limited in scope.

57. The frequent failure to prosecute police accused of responsibility for deaths in custody is due partly to deficiencies in internal investigation. Complaints about police misconduct are received by the Inspector General of Police (IGP), who selects either the Special Investigations Unit (SIU) or the Criminal Investigation Department (CID) to carry out an internal investigation. Internal investigations into serious incidents typically last from two to four years, and it seems likely that by no means all such complaints are investigated at all. When grave misconduct, such as torture or murder, has been alleged, the investigation is generally conducted by CID. The primary role of CID is assisting local police, and for it to also conduct internal investigations undermines both their actual effectiveness and outside perceptions of impartiality. Reform is needed, and it may be hoped that this can be spearheaded by a strong National Police Commission.³⁸

58. Cases that are referred to the Attorney-General seldom lead to convictions. This is partly due to the lack of evidence gathered, and partly to a judiciary that moves cases along slowly, sometimes tolerating years of delay preceding verdicts. One government official suggested that the judiciary was so overloaded that judges would seize on any plausible excuse to allow a postponement and cut the caseload. He pointed out that if indictments reliably resulted in interdiction, as the law requires, police officers and other government officials would be less likely to seek dilatory adjournments. I regret that I did not have the opportunity to meet with judges, but I note the widespread perception that the courts manage cases inefficiently. Prosecutors must also share the blame for the low conviction rates. The Attorney-General has become increasingly active in prosecuting police torture cases, and he informed me that there have been 64 indictments, 2 convictions, and 2 or 3 acquittals (most cases are pending). Time will tell whether this is the beginning of accountability or a further exercise in shadow-boxing.³⁹

C. The corrosive effects of impunity

59. The failure to effectively prosecute government violence is a deeply-felt problem in Sri Lanka. The paucity of cases in which a government official - such as a soldier or police officer - has been convicted for the killing of a Tamil is an example. Few of my interlocutors could name any such case, with the exception of Krishanthi, in which

six soldiers and a policeman were convicted.⁴⁰ The cause of this impunity is unclear. The result, however, is clear: many people doubt that their lives will be protected by the rule of law.

60. The State's failure to convict anyone for the Bindunuwewa massacre is an example of this impunity: on 25 October 2000, 27 Tamil men were beaten, cut, and trampled to death by a mob while they were in custody and "protected" by roughly 60 police officers, but not a single private person or public official has been convicted. I had previously corresponded with the Government concerning this case⁴¹ and, during my visit, I met with the mothers of Bindunuwewa victims, a survivor, and an attorney for the families.

61. That there was both State and individual criminal responsibility is undeniable, and supported by multiple government reports.⁴² However, not a single person has been convicted of any crime related to the events at Bindunuwewa.⁴³ I was offered various explanations for this failure of justice: an inadequate police investigation led to insufficient evidence for conviction; judicial bias or corruption produced acquittals; the complexity of the case forced the prosecution to rely on novel legal theories. I do not have the information available to form a judgement, but the bottom line remains that this is a deeply unsatisfactory outcome and one which is all too consistent with fears of impunity for those who kill Tamils.⁴⁴

D. Independent oversight bodies

62. The shortcomings of law enforcement and the justice system clearly require reforms of the relevant institutions. But independent bodies can play an important role in driving the reform process. While both the National Police Commission and the Human Rights Commission) have made valuable contributions, they lack resources and, even more importantly, political support.

63. The HRC has been acting as an independent oversight body for complaints concerning police conduct since 1997.⁴⁵ Its mandate is to investigate and respond to violations of fundamental rights under the Constitution and human rights under international law, including the right to life. It can receive complaints, and its investigations are facilitated by statutory powers to, for instance, pay unannounced visits to police stations and other places of detention. It has exercised its mandate with regard to torture cases, and is currently conducting an inquiry into the police shooting of criminal suspects. While the Commission lacks the power to impose remedial and preventative measures, it is empowered to recommend prosecutions and to refer cases to the courts. While it has the potential to play a crucial role, it lacks the necessary resources. Thus, for instance, it does not have enough vehicles to respond to all major mistreatment complaints by visiting detention places.

