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THE EUROPEAN COMMISSION GSP PLUS PRIVILEGE - SRI LANKA'S DILEMMA

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Editor's Note ... ...

The *Review*'s focus in this Double Issue, is on a highly contentious subject of discussion in Sri Lanka, namely, the European Commission's GSP Plus privilege which has now been officially suspended resulting in severe adverse impact on specific parts of the country's economy and most particularly, the garment industry.

We publish, in the interests of fairness, both the formal Report of the European Commission relating to the findings of the investigation with respect to the effective implementation of certain human rights Conventions in Sri Lanka (October 2009) as well as the Government's response to the investigation report (November 2009). In addition, extracts from the Interim Report of the Experts Panel of the European Commission (August 2009) are published. Unfortunately, due to lack of space the entire Experts Panel Report could not be published.

Many of the questions raised by the European Commission relate to problematic failures in Sri Lanka's national legal institutions, law enforcement and the legal system, and are quite unrelated to the conflict. They remain Rule of Law concerns which have been continually raised by activists, academics and professionals in this country for decades. The demonstrated ineffectiveness of the criminal justice system, the politicization of the police investigative function and (more recently) the failure to effectively implement the 17th Amendment to the Constitution are some of these questions. The Commission's conclusions that the police are unable or unwilling to investigate human rights violations, that torture in police custody is at least widespread and further, that the absence of a witness protection programme discourages witnesses from appearing and discourages complaints, therefore do not come as any surprise.

Key to the review was the question not only as to whether in theory, national laws satisfy international standards—primarily in terms of the International Covenant on Civil and Political Rights (ICCPR), the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (UNCAT) and the Convention on the Rights of the Child (CRC)—but also whether in practice, theoretical guarantees were fulfilled. In both respects, the answers were given in the negative by the Experts Panel whose report was relied upon by the Commission. The constitutional bill of rights was found to contain limitations and restrictions to an extent unacceptable by the three international conventions. In practice, even those rights that are legally guaranteed are not practically secured.

For example, though a domestic law was enacted in 1994 criminalizing torture and apparently giving effect to the UN Convention, this has had little impact due to bad investigations, lackadaisical prosecutions and a legal system plagued with delays and other failures in access to justice. Inevitably this spill-over of denial of justice becomes aggravated when confronted by human rights violations during conflict.

In that regard, Commissions of Inquiry that are politically driven do not serve to paper over the widening tears in the fabric of justice. The conclusions of the Commission moreover were that the Attorney General and his department had adversely influenced the work of the 2006 Commission of Inquiry to inquire into Grave Human Rights Violations while being initially an object of its investigation.

Emergency legislation overriding the Constitution and creating criminal offences that are vaguely defined thus undermining fair trial rights were identified as matters of primary concern. The regulations confer sweeping powers on the authorities and excessively limit or eliminate the accountability of State agents.

At yet another level, the finding was that Sri Lanka's judicial and administrative infrastructure is neither adequate nor effective in regard to providing a remedy for violations of rights. One reason for this conclusion is the observation that the Supreme Court is not easily accessible for people from the North and East of Sri Lanka, that provisions in the emergency regulations shield actions against officials from the courts and that there is a fear of bringing cases regarding human rights violations which causes a chilling effect.

Even more relevantly, it is questioned as to whether the failure of the court system is due, in part, to its being politicised. The former Chief Justice of the Supreme Court, Sarath Silva is observed to have misused his position by putting pressure on judges who had incurred his displeasure. Judges have been removed by the Judicial Services Commission when they have demonstrated too much independence. Legitimately it is pointed out that while the politicisation of judicial and quasi-judicial bodies is of recent origin, there have been no adequate structures put in place to prevent the same in the future. Sri Lanka has failed to implement its obligation to prevent enforced disappearances by State agents and other forces for which it is responsible. It has also failed to carry out effective investigations into alleged disappearances. The result is complete or virtually complete immunity.

Further, many of the State authorities in Sri Lanka entrusted with the task of protecting human rights, including the National Police Commission and the National Human Rights Commission, have lost their legitimacy and credibility because of the non-application of the 17th Amendment to the Constitution.

Moreover, the Commission has pointed out that the practical implementation of the freedom of expression has evolved into one of the most serious problems in Sri Lanka. Anti terrorist legislation in particular imposes limitations on the freedom of expression which are not compatible with obligations under the International Covenant on Civil and Political Rights (ICCPR). The policy of the government and its propaganda against all critics of its policy effectively destroys the freedom of the press. The culture of impunity prevails as far as physical assaults and more serious attacks against journalists are concerned which *de facto* seriously limits that freedom. In general however, Sri Lanka is found to be complying with its obligations under the provisions in the ICCPR of freedom of religion.

Child recruitment (into the forces) is also observed to have been a serious problem in Sri Lanka during 2005-2008. The government has taken steps to remedy this situation but it is pointed out that it is impossible at present to assess if these steps are adequate. The legislative framework concerning the protection of minorities is stated to be substantially adequate. However, in practice, the rights of persons belonging to national minorities, in particular to the Tamil population in the North and East have not been adequately protected.

The whole of these above concerns remain valid in Sri Lanka today despite the Government's summary dismissal of the Commission's observations and despite the fact that active conflict has ended. Rectification of these problems can only be to the good of this country and its people.

It is hoped that in the months ahead, given that there is yet a window of opportunity still provided by the European Commission for a rethinking of the continuation of the GSP Plus privilege, Sri Lanka's political rulers will attempt to remedy at least some of the more outstanding problems identified in these reports.

Kishali Pinto-Jayawardena

COMMISSION OF THE EUROPEAN COMMUNITIES –

REPORT ON THE FINDINGS OF THE INVESTIGATION WITH RESPECT TO THE EFFECTIVE IMPLEMENTATION OF CERTAIN HUMAN RIGHTS CONVENTIONS IN SRI LANKA, C(2009) 7999, BRUSSELS, 19 OCTOBER 2009

1. Initiation of the investigation

1. The investigation with respect to the effective implementation of certain human rights conventions in Sri Lanka was initiated by the Commission Decision of 14 October 2008 (OJEU L277/34 of 18 October 2008) pursuant to Article 18(2) of Council Regulation (EC) No.980/2005.[1] Article 16(2) of Council Regulation (EC) No.980/2005 provided for the temporary withdrawal of the special incentive arrangement referred to in Section 2 of Chapter II of that Regulation (the "GSP+" treatment), if the national legislation incorporating those conventions referred to in Annex III of the Regulation which had been ratified in fulfilment of the requirements of Article 9(1) and (2) was not effectively implemented.

2. Reports, statements and information of the United Nations (UN) available to the Commission at that time, including the report of the Special Rapporteur on Extrajudicial Executions of 27 March 2006, the statement of the Special Advisor to the Special Representative for Children and Armed Conflict of 13 November 2006 and the statement of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment of 29 October 2007, as well as other publicly available reports and information from other relevant sources, including non-governmental organisations, indicated that the national legislation of the Democratic Socialist Republic of Sri Lanka incorporating international human rights conventions, in particular the International Covenant on Civil and Political Rights (hereinafter 'ICCPR'), the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter 'CAT') and the Convention on the Rights of the Child (hereinafter 'CRC'), was not being effectively implemented.[2]

3. The Commission examined this information and found that it constituted sufficient grounds for the opening of an investigation with the objective of determining whether the legislation of Sri Lanka incorporating the International Covenant on Civil and Political Rights, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention on the Rights of the Child is effectively implemented.

2. Conduct of the investigation

4. Immediately after adoption of the Decision initiating the investigation the Commission received a Note Verbale from the Government of Sri Lanka (hereinafter 'GoSL') dated

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[1] Regulation No.980/2005 has been replaced by Council Regulation (EC) No.732/2008 of 22 July 2008 (OJEU L/211 of 6 August 2008) which at Article 10(6) states that investigations underway will be concluded under the new Regulation.

[2] The International Covenant on Civil and Political Rights, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, and the Convention on the Rights of the Child, are listed as core human rights conventions respectively in points 1, 5 and 6 of Annex III, Part A, of both Regulation (EC) No.980/2005 and Council Regulation (EC) No.732/2008.

17 October 2008 stating that Sri Lanka "will not agree to be subjected to an investigation by the EC". A notice pursuant to Article 19(1) of Council Regulation (EC) No.980/2005 on the initiation of an investigation with respect to the effective implementation of certain human rights conventions in Sri Lanka was published on 18 October 2008 (OJEU C/265/1). By means of this Notice, the Commission invited interested parties to send any relevant information and comments within four months from its date of publication. In a Note Verbale of 20 October 2008, the Commission informed the GOSL of the initiation of the investigation and invited it to co-operate in the investigation. In a further Note Verbale of 9 December 2008 the Commission reiterated its invitation to the GOSL to cooperate in the investigation. Sri Lanka however made no submission in the context of the investigation during the four months submission period indicated in the Notice. GOSL also made no submission in the context of the investigation prior to the conclusion of the investigation, although it provided some materials and information in the context of the ongoing political dialogue between the European Commission and Sri Lanka.

5. All submissions made by interested parties, together with all other information and materials gathered during the investigation and upon which the findings set out in this report are based (see Annex 1 to the report)[3] were entered into the file of the investigation, the non-confidential version[4] of which has been made available to Sri Lanka for inspection, upon request, as stated in Note Verbale of 28 May 2009. Sri Lanka made No.request for access to the file.

6. In the conduct of the investigation the Commission was assisted by three independent external experts (retired Judge L. Sevon, Professor F. Hampson and Professor R. Wieruszewski) who were tasked to provide independent legal advice on the matters at stake in the investigation, and in particular on whether Sri Lanka is effectively implementing its obligations under the ICCPR, CAT and CRC. For this purpose, the three independent external experts were asked to undertake a thorough examination of the legal and factual situation with respect to Sri Lanka's fulfilment of its human rights obligations and commitments under the three UN conventions.

7. In its Note Verbale of 28 May 2009 the Commission asked the GOSL to agree to a country visit to gather facts and information relevant to the investigation and conduct interviews with a comprehensive spectrum of individuals and organisations, including representatives of the Government of Sri Lanka. The proposed visit was to be carried out by European Commission officials accompanied by the three independent experts. The GOSL replied with Note Verbale of 17 June 2009 reiterating that the GOSL did not agree to be subjected to an investigation by the European Commission and stating that in this context it "does not agree to the proposed visit". In this connection, the European Commission considers that, by applying for the granting of GSP+ treatment under the rules and procedures foreseen in the applicable Council Regulations, the GOSL in 2005 and 2008 has *ipso facto* accepted the possibility of being subject to an investigation as provided for both in Council Regulation (EC) No.980/2005 and Council Regulation (EC) No.732/2008. In its Note

[3] The codes used in the footnotes identify documents indicated in the Annex.

[4] In the non-confidential version of the file information identifying individuals making submissions has been obscured, as a result of data protection and in some cases personal security concerns.

Verbale of 11 August 2009, the Commission thus reminded the GOSL that it was in accordance with the procedures set out in the Regulations under which Sri Lanka had applied for and was benefiting from GSP+ treatment that the European Commission opened and was conducting the investigation.

8. In the context of conducting their assessment, the independent experts met and sought the views of several individuals with a particular knowledge of the issues under investigation, including some representatives of organisations which had made submissions to the Commission in the four-month period referred to above or which had produced important analyses of the issues under investigation. Two briefings sessions were held in Geneva and London on 15-16 June and 24-25 June 2009 respectively. Some participants in these briefings asked that their participation or remarks be kept confidential and hence not divulged due to, *inter alia*, personal security concerns.[5] As such these elements have not been relied upon in the preparation of the findings. Some participants agreed to a non-confidential treatment of the information they provided and summary statements of their remarks, reviewed by the respective authors, have therefore been included in the non-confidential file of the investigation.

9. With Note Verbale dated 11 August 2009, the Commission submitted to the GOSL for its comments the interim report prepared by the three independent experts referred to above. A deadline of 28 August 2009 was set for the submission of comments. In the same Note Verbale the Commission advised the GOSL that if it wished to submit any comments or information to the investigation, it should do so by 16 September. This deadline was set in the light of the obligation to conclude the investigation within one year from its initiation (as set out in Article 18(6) of Council Regulation (EC) No.732/2008) and in order to ensure that any such information could be duly considered by the Commission in the preparation of the report on the investigation findings. In the same Note Verbale, the Commission also reminded the GOSL (for the second time),[6] that in accordance with the provisions of Article 18(5) of that Regulation, and in the absence of information provided by Sri Lanka, findings may be based on the basis of facts available. The final version of the independent experts report (hereinafter 'IER') was made available to Sri Lanka on 8 October 2009.

10. As noted above, the GOSL elected not to make any submission in the specific context of the investigation, despite repeated invitations by the Commission to co-operate in the exercise and thereby present its views on the matters at issue.[7] Accordingly the Commission, consistent with the provisions of Article 18(5) of Regulation No.732/2008, has reached its findings, as presented in this report, on the basis of the facts available. In so doing, the Commission has studied the documents submitted in response to the Notice of initiation of the investigation, as well as other documents available from public sources, including reports from UN Special Rapporteurs and other documents and reports submitted by Sri Lanka to the UN treaty bodies. In the absence of any formal submission by the Sri Lankan Government to

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[5] The Director of at least one of the organisations, which made a written submission in the context of the investigation, received a death threat explicitly connected to the fact that information was provided to the European Commission.

[6] See Note Verbale of the European Commission to the GOSL of 28 May 2009.

[7] See Notes Verbales of the European Commission to the GOSL of 20 October 2008, 9 December 2008, 28 May 2009, and 11 August 2009.

the investigation, these documents have served as a basis for assessment of Sri Lanka's actions as far as implementation of the three conventions is concerned. In evaluating conflicting evidence, the Commission sought to determine to what extent evidence was independently corroborated in other reports.[8]

11. In addition, while, as described above, the GOSL has expressly refused to be subject to the investigation and elected not to participate in the investigation process, the GOSL and the Commission have maintained an ongoing dialogue, including on human rights matters covered by the investigation.[9] The informal discussions held[10] and the information received from the GOSL,[11] while not part of the investigation as such, have nonetheless been taken by the Commission fully into account and have contributed to inform its assessment of the effective implementation of the international Conventions discussed in this report. It should be noted that most of the information received from Sri Lanka in this context concerned publicly available documents or statements of position by Sri Lanka which were already known to the Commission, and as such are referenced in this report. When new information was made available by the GOSL, it is also referenced in the report, as appropriate. Additional factual material gathered in this context is listed in Section C.3 of the evidentiary sources (see Annex 1) and referenced where appropriate in the findings. In addition, in its Notes Verbales the GOSL reiterated its view that Sri Lanka was effectively implementing the three conventions at issue.[12]

12. During the conduct of the investigation and pending its conclusion, pursuant to Article 10(6) of the GSP Regulation, Sri Lanka has continued to benefit from GSP+ preferences.

3. Scope and objectives of the investigation

13. In 2005 Sri Lanka applied for and was granted GSP+ benefits. Sri Lanka stated that it had ratified and effectively implemented all 16 human and labour rights conventions listed under Part A of Annex III of Regulation 980/2005, including the ICCPR, the CAT and the CRC.[13] The GOSL gave an undertaking to maintain the enforcement of the conventions.[14] It was stated that the legislation of Sri Lanka guaranteed the promotion and protection of human rights but that some of the derogable rights might be restricted by law only for specific

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[8] See IER, section 2.1.

[9] Respect for human rights is an essential element of the EC-Sri Lanka Cooperation Agreement. Art.1 of the Agreement provides that: "Cooperation ties between the Community and Sri Lanka and this Agreement in its entirety are based on respect for democratic principles and human rights which inspire the domestic and external polices of both the Community and Sri Lanka and which constitute an essential element of the Agreement." See OJ L85/33 of 19 April 1995.

[10] Meetings were held at the officials' level on 26 January 2009 in Brussels in the margins of the visit of the Foreign Minister of Sri Lanka, and on 13 May 2009 in Colombo on the context of the visit of the EU Troika.

[11] Notes Verbales of the GOSL to the European Commission of 13 July, 30 July, 3 August, 19 August, 11 September and 16 September 2009. A full listing of the materials contained in these Notes Verbales is included in Annex II.

[12] See in particular Notes Verbales of 17 October 2008, 17 June 2009 and 11 September 2009.

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

[14] The GOSL provided this undertaking with Note Verbale Ref. B/EC/8(5) submitted to the European Commssion on 20 September 2005.

purposes such as the interest of national security, racial and religious harmony and the national economy.

14. In its 2008 application for renewal of GSP+ treatment, the GOSL stated that Sri Lanka had continued to show tangible progress in complying with the conventions in issue.[15]

15. As recalled in paragraph 1, the Commission initiated the investigation in order to establish "whether the national legislation of the Democratic Socialist Republic of Sri Lanka incorporating the International Covenant on Civil and Political Rights, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention on the Rights of the Child is effectively implemented."

16. To deliver on this task, the Commission had to assess whether the national legislation of Sri Lanka corresponds to the obligations assumed by Sri Lanka under the three conventions,[16] whether these obligations are effectively implemented in practice, and, related to that, whether the institutions responsible for the protection of human rights and for providing remedies for violations are functioning adequately. These are essential elements for the implementation of human rights commitments to be deemed effective. This approach to the examination of Sri Lanka's effective implementation and fulfilment of its human rights obligations and commitments under the three UN instruments is line with the relevant UN Treaty bodies' interpretation of the implementing obligations deriving from such instruments.[17]

17. Human rights obligations only bind the State and its agents. The State is required to protect individuals within its jurisdiction from violations, including violations at the hands of third parties such as forces over which it exercises or could exercise effective or actual control. The State is under an obligation to respect, protect and fulfil the human rights obligations and to implement those obligations. Implementation includes legislative enactment. It also includes administrative policies and measures to give effect to the commitments. The State is required not only positively to deliver the rights but also to put in place measures to guard against the risk of abuse. That includes, but is not limited to, an

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[15] Note Verbale Ref. B/EC/8(20) and submitted to the EC on 9 October 2008 and annexed Status Report on ratification and implementation on Conventions referred to in Articles 8 & 9 and listed under Parts A and B of Annex III by Sri Lanka.

[16] "Sri Lanka follows a dualist system in implementing its obligations under international law. Therefore the enactment or the existence of corresponding domestic legislation is an essential prerequisite for the implementation of an international Convention in the domestic forum. Domestic legislation to give effect to international Conventions subscribed to by Sri Lanka takes the form of rights guaranteed under the Constitution, enactment of comprehensive legislation by way of an enabling Act, and enactment of subsidiary legislation and regulations under a principal Statute". See Supplement to the Report to the 3rd and 4th Combined Reports of Sri Lanka to the Committee against Torture, submitted on 14 August 2009, doc. C.1.19, para. 4.

[17] See General Comment No.31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, 26 May 2004; General Comment No.2, Implementation of Article 2 by States Parties, CAT/C/GC/2, 24 January 2008; General Comment No.5 (2003), General measures of implementation for the Convention on the Rights of the Child, 3 October 2003.

effective system of investigation in the event of alleged violations.[18] Only in such a case can implementation be called effective.

18. The investigation has focused on actions and measures taken by the Sri Lankan government and authorities and has not dealt with human rights violations committed by the Liberation Tigers of Tamil Eelam (LTTE) or any other group outside Government control. The focus on the government's actions must not be understood as disregarding or minimizing in any way the significance of human rights violations committed by the LTTE or any other group outside Government control.[19]

19. In addition to being responsible for the acts of State agents,[20] the State may also be held responsible or accountable for any other forces over which they exercise or could exercise effective or actual control.[21] Accordingly, the acts of forces under "Colonel" Karuna (the "Karuna group"),[22] who defected to the government side in 2004, are in general attributable to the State from the start of the period under investigation. This applies also to other armed groups operating in government controlled areas.[23]

20. The investigation has examined events and actions after the GSP+ treatment was granted to Sri Lanka on 27 June 2005 and is based on materials and information available up to 16 September 2009.

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[18] In this respect, the independent experts stated: "Isolated cases of alleged violations are not necessarily a sign of failed implementation as an individual State agent might engage in unauthorized action. Generally speaking, where the State's system for providing redress is functioning properly, it should be able to identify whether a violation has occurred, to compensate the victim and to ensure that the necessary steps are identified and implemented to ensure that the violation does not occur again. It is also possible that the domestic authorities fail to identify the act or omission as a violation. ... This being said, where there is clear and consistent evidence of conduct in violation of the State's obligations and where this is not corrected by the domestic remedial system, there is a lack of effective implementation of the relevant instruments which also constitutes a violation of the State's obligation to implement its international undertakings. ..." (IER, section 2.3). "Where any violation occurs on a widespread or systematic basis, there is a strong implication that domestic remedies are not operating effectively in that particular field. The assumption is that, if remedies were working effectively, they would both put an end to the practice and act as a deterrent against future violations. In case of violations occurring on a widespread or systematic basis the implementation of the relevant Conventions cannot be deemed effective" (IER, section 2.6).

[19] The LTTE was included in 2006 in the EU list of terrorist groups, see Council Decision of 29 May 2006, OJEU L144/21 of 31 May 2006.

[20] State agents include all persons who exercise authority in the name of the State, such as the executive, police and security forces, courts, judges and prosecutors, see General Comment No.31, cit., para. 4.

[21] See International law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, Article 8 (Conduct directed or controlled by a State): "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct", adopted by the International Law Commission at its fifty-third session (2001), in Report of the International Law Commission on the work of its Fifty-third session, Official Records of the General Assembly, Fifty-sixth session, Supplement No.10 (A/56/10), chp. IV.E.1. See also IER, section 2.2.

[22] The Karuna group is now known as Tamil Makkal Viduthalai Pulikal (TMVP), and was registered as a political party in 2007.

[23] For example the People's Liberation Organization of Tamil Eelam (PLOTE).

4. Findings of the investigation

4.1 Effective implementation: the legal and institutional framework with respect to the obligations contained in the ICCPR, CAT and CRC [24]

21. Chapter III of the Sri Lankan Constitution transposes into Sri Lankan law many of the provisions of the ICCPR. In 2007, Chapter III of the Constitution was supplemented by the ICCPR Act. The ICCPR Act was a response to the ruling in the *Singarasa* case,[25] in which the Supreme Court had held that Sri Lanka's accession to the Optional Protocol to the ICCPR was unconstitutional and as a consequence also cast doubt on Sri Lanka's compliance with the ICCPR itself.[26] The object of the ICCPR Act was to give effect to certain articles in the ICCPR which had not yet been transposed either through the Constitution or through other legislation. UN High Commissioner for Human Rights Louise Arbour warned that "the new legislation (i.e., the ICCPR Act) risked confusing further the status of different rights in national law".[27] Following the adoption of the ICCPR Act, the government sought an advisory opinion of the Sri Lankan Supreme Court, which stated that the combined effect of Chapter III of the Constitution, the ICCPR Act, a number of other laws and judgments of the Sri Lankan courts was to ensure that the provisions of the ICCPR were fully transposed into Sri Lankan law.[28]

22. This judgment can be questioned on a number of grounds. First, Article 16 of the Constitution ensured the continuation in force of laws which existed at the time when the Constitution came into force notwithstanding any inconsistency with the rights recognised by the Constitution. Second, the Constitution, ICCPR Act and other legislation do not include provisions corresponding to all ICCPR rights: the "right to life" is the most notable omission,[29] although several others are also not included, such as right to leave the country or

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[24] See in general IER, chapter 3 and 4. In considering the legal framework relevant for the effective implementation of the three Conventions account should also be taken of the underlying purpose of the special incentive arrangement for sustainable development and good governance set out Articles 8 and 9 of Council Regulation (EC) No.732/2008 and the substantive criteria Sri Lanka had to meet in order to qualify for the special incentive arrangement.

[25] See doc. A.6.1.

[26] See doc. A.6.2. Some commentators indicated that "this decision is at absolute odds with accepted international law", see for instance doc. A.4.14.

[27] See doc. A.3.4.

[28] The Supreme Court after a public hearing had concluded on the 17 March 2008: "(1) that the legislative measures referred to in the Communication of His Excellency the President dated 4. 3. 2008 and the provisions of the Constitution and of other law, including the decisions of the Superior Courts of Sri Lanka give adequate recognition to the Civil and Political rights contained in the International Covenant on Civil and Political Rights and adhere to the general premise of the Covenant that individuals within the territory of Sri Lanka derive the benefit and guarantee of Rights as contained in the Covenant. (2) that the aforesaid rights recognized in the Covenant are justiciable through the medium of the legal and constitutional process prevailing in Sri Lanka". See doc. A.6.2. See also Note Verbale of the GOSL of 11 September 2009, Annex 1.

[29] In the 2003 case *Kottabadu Durage Sriyani Silva* v. *Chanaka Iddamalgoda, Officer in Charge, Police Station Payagala and Six others*, [2003] 2 SLR 63, the Supreme Court had stated that "although the right to life is not expressly recognised as a fundamental right, that right is impliedly recognised in some of the provisions of Chapter III of the Constitution. In particular, Article 13(4) provides that no person shall be punished with death or imprisonment except by order of a competent court. That is to say, a person has a right not to be put to death because of wrongdoing on his part, except upon a court order. ... Expressed positively, that provision means that a person has a right to live, unless a court orders otherwise. Thus Article 13(4), by necessary implication,

the right to privacy.[30] Third, the Constitution allows for greater limitations on rights than permissible under the ICCPR, as it does not provide that limitations are subject to tests of necessity and proportionality. Article 15(7) of the Constitution is general in nature and permits restrictions as may be prescribed by law in the interest of national security, public order and the protection of public health and morality.[31]

23. Sri Lanka informed the UN Secretary General on 30 May 2000 that it had declared a state of emergency and wished to derogate from a number of ICCPR Articles.[32] In decisions on individual cases, and especially in General Comment 29, the UN Human Rights Committee has explained how a State must respect the rule of law in a state of emergency, stressing that even in an emergency situation certain rights can under no circumstances be suspended (or derogated from), including the right not to be tortured, or suffer cruel, inhuman or degrading treatment or punishment, the right not to be arbitrarily deprived of life and the right to freedom of thought, conscience and religion or fundamental principles of justice, including the presumption of innocence. Not even war or threat to the life of the nation can justify ignoring such rights.[33]

24. In 2005-2006, Sri Lanka adopted two emergency regulations: the Emergency (Miscellaneous Provisions and Powers) Regulation 2005 and the Emergency (Prevention and Prohibition of Terrorism and Specified Terrorist Activities) Regulation 2006. The emergency regulations pose a number of grave problems.[34] The principle of legality requires criminal offences to be clearly defined in unambiguous language. However, there is evidence that many of the provisions in the emergency regulations, such as the offence of engaging in

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recognises that a person has a right to life – at least in the sense of mere existence, as distinct from the quality of life – which he can be deprived of only under a court order".

30 See doc. B.2.3, C.2.23.

31 See IER, para 4.2. Article 15(7) provides: The exercise and operation of all the fundamental rights declared and recognized by Articles 12, 13(1), 13(2) and 14 shall be subject to such restrictions as may be prescribed by law in the interests of national security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society. For the purposes of this paragraph "law" includes regulations made under the law for the time being relating to public security.

32 The derogations related to ICCPR Articles 9(2), 9(3), 12(1), 12(2), 14(3), 17(1), 19(2), 21 and 22. See IER, section 2.4.

33 On 15 April 2008, the International Independent Group of Eminent Persons (IIGEP, the group of experts appointed by the President in 2006 to act as observers of the activities of a local Commission of Inquiry) issued its final Public Statement. In the Annex to the Public Statement dealing with international norms and standards, the report recognizes that: "Article 4 of the ICCPR does not permit, even in an emergency, any derogation from the provisions relating to the right to life, freedom of torture, and certain other fundamental rights. In the case of any derogation, it is incumbent upon the state to justify the measures against the yardsticks of necessity and proportionality. Sri Lanka has not chosen to announce to the States parties to the Covenant any measures of derogation pursuant to article 4 of the Covenant. Nevertheless, the IIGEP stresses the above principles in view of what has been described as the "culture of impunity" that prevails in certain quarters in Sri Lanka, which would lead to a failure to treat these grave human rights violations with the seriousness required, or even justify shielding the perpetrators from accountability, in a time of national emergency". See doc. A.5.6.

34 For an analysis of the emergency regulations see doc. C.2.15.

terrorism, "acts of terrorism", transactions and communications with persons or groups committing terrorist offences, have been given an extensive interpretation.[35]

25. Further, the emergency regulations delegate sweeping powers to military personnel to perform functions normally carried out by law enforcement officials, including powers of investigation, search, arrest and detention. Administrative detention is not adequately controlled by the provisions governing detention while under arrest or awaiting trial in line with the standards set out by the UN Human Rights Committee as the emergency regulations restrict court control of administrative detention. The emergency regulations also undermine the right against self-incrimination by creating a "duty" for persons to answer police questions and weaken the principle of the presumption of innocence by reversing the burden of proof. Lastly, the emergency regulations severely limit the accountability of civilian and military authorities for their actions in the performance of their duties by providing that no action or suit shall lie against any public servant specifically authorized by the GOSL to take action in terms of regulations, provided that such person has acted in good faith and in the discharge of his official duties.[36]

26. Sri Lanka's Constitution proscribes "torture or... cruel, inhuman or degrading treatment or punishment" (Art.11). Sri Lanka also has various domestic laws to prevent and criminalize torture. In relation to the implementation of the CAT, Sri Lanka has adopted the 1994 Convention against Torture or other Cruel, Inhuman or Degrading Treatment or Punishment Act ('CAT Act') whose objective is to transpose the CAT into domestic law.[37] Although in general the Constitution and the CAT Act incorporate the CAT in domestic legislation, several weaknesses have been identified. In particular, the Code of Criminal Procedure lacks several safeguards against torture, such as the right of a person arrested and held in custody to inform a family member of the arrest and the right of access to a lawyer and/or a doctor of his

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[35] See doc. C.2.1; A.4.6; A.3.10; A.3.13; A.4.3; A.4.8; A.4.1; A.4.11.

[36] Section 19 of the Emergency Regulations 2006 provides specific immunity for actions taken under the Regulations: "No action or suit shall lie against any Public Servant or any other person specifically authorized by the GOSL to take action in terms of these Regulations, provided that such person has acted in good faith and in the discharge of his official duties". Similar immunity provisions are contained in Regulation 73 of the Emergency Regulations 2005. The ICCPR require States to bring to trial and punish those guilty of human rights violations. The UN Human Rights Committee considers that amnesty laws, or similar measures, help to create a climate of impunity for the perpetrators of human rights violations and has stressed that States may not provide immunities or amnesties for human rights violations as "amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future". See General Comment No.20 (on the prohibition of torture and cruel, inhuman or degrading treatment or punishment), 10 March 1992, para.15. Similar immunity provisions are contained in other emergency legislation.

[37] There are diverging views on whether the CAT Act fully transposes the CAT. See, e.g., Kishali Pinto Jayawardena, *Rule of law in decline in Sri Lanka: Study on prevalence, deterrence and causes of torture and other forms of cruel inhuman and degrading treatment or punishment in Sri Lanka*, published by The Rehabilitation and Research Centre for Torture Victims, Copenhagen, Denmark, page 10, where she states that "Torture has been criminalised in the CAT Act, but the Act does not live up to Sri Lanka's obligations under the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment". In *Sriyani Silva*, cit., the Court relied primarily on the CAT itself, rather than the CAT Act, which does not contain any provision on the right of either the victim or a dependant to compensation.

choice.[38] The Code of Criminal Procedure also does not specify the interrogation conditions. The absence of an effective *ex officio* investigation mechanism in accordance with article 12 of the CAT is another weakness. Furthermore, under the emergency regulations, many of the safeguards against torture contained in the Code of Criminal Procedure do not apply, which has led to a situation in which torture becomes a routine practice in the context of counterterrorism operations. The non-applicability of important legal safeguards in the context of counter-terrorism measures, as well as excessively prolonged police detention, opens up the doors for abuse. While a significant number of indictments for torture have been brought under the CAT Act, the majority of prosecutions have been inconclusive.

27. Concerning the CRC, provisions giving effect to the Convention are to be found in the Constitution as well as in a number of laws. The Penal Code prohibits the recruitment of child soldiers in line with the provisions of the CRC. As a result, domestic legislation has incorporated the CRC.

28. The credibility of many of the *institutions for the protection of human rights* has suffered due to appointments to them having been made without observing the 17th amendment to the Constitution.[39] The 17th amendment makes appointments to independent commissions and senior positions in the public service—such as the Attorney General, the Inspector General of the Police, the Chief Justice and other Judges of the Supreme Court and the Court of Appeal—subject to a recommendation from, or approval of, the Constitutional Council. In practice, the President has made such appointments directly. As a consequence the institutions in question are widely perceived as having lost independence and fallen subject to political influence.[40]

29. States must effectively investigate all allegations of serious human rights violations.[41] There is a positive obligation on all States to investigate all crimes promptly, impartially and thoroughly. The duty to do so become paramount in cases where there are allegations of serious humans rights violations by the State's security forces. However, the efficiency of

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[38] The GOSL in Note Verbale of 11 September 2009, Annex 1, notes that: "In order to ensure that the right to a fair trial is 'practical and effective', a proposal is to be submitted that a suspect be allowed access to a lawyer at the initial stage of police interrogation No.matter how serious the Charge is. This fundamental right would offer protection against ill treatment, reduce the risk of miscarriage of justice and promote equality of bargaining power between the police and the suspect and respect the suspect's privilege against self incrimination. These rights have been enacted into the law of England and the rights of access to a lawyer may be waived by the suspect, but the State must prove unequivocally that the waiver was of the suspect's own free will. This expands the right conferred on a person charged with an offence in terms of Article 13 of the Constitution. By implementing safeguards such as right to inform a relative and access to legal representation at the investigating stage, it is also the view of the National Action committee on Torture to avert allegations of torture against police officers. This would also be a response to an exhortation of the Thirty Fifth Session of the United Nations Committee against Torture that Sri Lanka should take effective measures to ensure that fundamental legal safeguards must be enacted by Sri Lanka for persons detained by police".

[39] In 2007 it was announced that a Parliamentary Select Committee was in the process of finalizing a report which would enable the reconstitution of the Constitutional Council. See doc. A.6.7.

[40] See doc. A.3.10, A.3.13, A.3.5, A.4.1, A.4.7, C.2.22, C.2.25, C.2.15, C.2.2, A.3.17.

[41] In line with the obligations set in Art. 2 of ICCPR which refer to the obligation "to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy".

police investigations in Sri Lanka has been strongly criticised.[42] Persistent and credible allegations have been levelled against the police with respect to failure to act and obstruction of justice in order to cover up the role of government agents in human rights violations.[43]

30. The Attorney General's Department is the chief legal adviser to the President and to all departments and ministries of government, including the State security forces and the police. The Attorney General is the principal official responsible for authorising prosecutions concerning serious offences and enjoys wide prosecutorial discretion. The independence and impartiality of the Attorney General are particularly important in Sri Lanka given his extensive powers, obligations and duties in criminal proceedings, including investigations into allegations of serious human rights violations committed by the State. The manner in which the current Attorney General was appointed in disregard of the 17th Amendment raises questions about his independence and impartiality. Reports indicate that the Attorney General's Department does not vigorously prosecute cases involving serious human rights violations.[44]

31. The role of the Attorney General in the prosecution of cases may place the Attorney General in a conflict of interest as far as any inquiry into the administration of justice is concerned. This issue became evident in the context of the work of the Presidential Commission of Inquiry (CoI) set up in 2006 to investigate a number of serious violations of human rights. The conflict of interest generated by the Attorney General's actions was one of the main reasons behind the decision of the International Independent Group of Eminent Persons (IIGEP) to cease its activities.[45]

32. The judicial system of Sri Lanka has not been capable of meeting the challenges caused by the explosion of political crimes and human rights violations.[46] The judiciary is, or has been, vulnerable to political influence from the government and the former Chief Justice. It is widely reported that the former Chief Justice used the administration of case allocation as a way to sideline senior judges from hearing politically sensitive cases.[47]

33. The National Human Rights Commission (NHRC) of Sri Lanka is an independent commission, which was set up to promote and protect human rights in the country. Its main duties are to inquire into, and to investigate, complaints regarding procedures, to ensure

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[42] On 13 October 2007, the UN High Commissioner for Human Rights Louise Arbour at the end of her official visit to Sri Lanka stated that "in the context of the armed conflict and of the emergency measures taken against terrorism, the weakness of the rule of law and prevalence of impunity is alarming. There is a large number of reported killings, abductions and disappearances which remain unresolved. This is particularly worrying in a country that has had a long, traumatic experience of unresolved disappearances and no shortage of recommendations from past Commissions of Inquiry on how to safeguard against such violations. While the Government pointed to several initiatives it has taken to address these issues, there has yet to be an adequate and credible public accounting for the vast majority of these incidents. In the absence of more vigorous investigations, prosecutions and convictions, it is hard to see how this will come to an end. ... While Sri Lanka has much of the necessary human rights institutional infrastructure, critical elements of protection have been undermined or compromised". See doc. A.3.4.

[43] See doc. A.3.17, C.2.25, A.4.4, A.4.6, A.4.1.

[44] See doc. A.3.17, C.2.7, C.2.29.

[45] See doc. A.5.2, A.5.4, A.5.6.

[46] See doc. A.3.13.

[47] See doc. C.2.29.

compliance with the provisions relating to fundamental rights as guaranteed under the Constitution and to promote respect for, and observance of, fundamental rights. The NHRC also is mandated to inquire into and investigate complaints regarding infringements of fundamental rights, and to provide for resolution thereof by conciliation and mediation in accordance with the provisions of the NHRC Act. The NHRC lacks the capacity to conduct detailed criminal investigations and is not adequately funded and resourced. Both the Bar and academics are unanimous that the NHRC does not have the will or power to address the more serious human rights issues. The Government has announced its intention to increase the powers of the NHRC. In October 2007, the Sub-Committee on accreditation of the International Coordinating Committee (ICC) of National Human Rights Institutions took the decision to downgrade the NHRC from 'A' to observer 'B' status (not fully compliant with Paris Principles) due to two primary concerns: (1) it was not clear that the appointment of Commissioners was in compliance with the Paris Principles;[48] and (2) in practice, it was not clear that the NHRC remained balanced, objective and apolitical, particularly with regards to the discontinuation of follow-up to 2,000 cases of disappearances in July 2006.[49] This decision confirmed the inadequacy of the NHRC in fulfilling its important mandate.[50]

34. The use in Sri Lanka of Commissions of Inquiry (CoI) has been widely criticized because it represents an *ad hoc* response to a series of particularly shocking incidents which has tended to shift attention away from the deficiencies in the normal institutions devoted to the protection of human rights.[51] CoI cannot be a substitute for effective action by the relevant enforcement agencies[52]. In addition, it should be noted that the IIGEP established in the context of the 2006 Presidential Commission of Inquiry ceased its activities on the grounds that, *inter alia*, the proceedings of the Commission fell short of basic international norms.[53]

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[48] Principles relating to the Status of National Institutions (The Paris Principles), adopted by General Assembly resolution 48/134 of 20 December 1993.

[49] See doc. A.3.5.

[50] See doc. C.2.29. On 11 December 2007, the UN High Commissioner for Human rights Louise Arbour addressed the 6th Session of the Human Rights Council in Geneva, reporting on her recent visit to Sri Lanka. In her statement concerning Sri Lanka she stated: "During my visit, I paid special attention to the issue of abductions and disappearances, which have been reported in alarming numbers over the past two years. While the Government pointed to several initiatives it had taken to address these issues, there has yet to be an adequate investigation or credible public accounting for the vast majority of these cases. I am also concerned about safeguards for those detained under the emergency regulations, including during recent mass arrests in Colombo. Regrettably, the various national institutions and mechanisms that could be expected to safeguard human rights have failed to deliver adequate protection. In particular, the Human Rights Commission of Sri Lanka, which had previously enjoyed a proud reputation internationally, has had its independence compromised by the irregular appointment of its Commissioners and the credibility of its work has suffered". See doc. A.3.7.

[51] See doc. C.2.25.

[52] See doc. C.2.7, C.2.25.

[53] On 19 December 2007, the International Independent Group of Eminent Persons (IIGEP), released its 4th Public Statement which stated that: "the above issues reinforce the IIGEP's prior assessment that the Commission of Inquiry's process falls short of international norms and standards. The Commission's work also lacks transparency. For instance, all sessions conducted by the Commission have been held to the exclusion of the public, the victims and their families and, on occasions, the IIGEP. In addition, there continues to be a lack of full and timely disclosure of information to the IIGEP. The IIGEP reiterates its concerns regarding the Commission's lack of independence, ineffective witness protection measures and shortcomings in the investigations". See doc. A.5.2. The GOSL view on IIGEP's position is expressed in doc. A.6.10.

35. Sri Lanka undertook voluntary commitments made in the framework of the UN Human Rights Council (HRC) Universal Periodic Review (UPR) in May 2008[54] to develop a National Action Plan on Human Rights (NAPHR) in 2009 and to implement it over a period of five years. Sri Lanka has started work to draft the NAPHR but at the time of writing the Action Plan has not yet been finalised. Comprehensive information on its expected content have not been made available by GOSL to the Commission[55] and it is not therefore possible to assess to what extent implementation of the Action Plan could contribute to addressing existing shortcomings.[56]

4.2 Effective implementation: actual compliance with the obligations contained in the ICCPR, CAT and CRC

36. Throughout the period covered by the investigation a variety of credible sources, including UN special procedures and reputable NGOs have repeatedly expressed concern about the human rights situation in Sri Lanka and the existence of a widespread climate of impunity.[57] When UN High Commissioner for Human Rights Louise Arbour visited Sri Lanka in October 2007 she issued a statement stressing that "the weakness of the rule of law and prevalence of impunity was alarming".[58] In February 2009, ten UN independent experts and Special Rapporteurs on human rights came to a similar conclusion, recognising that "the deteriorating human rights situation.... has led to unabated impunity for human rights violations".[59] In May 2009 UN Special Procedures mandate holders reiterated "the wider and endemic problems and failures to protect human rights throughout the country. Weak institutional structures permit impunity to go unabated."[60] The overwhelming majority of these sources suggest that the situation has deteriorated[61] whilst the GOSL, *inter alia* in its Status Report presented in the framework of the GSP+ application of 2008, as well as in the information provided by the Government in the framework of UN HRC Universal Periodic Review in May 2008 and UN HRC Special Session in May 2009 maintained that progress had

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[54] See doc C.1.15.

[55] Through Note Verbale of the GOSL of 11 September 2009, Annex 11, the Commission received a short note providing an update on the preparation of the NAPHR.

[56] For an update on the preparation of the action plan, see also doc. C.1.19.