64. The NPC was established in 2001 by the Seventeenth Amendment to the Constitution. While it has a mandate to conduct independent investigations⁴⁶ and effective disciplinary procedures for police misconduct, its long-term effectiveness is threatened by the lack of a strong constituency supporting its independence. At one level this is unremarkable, given that many interlocutors reported a long history in Sri Lanka of politicians influencing appointments, transfers and promotions of police. Thus, vesting administrative powers over the police in an independent body promised to replace patronage and politics with professionalism. While most

members of civil society and Government that I talked with had favourable impressions of the NPC's efforts thus far, some also feared that, in struggling to insulate the police from politics, it would fall victim to politics itself.⁴⁷

65. The gap between theory and practice is illustrated by a turf war that played out over much of 2005. In March the NPC provided the IGP with a list of 106 officers to be interdicted (suspended), pursuant to the Establishment Code, due to their indictments for torture. I received varying accounts of the subsequent events from persons inside and outside of Government. Some insisted that no one had yet been interdicted; others that some had been interdicted but only after a delay of many months. According to the IGP, he did not move immediately because of the need to double-check the list provided by the NPC against his own files to avoid any errors. He reported to me that he found a few such errors and then proceeded to interdict the remaining officers. To have interdicted the officers based solely on the NPC's list would, he insisted, have compromised the due process rights of the officers. But this reflects a fundamental misunderstanding of the institutional structure set up by the Seventeenth Amendment. The IGP was given a purely consultative role subordinate to the NPC's power to discipline officers; while the NPC may well make mistakes, those are its responsibility.⁴⁸ Unless the NPC's independence is ensured in practice, its great potential will remain unrealized.

IV. SECURING FOR THE FUTURE THE SUCCESSES OF TODAY

66. The attention paid to the significant violations of the right to life that are being perpetrated in Sri Lanka today should not distract from what has been achieved. During the JVP insurgencies of 1971 and 1989 and earlier phases of the conflict with the LTTE, tens of thousands of persons disappeared or were killed in military operations. The important commitment of both the Government and the LTTE to a cessation of hostilities and a peace process should not be overlooked. Since the ceasefire was signed, the total number of killings related to the conflict has remained in the hundreds. Progress has been achieved not only in relation to the conflict but also in relation to ordinary policing. Institutional cultures accepting of extrajudicial executions, disappearances and torture are being changed for the better.

67. Even while the pace of change has sometimes been slow and half-hearted, it would be truly tragic if the mass violations of the past were reprised.

68. With that in mind, I was very disturbed to receive reports during my visit which appeared to indicate a re-emergence of the pattern of enforced and involuntary disappearances that has so wracked Sri Lanka in the past. During my visit to the east, I received complaints of Tamil youths being picked up by white vans (allegedly with involvement by the security forces), and of two Tamil men from the east abducted from a trishaw shortly after being released by the police in Colombo and later turning up dead. During the month of December, the Human Rights Commission of Sri Lanka received 16 complaints of disappearances from the north of the country. I am seeking further information on these cases and will pursue them with the relevant authorities, but I flag them here as an alarming warning that the escalating security situation could trigger a reversion to abusive practices of the past. I urge the Government to respond to these cases promptly and effectively and ensure that all the necessary safeguards with respect to detention are fully observed.

69. It is true that only knowledge can prevent history from repeating itself. Efforts to document past violations are critical for the future. While the Government has established several commissions of inquiry into disappearances, much work remains to be done in both documentation and publicity. I spoke with a researcher at the Human Rights Commission who has been compiling a comprehensive database of disappearances, and I also spoke with staff of the North-East Secretariat on Human Rights who have been documenting the disappearances that occurred in 1990 in Mandaitivu, Allaipiddy and Mankumban. These efforts are vital, and their results should be made widely accessible to the public. A lasting peace founded on respect for human rights will be very difficult to achieve if the crimes of history remain hidden in archives and mass graves.

70. It is often asserted that there is a tension between peacemaking and the threat of prosecution. However true that may be in some situations, the two interests are complementary in Sri Lanka. The jurisdiction of the International Criminal Court extends only to crimes committed after the country's ratification has taken effect and cannot be retroactive. In the current situation of relative calm, ratification would work to deter a return to the massive violations of the past, thereby helping to consolidate the gains of the ceasefire and the place of human rights in the peace process. Both parties have committed the kind of massive, serious violations of international criminal law that might well have led to prosecution had the Rome Statute then been in force. In the current situation, ratification would provide a measure of confidence to all that such violations will never be committed again.⁴⁹

V. RECOMMENDATIONS⁵⁰

Strengthening the ceasefire and respect for human rights and humanitarian law

71. **At the time of writing, the Government and LTTE had agreed to talks on strengthening the implementation of the CFA in late February 2006. Issues relating to extrajudicial executions are fundamental to the recent erosion of the ceasefire and the threats to the credibility of its monitoring mechanisms. The recommendations below should be squarely addressed in the talks:**

(a) The Government and LTTE should complement the CFA with a wide-ranging human rights agreement, as discussed during their earlier rounds of talks in 2003. An effective international human rights monitoring mechanism should be established with powers to document and investigate abuses, to report to the relevant authorities, and to work closely with other agencies involved in human rights at all levels;

(b) The Government needs to take the various steps outlined below immediately in order to comply with its existing human rights obligations;

(c) The LTTE, in compliance with its professed commitment to human rights, and in response to the international community's requirement that all non-State actors respect the Universal Declaration of Human Rights, must take a range of concrete steps to demonstrate that it is serious about human rights. These are outlined below;

(d) All parties to the conflict, including the Government, the LTTE and the Karuna group, must comply with their legal obligations under common article 3 of the Geneva Conventions of 12 August 1949 and customary international humanitarian law. In particular, humanitarian law requires respect in the conduct of hostilities for the distinction between civilians and combatants. The killing of anyone not taking an active part in hostilities (regardless of civilian status) is prohibited.

72. In any revision of the CFA, the monitoring role of the SLMM should be de-linked from the role of facilitating the peace process. As a more immediate measure, steps should be taken to strengthen the SLMM's work, including:

(a) More sustained follow-up to killings with a view to identifying the party and persons responsible;

(b) The prompt and accessible publication, within necessary limits, of complaints received and of the results of investigations;

(c) The establishment of a protocol to better protect witness identities;

(d) The designation of a senior human rights officer in each SLMM field office and a senior focal point in headquarters.

73. The Government should invite the Office of the High Commissioner for Human Rights to expand its field presence in Sri Lanka to enable it to provide technical support and assistance to the Human Rights Commission, SLMM and other United Nations agencies, pending the creation of a broader monitoring mechanism.

The Government

74. The Government should publicly reiterate its renunciation of any form of collaboration with the Karuna group, and should demonstrably take action to discipline military officers who breach this rule.

75. The Government is requested to provide an analysis of who gets compensation and under what circumstances and to put in place a revised set of arrangements intended to ensure fair and equitable access to compensation for the families of non-combatants subjected to extrajudicial execution. Existing arrangements are uneven at best, and non-existent at worst.

Police

76. The CFA must not be used as a pretext for failures to investigate killings. The Government should unambiguously instruct the police to investigate all killings vigorously and, wherever possible, to apprehend suspects.

77. A programme is urgently needed to provide essential training in criminal detection and investigation to all police reservists.

78. A police force which can only communicate very poorly in the Tamil language will be hard pressed to win the confidence and trust of the general public. The Government should adopt a programme of financial and other incentives to recruit Tamil and Tamil-speaking police officers, especially to work in the north and east.⁵¹

79. The Government and the LTTE should initiate and regularize contact between the government police and the policing forces that operate in LTTE-controlled areas with a view to minimizing the CFA's adverse effects on crime control.

National Police Commission⁵²

80. The members of the National Police Commission should be promptly appointed.

81. The Government should publicly confirm that it will insist upon respect for the Constitution's allocation of powers between the NPC and the IGP. Accordingly, the IGP should play only a consultative role in the NPC's exercise of its "powers of promotion, transfer, disciplinary control and dismissal".⁵³

82. The Government should provide the NPC with the resources required to enable it to effectively exercise its investigative and disciplinary powers.

The ICC Statute

83. The Government should ratify the Rome Statute of the ICC without reservation or declaration. Members of the Sri Lanka Army and LTTE fighters should be made aware of the rules of individual criminal responsibility and be trained in the provisions of international criminal law.

Liberation Tigers of Tamil Eelam

84. The LTTE should unequivocally denounce and condemn any killing attributed to it for which it denies responsibility. Mere denials are neither adequate nor convincing.

85. The LTTE should refrain from violating human rights, including those of non-LTTE-affiliated Tamil civilians. This includes in particular respect for the rights to freedom of expression, peaceful assembly, freedom of association with others, family life, and democratic participation, including the right to vote. The LTTE should specifically affirm that it will abide by the North-East Secretariat on Human Rights charter.

86. The LTTE should refrain from providing arms, training and encouragement to groups such as the "People's Army" civilian proxies and self-defence organizations.

The international community

87. The human rights capacity of the United Nations Country Team should be expanded immediately, pending the creation of a broader monitoring mechanism.