[57] See doc. C.2.13, C.2.24. See also doc. B.1.10, B.2.2, B.2.4, B.2.5, B.2.10, A.4.15, A.4.16.

[58] The statement noted that "in the context of the armed conflict and of the emergency measures taken against terrorism, the weakness of the rule of law and prevalence of impunity is alarming. There is a large number of reported killings, abductions and disappearances which remain unresolved. This is particularly worrying in a country that has had a long, traumatic experience of unresolved disappearances and no shortage of recommendations from past Commissions of Inquiry on how to safeguard against such violations. While the Government pointed to several initiatives it has taken to address these issues, there has yet to be an adequate and credible public accounting for the vast majority of these incidents. In the absence of more vigorous investigations, prosecutions and convictions, it is hard to see how this will come to an end." See doc. A.3.4.

[59] The group expressed their "deep concern at the deteriorating human rights situation in Sri Lanka particularly the decreasing space for critical voices and the fear of reprisals against victims and witnesses which – together with a lack of effective investigations – has led to unabated impunity for human rights violations". See doc. C.1.3.

[60] The group recognised that "in addition to our concern at the severe abuses in areas of conflict, we want to emphasize the wider and endemic problems and failures to protect human rights throughout the country. Weak institutional structures permit impunity to go unabated. We continue to receive disturbing reports of torture, extra-judicial killings and enforced disappearances". See doc C.1.14.

[61] As a result several bodies and institutions, including UN bodies, called for the establishment of an independent Human Rights monitoring, see for example doc. A.3.2, A.3.4.

been made. Allegations of violations of the three Conventions have been regularly denied by the Government.[62]

37. Article 6 of the ICCPR prohibits *arbitrary killings*[63] and requires States to protect the right to life and to investigate all killings. During the conduct of hostilities a killing will only be arbitrary if it violates the laws of armed conflict and international humanitarian law. The right to life is non-derogable.

38. As noted above, Sri Lankan law does not expressly provide for the obligation to protect the right to life. The Penal Code, however, prohibits different types of unlawful violence against the person, including offences affecting life. During the period covered by the investigation, there has been a high rate of unlawful killings in Sri Lanka, including killings carried out by the security forces, persons for whom the State is responsible and the police. Reports noted that extra-judicial killings were widespread and included political killings designed to suppress and deter the exercise of civil and political rights as well as killings of suspected criminals by the police.[64]

39. Unlawful killings perpetrated by soldiers, police and paramilitary groups with ties to the Government, have been a persistent problem in Sri Lanka. According to reports, many killings and disappearances of civilians have been carried out against persons suspected of being informants for, or collaborators with, the LTTE.[65] The army assisted by pro-government Tamil paramilitaries, reportedly engaged in a deliberate policy of extra-judicial killings against those they considered to be supportive of the LTTE.[66] An example of the high rate of killings is that in 2006-2007, forty-four humanitarian aid workers were killed and a further twenty-three disappeared.[67] The case of the killing of 17 aid workers of the French non governmental organisation *Action Contre la Faim* (ACF) in August 2006 was particularly striking. The lack of progress in the investigation into that incident led ACF to call for an

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[62] See for example doc. A.3.15. See also the submissions by individuals and organisations contained in doc. B.1.33,B.2.6, B.2.8, B.2.11, B.3.6, B.3.7, B.3.9.

[63] See IER, section 5.1.

[64] On 14 May 2008 Philip Alston, the UN Special Rapporteur on Extrajudicial Summary or Arbitrary Executions, submitted a Report to the 8th Human Rights Council to consider the implementation of recommendations he had made following visits to Sri Lanka (28 November to 6 December 2005) where he noted that "During his visit, the Special Rapporteur found that the police failed to respect or ensure the right to life. He noted that the underlying cause was that the police had become a counterinsurgency force. Police officers were accustomed to conducting themselves according to the broad powers provided them under emergency regulations rather than to those provided by the code of criminal procedure. ...The Special Rapporteur observed that these deficiencies in the police force had resulted in failures to respect and ensure the right to life. ... The Special Rapporteur found that the Government's response to human rights violations by the police was unsatisfactory. The system for conducting internal police inquiries was structurally flawed and, indeed, inquiries had not been held into the cases the Special Rapporteur presented to the Government..... More than two years later, the Government has completely failed to implement the Special Rapporteur's recommendations for improving police respect for human rights, police effectiveness in preventing killings, and police accountability. Indeed, there has been significant backward movement ...". See doc. A.3.13; and A3.10, A3.17, A4.1. The GOSL view on the report are set out in doc. A.6.5.

[65] See doc A.3.17, A.4.8, C.2.13., A.4.15.

[66] See doc. A.4.5, A.4.8, A.3.18.

[67] See IER, p.49.

international inquiry[68]. This call was supported by leading human rights defenders worldwide.[69] Reports from a wide range of sources indicate that the overall number of extrajudicial killings increased dramatically between 2006 and 2008.[70]

40. Reports also indicate that the police have engaged in *summary executions*. Several persons have been shot in police custody, while others have died as a result of torture.[71] The government had, as of 2008, failed to implement the recommendations of the UN Special Rapporteur on Extra-Judicial Killings for improving police respect for human rights and police accountability.[72] In March 2008 the International Committee of the Red Cross stated that "extra-judicial killings and disappearances are part of a terrible pattern of abuse in Sri Lanka which must be stopped".[73]

41. Attacks on the media, both through verbal threats by the Government and through brutal physical assaults by unknown persons, have been widely reported. Since 2006 a significant number of journalists have been killed which has deterred the press from closely monitoring conflict related violence.[74] Reported motives for targeting journalists include accusations of supporting the LTTE, having criticized the Government too strongly and having revealed information the Government disliked.[75] In January 2009, the prominent journalist Lasantha Wickrematunge, editor of *The Sunday Leader*, was murdered; no one has been charged in connection with his killing.[76] Human rights defenders have also reportedly been subject to intimidations, physical attacks and assassinations.[77]

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[68] More than three years after the crime was committed all legal procedures initiated have failed to identify the people responsible of the crime. An investigative report from the organization University Teachers for Human Rights provided strong evidence about the implication of army commandos and Special Forces and highlighted gross flaws in the procedures. See doc. C.2.4, C.2.37, A.4.9, A.4.1, C.2.17, A.4.12, A.4.13, A.5.1, C.2.3, B.2.1.

[69] See for instance doc. C.2.37.

[70] See doc. A.3.1, A.3.12, A3.14, A.3.17, A.4.2, A.4.4, A.4.6, A.4.8, C.2.25, C.2.37.

[71] See doc. C.2.16, C.2.23, A.4.5, A.4.6.

[72] In a report issued on 27 March 2006, the UN Special Rapporteur on Extrajudicial Executions Philip Alston noted that "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.... The pattern of summary executions that emerges demands a systematic official response that brings those responsible to justice and discourages future violations... . The other main cause of deaths in police custody is torture (Deaths are an inevitable side-effect of the widespread use of torture.) ... Government officials were generally candid in recognizing that torture is widespread. The failure to effectively prosecute government violence is a deeply-felt problem in Sri Lanka." See doc. A.3.1, para. 53 and 54, page 18. The views of the GOSL on the report are set out in doc. A.6.4.

[73] See doc. A.5.5. In the statement the ICRC also deplores the misleading public use of its confidential findings on disappearances by the Sri Lankan authorities.

[74] See doc. C.1.3, A.4.6, C.2.7, C.2.26.

[75] See doc. A.4.10, A.4.11, C.2.5, C.2.26.

[76] See doc. C.2.39.

[77] See doc. A.4.11.

42. During the final phase of hostilities between government forces and the LTTE in 2009, there were widespread allegations that government forces attacked medical facilities and fired heavy artillery into an area which had been designated as a "no-fire" zone[78]. It is impossible to ascertain the number of civilian casualties during the last phase of the armed conflict as no independent monitors or journalists were allowed into the conflict zone, despite repeated international calls for independent inquiries and appeals to document the events. Nevertheless a number of authoritative sources confirmed the use of heavy weapons by Government forces and a very high number of civilian casualties[79]. For instance, the UN High Commissioner for Human Rights pointed out that "a range of credible sources had indicated that more than 2,800 civilians may have been killed and more than 7,000 injured many of them inside the no-fire zones between 20 January and 13 March 2009 alone".[80] The May 2009 Report of the UN Secretary-General on the protection of civilians in armed conflict recognised that "the intensification of fighting in the Vanni region of Sri Lanka, for example, was reportedly marked by the repeated use of heavy weapons by Sri Lankan armed forces in attacks on areas containing large numbers of civilians, including the so-called 'no-fire zones', with reports of multiple strikes on medical facilities. Combined with the refusal of the LTTE to allow civilians within its control to seek safety in an attempt to render areas immune from attack and to seek military and propaganda advantage, the consequences for civilians were catastrophic. Thousands have been killed and wounded and their plight further compounded by extremely limited access to medical and other assistance."[81] Figures on civilian casualties quoted by international press and human rights organisations were as high as 20,000 for the period between January 2009 and the end of the conflict in May 2009.[82] An accountability process and independent inquiries were called for, including by UN Secretary General.[83] The GOSL referred to the last phase of the conflict as the "world largest hostage rescue operation in history"; it systematically dismissed allegations of civilian casualties and consistently denied any wrongdoing.[84]

43. Article 7 of the ICCPR prohibits *torture* or *cruel, inhuman or degrading treatment or punishment* (CIDT).[85] The provision is non-derogable even during states of emergency. Article 2 of CAT foresees that each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

44. International reports indicate continual and well-documented allegations of widespread torture and ill-treatment committed by State forces (police and military) particularly in

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78 Seee doc. C.2.12, C.2.24.
79 See doc. C.1.8, C.1.10, C.2.9, C.2.10, C.2.11, C.2.12, C.2.18, C.2.19, C.2.24. See also B.2.7.
80 See doc. C.1.1, C.1.22.
81 See doc. C.1.16, C.2.21, C.2.24.
82 *The Times* article on 29 May 2009, based on UN sources, eyewitnesses and an examination of aerial photographs, put the civilian death toll in the final army offensive against the LTTE at more than 20,000; *Le Monde* referred to similar order of magnitude in the article published on 28 May 2009.
83 See doc. C.1.12, C.1.9, C.1.13, C.1.14, C.1.17, C.1.18.
84 See doc. C.3.4, C.3.5, C.3.2, A.3.15.
85 See IER, section 5.2.

situations of detention.[86] The UN Special Rapporteur on Torture has expressed shock at the severity of the torture employed by the army, which includes burning with soldering irons and suspension of detainees by their thumbs.[87] The UN Special Rapporteur on Extra-judicial Killings has noted that the majority of deaths as a result of torture at the hands of the police are not caused by "rogue" police officers but by ordinary officers taking part in an established routine.[88] There are particularly widespread allegations of torture and CIDT in and near recent conflict zones. The allegations include claims of sexual assault and rape in IDP camps.[89]

45. Government officials have recognized that torture by police and security forces is widespread, [90] although the GOSL denies that torture is widespread but "is only occasionally resorted to by over-zealous investigative personnel [91]

46. There are consistent reports that allegations of torture or CIDT are not promptly or impartially investigated.[92] Detainees and other victims are reluctant to report incidents of torture or CIDT to the authorities due to intimidation by police officers and threats of further violence. Medical examination of persons who complain of torture is wholly inadequate. The UN Special Rapporteur on Torture has noted that his fact-finding was obstructed by officials who attempted to hide or transfer detainees, particularly those who had been most seriously subjected to torture, as they still bore marks of ill-treatment. A combination of antiquated facilities and severe overcrowding give rise to degrading treatment at some prisons.[93] In May 2009 the UN Special Procedures mandate holders pointed to the fact that they "continued to receive disturbing reports of torture, extra-judicial killings and enforced disappearances".[94]

47. Sri Lanka has various domestic laws to prevent and criminalize torture and CIDT, including the CAT Act. The Government has also created specific human rights bodies, such as the NHRC and the National Police Commission, which are designed to monitor human rights and to receive complaints regarding human rights violations, including of torture and CIDT. However, many of these institutions have been rendered ineffective due to lack of resources, lack of political will and conflicts of interest. The ineffectiveness of institutional safeguards has allowed the police, the armed forces and other Government officials to engage

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[86] On 29 October 2007, Manfred Nowak, the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, told the General Assembly's Third Committee that "the high number of indictments for torture filed by the Attorney General's Office, the number of successful fundamental rights cases decided by the Supreme Court of Sri Lanka, as well as the high number of complaints that the National Human Rights Commission continues to receive on an almost daily basis indicates that torture is widely practiced in Sri Lanka". See doc. A.3.6.

[87] See doc. A.3.10, A.3.11.

[88] See doc. A3.6, A3.10, A3.1.

[89] It is difficult to verify these allegations which have been reported in the press, *Sky News*, Sri Lanka Tamil refugees under rape and kidnapping in camps, available at: www.wikio.fr/video/1220176 [accessed on 25 September 2009]; *Al Jazeera*, No.welfare for Sri Lanka's Tamils, 6 July 2009, available at: English.aljazeera.net/news/asia/2009/06/200961962329963252.htm [accessed on 25 September 2009].

[90] See doc. A.3.1, para. 53 and 54, page 18.

[91] See doc. A.6.8, A.6.9.

[92] The Asian Human Right Commission continues to document regular cases of alleged torture, see specific cases at: http://www.srilankahr.net/. See doc. A.3.10, A.4.8.

[93] See doc. A.3.10.

[94] See doc C.1.14.

in, or to be complicit in, torture or CIDT with impunity.[95] While a significant number of indictments for torture or CIDT have been brought, the majority of prosecutions initiated against police officers or members of the armed forces on charges of abduction, unlawful confinement or torture have been inconclusive due to a lack of sufficient evidence and the unavailability of witnesses. So far in the exercise of its jurisdiction under the CAT Act, the High Court has handed down very few convictions.[96] The lack of a legal framework for witness protection has also hindered effective prosecution of torture cases.[97]

48. Many of the protections against torture contained in domestic laws do not apply in cases of detention under the emergency legislation.[98] The emergency legislation authorizes detention in a much wider range of circumstances than the law normally applicable.[99] The emergency legislation allows security forces to hold suspects for up to one year under "preventive detention" orders issued by the Secretary of the Ministry of Defence without complying with the procedural safeguards for detainees provided in the Criminal Procedure Code. Although involuntary confessions are not admissible in evidence, the onus of proving that the confession was involuntary rests on the person alleging torture.

49. Article 9 of the ICCPR states that everyone has the right to liberty and security of person and that no one shall be subject to *arbitrary arrest and detention.*[100] At the time of a person's arrest, he must be informed of the reasons for his arrest and promptly informed of the charges. He must also be promptly brought before a judge and given a trial within a reasonable amount of time. Every person arrested and detained has the right to challenge the lawfulness of his detention and shall have an enforceable right to compensation. Article 10 states that everyone arrested and detained shall be treated with humanity and dignity. Accused persons must be segregated from convicted detainees and children segregated from adults in detention. Articles 9 and 10 are potentially derogable.

50. In Sri Lanka constitutional safeguards relating to arrest and detention include Article 13 of the Constitution which foresees a number of fundamental safeguards, such as freedom from arbitrary arrest and the right to be informed of the reasons for the arrest. Every person held in custody, detained or deprived of personal liberty shall be brought before a judge and shall not be further held in custody, detained or otherwise be deprived of personal liberty except upon and in terms of the order of the judge. The Code of Criminal Procedure includes safeguards regarding the integrity of detained persons. However, many of the protections in the Code do not apply in cases of detention under the emergency legislation. The emergency legislation allows security forces to arrest persons on broadly defined grounds and to hold suspects for

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95 See doc. A.3.1, A.3.6, C.2.7.

96 *Republic of Sri Lanka* v. *Madiliyawatte Jayalathge Thilakarathna Jayalath*, Colombo High Court, 19 January 2004; *Republic of Sri Lanka* v. *Edirisinghe*, Colombo High Court, 20 August 2004; *Republic of Sri Lanka* v. *Selvin Selle and Another*, Colombo High Court, 20 July 2007.

97 A proposal for witness protection legislation has been tabled and recent information indicates that it might advance, see doc. A.6.3. See also Note Verbale of the GOSL of 3 August 2009.

98 See doc. C.2.15.

99 See doc. A.3.1 where it is stated that "today, too many police officers are accustomed to "investigating" by forcibly extracting confessions and to operating without meaningful disciplinary procedures or judicial review", para. 50, and that "the failure to effectively prosecute government violence is a deeplyfelt problem in Sri Lanka", para. 59.

100 See IER, section 5.3.

up to one year under "preventive detention" orders issued by the Secretary of the Ministry of Defence without complying with the procedural safeguards for detainees provided in the Criminal Procedure Code.

51. Under the 2005 Emergency Regulations (Regulation 19), persons suspected of "acting in any manner prejudicial to the national security or the maintenance of public order, or to the maintenance of essential services" may be arrested and held in detention for up to 18 months, without access to independent judicial review. Persons may be similarly detained under the Section 9 of the Prevention of Terrorism (Temporary Provisions) Act ('PTA'). There is also provision (Regulation 22) for automatic detention of a "surrendee" up to two years for the purposes of "rehabilitation", including persons seeking the protection of the state because of "fear of terrorist activities".

52. A person held in administrative detention, under Regulation 19(1), is to be physically produced before a magistrate "within a reasonable time, having regard to the circumstances of each case, and in any event not later than thirty days from the date of such detention" and not within 24 hours of arrest as generally provided for under the Criminal Procedure Code. Court scrutiny and discretion to overturn an order made under Regulation 19(1) is in fact expressly excluded and where the Secretary to the Ministry of Defence has ordered detention under Regulation 19 or 21, the court "shall order" continued detention.

53. The only remedy for a person under Regulation 19 detention is to make objections to an "Advisory Committee", consisting of persons appointed by the President, or the President himself, which reports to the Secretary of the Ministry of Defence who may revoke the detention order, except where the person is a member of a proscribed organization. This is inconsistent with Article 9 (4) of the ICCPR which provides that any detained person is entitled to take proceedings before a "court", not a committee appointed by the Executive, in order for the court to decide without delay on the lawfulness of detention.

54. On 7 July 2006, the President issued directions to the Heads of the Armed Forces and the Police Force to enable the Human Rights Commission of Sri Lanka reaffirm that the police and armed forces shall assist and facilitate the work of the NHRC in the exercise of its powers and duties to ensure the fundamental rights of those arrested and detained. However, the Presidential Directions are guidelines only and their exact legal status and impact are unclear.

55. The emergency and anti-terrorism legislation has been used to arrest and detain—in some cases without charge - critical journalists, newspaper operators and political opponents of the government. A notable example is the detention without charge for five months under the emergency legislation of the prominent journalist J. S. Tissainayagam.[101] Moreover, on 31 August 2009, Mr. Tissainayagam was found guilty under the Prevention of Terrorism Act of (1) attempting to cause the commission of acts of violence or racial or communal disharmony with clear intentions of causing disrepute to the government, an act of conspiracy;

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[101] See doc. C.2.38 and many statements from human rights organisations (such as Amnesty International, "Sri Lanka jails journalist for 20 years for exercising his right to freedom of expression", 1 September 2009), Governments, and the EU.

(2) attempting to cause the commission of acts of violence or racial or communal disharmony relating to articles published in the North Eastern Monthly magazine in 2006 and 2007, and (3) collecting and obtaining information for the purpose of terrorism and raising funds for the purpose of terrorism through the collection of funds for the said magazine. He was given consecutive sentences of 5, 5 and 10 years rigorous imprisonment respectively.

56. Over the period covered by the investigation several cases alleging arbitrary detention were referred to the UN Working Group on Arbitrary Detention. In the majority of cases, the Sri Lankan government responded to the communication of the Working Group.[102] In every case referred to it, the Working Group found the detention to be arbitrary because of the conditions of arrest allowed under the emergency regulations.[103]

57. There are reports that the TVMP/Karuna group has detained children suspected of association with the LTTE and in some cases recruited them into the TVMP.[104] The UNHCR reported in April 2009 that the TVMP was continuing to conduct arbitrary detentions and abductions in the east of Sri Lanka.[105]

58. The Emergency Regulations authorise the creation of counter-terrorism detention camps which are not subject to inspection by the NHRC. Provisions under the 2005 Emergency Regulations and the PTA allow for persons to be detained in places of detention other than a regular police station, detention centre, penal institution or prison, and the publication of a list of such authorised places of detention is not required.[106] The risk of human rights violations, such as *incommunicado* detention or enforced disappearance, is significantly increased when detainees are held in locations that are not recognised places of detention, without the normal procedures and safeguards to protect detainees.[107]

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[102] Opinions adopted by the Working Group on Arbitrary Detention, E/CN.4/2006/7/Add.1, 19 October 2005, Opinion 8/2005, pp.33-36; A/HRC/10/21, Opinion 30/2008, p.8; see also Urgent Appeal, p.12.

[103] The Emergency Regulations allow confession made to a police officer of a rank not lower than assistant superintendent of police to be admitted as evidence (provided that such confession was not made under threat, coercion or promise). Accordingly, there exists No.possibility of admitting as evidence any confession made under torture. Confessions made to police officers in the circumstances described violate the principles of article 14 ICCPR, regardless of whether the legislation concerned is of an emergency nature. Sections 25 and 26 of the Evidence Ordinance declare inadmissible confessions made to a police officer, a forest officer or an excise officer and confessions made by any person while in the custody of the these three categories of officers, unless made in the immediate presence of a Magistrate. However, Regulation 41 (4) of the 2005 Emergency Regulations allows the use of confessional evidence and Regulation 63 (4) excludes the applicability of Sections 25 and 26 of the Evidence Ordinance. Regulation 41 also reverses the burden of proof placing it on the maker of a statement to attempt to "reduce or minimize" the weight to be attached to it. In addition, Regulation 48 of the EMPPR 2005 provides that any documents found in the possession, custody or control of a person suspected of an offence under any emergency regulation "shall be submitted in evidence against such person without proof thereof". See C.2.15.