88. **Concerned Member States, particularly the Donor Co-Chairs and contributing countries to SLMM, should provide political, human and financial resources for expanded human rights monitoring by SLMM or another international mechanism.**

89. **The Governments of all United Nations Member States in which there is a significant Tamil diaspora should enter into serious dialogue with those communities in light of the findings in this report. The diaspora has a responsibility to use its considerable political and financial influence and funding to promote and to insist upon respect for human rights.**

Follow-up

90. **A follow-up to this report by the Special Rapporteur will evaluate all measures taken to implement these recommendations.**

Notes

¹ Throughout this report the term ‘extrajudicial executions’ is used to refer to executions other than those carried out by the State in conformity with the law. As noted elsewhere ‘[t]he terms of reference of this mandate are not best understood through efforts to define individually the terms “extrajudicial”, “summary” or “arbitrary”, or to seek to categorize any given incident accordingly.’ Rather, ‘the most productive focus is on the mandate itself, as it has evolved over the years through the various resolutions of the General Assembly and the Commission.’ E/CN.4/2005/7, para. 6.

² At the time of writing, the series of attacks perpetrated against security forces since 4 December 2005 had resulted in the deaths of at least 78 members of the Sri Lankan armed forces, police force, and home guard.

³ SLMM, “The Cease Fire Agreement and the Peace Process in Jeopardy”, 29 Dec. 2005, available at http://www.slmm.lk/intros/press_releases.htm.

⁴ Sri Lanka has a population of 20 million, of whom 74% are Sinhalese, 13% Sri Lankan Tamil, 7% Sri Lankan Moor and Malay Muslims, 6% Indian Tamil, and 1% other.

⁵ The SLMM does not provide detailed data on conflict-related killings. At the time of my visit, it had received 138 complaints concerning assassinations of civilians, of which 20 had been resolved, and 14 were classified as CFA violations (by the LTTE). (These data cover the period from February 2002 through November 2005. Assassinations of civilians are violations of Art. 2.1 of the CFA. Data available at http://www.slmm.lk/intros/C_and_V.html.) There are no publicly-available SLMM statistics on how many total killings the 138 complaints concerned, nor regarding the number of complaints concerning the killing of combatants. (The killing of combatants violates Art. 1.2 of the CFA which proscribes all military action. The SLMM’s statistics on violations of Article 1.2 do not, however, disaggregate killings.) Moreover, killings believed to have been committed by the Karuna group and other armed groups that are not party to the CFA are not reflected in these data.

The Government and others presented me with more comprehensive lists of killings. The Government claimed that as of 30 September 2005, the LTTE had killed 363 people. (I received various lists from different arms of the Government and the relationship among the lists is not always clear.) The EPDP (the Eelam People's Democratic Party) claimed that 43 of its members had been killed as of 14 October 2005. The EPRLF (the Eelam People's Revolutionary Liberation Front) claimed that the LTTE had killed 334 people in the Batticaloa and Ampara districts as of 5 December 2005. (Of the 334 alleged killed, 170 were Karuna cadres killed on 9 April 2004 in major fighting following the Karuna - LTTE split.) There is relatively little information that is not perpetrator or victim specific. However, a civil society group recorded a total of 295 killings by all parties during the period from 1 January through 21 November 2005. (Information provided by the Foundation for Co-Existence.) Another source recorded 338 killings during the period from 1 January through 13 November 2005. The discrepancy between these two figures is due mainly to differing characterizations of some incidents that may have been either conflict-related killings or common murders.

⁶ CFA, Art. 1.8.

⁷ CFA Article 1.13 permits unarmed LTTE members freedom of movement in Government-controlled areas in the North and East for the purpose of "political work". On 18 November 2004, LTTE offices in Akkaraipattu and Arayampathy were attacked with grenades. On 21 November 2004, LTTE offices in Batticaloa and Kaluvanchikudy were attacked with claymore mines. These and subsequent attacks forced the LTTE to scale back its presence in Government-controlled areas in the East.

⁸ Prior to December 2005, roughly half of all killings in 2005 took place in the Batticaloa district.

⁹ "STF, SL Ministers complicit in paramilitary operations, Karuna in India", *TamilNet*, 12 Dec. 2005, available at <http://www.tamilnet.com/art.html?catid=13&artid=16531>.

¹⁰ Eight of the injured remained in critical condition when I visited.

¹¹ "STF, SL Ministers complicit in paramilitary operations, Karuna in India", *TamilNet*, 12 Dec. 2005, available at <http://www.tamilnet.com/art.html?catid=13&artid=16531>; "Two paramilitary cadres surrender, say Karuna group responsible for attacks against Muslims", *TamilNet*, 6 Dec. 2005, available at <http://www.tamilnet.com/art.html?catid=13&artid=16483>.

¹² In estimates prepared by the UNHCR as of June 2001 the number of internationally displaced Tamils was said to be 817,000, most of whom were refugees or asylum seekers. Canada hosted an estimated 400,000 Tamils, followed by Europe (200,000), India (67,000), the United States (40,000), and Australia (30,000).

¹³ In 2004 the Secretary-General's High-level Panel on Threats, Challenges and Change concluded at the end of a detailed analysis "that there is nothing in the fact of occupation that justifies the targeting and killing of civilians". *A More Secure World: Our Shared Responsibility*, (United Nations, 2004), para. 160.

¹⁴ Consistent with this analysis, the LTTE created North East Secretariat on Human Rights released the final version of the *NESOHR Charter* of human rights in Oct 2005. Its stated objectives include promoting respect for human rights “according to the Universal Declaration of Human Rights and the International Covenants on human rights ...”, available at <http://nesohr.org/charter/Charter-English.PDF>

¹⁵ E/CN.4/2005/7, para. 76.

¹⁶ SC Res. 1265 (1999), preamble; SC Res. 1193 (1998), paras. 12, 14; SC Res. 814 (1993), para. 13.

¹⁷ This acceptance is recorded in the *Letter of Authorization for the Filing of a Legal Action and Representation of the Liberation Tigers of Tamil Eelam in the Judicial Review of the Terrorist Designation of the Organization Pursuant to Section 219 of the Anti-Terrorism and Effective Death Penalty Act of 1996* to the U.S. Court of Appeals, District of Columbia Circuit, from the LTTE International Secretariat, Nov. 6, 1997. The letter notes, inter alia, that the LTTE “never targets civilians who ‘take no active part in the conflict’”.

¹⁸ Rule 1 of the ICRC’s study on *Customary International Humanitarian Law* (J.M. Henckaerts and L. Doswald-Beck, eds., 2005) p. 3 states that “The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.”; art. 13 (3) of Protocol II provides that “Civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities.” And Art. 8 (2) (e) (i) of the Rome Statute provides that it is a war crime to “Intentionally direct attacks against the civilian population as such or against individual civilians not taking direct part in hostilities”.

¹⁹ CFA art. 1.2.

²⁰ The structural constraints the CFA places on police work must also be overcome. While the CFA’s provisions restricting the movement of Government “armed forces” and LTTE “fighting formations” into areas controlled by the other party do not expressly address police officers, the understanding of the parties has given these provisions a prudent breadth. (CFA arts. 1.4-1.7.) It is clear that both parties have genuine security concerns regarding the movement of all armed personnel into their areas of control and understandable that police officers do not, in practice, have access to areas controlled by the opposing party.

²¹ Note also the finding of the National Human Rights Commission that the paucity of Tamil speaking officers “remains a major grievance [that] is linked to the deteriorating security situation”. *The Human Rights Situation in the Eastern Province: Update* (April 2005), p. 24.

²² The IGP noted that there were already financial incentives for Sinhala officers to learn Tamil and that he had introduced a program of three-months training in Tamil for new recruits. These measures have been inadequately implemented. The current financial incentives are

based, not on demonstrating a high level of proficiency, but on completing a relatively short course. The language-training plan holds greater potential, but because there has been no regular recruitment since 2001, it remains a theoretical innovation.

²³ SLMM press release, 8 March 2005.

²⁴ CFA art. 3.2.

²⁵ CFA arts. 3.2–3.3.

²⁶ See CFA art. 3.6.

²⁷ Following the 2003 peace talks in Hakone, it was envisioned that, with international support, the HRC would play the lead monitoring role. However, the HRC itself has stated “its belief that no national or regional human rights entity will be able to effectively monitor and implement human rights standards in the north and the east. No organization or individual enjoys that kind of universal authority and legitimacy.” Human Rights Commission of Sri Lanka, *The Human Rights Situation in the Eastern Province (Dec. 2003)*, p. 33.