[104] See doc. A.3.3, A3.9, C.1.21, A.3.17, C.1.11, C.2.20, C.2.35.

[105] See doc. C.1.23.

[106] See doc. C.2.15.

[107] The UN Working Group on Enforced or Involuntary Disappearances has stated that for places of detention to be 'officially recognised', "requires that such places must be official—whether they are police, military or other premises - and in all cases clearly identifiable and recognised as such. Under no circumstances, including states of war or public emergency, can any State interests be

59. In the aftermath of the end of the conflict in spring 2009, almost 300,000 persons crossed to the Government controlled areas from the conflict zone and have been held in military controlled Internally Displaced Persons camps for security reasons. The UN High Commissioner for Human Rights stressed in September 2009 that in Sri Lanka internally displaced persons are effectively detained under conditions of internment.[108] It must be recognized that the GOSL was faced with a daunting practical challenge in dealing with the sudden movement of such large numbers of persons. Nevertheless, the conditions in the camps raise grave concerns. There is severe over-crowding, and inadequate water, sanitation, food and health care.[109] The security forces not only patrol the perimeters of the camps but also manage the camps internally.[110] The over-riding priority is security and not the meeting of humanitarian needs.[111] No one can enter the camps without the permission of the security forces. The detainees do not have the right to leave the camps and are thus deprived of their liberty. It is not clear whether the Government regards them as being detained. While the huge practical challenge which faces the Government has to be taken into account, the situation in the camps amounts to mass internment and is disproportionate to the genuine need to screen IDPs in order to identify former LTTE members. Despite the presence of large numbers of soldiers guarding the camps, it is reported that allegedly many persons have disappeared from the camps, apparently at the hands of the security forces or paramilitary groups.[112] These reports cannot be confirmed because the camps are closed to human rights organisations, journalists and other independent observers. In addition, the screening process of IDPs in the camps takes place without transparency, independent monitoring or accountability. Moreover, there is no information available concerning the treatment and present location of persons identified during screening as LTTE cadres. This raises serious concerns about due process and the nature of the screening.[113]

60. So far as obtaining redress for unlawful detention is concerned, emergency regulations, such as Section 19 of the Emergency Regulations 2006 or Section 26 of the PTA, bar legal proceedings against any officer for acts done in good faith. These provisions thus render it impossible to use normal avenues of redress and compensation for unlawful arrest and detention. Although it remains possible to apply for *habeas corpus* in the High Court and the Court of Appeal, such applications have been rarely successful in gaining release.[114] Relief against arbitrary arrest and detention can also be found by filing a fundamental rights application in the Supreme Court, but distance, difficulty of travel and of access to a Supreme Court lawyer create very significant barriers for most litigants.

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invoked to justify or legitimise secret centres or places of detention which, by definition, would violate the Declaration [for the protection of all persons from enforced disappearances], without exception", see General comment on article 10 of the Declaration, WGEID Report 1996 (excerpt of E/CN.4/1997/34, 13 December 1996), para. 24.

108 See doc. C.1.20.

109 See doc. C.2.36.

110 See doc. C.1.7.

111 See doc. C 2.36.

112 See doc. C.2.36, C.2.42, C.2.43 and news published on the BBC website on 15 June 2009 www.bbc.co.uk/sinhala/news/story/2009/06/090615_sunila_hooded.shtml [accessed on 25 September 2009].

113 See doc. C.2.36, C.2.42, C.2.43.

114 See doc. C.2.23, C.2.29.

61. *Enforced disappearances* constitute a multiple human rights violation.[115] They potentially violate the right to life, the prohibition on torture and CIDT, the right to liberty and security of the person, and the right to a fair and public trial. They represent the ultimate violation of the prohibition of arbitrary detention and also constitute inhuman treatment for the next-of-kin.

62. Sri Lanka has among the highest number of disappearances in the world since 2006.[116] The numbers provided for disappearances vary between different organisations but all reports agree that the number of disappearances is substantial. The UN High Commissioner for Human Rights has stated that some 1500 persons disappeared between December 2005 and December 2007.[117] Human Rights Watch has reported 1000 cases of disappearances were reported to the NHRC in 2006 and over 300 in the first four months of 2007.[118] In June 2008, the UN Working Group on Enforced and Involuntary Disappearances noted that it had sent 22 urgent actions to the Sri Lankan Government in the previous two months alone and that both women and humanitarian aid workers were being targeted.[119] The former Sri Lankan Minister of Foreign Affairs Mangala Samaraweera in January 2007 was quoted in several news agencies stating that a person was abducted in Sri Lanka every five hours.[120] The figures made available in November 2008 by Judge Tillekeratne, Chairman of the Presidential Commission on Disappearances, showed that 886 persons disappeared in less than 12 months.[121]

63. Reports indicate that in a significant number of cases individuals who initially disappeared were subsequently discovered in state detention. This strongly suggests that the state was implicated in their original disappearance.[122] The UN Working Group on Enforced and Involuntary Disappearances has found that the Sri Lankan army, the police and the TVMP/Karuna group were responsible for many of the disappearances between November 2006 and November 2007.[123] The report noted a growing culture of impunity enjoyed by members of the security forces and pro-government armed groups who perpetrated enforced

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115 See IER, section 5.4.

116 See doc A.3.12, C.1.2, A.3.14.

117 See doc. A.3.7, A.4.5.

118 See doc. A.4.8.

119 See doc. A.3.14. A previous report issued on 10 January 2008 reported cases examined by the Working Group between November 2006 and November 2007. Regarding Sri Lanka the report states that "the Working Group sent 37 cases under its urgent action procedure to the Government of Sri Lanka. The majority of these cases concerned males aged between 22 and 56. One case concerned a female victim and one case concerned a 16-year-old male. Eleven cases occurred in Jaffna and 19 in Colombo. The Sri Lankan Army and the Criminal Investigation Department were allegedly responsible for a large number of these cases. Other possible perpetrators include the Sri Lankan security forces, the police, and the Karuna Group". See doc. A.3.9.

120 See *The Sunday Leader*, January 28, 2007.

121 See doc. A.4.8.

122 One example is the case of the controversial arrest of *Sudar Oli*, editor Mr. N. Vidyatharan in February 2009; the police spokesman first told the media that he had been abducted by a group of gunmen and driven off in a white van in broad daylight while he was attending a family funeral. The story was later modified to the effect that he was arrested by the Colombo Crimes Bureau. See "Controversy Over Arrest of Tamil Newspaper Editor", in LankaNewspaper.com, 27 February 2009, available at: www.lankanewspapers.com/news/2009/2/40123_space.html [accessed on 25 September 2009]. Reporters without Borders and other NGOs also reacted strongly on this arrest.

123 See doc. A3.14 and C.2.7.

disappearances as the government took no steps to combat the problem. Disappearances appear to be part of the Government's counter-insurgency strategy.

64. The TMVP continued to abduct children during the period covered by the investigation. Reports indicate that Sri Lankan security forces were complicit in these abductions.[124]

65. Reports indicate that senior officials have interfered in complaints brought by families of disappeared persons and witnesses and family members have been threatened.[125] Although the government has created at least nine special bodies to investigate disappearances among other human rights violations, reports indicate that these bodies have failed so far to carry out effective investigations into alleged disappearances and to bring an end to disappearances.[126] The government responded to any criticism concerning disappearances by issuing strong remarks against international monitors, NGOs and journalists, often labelling them as "traitors".[127]

66. Article 12 in ICCPR provides that any person lawfully within the territory of a State has the right of liberty of movement and freedom to choose his residence. This right can be subject to restriction if provided by law, necessary to protect national security, public order, public health or morals, or the rights of others and if the restrictions are necessary and proportionate. Under the ICCPR, the right to freedom of movement can only be restricted in exceptional circumstances, if provided by law, and in conformity with the obligations contained in Article 12(3). Moreover, the UN Human Rights Committee has stated that laws authorising restrictions should use "precise criteria and may not confer unfettered discretion on those charged with their execution."[128]

67. Article 14 of the Sri Lankan Constitution gives all citizens *freedom of movement*[129] and freedom to choose a place of residence in Sri Lanka.

68. Emergency laws and regulations allow for the imposition by government officials of curfews, restrictions on travel outside of Sri Lanka and prohibitions of movement in particular areas (zones), with considerable power given to the Secretary to the Ministry of Defence and the "Competent Authority" (generally a member of the military) to restrict or authorise

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124 See IER, p.83-84.

125 See doc. C.2.14, C.2.6.

126 See doc. A.3.14, C.2.7.

127 For example a text published on the Ministry of Defence website in April 2008 entitled "Deriding the war heroes for a living – the ugly face of Defence Analysts in Sri Lanka" begins with the following paragraph: "There has been much controversy among the media and political circles over the stance taken by the Ministry of Defence on the media freedom in this country. Some have even called it a government's war on media; some call it an anti democratic stance taken by the government. Whatever it is, the Ministry stands affirm on its stance over the irresponsible defence reportage and will assure to take all necessary measures to stop this journalistic treachery against the country"; and concludes: "The Ministry expects all the responsible media professionals to comprehend that soldiers are in a noble mission; i.e.: to rid the country from the scourge of terrorism. Thus, the Ministry does not find any other word better than a 'Traitor' to call whoever attempts to show the soldiers as thieves or fools by making false allegations and raising baseless criticism against them". See doc. C.2.27. See also doc. A.4.7, A.4.10, A4.11.

128 See UN Human Rights Committee, General Comment No.27, Freedom of Movement, CCPR/C/21/Rev.1/Add.9, 1999, para. 13.

129 See IER, section 5.5.

movement.[130] Specific Emergency Regulations established a number of special zones designated as High Security Zones (zones with high security presence), Prohibited Zones (compounds with high security zones) and Restricted Zones (areas temporarily restricted).

69. The UN Human Rights Committee has noted that evacuation or relocation must not lead to "forced transfer" or "forced internal displacement" of a population from one part of the country to another in violation of human rights obligations.[131] IDPs are entitled to the protection of their human rights, including those in the ICCPR, during and after displacement, including with respect to return, resettlement and reintegration. Under the ICCPR (Article 2 (1)) IDPs must not be subjected to discrimination or distinction based on race, colour, sex, language, religion, political or opinion, national or social origin, property or other status.

70. However, it is reported that Tamils often cannot leave their areas of residence, such as for example the Jaffna peninsula, without permission of the security forces. Permission is required to enter security areas. Mass evictions have also occurred: for example, in 2007 hundreds of Tamils were expelled from Colombo. This decision was challenged by the NGO CPA through a fundamental case submitted to the Sri Lanka Supreme Court in December 2007. The Supreme Court reversed the decision and ordered the eviction to stop.[132]

71. Displaced persons who have sought to return to their homes have faced several obstacles. Significant restrictions have been placed on the movement of fishermen, who are allowed to fish only during certain hours and in a limited zone. Returnees have been issued with a specific identification card in addition to their normal identification card. Villagers have expressed concern that this additional documentation restricts their mobility and access to education, since this additional document provides their residence status and only those who can prove residence in a specific area can go to school in that area. The government has in some cases forced thousands of IDPs to return against their wishes.[133] These IDPs were subject to physical attacks from the security forces and were threatened that supplies of food, water and electricity would be cut off in case of resistance.[134] In other cases, the government has refused to allow IDPs to return to their homes. In May 2007 an area spanning some 90 km in the Muttur East and Sampur areas was first designated as a High Security Zone and then as a Special Economic Zone; the effect of these designations was to bar the original inhabitants, largely ethnic Tamils, from returning to their homes.

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[130] Regulation 18(1)(a) and (b), 2005 Emergency Regulation gives the Secretary to the Minister of Defence discretion to use a wide array of powers to restrict freedom of movement to prevent a person "acting in any manner prejudicial to the national security or to the maintenance of public order, or to the maintenance of essential services", the Competent Authority is given power to authorize access into the specified zone under various emergency regulations creating such zones.

[131] See General Comment No.27, Freedom of movement, cit., para. 7, and General Comment No.29, States of Emergency (article 4), CCPR/C/21/Rev.1/Add.11 (2001), para. 13(d).

[132] The Sri Lankan Supreme Court on June 8, 2007 issued an injunction on the Sri Lanka Police to stop the evacuation of residents of Colombo lodges after hearing a fundamental rights petition filed by a non governmental organization, the Centre for Policy Alternatives, Sri Lanka (CPA). As a result of the ruling, police boarded 185 out of the 270 people who were sent to Vavuniya onto five buses and took them back to Colombo.

[133] See doc. C.2.14, C.2.41, see also HRW, News Release, "Sri Lanka: Civilians Who Fled Fighting Are Forced to Return", 15 March 2007.

[134] See doc. C.2.27 and A.3.18.

72. The existence of effective remedies to challenge restrictions on movement of people or denial of access to areas would contribute to ensure that any such measures taken are strictly necessary and proportionate. On 18 July 2007, the Supreme Court rejected a fundamental rights petition, which challenged the creation of a high security zone in Sampur on grounds of discrimination and freedom of movement[135].

73. The emergency legislation has been criticized for stifling media freedom and freedom of expression.[136] ICCPR Article 19 provides for *freedom of expression* and covers the right not only to impart information and ideas but also to seek and receive them.[137] The right to freedom of expression can be limited for reasons of national security, and could be suspended in a state of emergency, but such restrictions must be strictly required and proportionate to the threat. There must be a direct causal link between the words spoken, or written, and the legitimate security concern. Restrictions cannot be arbitrary, and there must be no other adequate means available.[138]

74. The Constitution of Sri Lanka guarantees freedom of the press and freedom of expression. However, the emergency legislation enables the Government to restrict freedom of expression in a disproportionate way. Several emergency laws create broad criminal offences aimed at limiting the communication and possession of information or material "prejudicial to national security".[139] These broadly defined offences leave so much room for interpretation to the point that it is difficult for a person to know whether or not he is committing an offence. This may lead to self-censorship. In addition, regulation 15 of the 2005 Emergency Regulation provides that a "competent authority" may "take such measures and give such direction" as necessary to prevent and restrict publications in and transmission outside Sri Lanka, of matters which "might be prejudicial" to the interests of national security, public order or essential services, or of matters "inciting or encouraging" persons to "mutiny, riot or civil commotion", or to "commit breach of any law", which may be prejudicial to public order or essential services.

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135 See doc. A.4.15.

136 See doc. C.2.15 and C.2.22.

137 See IER, section 5.7.

138 See General Comment No.10, Freedom of expression, para. 4: "when a State party imposes certain restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself".

139 See 2005 Emergency Regulation 18(1)(vi) enabling the Secretary to the Minister of Defence to make an order imposing upon a person restrictions on association or communication, and in relation to "dissemination of news or the propagation of opinions", to prevent that person acting "in any manner prejudicial" to national security, public order or the maintenance of essential services; Regulation 27 making it an offence to distribute leaflets that are "prejudicial" to public security, public order or essential services; Regulation 28 stating that: "no person shall, by words of mouth or by another other means whatsoever, communicate or spread any rumour or false statement which is likely to cause public alarm or public disorder"; Regulation 29 making it an offence to print, publish or comment on any pictorial, photographic or cinematograph film of the activities of any proscribed organization, any matters relating to Government investigations of a terrorist movement, any matter relating to national security, or "any matter likely, directly or indirectly to create communal tension"; and Regulation 9 of the 2006 Emergency Regulations making it a criminal offence, punishable by up to 10 years imprisonment, to "provide any information which is detrimental or prejudicial to national security" to anyone engaged in "terrorism" (as defined in Regulation 6).

75. Implementation of the right to freedom of expression remains a serious problem. Sri Lanka has been ranked as one of the most dangerous countries in the world for journalists.[140] It is reported that senior Government officials have repeatedly accused critical journalists of treason and often put pressure on editors and publishers to run stories that portrayed the Government in a positive light. Journalists who criticise the government have reportedly been subject to verbal and physical attacks, harassment, restrictions on access and vilification.[141] A considerable number of Sri Lankan journalists have been driven into exile;[142] in some cases, their families remaining in Sri Lanka have continued to receive threats. Government representatives have often attempted to discredit critical voices, notably journalists, as supporters of the LTTE and traitors to Sri Lanka. The Ministry of Defence website has accused journalists of acting as mouthpieces for the LTTE.[143]

76. In October 2008, a mission of press organisations to Sri Lanka noted that the situation concerning press freedom had deteriorated since 2007 and was marked by continuing murders of journalists, abductions, intimidation and harassment.[144] On 8 January 2009 Lasantha Wickramatunge, editor of *The Sunday Leader*, was murdered. Reports indicate that the number of threats against journalists increased still further during 2009.[145] The GOSL has thus failed to take adequate steps to prevent attacks against journalists.

77. Article 14 of the ICCPR guarantees *access to justice and the right to a fair trial.*[146] The Sri Lankan Constitution provides for the independence of the judiciary. However, reports indicate that the criminal justice system has critical shortcomings that obstruct justice for victims of human rights violations.[147] The judiciary is reportedly subject to political pressure. There have been unjustified threats of impeachment and some judges have been dismissed or transferred without objective reasons.[148]

78. Reports indicate that the vast majority of human rights violations are never subject to legal proceedings.[149] Those cases that are tried rarely conclude with a conviction. Since 1994, only three persons have been convicted of torture and fewer than thirty for abduction or wrongful imprisonment. In only one case has a member of the security forces been convicted of murder.[150] Cases are frequently transferred from one court to another which hinders effective trials by making it difficult for witnesses and victims to attend. Due to significant intimidation witnesses are often reluctant to testify. As noted, there is currently no witness protection programme, although a witness protection bill is pending in Parliament.[151] It is to be noted that in 2008, following a request by the Commission of Inquiry (CoI), the IIGEP facilitated video-conferencing from abroad from witnesses of serious human rights

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140 See doc. A.4.6, A.5.3, C.1.3, C.1.14, C.2.26.
141 See A.4.10, C.2.28. See also B.2.5 and B.2.9.
142 See doc. C.2.26. According to the Committee to Protect Journalists Sri Lanka has the highest number of journalists in exile in the world.
143 See doc. C.2.27.
144 See doc. C.2.5.
145 See doc. C.2.22, C.2.26.
146 See IER, section 5.9.
147 See doc. C.2.22, C.2.29.
148 See doc. C.2.29.
149 See doc. C.1.14, C.2.22.
150 See doc C.2.25.
151 See doc. A.6.3.

violations.[152] The sudden decision in May 2008 by the President's Secretary to suspend testimony through video conferencing pending the approval of the future witness protection law was a major setback to the functioning of the CoI.

79. In the context of the CRC the situation of *child soldiers* has been of particular concern.[153] The Penal Code of Sri Lanka prohibits the recruitment of a child as soldier. The GOSL regards the recruitment and use of children in armed conflict as a serious child rights' violation and has consistently asserted its "zero tolerance" position on the practice.[154] Although the LTTE was the main body responsible for child recruitment, reports indicate that the Karuna group subsequently known as the TMVP continued to abduct children in government-controlled areas during 2006 to 2008.[155] Reports also indicated that certain elements of the government security forces supported and sometimes participated in these abductions.[156] The UN Secretary General noted in December 2007 that there was no evidence that the police or security forces had taken any steps to secure the release of abducted children although the police and security forces had clear knowledge of the abducted children.[157]

80. In 2009 the government has launched a National Campaign against the recruitment of child soldiers[158] and has undertaken certain steps to improve the situation of children affected by the armed conflict including the establishment of dedicated centres for "child surrendees" The government has taken further steps to remedy the situation through encouraging the Karuna/TMVP Group to sign a time-bound Action Plan for the release of child soldiers in

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152 Reportedly the CoI was beginning to make progress and further video conferencing testimony on the ACF case would have possibly revealed important evidence on the perpetrators of the cases relating to the five students and the ACF massacre. According to Devanesan Nesiah, former member of the CoI, the cancellation of the programmed video-conferencing on the directions of the presidential secretariat was a major setback as there were very good prospects of reaching satisfactory conclusions in the ACF aid workers case, the Trincomalee youth case, and, perhaps, in a few other cases. But these were sharply diminished as a result of that directive. Devanesan Nesiah was quoted in an interview by Namini Wijedasa of Lakbima News, "Dr Nesiah: President wanted me to quit the Commission", posted by Federal Idea on 2 August, http://federalidea.com/fi/2008/08/dr_nesiah_president_wanted_me.html [accessed on 20 September 2009].

153 See IER, section 5.10.

154 See doc. A.6.6.

155 The TMVP (Karuna Group) was listed in Annex 2 of the 2006 Report of the Secretary General to the Security Council on Children and Armed Conflict together with the LTTE as a group that used and recruited children. Following that listing, the leader of TMVP made a commitment in December 2006 to the Secretary General's Special representative for Children and Armed Conflict to stop child recruitment and release all child soldiers. See doc. A.3.3, C.1.11, C.1.6, C.2.20.