²⁸ However, in evaluating criticisms of the limited human rights dimension of the SLMM’s mandate, it should be borne in mind that the limited “jurisdiction” of the Mission does not restrict in any way the pre-existing and continuing legal obligations of both the Government and the LTTE under human rights and humanitarian law. Similarly, it would be unwise to attach too much importance to the fact that human rights are not affirmed or codified in the CFA. The CFA does, after all, prohibit both “hostile acts” against the civilian population and all “offensive military action” regardless of its target. Because killings are the single most important element in undermining respect for the full range of human rights of Sri Lankans today, full compliance with the CFA would go very far in restoring peace and the enjoyment of human rights.

²⁹ For instance, the report of a Presidential Commission appointed to investigate the ambush and killing of LTTE leader Kausalyan in February 2005, along with other attacks in the east, has never been made public.

³⁰ Of the 65,000 policemen and women, 20,000 belong to the regular police and 45,000 to the reserves.

³¹ See also the report of the Commission of Inquiry into Involuntary Removal or Disappearance of Persons in the Northern and Eastern Provinces (1997).

³² Problematic provisions of the Prevention of Terrorism Act, the Emergency Regulations Act, and emergency regulations previously in force are discussed in the report of my predecessor on his visit to Sri Lanka in 1997. E/CN.4/1998/68/Add.2, paras. 71-90. CFA Article 2.12 provides that, “The Parties agree that search operations and arrests under the Prevention of Terrorism Act shall not take place. Arrests shall be conducted under due process of law in accordance with the Criminal Procedure Code.”

³³ In this respect it is highly problematic that the Sri Lanka Police are now subject to the jurisdiction of the Ministry of Defence, Public Security, Law and Order (see <http://www.mod.gov.lk/role.html>). Inasmuch as the police are responsible for investigating crimes committed by the military, this arrangement limits the independence of these investigations. And inasmuch as the militarization of the police is part of the problem, this reorganization is surely not a helpful part of the solution.

³⁴ The Civil Rights Movement of Sri Lanka, a non-governmental organization, has brought these cases to the attention of the Human Rights Commission (HRC), which has entrusted a retired judge with an enquiry into some of the cases. The HRC enquiry is in course at the time of writing.

³⁵ A number of allegations of torture in police custody in Sri Lanka resulting in the death of the torture victim have been recorded by the Special Rapporteur on extrajudicial, summary or arbitrary executions. See, e.g., E/CN.4/2005/7/Add.1, paras. 649-53, 661-65; E/CN.4/2003/3/Add.1, paras. 461, 462 (response at E/CN.4/2004/7/Add.1, para. 538), 463 (response at E/CN.4/2004/7/Add.1, para. 539). See also the letter of 22 November 2005 included in E/CN.4/2006/53/Add. 1.

³⁶ During my visit, I was informed that between 1 January and 30 October 2005 the National Police Commission had received 221 complaints concerning assault and torture by the police, six of which resulted in death. The prevalence of custodial torture has been extensively documented by the international human rights system. The Special Rapporteur on Torture recorded 52 allegations in 2003 (E/CN.4/2004/56/Add.1) and the 76 allegations in 2004 (E/CN.4/2005/62/Add.1). And in its Concluding observations on the second periodic report of Sri Lanka (CAT/C/LKA/CO/1/CRP.2) (23 November 2005), § 16, the CAT Committee noted the “continued well-documented allegations of widespread torture and ill-treatment [...] mainly by the State’s police forces”.

³⁷ States have substantial legal obligations in this context. While the primary obligations and corresponding sanctions of international human rights law are placed on *States*, States are also required to impose sanctions on *individuals*. In general terms, the ICCPR obligates States to respect and ensure the right not to be arbitrarily deprived of one’s life. More specifically, the State is required to take all necessary steps, including legislative and other measures, to give effect to the right to life and to provide an effective remedy for violations. One measure that is always required is to criminalize serious violations and to investigate, prosecute, and punish responsible individuals. As the Human Rights Committee has commented, “failure to bring to justice perpetrators of ... violations could in and of itself give rise to a separate breach of the [ICCPR]”. (Human Rights Committee, General Comment 31, “Nature of the Legal Obligation on States Parties to the Covenant” (2004), CCPR/C/21/Rev.1/Add.13; CHR Resolution 2004/37, para. 18.) When an abuse is perpetrated by a private individual, the State is responsible if it failed to exercise “due diligence” in preventing that abuse, but when an abuse is perpetrated by a Government agent, the State is also responsible. (E/CN.4/2005/7, paras. 71-75.) In cases of custodial death, the State’s two-fold obligation - to ensure as well as respect - justifies the presumption that the State, whether by act or by omission, is legally responsible. (*Dermot Barbato v. Uruguay*, HRC, No. 84/1981 (1990), para. 9.2.) When the State is

responsible, in addition to its other obligations, it must make reparations to the victim's family. This legal framework provides not only a yardstick for assessing current practices but also a framework for considering possible reforms.