156 On 13 November 2006, Allan Rock, the Special Advisor to the UN Special Representative for Children and Armed Conflict visited Sri Lanka. The press statement said that "under-age recruitment continued and the LTTE had yet to release several hundred children as verified by UNICEF. The mission also found that so-called Karuna faction continued to abduct children in government-controlled areas of the East, particularly Batticaloa district. Between May and November 2006, 135 cases of under-age recruitment by abduction had been reported to UNICEF, with evidence that this trend was accelerating. The mission also discovered a disturbing development involving the Karuna abductions. It found strong and credible evidence that certain elements of the government security forces are supporting and sometimes participating in the abductions and forced recruitment of children by the Karuna faction". See doc. A.3.3.

157 See doc. A.3.8.

158 See doc. C.1.5.

cooperation with UNICEF in December 2008.[159] It is too early to assess whether the Action Plan will achieve the desired effects, but preliminary information indicates that not all child soldiers have been released. Moreover in June 2009 the UN Secretary General's Report on Children and Armed Conflict stated that "while TMVP is now a registered political party, recruitment of children by this group continues, although at a reduced rate. Furthermore the group has failed to abide fully by its previous commitments and relevant national and international law. According to UNICEF data-bases as of 31 August 2009 there were 94 outstanding cases of under age recruitment by the TMVP. Of these, 15 were under the age of 18, and 78 were recruited while under 18 but had passed that age".[160] The UN Secretary General has also indicated that during the reporting period (15 August 2007-31 January 2009) "concerns have emerged relating to an armed group that has been operating in both the east and the north of Sri Lanka for some time. The Country Task Force has received and followed up a small number of reports of children being recruited and harassed by the pro-Government People's Liberation Organization of Tamil Eelam (PLOTE), and other human rights agencies have reported incidents of violence and abductions, including against children, by this group."[161] It is noteworthy that to date there has been no conviction in Sri Lanka in relation to child recruitment.

81. According to Sri Lanka's National Report, which was presented during the UPR in 2008, "Sri Lanka volunteered to work with the United Nations Security Council Working Group on Children and Armed Conflict pursuant to SC Resolution 1612 in setting up a Task Force for Monitoring and Reporting as a means to giving effect to the Government's zero-tolerance policy on child recruitment".[162] This policy was confirmed by the statement made by Mr. Suhada Gamalath, Secretary/Ministry of Justice and Commissioner General of Rehabilitation at the Meeting of the Security Council Working Group on Children and Armed Conflict held in New York on 1 July 2009 that most child combatants had been identified and were in a process of being sent to child rehabilitation centres. According to that statement "these children are being treated as victims and not as suspects in detention for their involvement in terrorist activities. It is a high priority for the Government to see these children returned to their families and to be able to either resume schooling or be gainfully employed in a trade and integrate into normal life in society".[163] In addition, on 31 July 2009 a National Framework on the Reintegration of Ex-combatants which included child soldiers was adopted.[164] The GOSL provided further information on action taken relating to former child combatants attached to its Note Verbale of 3 August 2009.

4.3 Conclusions

82. In this investigation, the Commission has reviewed a number of distinct aspects of effective implementation of the ICCPR, CAT and CRC. The Commission has conducted this review with a particular focus on those obligations which are amongst the most important and

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159 See doc. C.3.1. On 31 July 2009 a National Framework on the Reintegration of Ex-combatants covering also child soldiers was adopted, see doc. C.3.3.

160 See doc. C.1.11.

161 See doc C.1.11.

162 See doc. A.3.18, para. 79, p.18. Further details are contained in doc. C.1.19, para. 4.13.

163 See doc C.3.2. See also Note Verbale of the GOSL of 3 August 2009, Annex 2.

164 See doc. C.3.3.

fundamental human rights obligations established in the three Conventions, and where in light of the information available to the Commission, most of the problems in effective implementation were concentrated.[165] The following conclusions of the investigation are based on the Commission's analysis of these aspects.

83. The legal and institutional framework giving effect to the ICCPR, CAT and CRC is not sufficient to ensure effective implementation of all relevant obligations provided for by the three instruments. Some of the provisions of the Conventions have not been transposed in full, while provisions in the domestic legislation are in some cases more restrictive than the corresponding provisions in the Conventions. Domestic legislation also contains provisions which are not entirely in compliance with the Conventions. In particular, the emergency legislation overrides other current legislative provisions and imposes restrictions on human rights which are incompatible with the Conventions.

84. The police are unwilling or unable to investigate human rights violations. The criminal investigation system and the court system have proven inadequate at investigating human rights abuses. The NHRC is weakened, incapable of performing its role and has lost international recognition. The emergency legislation shields officials against prosecution.

85. So far as effective implementation in practice of the conventions is concerned, the evidence shows that unlawful killings, perpetrated by police, soldiers and paramilitary groups, are a major problem. While Sri Lanka has a strong record of adopting legislation to criminalize torture, in practice torture both by the police and the armed forces remains widespread. The powers of detention conferred by the emergency legislation have enabled arbitrary detention without effective possibility of review of the lawfulness of detention. There have been a significant number of disappearances which are attributable to state agents or paramilitary factions complicit with the government; hence Sri Lanka has failed to implement its obligation to prevent disappearances by State agents and other forces for which it is responsible.

86. Serious restrictions have been placed on freedom of movement, notably concerning the thousands of persons interned in IDP camps. Strong verbal condemnations by government representatives of journalists combined with a failure to take effective action to protect journalists against physical violence have undermined the right to freedom of expression.

87. Child recruitment was a serious problem in the period 2005 to 2008. The government has taken important steps to address child recruitment and implement its zero tolerance policy. At present it is impossible to assess if these steps will be adequate. However, it is clear that during the period covered by the investigation child recruitment was taking place in government-controlled territory by the Karuna group/TMVP with at least the occasional involvement of government forces.

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[165] For instance, issues connected to the freedom of association (regulated by ICCPR Article 22 which makes reference to the ILO Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize) have not been addressed in this report. This does not mean that the Commission excludes that questions related to freedom of association may exist, see B.2.12.

88. The Government of Sri Lanka has taken the position that Sri Lanka has effectively implemented the three Conventions.[166] However, on the basis of the facts and information available, including relevant materials and information provided by the GOSL (although outside the formal context of the investigation), the Commission has concluded that neither the ICCPR, the CAT, nor the CRC, nor the legislation incorporating the obligations under these Conventions have been effectively implemented in Sri Lanka during the period covered by the investigation.

Annex 1

Evidentiary sources

The sources on which the findings contained in this report are based are those included in the non-confidential file of the investigation. The ones specifically referred to in this report are indicated below and identified with the same codes used in the non-confidential file of the investigation.

A.3: UN reports and other materials available prior to the opening of the investigation

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A.3.2 – Statement by the Special Rapporteur on Extrajudicial Executions, United Nations High Commissioner for Human Rights, 5 September 2006.

A.3.3 – Office of the High Representative of the Secretary-General for Children and Armed Conflict, Statement from the Special Advisor on Children and Armed Conflict, Allan Rock, 13 November 2006.

A.3.4 – Press Statement by UN High Commissioner for Human Rights on Conclusion of her visit to Sri Lanka, 13 October 2007.

A.3.5 – International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, Report and Recommendations of the Subcommittee on Accreditation, Geneva, 22 to 26 October 2007.

A.3.6 – UN News service, UN Human Rights expert reports allegation of torture in Sri Lanka, 29 October 2007.

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A.3.8 – UN Security Council, Report of the Secretary-General on Children and armed conflicts in Sri Lanka, S/2007/758, 21 December 2007.

A.3.9 – Report of the Working Group on Enforced or Involuntary Disappearances, A/HRC/7/2, Sri Lanka chapter, 10 January 2008.

A.3.10 – UN General Assembly, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, 7th Session of the UN Human Rights Council, A/HRC/7/3/Add6, 26 February 2008.

A.3.11 – UN Press Release, Statement of the Special Rapporteur on Torture, Manfred Nowak 7th Session of the UN Human Rights Council, 26 February 2008.

A.3.12 – Working Group on Enforced or Involuntary Disappearances, Human Rights Council, Inter-active Dialogue with the Council, Statement of the Chair-Rapporteur during the period covered by the report, Santiago Corcuera Cabezut, 10 March 2008.

A.3.13 – Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, Follow-up to country recommendations, A/HRC/8/3/Add.3, 14 May 2008.

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[166] See in particular Notes Verbales of 17 October 2008, 17 June 2009 and 11 September 2009.

A.3.15 – Report of the Working Group on the Universal Periodic Review Sri Lanka, A/HRC/8/46, 5 June 2008.

A.3.16 – CRC 3rd and 4th combined periodic report by Sri Lanka, October 2008.

A.3.17 – Universal Periodic Review, Summary of stakeholders information, 3 April 2008.

A.3.18 – National Report Submitted in Accordance with Paragraph 15 (A) of the Annex to Human Rights Council Resolution 5/1, 2 May 2008, A/HRC/WG.6/2/LKA/1.

A.4: NGOs materials available prior to the opening of the investigation

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A.4.2 – Report of the Civil Monitoring Commission, Free Media Movement and Law & Society Trust, Second submission of the Presidential Commission of Inquiry and public on human rights violations in Sri Lanka: January-August 2007, 31 October 2007.

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A.4.5 – Asian Human Rights Commission, State of Human Rights in 11 Asian Nations, 2007 (Sri Lanka chapter).

A.4.6 – Amnesty International Report, Sri Lanka: Silencing Dissent, 7 February 2008.

A.4.7 – UN Human Rights Council: Third regular session: Compilation of statements by Amnesty International (including joint statements), 22 December 2006.

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A.4.13 – International Commission of Jurists, Report on the ACF case – April 2007.

A.4.14 – Commonwealth Human Rights Initiative, "Police Accountability in Commonwealth South Asia" 2007.

A.4.15 – Human Rights Watch, Return to war: human rights under siege, August 2007.

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A.5: Other materials available prior to the opening of the investigation

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A.5.2 IIGEP, 4th Public Statement: IIGEP Reports No Indication of Implementation of its Recommended Corrective Actions and Lays down Minimum Conditions for Success of Presidential Commission of Inquiry's Impending *Public* Inquiries, 19 December 2007

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A.5.4 IIGEP, 5th Public Statement: The Presidential Commission's Public Inquiry Process so Far Falls Short of International Norms and Standards, 6 March 2008

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A.5.6 IIGEP, 6th Public Statement: The Members of the IIGEP submit their Concluding Public Statement on the Work of the Commission of Inquiry and find a Lack of Political Will to Support a Search for the Truth, 15 April 2008

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A.6.2 Supreme Court determination on the ICCPR Bill 2008, 17 March 2008

A.6.3 Draft Witness Protection Bill, June 2008

A.6.4 Statement by the Delegation of Sri Lanka following Special Rapporteur Mr. Alston's presentation at HRC, 19 September 2006

A.6.5 Statement of Sri Lanka Ambassador to UN, Mr. Kariyawasam on agenda item 67 (c), 27 October 2006

A.6.6 Security Council Working Group on Children and Armed conflict by H.E. Prasad Kariyawasam, 15 February 2007

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A.6.8 Response of GOSL on Report on his mission to Sri Lanka of Mr. Nowak, October 2007

A.6.9 Response of GOSL Delegation on Report on his mission to Sri Lanka of Mr. Nowak, at the Human Rights Council, 2008

A.6.10 Position of GOSL with regard to the several issues contained in the 6th Public

Statement of the IIGEP, 23 April 2008

B: Official submissions during the 4-month comment period under art.18 of Council Regulation (EC) No.980/2005

B.1.10 Submission by individual

B.1.33 Submission by individuals

B.2.1 Submission by Action Contre la Faim, 16 February 2009

B.2.2 Submission by Amnesty International, 13 February 2009

B.2.3 Submission by Centre for Policy Alternatives (CPA), 13 February 2009

B.2.4 Submission by Human Rights Watch, 18 February 2009

B.2.5 Submission by International Federation of Journalists (IFJ), 16 February 2009

B.2.6 Submission by Lawyers for Human Rights and Development (LHRD), 2 February 2009

B.2.7 Submission by National Capital Region Tamil Association, Canada, 3 December 2008

B.2.8 Submission by Parent United to Legislate a More Sentient Epoch (PULSE), 7 February 2009

B.2.9 Submission by Reporters sans Frontiers, 17 February 2009

B.2.10 Submission by Tamil Centre for Human Rights, 4 January 2009

B.2.11 Submission by Tamil United Liberation Front, 27 January 2009

B.2.12 Submission by the European Trade Union Confederation and the International Trade Union Confederation of 19 November 2008

B.3.6 Submission by Joint Apparel Association Forum (JAAF), 20 January 2008

B.3.7 Submission by Jinadasa

B.3.8 Submission by Sri Lanka Apparel Association

B.3.9 Submission by Sri Lanka First

B.3.10 Submission by Stirling Group

C.1: UN reports and materials collected during the investigation

C.1.1 UN Press Release, UN Human Rights Chief Deplores Deteriorating Situation for Civilians in Sri Lanka, 29 January 2009

C.1.2 Report of the Working Group on Enforced or Involuntary Disappearances, A/HRC/10/9, 6 February 2009

C.1.3 Press release by the Office of the High Commissioner on Human Rights (OHCHR), Sri Lanka: UN Experts Concerned at Suppression of Criticism, Impunity, 9 February 2009

C.1.4 Report of the Representative of the Secretary-General on he Human Rights of the Internally Displaced Persons, Walter Kälin, A/HRC/10/13, 9 February 2009

C.1.5 Joint Press Release by the Bureau of the Commissioner General of Rehabilitation and United Nations Children's Fund (UNICEF), National Campaign against Recruitment of Child Soldiers, 26 February 2009

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C.1.8 UN Press Conference on Sri Lanka by Under-Secretary-General for Humanitarian Affairs, 15 April 2009

C.1.9 UN News Centre, "Urgent International Scrutiny needed in Sri Lanka, say UN Human Rights Experts", 8 May 2009

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C.1.11 UN Security Council, Report of the Secretary-General on children and armed conflict in Sri Lanka, S/2009/325, 25 June 2009

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C.1.13 Message of the High Commissioner for Human Rights Navi Pillay at the Human Rights Council Special Session on the human rights situation in Sri Lanka, 26 May 2009

C.1.14 Statement by Ms Magdalena Sepúlveda, Independent expert on the question of human rights and extreme poverty, delivered on behalf of all Special Procedures mandate holders of the Human Rights Council at the Eleventh Special Session of the Human Rights Council, The human rights situation in Sri Lanka, 26 May 2009

C.1.15 Report of the Human Rights Council on its Eleventh Special Session, A/HRC/S-11/2, 26-27 May 2009

C.1.16 UN Security Council, Report of the Secretary-General on the protection of civilians in armed conflict, S/2009/277, 29 May 2009

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C.1.18 Press release by UN Special Rapporteur on extrajudicial, summary or arbitrary executions, An independent Investigation into Sri Lankan executions is urgent, 28 August 2009

C.1.19 3rd and 4th Combined Periodic Report on Sri Lanka under Article 19 of the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, 14 August 2009

C.1.20 Statement by the UN High Commissioner for Human Rights, N. Pillay, September 2009

C.1.21 UNICEF Press Release – August 2009

C.1.22 Statement by the UN High Commissioner for Human Rights, N. Pillay, 13 March 2009

C.1.23 UNHCR Guidelines for Asylum seekers from Sri Lanka, April 2009

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C.2.2 ICG, Sri Lanka's Eastern Province: Land, Development, Conflict, Asia Report No.159, 15 October 2008

C.2.3 UTHR, Special Report No. 31, Paws of an Un-Heroic War, 28 October 2008

C.2.4 UTHR, Special Report No. 33, Third Anniversary of the ACF Massacre – A Travestied Investigation, Erosion of the Rule of Law and Indicators for the Future of Minorities in Sri Lanka, 4 August 2009

C.2.5 International Press Freedom and Freedom of Expression Mission to Sri Lanka, Media under Fire: Press Freedom Lockdown in Sri Lanka, December 2008

C.2.6 Human Rights Watch (HRW), Trapped and Mistreated – LTTE Abuses against Civilians in the Vanni, December 2008

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C.2.8 IFJ, IFJ Calls for Inquiry into Lasantha's murder, 12 May 2009

C.2.9 International Committee of the Red Cross (ICRC) News Release No. 09/02, Sri Lanka: Major Humanitarian Crisis Unfolding, 28 January 2009

C.2.10 HRW, War on the displaced – Sri Lankan and LTTE Abuses against Civilians in the Vanni, February 2009

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C.2.14 Centre for Policy Alternatives (CPA), A Profile of Human Rights and Humanitarian Issues in the Vanni and Vavuniya, March 2009

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C.2.23 Kishali Pinto-Jayawardena, The rule of Law in Decline; Study on Prevalence, Determinants and Causes of the Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (CIDTP) in Sri Lanka, May 2009

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C.2.26 Committee to Protect Journalists, Special Report: Journalists in Exile 2009, 17 June 2009

C.2.27 Sri Lanka Ministry of Defense, Review of statements related to lawyers, journalists, civil society, 18 June 2009

C.2.28 Media Matters Sri Lanka Bulletin (15), 29 June 2009

C.2.29 ICG, Sri Lanka's Judiciary: Politicised Courts, Compromised Rights, Asia Report, No.172, 30 June 2009

C.2.35 Coalition to Stop the Use of Child Soldiers, Sri Lanka: Issues concerning protection of children post armed conflict, July 2009

C.2.36 Amnesty International, Unlock the camps in Sri Lanka, Safety and Dignity for the Displaced Now – A Briefing Paper, August 2009

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C.2.39 Journalists for Democracy Sri Lanka (JDS), Monthly Summary Report, August 2009

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C.2.41 CPA, Trincomalee High Security Zone and Special Economic Zone - September 2009

C.2.42 Amnesty International, "Sri Lanka's displaced face uncertain future as government begins to unlock the camps", statement of 11 September 2009

C.2.43 Human Rights Watch, Letter sent to EU Foreign Ministers on September 11, 2009

C.3: Sri Lanka materials collected during the investigation

C.3.1 Action Plan between the Tamil Makkal Viduthalai Puligal (TMVP) and the Commissioner General for Rehabilitation (CGR), GOSL and UNICEF regarding Children Associated with TMVP, 1 December 2009

C.3.2 Statement at Meeting of Security Council Working Group on Children and Armed Conflicts by Mr. Gamalath, Sri Lanka Secretary, Ministry of Justice, New York, 1 July 2009

C.3.3 Media Release from Sri Lanka Ministry of Disaster Management and Human Rights - National Framework Proposal on the Reintegration of Ex-combatants, 31 July 2009

C.3.4 Statement at 12th Session of UN Human Rights Council by Mr. Peiris, Attorney General of Sri Lanka, 15 September 2009

C.3.5 Statement at 12th Session of UN Human Rights Council by Hon. Samarasinghe, Minister of Disaster Management and Human Rights of Sri Lanka, 14 September 2009

Annex 2

Political Dialogue

As part of the Commission's ongoing dialogue with the GOSL on issues relevant to this investigation, as described in paragraph 11 of the report, the Commission received the following written materials. The majority of these documents was already available to the Commission and has been used as part of the evidence and has been recorded as such in Annex 1. Where pertinent to the analysis and not already available in other public documents, the views expressed by the GOSL are indicated in the footnotes by reference to the relevant Note Verbale.

1. Note Verbale of 13 July 2009
i. on the trial of journalist J.S. Tissainayagam
ii. on the detention of 3 Doctors who were part of the LTTE propaganda machine
iii. on GOSL-UNICEF Action Plan on Child Soldiers

2. Note Verbale of 30 July 2009 on the GOSL statement to the UN Security Council Working Group on Children and Armed Conflict, New York, 1 July 2009

3. Note Verbale of 3 August 2009 providing an update on recent developments relating to protection and promotion of human rights

i. on preparation and submission of periodic reports of the GOSL relating to the CEDAW, CAT and ICCPR to the OHCHR bodies

ii. on consensus reached by the Parliamentary Consultative Committee on Justice and Law Reforms on 23 July 2009 relating to amendments to be moved for the enactment of the Assistance and Protection to Victims of Crime and Witness Bill

iii. on the formal adoption on 30 July 2009 by a gathering of state, civil society, international organizations and diplomatic representatives of the Government of Sri Lanka, a document setting out a framework for national reconciliation including the rehabilitation and reintegration of ex-combatants (Annex 1 – Press release and final draft of the National Framework for the Reintegration of ex-combatants adopted on 31 July, 2009)

iv. on GOSL's decision to move amendments to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Act with a view to remove the minimum mandatory jail term to be imposed on convicts

v. on the handing over of the Report of the Commission of Inquiry (COI) into serious violations of human rights to the President in July 2009, and that thereafter the Attorney General's advice had been sought by the President on the implementation of the recommendations of the Commission

vi. on the preparation of the National Action Plan on Human Rights which had reached the 4th phase of the programme

vii. on steps being taken in recent weeks in pursuance of the Government's commitment to protect and promote the rights of former Child Combatants in consultation with relevant organizations including the UNICEF (Annex 2 – update on the status regarding action taken relating to former child combatants)

4. Note Verbale of 19 August 2009 informing the EC of the transmission of the Periodic Report of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on 14 August 2009

5. Note Verbale of 11 September 2009

i. Note on GOSL's compliance with the International Covenant on Civil and Political Rights (ICCPR), the Convention Against Torture (CAT) and Convention on the Rights of the Child (CRC) - Annex 1

ii. Statement by Delegation of Sri Lanka following UN Special Rapporteur on extrajudicial, Summary and Arbitrary Executions, Ambassador Philip Alston's presentation at the UN Human Rights Council on 19 September 2006 - Annex 2

iii. Statement by the Permanent Representative of Sri Lanka to the UN at the UNGA 61 Session, Social, Humanitarian and Cultural Committee, on matters including Alston Report of 27 October 2006 - Annex 3

iv. Statement made by GOSL on 15 February 2007 at the UN Security Council Working Group on Children and Armed Conflict in New York where the Report of the UN Secretary General's Representative on Children and Armed Conflict (which was based on the previous Report of Ambassador Allan Rock) was presented and considered - Annex 4

v. Ministry of Disaster Management & Human Rights Press Release on the visit of the then UN High Commissioner for Human Rights Madam L. Arbour, 13 October 2007 - Annex 5

vi. Letters addressed by the Minister of Disaster Management and Human Rights Hon. Mahinda Samarasinghe to Mrs. Arbour dated 5 November and 5 December 2007 - Annex 6

vii. Response of GOSL dated Geneva, 20 February 2008, to the Report of the UN Special Rapporteur on Torture Ambassador Manfred Nowak's mission to Sri Lanka in October 2007 - Annex 7

viii. Response of GOSL to Ambassador Nowak's statement of 10 March 2008 at the Human Rights Council - Annex 8

ix. Press Statement of GOSL dated 23 April 2009, issued on the occasion of the resignation of the members of the IIGEP and the issuance of the 6th Public Statement of the IIGEP - Annex 9

x. Voluntary Pledges made by Sri Lanka and Recommendations of Member States made to Sri Lanka and accepted for implementation by the GOSL during Sri Lanka's participation in the Universal Periodic Review - Annex 10

xi. Update on the National Action Plan on Human Rights - Annex 11

Annexure
1. Supreme Court Determination on ICCPR Bill
2. ICCPR Act No. 56 of 2007
3. 3rd and 4th Combined Periodic Report – CAT (July 2009)
4. National Child Protection Authority Act No.50 of 1998
5. 3rd and 4th Combined Periodic Report – CRC (October 2008)
6. Assistance and Protection to Victims of Crime and Witnesses Bill

6. Note Verbale of 16 September 2009

i. Statement at 12th Session of UN Human Rights Council by Mr. Peiris, Attorney General of Sri Lanka, 15 September 2009

ii. Statement at 12th Session of UN Human Rights Council by Hon. Samarasinghe, Minister of Disaster Management and Human Rights of Sri Lanka, 14 September 2009

OBSERVATIONS OF THE GOVERNMENT OF SRI LANKA (5 NOV. 2009) IN RESPECT OF THE "REPORT ON THE FINDINGS OF THE INVESTIGATION WITH RESPECT TO THE EFFECTIVE IMPLEMENTATION OF CERTAIN HUMAN RIGHTS CONVENTIONS IN SRI LANKA", DOCUMENT No. C (2009) 7999 (19 OCT. 2009)

With reference to the Commission of the European Communities, (hereinafter 'EC'), document C(2009)7999, dated 19 October 2009, titled "Report on the findings of the investigation with respect to the effective implementation of certain human rights conventions in Sri Lanka" (hereinafter referred to as the 'EC Report'), the Government of Sri Lanka, (hereinafter referred to as the 'GoSL'), wishes to make the following comments, without prejudice to its position conveyed in its previous communications conveyed through diplomatic channels concerning the GSP+ "investigation" further referred to in paragraph 5 hereof;

1. The GSP+ tariff benefits extended to Sri Lanka resulted in exports to the EU increasing by 42% in comparison to what they were in 2004, to Euro 2.062 billion in 2008, thereby accounting for 36% of Sri Lanka's exports that year. Apparel and related items which account for 53% of Sri Lanka's total exports to the EU, benefited in particular. Other sectors too such as fish products, ceramic products, rubber and rubber based products and jewellery augmented their exports to the EU, under the GSP+ Scheme. Along with the growth in exports, the bilateral trade turnover also expanded, from Euro 2.4 billion in 2004 to Euro 3.3 billion in 2008.

2. It must be noted that the apparel sector provides direct employment for more than 270,000 persons, benefiting both directly as well as through indirect employment at least a million persons, or 5% of a population of 20 million. It accounts as well for around 8% of GDP.

3. Thus it is clear that this Scheme has facilitated and promoted trade and development in Sri Lanka as envisaged by the Enabling Clause. It is noted that the guiding principle behind the Enabling Clause which forms the basis of the GSP+ Scheme, is precisely that such schemes be designed and, if necessary, modified to respond positively to the development, financial and trade needs of the developing countries. The continuation of the GSP+ Scheme would without doubt bring further benefit to the people of Sri Lanka and strengthen the efforts of the Government to meet the challenge of the Millennium Development Goals. By contrast, any withdrawal of the GSP+ Scheme from Sri Lanka, will lead to disruption and loss of market share. While there will be some implications as well for European consumers in view of Sri Lanka's position as a major supplier of apparel to certain segments of the EU market, the burden of coping with such a situation will be much heavier for the Government and people of Sri Lanka and would significantly affect both Sri Lanka's trade and development, as well as the pace of her post-conflict recovery.

4. It must also be noted that the present moment is of great significance for Sri Lanka, since having accomplished a feat seldom paralleled in contemporary times, namely of defeating the scourge of terrorism and rescuing nearly 300,000 of its citizens from the LTTE, the GoSL has vigorously embarked on the process of developing the conflict affected areas,

while further strengthening national amity and reconciliation. Both of these processes complement and support the other. The de-mining of areas in the East accompanied by the re-settlement of those displaced and the building up of infrastructure ravaged in the last 30 years due to terrorist activity will benefit in particular, the fisheries and agriculture sectors. These sectors are vital for the populace of the Northern Province which is predominantly Tamil as well as for those in the Eastern Province, which has almost equal numbers of Muslims, Sinhalese and Tamils. While the GSP+ Scheme has allowed the fisheries and agriculture related exports to grow, conversely its removal will result in some down-sizing of the expansion potential.

5. It is correct that the GoSL did not participate in the process of the GSP+ "investigation" and refused a request for "experts" to visit Sri Lanka as a matter of principle, as it was felt to be both inappropriate for Sri Lanka, a sovereign State, to participate in such a process, as well as to be unnecessary, given the numerous on-going processes of constructive engagement both between the GoSL and the European Institutions, as well as between the GoSL and the UN system.

6. Nevertheless, it also needs to be stated in this regard that Sri Lanka as a State Party to the core human rights treaties is consistently cooperating with the relevant treaty bodies who are the competent international organs established for the purpose of monitoring domestic measures of implementation, *inter alia* through the submission of periodic national reports and through other methods of engagement such as visits by Special Rapporteurs. The most recent interaction of Sri Lanka was with the Committee on the Rights of the Migrant Workers in October 2009. Sri Lanka has already submitted its periodic Report relating to the Convention against Torture and the Convention on the Rights of the Child (hereinafter 'CRC'). It is expected that the Periodic Report on the ICCPR, which is currently being considered by the Inter- Ministerial Committee established for that purpose, will be submitted during November 2009 to the relevant UN body.

7. Further it is also noted that while not subjecting itself to the process of "investigation", the GoSL continued to engage with the EC on the issues of mutual interest through existing diplomatic channels, a fact acknowledged in the EC report. It did so in-keeping with the spirit of transparency and mutual respect that is appropriate to the historic and long standing relationship between Europe and Sri Lanka. The engagement with the European Institutions and the transparency which prevails in Sri Lanka with its unbroken record of democratic governance dating back to 1931, should have sufficed to enable the "experts" and the EC to analyze the validity of the views clearly hostile to Sri Lanka, in an objective manner, with due weightage being given to the reality that in many instances, there is also another side to the story.

8. It is in the above context that any investigation of this matter could and should have been conducted following internationally recognized standards of objectivity.

9. The Annexure hereto, which is an integral part of the Observations of the GoSL, analyses the Report of the EC which is largely based on the findings of the "experts". The present analysis was conducted by a team comprising public officials drawn from several relevant Ministries and Departments of the GoSL, including the Office of the Attorney

General, the Ministry of Disaster Management & Human Rights, the Ministry of Defence, the Ministry of Justice, the Ministry of Export Development and International Trade and the Ministry of Foreign Affairs. The analysis brings out repeated and indeed frequent instances in which the "experts" have "mis-directed" themselves.

10. In addition to the analysis in the Annexure, there are also some broader issues that permeate the whole process, which need to be flagged. For example, paragraph one of the Report states that the said "investigation" was initiated by the Commission decision of 14 October 2008 (OJEUL 277/34 of 18th October 2008) pursuant to Article 18 (2) of Council regulation (EC) No.980/2005 to ascertain "if the national legislation incorporating those conventions referred to in annex III of the Regulation which had been ratified in fulfilment of the requirements of Article 9(1) and (2) was not effectively implemented". However, paragraph 16 of the Report gives a much more expanded remit to the investigation, *inter alia,* by dealing with additional issues such as whether institutions responsible for the protection of human rights and for providing remedies for violations are functioning adequately. The GoSL views this as an arbitrary expansion of the "investigation".

11. It is also regrettable that Sri Lanka's commendable achievements in relation to its compliance under the CRC, which have been acknowledged by the Committee on the Rights of the Child and the international community at large, have been glossed over, so that the Report focuses only on the limited aspect of child soldiers. In its allegations pertaining to the recruitment of children, the Report also fails to take into account the significant progress attained by the GoSL through the Tripartite Action Plan, whereunder only one child is reported to have been recruited after the entry into force of the Action Plan in December 2008, according to information provided by UNICEF as at 30 September 2009. This once again reflects the overall imbalance in the Report in that the effective implementation of the CRC has been largely ignored.

12. Furthermore, one of the benchmarks which lies behind the protection afforded by the Emergency Regulations barring legal proceedings against an officer acting in good faith as mentioned in paragraph 60 of the EC Report, stems from the universally accepted dictum "*omnia praesumuntur rite esse acta*", namely, that acts are presumed to have been correctly performed. Given the universality of this dictum and its prevalence in other GSP+ beneficiary countries, singling out Sri Lanka alone is highly discriminatory. The same could be said about many of the other criticisms levelled against the GoSL under the EC Report, *inter alia*, those relating to the allocation of judges to a bench by the Chief Justice, the provisions of the anti-terrorism laws, matters relating to detention and the admissibility of confessions.

13. In an interview published in the *Sunday Times* (Sri Lanka) on 1 November 2009, a senior official of the EC in Sri Lanka has stated that the conduct of an investigation was necessitated in that "If we don't apply our own laws, not only will we be failing in our duty and be open to legal challenge in the European Court of Justice but also open to challenge in Geneva at the WTO by those countries who want GSP Plus but didn't get it for whatever reason. They can point the fingers and say that we are not applying our own rules, that there is no coherency in the application of the eligibility criteria and therefore the instrument is not

in conformity with the WTO rules... our ethical responsibility is to the coherency and integrity of the instrument. It is also our legal responsibility". In this regard, GoSL wishes to question the EC decision to singularly apply these values to Sri Lanka. It is noted that this has been done notwithstanding the fact that there are States currently enjoying GSP+ benefits on whom strictures have been pronounced by UN monitoring bodies including the ILO, on whom a process of investigation has not been ordered. Therefore this manifest element of selectivity and discrimination contravenes the universally endorsed principle of the rule based granting of tariff preferences.

14. The aforementioned news report of 1st November 2009 also referred to a statement made to the Sri Lanka-Canada Business Council by a senior official of the EC in Sri Lanka published in the "Sunday Times" of 17th February 2008, where he observed "this is simply a matter of 27 conventions. It is not related to the issue of the conflict. It depends on the ratification and effective implementation of the conventions. The war and other internal matters are not an issue here". The GoSL contests this position and asserts that the decision to order the GSP+ "investigation" on Sri Lanka was politically motivated and accompanied by a high degree of prejudice. It wishes to place on record that a Commissioner of the European Commission had stated at a meeting with the Minister of Export Development and International Trade of Sri Lanka, on 13th March 2008, in Brussels, "this war is never, never, never going to be solved militarily. The only possible solution is a political one. We have been telling you this for a long time. You have ignored us. We now have a powerful weapon in the GSP+, which we will not hesitate to use". Furthermore, a Minister of the Federal Republic of Germany has stated, as reported in the *Der Tagesspiegel* newspaper published on 9 February 2008, "The international community must influence both parties to the conflict to seek a political solution and withdraw from the war which brings only suffering to the people. In the beginning of March a EU-Troika will travel to Sri Lanka. If the Sri Lankan government continues to insist on a military option, I will demand that the EU should withdraw the General System of Preferences (GSP) offered to Sri Lanka. This concession enables Sri Lanka to export its goods and products to the EU at reduced or exempted tax and duty levies. This step will really bring economic pressure on the GoSL. For Sri Lanka a preference system plus is in place until the end of 2008 which, however, requires good governance".[1] These statements reflect the extraneous purposes for which the GSP + Scheme is sought to be withdrawn and are clearly violative of the letter and spirit of the Enabling Clause and other relevant practices of the WTO.

15. Such statements as referred to in paragraphs 13 and 14 above must be especially kept in mind, when considering the assertion made in paragraph 6 of the EC Report that "the Commission was assisted by three independent external experts". This use of terminology makes it explicit that the Commission was the driving force behind the "experts", who could only assist rather than for example guide the EC.

16. In this situation, of the very foundation of the Report being in question, it would be reasonable to keep action on the document in abeyance, while the authorities of the EC and the GoSL continue a constructive engagement concerning the issues at hand.

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[1] The wording as quoted originates from an unofficial translation into English of the German text carried by the *Der Tagesspiegel*.

Annexure

(1) **EC Comment (para.22** of EC report): With regard to the Advisory opinion of the Sri Lanka Supreme Court on the ICCPR, the claim that the "Judgment can be questioned on a number of grounds".

GoSL Position: According to the Constitution of Sri Lanka, the Supreme Court has the sole and exclusive jurisdiction on interpretation of the Constitution and Laws and no other opinion matters in this regard.

Given this status of the Supreme Court, the Advisory Opinion is nothing less than a decision of the apex Court of the State. This position was made clear in D.M.S.B. Dissanayake (SC Rule 2004) which unequivocally held that the exercise of consultative jurisdiction by the Supreme Court forms part of the administration of justice by the Court to the like manner as the exercise of other jurisdiction vested in the Court. In fact, it was the European Commission itself, which suggested through diplomatic channels to the Government of Sri Lanka, that the issue of whether the ICCPR is incorporated into the laws of Sri Lanka, should be referred to the Supreme Court.

The President of Sri Lanka then exercising his powers under Article 129 of the Constitution, sought on 4th March 2008, the opinion of the Supreme Court on the following:

1. *Whether the legislative provisions cited in the reference, i.e., the ICCPR Act No.56 of 2007, adhere to the general premise of the ICCPR and whether individuals within the territory of Sri Lanka derive the benefit and guarantee of rights contained in the ICCPR, through the medium of legal and constitutional processes prevailing in Sri Lanka?*

2. *Are such rights recognized in the ICCPR justiciable through the medium of legal and constitutional process prevailing in Sri Lanka?*

The Supreme Court in turn having conducted public hearings concluded on 17 March 2008 that the ICCPR has been adequately incorporated into the laws of the country in three ways:

1. by the provisions contained in Chapter III of the Constitution,

2. other provisions of legislation which recognize the principles of the ICCPR and,

3. judicial decisions.

Accordingly, the Supreme Court held:

1. that the legislative measures referred to in the communication of His Excellency the President dated 4.3.2008 and the provisions of the Constitution and of other law, including decisions of the Superior Courts of Sri Lanka give adequate recognition to the Civil and Political Rights contained in the International Covenant on Civil and Political Rights and adhere to the general premise of the Covenant that individuals within the territory of Sri Lanka derive the benefit and guarantee of rights as contained in the Covenant;

2. that the aforesaid rights recognized in the Covenant are justiciable through the medium of the legal and constitutional process prevailing in Sri Lanka. .

Accordingly, it must be stated that the opinion of the Supreme Court settled this matter conclusively. The suggestion made by the European Commission through diplomatic channels, also attests that there were No.doubts on the part of the Commission concerning the competence of the apex Court of the State, to rule on the subject.

(2) **EC Comment (para.22** of EC report): "Article 16 of the Constitution ensured the continuation in force of laws which existed at the time when the Constitution came into force notwithstanding any inconsistency with the rights recognized by the Constitution".

GoSL Position: The provisions of Article 16 of the Constitution which served to pre-empt the possibility of any post enactment review of existing legislation, is in reality a very necessary safeguard entrenched in the Constitution, *inter alia*, to protect the personal and customary laws of Sri Lanka.

It should be noted that these laws have their roots even before the British gave statutory effect to such laws, by way of the Proclamation of 23 September 1799. Based on this Proclamation the Roman-Dutch law, the Kandyan law, the Thesawalamai and the Muslim law continued in force. The application of personal laws arises only in the context of marriage, divorce, succession and property rights.

These personal laws have moreover been enriched by the history, culture and the religious sacred values of the people, who are subject to such laws.

Thus Sri Lanka's legal system is a unique blend of customary and personal laws, which are constantly being reviewed. In fact, several attempts have been made previously to amend the personal laws, with a view to ensuring consistency with the other laws of the country. However due to divergent views emanating from the minority communities themselves who voluntarily subject themselves to such laws, many of the suggested changes were not enacted.

The conclusion to be drawn therefore is that a circumspect and long term approach is needed from the Legislators, lest the communities, to which the personal and customary laws apply, consider such changes intrusive and a violation of their community rights.

It is also noted that Article 27 of the ICCPR states, "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion...." As such the ICCPR itself recognizes the right of individuals belonging to certain groups to adhere to practices inherent to their culture.

(3) **EC Comment (para.22** of EC report): "The Constitution, ICCPR Act, and other legislation, do not include provisions corresponding to all ICCPR rights: the "Right to Life" is the most notable omission."

GoSL Position: Despite the absence of a direct reference to Right to Life in the ICCPR Act, the provisions of Articles 11 and 13 (4) of the Constitution in combination with other

guarantees have ensured the right to life have recognized the Right to Life and the Supreme Court in several landmark decisions, has reiterated this position.

Accordingly this right has been declared by the Supreme Court of Sri Lanka as an inherent right, common to all persons regardless of the fact that such right is not expressly stated in the Constitution. This important pronouncement has been made in a series of Supreme Court decisions such as, *Sriyani Silva (wife of deceased Jagath Kumara)* v. *Iddamalgoda, Officer in Charge, Police Station Payagala and others* (2003) 1 SLR 14 and *Rani Fernando (wife of deceased Hewage Lal)* v. *Officer in Charge, Police Station, Seeduwa and others* (2004) 1 SLR 40. It should be specifically noted that the Penal Code goes onto protect life and limb by criminalizing acts that amount to onslaughts on the integrity of a person. The Offensive Weapons Act and the Firearms Act give additional protection by further penalizing acts that pose a danger to life.

With regard to the right to life in the context of any enforced and involuntary disappearances, the Supreme Court in the case of *Kanapathipillai Machchavalan* v. *OIC, Army Camp, Plantain Point, Trincomalee and others* (SC Appeal No.90/2003, SC (Spl) L.A. No.177/2003, SCM 31.03.2003) held that the right not to cause disappearances is also a part of the right to life. The Court held that:

> *"Article 13(4) of the Constitution does not deal directly with the right to life, but states that;*
>
> *No person shall be punished with death or imprisonment except by an order of a competent court, made in accordance with the procedure established by law. The arrest, holding in custody, detention or other deprivation of personal liberty of a person pending investigation or trial shall not constitute punishment".*
>
> *"Considering the content of Article 13(4), this Court has taken the position that no person should be punished with death or imprisonment except by an order of a competent court. Further, it has been decided in Kottabadu Durange Sriyani Silva* v. *Chanaka Iddamalgoda... and in Rani Fernando's case... that if there is No.order from Court, no person should be punished with death. **And unless and otherwise such an order is made by a competent court, any person has a right to live.** Accordingly, Article 13(4) of the Constitution, has been interpreted to mean that a person has a right to life unless a competent court orders otherwise"* (Emphasis added).

In this regard it must be added that the Court has also expansively interpreted the principle of *locus standi*, to enable the spouse as well of an aggrieved person, to petition the Supreme Court. (Reference: *Sriyani Silva (wife of deceased Jagath Kumara)* v. *Iddamalgoda, Officer in Charge, Police Station Payagala and others* (2003) 1 SLR 14.)

It has to be observed that though the offence of murder and some other offences are punishable with death, Sri Lanka has hardly ever carried out death sentences observing a moratorium on capital punishment. The President of the Republic in the exercise of his constitutional powers by virtue of Article 34 of the Constitution could pardon any offender or commute any sentence passed on an offender and thus these provisions guarantee and ensure right to life.

(4) **EC Comment (para.22** of EC report): "The Constitution, ICCPR Act, and other legislation, do not include provisions corresponding to all ICCPR rights.... The right to privacy".

GoSL Position: It has to be noted that right to privacy can indeed be claimed by a person aggrieved by any violation thereof, through other causes for action recognized in law such as the tort of confidential information and the breach of confidence. It is noted that *actio Injuriarum* can be invoked to protect the right of privacy. Thus there does exist a mechanism to validate the right to privacy.

(5) **EC Comment (para.22** of EC report): "The Constitution, ICCPR Act, and other legislation, do not include provisions corresponding to the ICCPR.... right to leave".