³⁸ Notably, the police disciplinary process is least effective when dealing with more senior officers. Statistics relating to "departmental lapses" show that disciplinary proceedings are almost exclusively initiated against low-ranking officers. There is a determined unwillingness to hold police officers with command responsibility accountable for torture and killings engaged in by their subordinates, whether at the disciplinary or at the criminal level. This applies to both internal and external accountability mechanisms. In 2001, constables were found responsible for 86% of "departmental lapses"; superintendents were found responsible for only 0.04% of such lapses. (*Sri Lanka Administration Report, 2001*, Appendix 1, Table 6.)

³⁹ I should note that the deficiencies in the system of criminal justice are not mitigated by the more effective process for vindicating the fundamental rights guaranteed by the Constitution, including the right to life and to freedom from torture. In the last two years, the Supreme Court has awarded compensation in a number of such cases. But while reparations are an important component of effective remedies, they are not a substitute for prosecution. In Sri Lanka the Court determines what portion of the compensation shall be paid by the State and what portion by the convicted officer. In one prominent case, involving the killing of WMGM Perera, less than a quarter of the compensation awarded was to be paid by the persons responsible, while the State paid the rest. The State's contribution undercuts the deterrent effect of the Court's fundamental rights jurisdiction and further emphasizes the importance of effective prosecution and punishment in cases of official torture and summary execution.

⁴⁰ The case involved the 1996 rape and murder of an 18 year old high school student and the murder of family members who went looking for her.

⁴¹ Letter of 10 August 2005, in E/CN.4/2006/53/Add. 1.

⁴² On 8 March 2001, the government established a Commission of Inquiry into the killings. The Commission faulted the local police commanders (identified by their rank and name) for failing to protect the detainees from the attack in spite of prior knowledge of a planned demonstration by local villagers in front of the detention centre, and for their failure to take any disciplinary action against their subordinates for failing to protect inmates under their control. A report of the National Human Rights Commission found no evidence to suggest the incident had been "an unpremeditated eruption of mob violence caused by the provocation of the inmates. It is more consistent with a premeditated and planned attack". (Human Rights Commission of Sri Lanka, *Interim Report on the Incident at the Bindunuwewa Rehabilitation Centre, Bandarawela - 24 & 25 October 2000*, 1 Nov. 2000, p. 16.) The Commission also found that the sixty or so police officers had "been guilty of a grave dereliction of duty in not taking any effective action to prevent the acts of violence ...". *Ibid.*, p. 12.

⁴³ Following autopsies on the victims' bodies the police arrested 56 suspects among both villagers and police officers. While the remains of 17 of the victims were identified at the

mortuary by family members, the families of the remaining 10 victims refused to identify their loved ones among the badly mangled remains. In the course of my visit, I met the mothers of four of the latter group. In the immediate aftermath of the massacre they provided blood samples in order to match their DNA with that of the unidentified victims, as requested by the authorities. According to the authorities, the samples were sent to a DNA laboratory in New Delhi. According to the information presented to me the authorities have still not disclosed to these mothers the results of the DNA matching. This is an issue which the Government should clarify immediately. Prosecutors charged 41 persons with various crimes, including murder. Of those, 23 were released on the grounds that there was no case to answer. The remaining 18 were tried and 13 of them acquitted for lack of evidence. On 1 July 2003, the Colombo High Court found the remaining five individuals guilty and sentenced them to death. The Supreme Court subsequently quashed the conviction of one of the five, a police sub-inspector from Bandarawela, on grounds of “lack of evidence”. On 27 May 2005, the Supreme Court acquitted the remaining four accused, again citing lack of evidence. The two commanding officers identified in the Commission of Inquiry report have neither been disciplined nor criminally prosecuted.