GoSL Position: The case of *Somawansa and 205 others* v. *AG* (SC (Spl) No.205/2006) discussed matters relating to the freedom to leave and return to the State under immigration law. It was in response to international concerns on violations of immigration and emigration laws that the Immigrants and Emigrants Act of the country was amended in order to arrest abuses through the transportation of people in and out of Sri Lanka. It is axiomatic that the right to leave is also contingent upon a corresponding right to be received and if the right to leave is unfettered, the phenomenon of boat people is bound to increase and it would certainly impact on the immigration laws of the receiving country.

(6) **EC Comment (para.22** of EC report): "The Constitution allows for the greater limitation of rights than permissible under ICCPR.... Article 15(7) of the Constitution is general in nature and permits restrictions as may be prescribed by law in the interests of national security, public order and the protection of public health and morality".

GoSL Position: With regard to the allegation that there are greater limitations on rights through the Constitution than permissible under the ICCPR, it may be noted that when in 2005 Sri Lanka applied for and was granted GSP benefits, the EC itself implicitly accepted, as stated in paragraph 13 of its report under reference, that while the legislation of Sri Lanka guaranteed the promotion and protection of Human Rights, there may be some restriction on derogable rights for specific purposes such as the interest of national security, racial and religious harmony and national economy.

The Supreme Court has adopted an active role in the protection of the rights of those arrested under the laws of Sri Lanka. As regards freedom from arbitrary arrest and detention that are provided for in Articles 13 (1) and (2) of the Constitution, the Supreme Court has declared in *Channa Peiris* v. *AG* (1994) that an arrest without lawful grounds and justification or legal cause for such arrest in the absence of material to the contrary is an arbitrary arrest which would not be "according to the procedure established by law". (Also see, *Munidasa* v. *Seneviratne* SC(FR) No.115/1991, SCM 03.04.1992.) The conclusion is that if there exists No.reason for an arrest, the subsequent detention would become illegal even if it is within 24 hours from the time of arrest.

The Supreme Court has adopted an active role in the protection of the rights of those arrested under the laws of Sri Lanka.

(7) **EC Comment (para.22** of EC report): "...the Constitution allows for greater limitations on rights than permissible under the ICCPR, as it does not provide that limitations are subject to tests of necessity and proportionality".

GoSL Position: On questions raised on necessity and proportionality, any person, if he/she alleges that his/her rights are unnecessarily and disproportionately limited, may invoke the fundamental rights jurisdiction of the Supreme Court. For instance, the Supreme Court has taken adopted an active role in the protection of the rights of those arrested under Emergency Regulations. The Court in 2008 gave an order stating that persons arrested under section 19(1) of the Emergency Regulations could be kept in Police custody only for ninety days and that the said detainee should be transferred to the fiscal custody upon the expiration of 90 days from the date of arrest. This process moreover takes place under the direction and supervision of a Magistrate [*vide*, SC(FR) No.173/2008 decided on 29 July 2008].

Therefore, any derogations or disproportionate and unnecessary limitations that ensue seeking the cover of the provisions of Article 15 of the Constitution and their justifiability in a given case, can always be challenged in the Supreme Court on the test of necessity and proportionality. In the case of *Wickremabahu* v. *Herath* (1990) 2 SLR 348, it was emphatically stated that if the Court is satisfied that restrictions are clearly unreasonable, they cannot be regarded as being within the intended scope of the power under Article 15(7). Citing the decision of *Hidaramani* v. *Ramavel* (1971) 75 NLR 67, the Supreme Court in the *Wickremabahu* case went on to hold that a detention order made by the executive can be judicially reviewed on the tests of improper purposes, unreasonableness and bad faith. In other words a petitioner seeking a judicial review of arrest and detention can demonstrate that the opinion formed by the executive was manifestly absurd or perverse. It has to be noted that these tests are coterminous with necessity and proportionality. In fact in *Abeysinghe* v. *Rubesinghe* (2000) 1 SLR 314, the Supreme Court commented that necessity is inherent in Article 15(7) read with Article 155(2). The emphatic declaration that necessity and proportionality are tests subjecting derogations to its legal limits is quite explicit in the following statement of the Supreme Court in the *Abeysinghe* case, namely:

> *"the necessity requirement involves a review of whether the restrictions are proportionate to the legitimate aim pursued. ...Proportionality is, in my view, in Article 15(7) read with Article 155(2) of the Constitution. ...the restriction must be proportionate and closely tailored to the accomplishment of the legitimate governmental objective necessitating it.... Thus it is patently inaccurate to assert that necessity and proportionality do not obtain in Sri Lanka as effective tools of testing derogations".*

It must also be added that Sri Lanka had to cope with a situation of terrorism and conflict that prevailed in the country for over a three decade long period of three decades. It is in this specific context that the provisions of Article 15(7) of the Constitution, which impose restrictions in the interest of national security had to be invoked through the Declaration of a State of Emergency.

Furthermore, such a Declaration by the Executive is subject to a monthly review by the Legislature and if not endorsed by an absolute majority in Parliament, would automatically lapse.

(8) **EC Comment (para.23** of EC report): "Sri Lanka informed the UN Secretary General on 30 May 2000 that it had declared a state of emergency and wished to derogate from a number of ICCPR articles... not even war or threat to the life of the nation can justify ignoring such rights".

GoSL Position: Paragraph 23 of the EC Report contains a singularly unfortunate juxtaposition of two elements.

Firstly, it records the factual event of Sri Lanka informing the UN Secretary General in May 2000 of its declaration of a State of Emergency and the consequent need to derogate from some ICCPR Articles. Then it goes on to record a general observation that not even war or threat to the life of the nation can justify ignoring such rights.

This juxtaposition therefore implies that Sri Lanka in her notification to the UN Secretary General sought to justify derogation from entrenched rights. The reality is quite to the contrary. The relevant extracts of the communication to the UN Secretary General are as follows:

> *"The Emergency Regulations do not entail any inconsistency with Sri Lanka's obligations under international law and do not involve any element of discrimination on the grounds of race, color, sex, language, religion, or social origin. These Regulations are consistent with Sri Lanka's obligations under the International Covenant on Civil and Political Rights to which Sri Lanka is a Party. There is no derogation from Articles 6, 7, 8, 11, 15, 16, and 18 as stipulated under the provisions of Article 4 of the Covenant.*
>
> *The following Articles have been restricted under the Emergency Regulations in the interest of national security:*
>
> *Article 9(2) & (3)*
> *Article 12*
> *Article 14(3)*
> *Article 17(1)*
> *Article 19(2)*
> *Article 21*
> *Article 22(1).*
>
> *The above communication is being made pursuant to Sri Lanka's obligations under Article 4 of the International Covenant on Civil and Political Rights."*

It must also be noted that the GOSL, in the same notification sent to the UN Secretary General, expressly provided for the following safeguards to persons affected by the Emergency Regulations. Thus, the notification informed the Secretary General as well that:

> *"The Emergency Regulations that have been proclaimed on 3rd May 2000, contain several salutary features which are designed to safeguard human rights and fundamental freedoms. The provision which existed in the earlier Regulations proclaimed in 1989, i.e., **Regulation 55FF**, which gave power to police officers to take measures as may be necessary for the taking possession of and the burial or cremation of any dead body and to determine in their discretion, the persons who may be permitted to be present at any assembly for the purpose of, or in connection with any such burial or cremation, have **not** been included.*

*The current regulations **preserve the jurisdiction of the High Court** to inquire into the death of any person due to action of or in the custody of any police officer or any member of the armed forces, thus ensuring the application of the normal judicial process.*

Further safeguards have been incorporated in the current regulations relating to the procedure for arrest, period of detention and rehabilitation of persons who are detained or who have surrendered. Among the safeguards are the following:

1) A clear procedure has been laid down regarding the arrest of persons contravening Emergency Regulations and in respect of the seizure of property in the course of arrest. Accordingly, where a person in arrested for contravention of an Emergency Regulation:

*(a) the arresting officer is required to inform the relevant authorities of the arrest, **within 24 hours** of such arrest;*

*(b) The arresting officer is **required to issue to the spouse, child or close relative of the arrested person, a receipt acknowledging the fact of such arrest;***

*(c) Where property is seized in the course of such arrest, the arresting officer is required to **issue a receipt describing the property** seized.*

***The failure to report, or to issue a receipt,** as required above, is an offence under the Regulations. These provisions are designed to prevent the arbitrary arrests of persons under the emergency.*

2) The period of detention of a person on an order by the Secretary to the Ministry of Defence is limited to one year.

3) Any person aggrieved by an order of detention is given an opportunity to make his objections to the Advisory Committee established under the Regulations. The report of the Advisory Committee with respect to any such objection is required to be submitted to Secretary, Ministry of Defence who after consideration, may revoke the order.

4) Persons could only be detained in approved places of detention which have been gazette.

5) A Commissioner General of Rehabilitation is appointed for the purpose of monitoring rehabilitation programmes of persons who have been either detained or who have surrendered.

6) Any prosecution for an office under the Emergency Regulations could be instituted in the Magistrate's Court only with the written sanction of the Attorney General. Trials before the High Court will be on indictment by the Attorney General, as required under the normal laws".

Therefore, not only does the juxtaposition of the two statements misrepresent the statement given by the Government of Sri Lanka, it also does not take into account the aforementioned express measures taken by the Government to safeguard the interests of the persons affected by the Emergency Regulations. Notwithstanding the above, the Courts have also been relentlessly reviewing the abovementioned procedures thereby ensuring transparency and accountability.

(9) **EC Comment (para.24** of EC report): "The principle of legality requires criminal offences to be clearly defined in unambiguous language. However, there is evidence that

many of the provisions in the emergency regulations, such as offences of engaging in terrorism, "acts of terrorism", transactions and communications with persons or groups committing terrorist offences, have been given an extensive interpretation".

GoSL Position: In any situation of the offenses having been defined in an ambiguous language as stated in paragraph 24 of the EC Report, the accused is given an opportunity of challenging any such ambiguity at the trial and there is a right of appeal available to a person aggrieved, if his challenge is not upheld. Any ambiguous language can therefore be challenged before a Court.

In particular Chapter XVI of the Code of Criminal Procedure Act among other things stipulates the requirements of a valid charge and any deficiency in the charge can always be raised as a defence. This has resulted in trials being declared a mistrial or a non trial. (Reference: *Sameen* v. *The Bribery Commissioner* (1991) 1 SLR 76 and *Godage and others* v. *Officer in Charge, Police Station, Kahawatte* (1992) 1 SLR 54.)

The Emergency Regulations themselves and the actions taken there under are moreover subject to challenge under administrative law remedies, in addition to the fundamental rights remedies.

Parliament is also charged with the responsibility of approving on a monthly basis the continuation in force of a State of Emergency and the Regulations there under.

It has to be observed that no person charged with the offences of unlawful activity has to date complained of any misunderstanding of the offences. On the contrary such persons have endeavored to present credible defences to such charges, however minor such charges might have been.

(10) **EC Comment (para.25** of EC report): "...the emergency regulations also undermined the right against self incrimination by creating a 'duty' for persons to answer police questions and weakens the principle of presumption of innocence by reversing the burden of proof".

GoSL Position: In terms of Clause 45(1) of the Emergency Regulations dated 3rd February 2005 published in Gazette No.1378/23, a person taken into custody and detained under any Emergency Regulation may during the period of such custody and detention be questioned and "it shall be the duty of the person so questioned to answer the questions addressed to him". This requirement imposes no burden on the person being questioned to self incriminate himself. Sections 105-111 of the Evidence Ordinance also contemplates shifting of the burden of the proof.

Moreover, the Emergency Regulations have under no circumstances have undermined the presumption of innocence. In fact, while during the existence of a State of Emergency, a confession made to a Police officer of and above the rank of an Assistant Superintendent of Police is admissible in legal proceedings, the admissibility thereof is contingent upon the Court satisfying itself of the voluntary nature of such confession.

It is of course correct that in order to shut out the confessions made to a police officer, it would be incumbent on the accused to establish that such confessions were obtained from him by threat, promise or inducement. The accused has the option to do so relying on the balance of probability, a lower standard of proof. The Sri Lankan Courts have been careful to scrutinize the reception of confession evidence and every latitude has been given to the maker of the confession, having conscious regard to due process in respect of his/her rights. In all cases where the voluntariness of a confession is challenged, *a voire dire* inquiry is held to determine the voluntariness.

The proviso to Article 13(5) of the Constitution of Sri Lanka states, "...provided that the burden of proving particular facts may, by law, be placed on an accused person", such as in relation to facts which are peculiarly within his knowledge in terms of section 106 of the Evidence Ordinance. This position is also consistent with the famous dictum known as Ellenborough principles.

The proviso therefore, explicitly recognizes the permissibility of the shifting of the burden of proof to a person accused of an offence. This is an emerging trend reflected in the legislation of many countries, including the United Kingdom, which enacted a reversal of burden to the accused in its Terrorism Act of 2000. The Strasbourg jurisprudence and the English authorities are in agreement that Article 6(2) of the European Convention on Human Rights, (ECHR), namely the presumption of innocence, does not establish an absolute rule (reference: *Salabiaku* v. *France* (1988) 13 EHRR 379).

Given the above, Sri Lanka has certainly not departed from any basic international norms relating to the administration of criminal justice.

Moreover, while the lifting of the Emergency Regulations is desirable in the long term and will inevitably take place, such a step cannot be undertaken immediately, as although the conventional fighting capability of the LTTE has been defeated, remnant cadres and large caches of arms and ammunition remain. It must also be noted that countries despite the absence of terrorist attacks on their soil for many years, prefer for the sake of prudence not to reverse legislation introduced to fight terrorism.

(11) EC Comment (para.25 of EC report): "...the emergency regulations delegate sweeping powers to military personnel to perform functions normally carried out by law enforcement officials, including powers of investigation, search, arrest and detention".

GoSL Position: As regards the assertion that the Emergency Regulations delegate sweeping powers to military personnel to perform functions normally carried out by law enforcement officials, this assertion does not reflect the current position. Since 2005, the powers of investigation and detention have been within the exclusive domain of the Police Force and such aforesaid powers are not exercised at all by the Armed Forces.

In terms of the relevant provisions of the Emergency Regulations (Regulation 20 of the Emergency (Miscellaneous Provisions and Power) Regulation 1 of 2005) members of the Armed Forces are vested with powers only to search, seize and arrest any person who is

committing or has committed or whom they have reasonable ground to suspect was concerned in or was committing or have committed any offence under the Emergency Regulations.

Moreover, as per the Emergency Regulations published in Gazette Extraordinary No.1405/14 dated 13 August 2005, the Armed Forces cannot detain any arrested person for more than 24 hours (Regulation 20(2)). Accordingly, there are no detention centers maintained by the Armed Forces.

(12) **EC Comment (para.25** of EC report): "...the emergency regulations severely limit the accountability of civilian and military authorities for their actions in the performance of their duties by providing that no action or suit shall lie against any public servant specifically authorized by the GOSL to take action in terms of regulations, provided that such person acted in good faith and in the discharge of his official duties".

GoSL Position: The provision that no action or suit shall against any public servant provided that such person had acted in good faith and in the discharge of his official duties, is uniformly found, in many a statute in Sri Lanka and is not exclusive to the Emergency Regulations. The underlying rationale behind these provisions is to encourage public officers to discharge their functions, in keeping with procedures established by law. It is a complete misconception to construe this as a license to violate the law.

This provision does not preclude a person alleging *mala fides* on the part of civilian and military authorities from suing them and obtaining redress by way of damages through the Courts of Sri Lanka. Apart from a civil remedy available in the District Court of Sri Lanka, persons alleging *mala fide* can also seek just and equitable relief through the Supreme Court of Sri Lanka, in the exercise of its fundamental rights jurisdiction under Article 126 of the Constitution.

In *Saman* v. *Leeladasa* (1989) 1 SLR 1, Justice Mark Fernando clearly recognizes that an infringement of fundamental rights is justiciable under Roman Dutch Law as a delict or civil wrong. Indeed, in *Vivien Gunawardene* v. *Hector Perera* (1983) 1 SLR 315 at p.321, Soza J stated that the Constitution of 1978 provided a special forum and machinery for enforcement of fundamental rights but that "old remedies co-exist with the new". Thus there is no impediment that exists for an aggrieved person to sue a public servant in several fora for any infraction of law.

Moreover, Section 114(D) of the Evidence Ordinance whose provenance derives from English law, creates a presumption of regularity of acts of public officials and it is open to anyone to rebut this presumption in a Court of law.

(13) **EC Comment (para.26** of EC report): "Code of Criminal Procedure lacks several safeguards against torture".

GoSL Position: The Code of Criminal Procedure Act has specific procedures. Thus whenever an accused is brought before a Court he or she has the right to inform the Court of any abuse, mistreatment, torture, inhuman or degrading treatment or punishment.

In addition, Articles 13(1) and (2) of the Constitution provide for further safeguards as regards the arrest, detention, or deprivation of personal liberty of a person arrested under the provisions of any law.

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

Article 13(2) states, "Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the judge of the nearest competent court according to the procedure established by law, and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such judge made in accordance with procedure established by law". In terms of Article 13(2) of the Constitution and Sections 36 and 37 of the Code of Criminal Procedure Act, when a person is arrested, he should be brought before the magistrate within a reasonable time, but in any event, not exceeding twenty-four hours. When a suspect is brought before the Magistrate, the Magistrate gets an opportunity to ascertain not only whether there are any complaints to be made, but also to observe any physical injuries on the suspect.

These provisions are supplemented by the Convention against Torture Act No.22 of 1994.

(14) **EC Comment (para.26** of EC report): "Code of Criminal Procedure lacks several safeguards against torture... right of access to a lawyer".

GoSL Position: In practice, lawyers attend police stations upon being notified of arrest of a person and police officers do not prevent such attendance. Moreover Article 13(3) of the Constitution states any person charged with an offence shall be entitled to be heard in person or to be represented by an Attorney at law at a fair trial by a competent Court. Further the provisions of Section 41 of the Judicature Act permit legal assistance and representation on behalf of persons who have or claim to have a right to be heard in every Court. It has to be noted that the State defrays the cost of legal representation for a person charged with an offence, if he is in indigent circumstances and requests legal assistance.

Building on the above, as per Section 4(1) of the ICCPR Act a person may "defend himself in person or through legal assistance of his own choosing and where he does not have such assistance to be informed of such right" and "have legal assistance assigned to him in appropriate cases where the interests of justice so requires and without any payment by him, where he does not have sufficient means to pay for such assistance".

(15) **EC Comment (para.26** of EC report): "The absence of an effective *ex officio* investigative mechanism in accordance with article 12 of the CAT is another weakness".

GoSL Position: The claim that the absence of an *ex officio* investigative mechanism in accordance with Article 12 of the CAT operates as a weakness, is erroneous. On the contrary whenever there is an allegation of torture a due investigation is launched by the Attorney General who is empowered by the Code of Criminal Procedure Act to direct and supervise the conduct of such an investigation. If on examination he is satisfied that the material submitted

to him warrants an indictment, he is empowered to indict the alleged perpetrator for torture. In appropriate cases the Attorney General of Sri Lanka forwards direct indictments without committal proceedings.

In fact the Report itself in its footnote 86 refers to the reference of 29 October 2007 made by the UN Special Rapporteur on Torture to "the high number of indictments for torture filed by the Attorney General's office.

(16) **EC Comment (para.26** of EC report): "...under Emergency Regulation, many of the safeguards against torture contained in the Criminal Procedure do not apply...".

GoSL Position: On the issue raised that the safeguards against torture contained in the Code of Criminal Procedure Act do not apply in the context of the Emergency Regulations, this position has been refuted by Sri Lanka in her communication of May 2000 to the UN Secretary General concerning the declaration of a State of Emergency and the consequent need to derogate from some ICCPR articles (*vide* paragraph 23 above).

(17) **EC Comment (para.26** of EC report): "While a significant number of indictments for torture have been brought under the CAT Act, a majority of prosecutions have been inconclusive".

GoSL Position: The fact that not too many cases end up in convictions is a result of the adversarial system of criminal justice that is practiced in Sri Lanka. The adversarial system has certain salutary safeguards such as presumption of innocence, burden of proof beyond reasonable doubt, and the possibility of impeaching the credibility of witnesses, which make it imperative that a Court acquit an accused, unless the prosecution proves its case beyond reasonable doubt. In another wards, the court must be satisfied that the accused committed the offence as alleged.

In these circumstances the conviction of all the accused who are indicted for torture may not have been possible.

The obligations flowing from the Convention against Torture Convention is to "submit the case to its competent authorities for the purpose of prosecution" and not an obligation to guarantee a conviction in all cases. While all efforts will be made in good faith to investigate and prosecute and secure a conviction, a reasonable interpretation of the Convention does not warrant a conclusion that every prosecution must as of necessity lead to a conviction.

Furthermore, it is also noted that the mere occurrence of torture does not constitute a violation of the Convention, unless it forms part and parcel of State Policy. It is pertinent to note that the Special Rapporteur, Professor Manfred Nowak, at a briefing in October 2007, stated that torture was not systemic in the criminal justice or law enforcement systems.

(18) **EC Comment (para.26** of EC report): "The non-applicability of important legal safeguards in the context of counterterrorism measures, as well as excessively prolonged police detention, opens up the doors for abuse".

GoSL Position: Whenever States have enacted counter terrorism laws, somewhat prolonged police detention has been permitted in a number of Statutes, such as the UK Terrorism Act of 2000. Such a detention was found acceptable in the European Court of Human Rights in the case of *Brogan* v. *United Kingdom* (1988 11 EHRR 117).