⁴⁴ For most Sri Lankans, the legal ins-and-outs of any particular case are, understandably, less notable than the broader patterns of justice they perceive. In this regard the impunity in *Bindunawewa* stands in stark contrast in the public mind to the speedy and effective investigation following the November 2004 assassination of Sarath Ambepitiya, a High Court judge. Within seven months the investigation and trial were completed and convictions obtained. Success in the latter case holds two important lessons. Firstly, the efficiency of the process meant that although some of the witnesses were reportedly threatened, none of them withdrew, changed testimony, or was injured, unlike the situation in a great many other criminal cases. Secondly, sophisticated forensic evidence, including DNA evidence, was reportedly crucial in securing the conviction. The *Ambepitiya* case demonstrated that the Sri Lankan police, prosecution and judiciary are capable of delivering justice to the victims of extrajudicial killings. But in the public mind it seemed also to show that the speed and efficacy of justice depend on the identity of the victim rather than the difficulty of investigating the crime. There is an urgent need to dispel this perception with reforms that ensure timely and effective justice for all.

⁴⁵ The HRC was established pursuant to the Human Rights Commission of Sri Lanka Act of August 1996 available at <http://www.hrc-srilanka.org/docs/HRActe.pdf>. In 2002 it was brought under the Seventeenth Amendment to the Constitution.

⁴⁶ Apart from its disciplinary powers, discussed below, the NPC has an investigate mandate to “entertain and investigate public complaints and complaints of any aggrieved person made against a police officer or the police service, and provide redress in accordance” with the law. (Constitution, Article 155(G)(2).) The NPC’s Public Complaints Investigation Unit (PCIU) has been operating since October 2004. While the PCIU remains in its infancy, the plan is to take a multi-pronged approach. A centralized office will investigate especially serious complaints, such as summary execution and torture, determine disciplinary sanctions, and report cases to the Attorney-General as appropriate. Other complaints, especially of police inaction, will be

resolved by staff in the field engaging directly with local police stations and still others will be

delegated to the IGP. This approach promises to be fruitful if the NPC receives the resources and political support it needs.

⁴⁷ I met only with the NPC's secretariat since the Commissioners' mandates had expired and new members had not yet been appointed. While this was due to a political stalemate blocking the appointment of members of the Constitutional Council, concern was expressed by some that there might be a lack of political will to support the NPC and the other independent commissions created by the Seventeenth Amendment. At the time of writing, this worrying situation persisted. "Govt keen to resolve CC impasse", *Daily News*, 17 December 2005.

⁴⁸ "The appointment, promotion, transfer, disciplinary control and dismissal of police officers other than the Inspector-General of Police, shall be vested in the Commission. The Commission shall exercise its powers of promotion, transfer, disciplinary control and dismissal in consultation with the Inspector General of Police." Constitution, Article 155(G)(1)(a).

⁴⁹ Ratification should be undertaken without making the declaration permitted under article 124 of the Statute that temporally limits the jurisdiction of the ICC.

⁵⁰ These recommendations are not intended to be comprehensive. They focus primarily on specific concrete measures which should be taken immediately by those concerned.

⁵¹ I note that a similar recommendation has been made previously by the National Human Rights Commission. *The Human Rights Situation in the Eastern Province: Update* (April 2005), page 24.

⁵² I note that similar recommendations have been made previously by the Committee Against Torture and the Human Rights Committee. CAT, Concluding Observations on the Second Periodic Report of Sri Lanka (25 Nov. 2005), para. 7; HRC, Concluding Observations (1/12/2003), para. 9.

⁵³ Article 155G(1)(a) of the Constitution. The NPC may delegate this power, but has not and should not. See Article 155J.

Appendix

PROGRAMME OF THE VISIT

Upon invitation of the Government of the Socialist Democratic Republic of Sri Lanka I visited Sri Lanka from 28 November to 6 December 2005. In addition to my stay in Colombo, I travelled to the districts of Batticaloa, Ampara and Kilinochchi. I met with representatives of the Government, including the Minister of Foreign Affairs, the Attorney-General, the Inspector General of Police, officers of the Sri Lankan Army (both at headquarters and in regional commands), and several district police superintendents; with the Human Rights Commission of Sri Lanka and National Police Commission; with representatives of the LTTE, including the head of its political wing, its chief of police, chief of the judicial wing and chief judge, its representatives in the east, as well as its human rights body (the North-East Secretariat on Human Rights, NESOHR); with the Sri Lanka Monitoring Mission and ICRC; with the United Nations Resident Coordinator, members of the United Nations Country Team and representatives of the diplomatic community in Colombo; with witnesses of extrajudicial killings and relatives of those killed, with representatives of various political parties, and with numerous representatives of Sri Lankan civil society. To all the persons met I express my gratitude for the assistance offered. I am particularly indebted to the Senior Human Rights Adviser to the United Nations Country Team in Sri Lanka whose assistance was invaluable for my visit and to UNDP for its logistical support.