In any event, the legality or otherwise of an incarceration can be challenged and even if upheld, there is periodic judicial review of the continuing detention.

It is noted as well that the Report also seeks to establish a wholly unrealistic dichotomy between the areas of Sri Lanka that continued to be affected by LTTE dominance and those areas that were not. This argument is not tenable, as a terrorist group even while not being present in numbers in an area, nevertheless has the capacity to instill a state of fear among the people in that area and cause damage.

At the same time, the new situation that has developed since the ending of the armed conflict in mid May 2009 needs to be recognized and all assistance must be provided to support efforts at restoring normalcy.

(19) **EC Comment (para.28** of EC report): "The credibility of many of the institutions for the protection of human rights has suffered due to appointments to them having been made without observing the 17th Amendment to the Constitution"..

GoSL Position: The 17th Amendment of 2001 was hastily drafted and contained a series of compromises, which had to be made to secure the two third majority in Parliament needed for this package. This deprived the amendments of internal consistency and implementability.

Since then there have been four administrations that have held office in which both the current ruling party and current opposition have participated. The confirmed inability to operationalize the amendment despite changes of administration as a consequence of elections indicates the existence of practical issues that have to be resolved prior to implementation.

It must be observed that the 17th Amendment to the Constitution accordingly has a two-fold weakness from the perspective of its practical implementation. Firstly, there is an intrinsic abdication of parliamentary power by the elected representatives of the people to non-elected persons, which is contrary and repugnant to the doctrine of public trust that entrenches the principle that the sovereignty of the people is inalienable. Secondly, serious suspicion could arise with regard to the degree of independence which can be exercised by those persons appointed in terms of Article 41(c) of the 17th Amendment due to the fact that the appointees are agents of the respective political parties/persons authorized to nominate members to the Constitutional Council. It is due to these two reasons that neither of the two leading parties of Sri Lanka can find consensus with regard to the implementation of the 17th amendment.

In 2007, a Parliamentary Select Committee was appointed to resolve the issues and its sittings are continuing.

(20) **EC Comment (para.29** of EC report): "The efficiency of police investigations in Sri Lanka has been strongly criticized".

GoSL Position: The criminal investigative system of Sri Lanka functions to the best of its ability while coping with the resource constraints of a developing society.

Moreover, during the period of the conflict situation in some cases investigators found it impossible to comprehensively investigate certain cases, due to the inability of the law enforcement agencies to access the so called "uncleared" areas dominated by the LTTE.

At the same time, there are now several processes aimed at improving the investigative phase, the adjudicatory phase, and the penal sanction management phase of the criminal justice system.

Thus significant endeavours have been made to enhance the capacity in criminal investigations.

1. A system of "Scene of Crime Officers" (SOCO) has been operationalized, with the view to enabling criminal investigators to record with the highest degree of professionalism scenes of crime and collect items of evidence from scenes of crime having forensic value.

2. Plans are afoot to automate the finger print screening and tallying system.

3. All police stations in the country now have Women and Child offences desks, staffed by female officers to record and investigate offences relating to women and children.

4. Special programs are afoot to train police officers in the use of both official languages (Sinhala and Tamil) and the link language (English).

It is believed that these initiatives and the improved security environment prevalent in the country would help the Police to focus on crime prevention and reduction, in addition to improving the efficiency of the conduct of criminal investigations.

There is also adequate legal remedy available in the event of any Police malfeasance taking place. These remedies are as follows;

1. Complaining to the relevant magistrate under whose judicial purview the particular case is being investigated.

2. Obtaining from the Court of Appeal a Writ of Mandamus compelling the Police to pursue certain investigational leads.

3. Obtaining redress through the filing of fundamental rights application in the apex Court of Sri Lanka.

4. Through administrative processes which are available to the aggrieved party such as by complaining to the hierarchical command and to the Parliamentary Commissioner for Administration, (Ombudsman), for appropriate remedial measures.

(21) **EC Comment (para.30** of EC report): "The Attorney- General's Department does not vigorously prosecute cases involving serious human rights violations".

GoSL Position: The Attorney-General's Department is mandated by the Code of Criminal Procedure Act to initiate legal proceedings in criminal matters, when the material available warrants the exercise of its statutory functions. Regardless of the subject matter, the Department has always exercised its functions diligently. The allegation that the Attorney General's Department does not vigorously prosecute cases involving serious human rights violations is unsubstantiated.

The Attorney General of Sri Lanka has a quasi judicial role, by virtue of the multi faceted powers vested in him, under legislative enactments, including the Code of Criminal Procedure Act. His powers include the launching of investigations, examining material and initiating charges. Moreover, any decision of Nolle Prosequi is solely his prerogative. Accordingly, the office of the Attorney General is held in high esteem as an impartial arm of governance.

(22) **EC Comment (para.31** of EC report): "The role of the Attorney General in the prosecution of cases may place the Attorney-General in a conflict of interest as far as any inquiry into the administration of justice is concerned... was one of the main reasons behind the decision of the IIGEP to cease its activities".

GoSL Position: The Attorney General is not representing any party when he exercises his responsibility to guide a criminal or other investigation.

His sole objective is the eliciting of the facts. Thus, in a situation of the Attorney General having decided to prosecute an offender, there is no scope for any conflict of interest arising.

Stemming from the above, the officers of the Attorney General's Department only assist the finding of facts by the Commissions of Inquiry and as such no conflict arises thereafter when the Attorney General assumes the role of a prosecutor. It is therefore unfortunate that the situation of an unfounded misreading of the Attorney General's role arose, during the period of the IIGEP.

This position is confirmed by the Communication sent by Justice Bhagwati who headed the IIGEP.

Please see the comments below with reference to paragraph 34 of the EC Report.

(23) **EC Comment (para.32** of EC report): "The judiciary is, or has been, vulnerable to political influence from the Government and the former Chief Justice. It is widely reported that the former Chief Justice used the administration of case allocation as a way to sideline senior judges from hearing politically sensitive cases".

GoSL Position: With regard to the allegation that the judiciary is vulnerable to political influence, it is submitted that the judiciary, which is constitutionally recognized and established as a separate and independent branch of the Government, maintains the separation of powers at all times. This is amply reflected in the decision of the Magistrate's Court delivered on 3 November 2009, regarding the acquittal of four Tamil MPs charged under anti-terror laws for making statements against the Government and the Security Forces. An independent decision of this nature, which is adverse to the Government, would not have been possible in a situation where the Courts are politically influenced by the Government.

With the doctrine of separation of powers, at all times the Supreme Court of Sri Lanka, including during the tenure of the former Chief Justice, enjoyed absolute independence. While the Commission Report has in paragraph 33 opted to allege the vulnerability of the judiciary to political influence, the same document nevertheless hails in its paragraph 70, the decision of the Supreme Court under the same Chief Justice to halt the "mass eviction... of Tamils from Colombo". It is therefore submitted that through the reference in para.70, the Commission itself has conclusively disproved the validity of its allegation in paragraph 32.

As regards the matter of case allocation, it has been a recognized and established prerogative of the Chief Justice to assign judges to hear cases.

The example of the legal recognition of the validity of the prerogative is *Queen* v. *Liyanage* (1962) 64 NLR 313 which examined the question of the then Minister of Justice nominating a bench of judges to hear a particular case arising from an attempted coup d'état. The Minister acting under Section 440a of the Criminal Procedure Code as amended by the Criminal Law (Special Provisions) Act No.1 of 1962, directed that certain persons accused of the offence be tried before the Supreme Court through a Trial at Bar by three judges, without a jury. At the same time acting under section 9 of the Criminal Law (Special Provisions), he nominated three judges of the Supreme Court to preside over this trial. At the trial a preliminary objection was raised as to the constitution of the court. It was argued that the nomination of the judges by the Executive to hear the case, violated the concept of the separation of powers and was therefore unconstitutional. The three nominated judges, however, upheld the preliminary objection that the court was improperly constituted and therefore went on to rule that they had no jurisdiction to proceed with the trial.

From this it is quite evident that the power of nomination is one which falls within the domain of the judiciary. The former Chief Justice did not accordingly violate any norm when he exercised his rightful prerogative to nominate judges to hear cases.

(24) **EC Comment (para.34** of EC report): "The use in Sri Lanka of Commissions of Inquiry (COI) has been widely criticized... the IIGEP established in the context of the 2006 Presidential COI ceased its activities on the grounds that, *inter alia*, the proceedings of the Commission fell short of basic international norms".

GoSL Position: Justice P.N. Bhagwati, a former Chief Justice of India who functioned as the Chair of the IIGEP, in his letter to the President of Sri Lanka, dated 26 April 2008, stated: "I may add that so far as the Commission of Inquiry is concerned it has been doing very good work and the Members of IIGEP have had the best of cooperation from the Chairman and Members of CoI I have no doubt that CoI will continue to carry on its work with the same zeal and dedication as it has been doing so far, All my best wishes to CoI and to the Government of Sri Lanka". Justice Bhagwati's observations certainly do not endorse the allegation that the Commission fell short of the basic international norms.

(25) **EC Comment (para.35** of EC report): "Sri Lanka has started work to draft the NAPHR but at the time of writing the action plan has not yet been finalized".

GoSL Position: The Government of Sri Lanka pledged to develop the National Action Plan at its Universal Periodic Review in May 2008. In fulfilling this pledge, the Government began drafting the Action Plan in September 2008. A stocktaking exercise to identify the most pressing human rights issues also led to the identification of eight focus areas of the Action Plan namely civil and political rights, torture as a special area of emphasis, economic social and cultural rights, women, children, IDPs, migrants and labour rights. The development of the National Action Plan is being guided by a high level Coordinating Committee comprised of representatives of both Government and civil society. The National Action Plan for the Protection and Promotion of Human Rights will have short and medium term targets within a 5-year timeframe.

The process of developing the Sri Lankan National Action Plan conforms to the model process prescribed by the OHCHR. There has been a strong emphasis on a participatory approach to developing the Action Plan in which representatives of Government agencies and civil society organizations have been included in the drafting process on an equal footing to ensure a balanced and progressive plan. Drafting Committee members were selected based on their expertise, to ensure that those who are working at the ground level on the various issues are directly involved in drafting the Action Plan. In addition, the various Government Agencies that will be implementing the plan are also involved in drafting it in order to ensure a smooth transition from drafting to implementation.

A deadline of end November 2009 had been set for the drafting Committees to conclude their work. Pursuant to the completion of the drafting, the Ministry of Disaster Management and Human Rights will consolidate the texts received by the eight Drafting Committees. The consolidated text will be made public for comment prior to implementation of the final National Action Plan. Monitoring and evaluation of the implementation of the Action Plan will be conducted by a dedicated monitoring unit based at the Ministry of Disaster Management and Human Rights under the guidance of the multi-agency Coordinating Committee.

It is also noted that that European Parliament urgency resolution of 22 October 2009, said it "Recognizes Sri Lanka's development of a National Action Plan for the Promotion and Protection of Human Rights".

The indications of a widest possible consultative process with all stakeholders towards the formulation of the NAPHR in a manner that ensures transparency, must be appreciated.

(26) **EC Comment (para.36** of EC report): "Throughout the period covered by the investigation a variety of credible sources including UN special procedure and reputable NGOs have repeatedly expressed concern about the human rights situation in Sri Lanka and the existence of a widespread climate of impunity".

GoSL Position: The suggestion made by the sources that there is a wide spread climate of impunity, is rebutted by the vigorous investigations conducted by the Police and the prosecutions launched in various forums. In the year 2009, 17 files relating to allegations of torture were opened in the Attorney General's Department subsequent to investigations carried out by the Police and three persons have been indicted to stand trial for the offence of

torture so far. Advice in respect of 13 subject matters relating to allegations falling under the CAT Act, has been rendered by the office of the Attorney General. The investigation and the subsequent filing of the indictments demonstrates the commitment on the part of the respective law enforcement authorities in relation to the ICCPR and this should be taken note of as a positive measure.

In addition to the institutional criminal proceedings, any offenders are disciplinarily dealt with by their respective agencies and there are procedures in the Establishment Code to interdict public officers against whom allegations of serious criminal charges are made (chapter XLVIII of the Establishment Code).

The Acts pertaining to the Armed Forces provide for suspension from service and or trial by court martial. Thus, criminal prosecutions have been launched against army personnel in respect of 9 incidents which occurred in 2006-2009 of alleged offences against civilians, as well as for a recent incident of causing grievous hurt to 2 civilians by discharging fire arms at an IDP facility in Vanni. This incident which occurred on 26th September 2009 has resulted in the prosecution of the offending soldiers, while a parallel Court of Inquiry has been convened to inquire into this incident by the Army.

(27) **EC Comment (para.38** of EC report): "Sri Lankan law does not expressly provide for the obligation to protect the right to life".

GoSL Position: *See comments to paragraph 22 of the EC Report above.*

(28) **EC Comment (para.38** of EC report): "During the period covered by the investigation, there has been a high rate of unlawful killings in Sri Lanka, including killings carried out by the security forces, persons for whom the state is responsible and the police".

GoSL Position: Any unlawful killings that are claimed to have taken place would have occurred in extraordinary circumstances beyond government control, arising from the conflict situation prevalent during the last three decades. They certainly did not take place with the knowledge or concurrence of the Government. In fact, whenever credible evidence of the involvement of rogue elements within the security forces emerged, effective action has been taken to bring the perpetrators to book These efforts have resulted in a very sharp decline in the number of allegations unlawful killings.

See also comments in respect of paragraph 36 of the EC Report.

(29) **EC Comment (para.39** of EC report): "The Army assisted by pro-government Tamil paramilitaries, reportedly engaged in a deliberate policy of extra judicial killings against those they considered to be supportive of the LTTE... 2006-2007, forty four humanitarian aid workers were killed and a further 23 disappeared. The case of the killing of 17 aid workers of French NGO ACF in August 2006 was particularly striking".

GoSL Position: This together with other incidents have been inquired into by the CoI. With specific reference to the ACF case, there has been no evidence to suggest that the government

Forces were responsible for this attack. Earlier suggestions by an Australian Forensic Pathologist based on a perceived similarity of projectiles recovered from the scene of this incident which cast aspersions on the Forces, was proved erroneous by ballistic experts. The Pathologist involved then accepted the validity of the assessment by the ballistic expert.

(30) **EC Comment (para.39** of EC report): "...reports from a wide range of sources indicates that the overall number of extra-judicial killings increased dramatically between 2006 and 2008".

GoSL Position: With the winding down of the operations in the East and the elimination of the LTTE in May 2009, the Government's writ now runs effectively throughout the entire territory of Sri Lanka and the reports of alleged disappearances and extra judicial killings have reduced dramatically.

(31) **EC Comment (para.41** of EC report): "Attacks on the media, both through verbal threats by the government and through brutal physical assaults by unknown persons had been widely reported. Since 2006 a significant number of journalists have been killed... in January 2009, the prominent journalist Lasantha Wickrematunge, Editor of the *Sunday Leader*, was murdered; no one has been charged in connection with his killing.

GoSL Position: The due process is been followed in the case pertaining to the murder of the late Lasantha Wickramatunge. Accordingly, the Police are reporting with the regularity required by law to the Magistrate on the status of the investigation. At present certain possible clues have emerged, consequent to the arrest of a suspect and vigorous investigations are being pursued.

With regard to the other alleged attacks on journalists, the relative lack of visible progress is due to the investigations not eliciting adequate evidence for the launching of a prosecution, despite the best endeavours of the law enforcement authorities. It is noteworthy that during this period there have instances of attack on journalists who have supported the government position as well, such as that of Upali Tennekoon, editor of the "*Rivira*". It should also be kept in mind in this regard that there is a record of successful Police investigations being followed by prosecutions, irrespective of the status of the perpetrators.

For example, the complaint made by a senior journalist led a few years ago to the arrest, indictment, and successful prosecution of two commissioned Sri Lanka Air Force Officers, who were heading the personal security detachment of the then Commander of the Air Force.

(32) **EC Comment (para.42** of EC report): "During the final phase of hostilities, government forces attacked medical facilities and fired heavy artillery into an area which had been designated as a "no-fire" zone... figures on civilian causalities quoted by international press and human rights organizations were as high as 20,000 for the period between January 2009 and the end of conflict in May 2009".

GoSL Position: The last phase of the operations resulted in the movement of over 250,000 men, women and children who had been held as human shields by the LTTE, fleeing to the

government controlled areas once the Army breached the LTTE lines. Had they perceived themselves as being targeted by the Security Forces, they would obviously not have done so. Accounts provided on 08th July 2009 at a media briefing by 05 medical doctors who were located in the no-fire zone during this period have made clear that under the pressure of the LTTE they had provided exaggerated and contradictory figures about the claimed civilian causalities, as well as about alleged destruction caused to Government hospitals due to Security Forces shelling. It may also be noted in this regard that the Report to Congress on Incidents During the Recent Conflict in Sri Lanka has observed in its paragraph 2 on page 10 that "Numerous commercial imagery-based reports issued by UN agencies and non governmental organizations identified evidence of shelling in the NFZ. ***US Government sources are unable to attribute the reported damage to either the Government of Sri Lanka*** or LTTE forces" (emphasis added). Thus the report lacks any credibility on attributing responsibility to the Government.

(33) **EC Comment (para.44** of EC report): "The UN Special Rapporteur on Torture has expressed shock at the severity of the torture employed by the army, which includes burning with soldering irons and suspension of detainees by their thumbs".

GoSL Position: A perusal of the Special Rapporteur's Report would indicate that he is referring to LTTE cadres apprehended by the Army during the course of security operations. It must be noted that such persons enjoyed during the conflict situation the facility of being visited by the members of the ICRC, pursuant to the acceptance by Sri Lanka of the offer of protection of the ICRC made under its humanitarian mandate.

The visits of the ICRC members were moreover complemented by visits by family members. In such a context any severe torture of the nature alleged to have taken place by the Special Rapporteur would not have gone unnoticed and would have led to complaints.

Therefore, the correct conclusion to be drawn is that there has always been in place adequate measures, including through the visits by the ICRC, to prevent any possibility of torture taking place.

With respect to the other allegations of torture made by the Report of the Special Rapporteur, the Government of Sri Lanka has in a statement on 10 March 2008 at the Human Rights Council, observed that at a de-briefing session in October 2007, the Special Rapporteur Professor Nowak had stated that though instances of torture could be seen at diverse locations, it was **not systemic** in the **criminal justice or law enforcement** system.

(34) **EC Comment (para.44** of EC report): "... the allegations include claims of sexual assaults and rapes in IDP camps".

GoSL Position: As regards the allegation of sexual assault and rape in IDP camps, it must be noted that the Ministry of Disaster Management and Human Rights has convened meetings of the Protection Cluster involving key UN agencies, INGOs and NGOs. Law enforcement and Armed Forces personnel as well as civil authorities participated in these meetings, which were followed up by visits to the main IDP camps in Vavuniya. The visits which took place during

the course of 2009 were used to specifically pose the question as to whether incidents of physical and sexual abuse had taken place. The responses were in the negative.

Another pertinent fact to be kept in mind is that a Delegation of 10 Members of the Indian Parliament elected from constituencies in the South Indian language with the Tamil community in Sri Lanka, visited on 11th October 2009 the IDP camps. The Delegation acknowledged at the end of their visit that they had had absolutely unrestricted access to all areas of the camps and that they were able to go wherever they wanted and to speak to whomever they wished to. The media reports based on comments by members of the delegation, both while in Sri Lanka and upon their return to India, stated that the IDPs had impressed upon the visiting Members of Parliament their desire to return to their homes at the earliest possible opportunity. Nowhere were there any reports of the IDPs having claimed they were subject to sexual assault and rape. Nor indeed, have any of the members of the Delegation made such an assertion.

It may also be noted that in May 2009 an EU TROIKA delegation visited the IPD camps. Then too as happened later with the Indian Delegation there were no reports of that the IDPs were subject to sexual assault and rape.

The above is cited in order to flag that great care must be taken to authenticate the veracity of reports, without loosely referring to allegations that are palpably unsubstantiated. In fact footnote 89 of the European Commission Report itself states that, "It is difficult to verify these allegations which have been reported in the press". There is a track record in the Sri Lanka situation of vested interests presenting such charges, in order to attain their sinister objectives.

(35) **EC Comment (para.46** of EC report): In May 2009 the UN special procedure mandate holders pointed to the fact that they "continued to receive disturbing reports of torture and extra judicial killings and enforced disappearances".

GoSL Position: This comment can be traced to the joint statement made on behalf of all special mandate holders during the Human Rights Council (HRC) Special Session on Sri Lanka, in May 2009. The observation is of a general nature. It is noteworthy that the wide ranging Resolution on Sri Lanka which was approved by the HRC did not endorse this view.

In fact it is important to note that the UN Working Group on Enforced or Involuntary Disappearances itself, in its data, reflects the steep downward trend experienced by Sri Lanka with regard to disappearances. There have been 3 three reported incidents of disappearances in 2009, in comparison to 120 incidents alleged to have taken place in 2008. Even the 2008 figures represent a significant drop from the number of 206 reported in 2006 and 163 reported in 2007.

(36) **EC Comment (para.46** of EC report): The UN Special Rapporteur on Torture has noted that his fact finding was obstructed by officials who attempted to hide or transfer detainees.

GoSL Position: On the contrary, Professor Manfred Nowak in the "Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, Mission to Sri Lanka" (A/HRC/7/3/Add.6) dated 26 February 2008, expressed "...appreciation to the Government for the respect of the terms of reference for the visit. In particular, he wishes to thank the Inspector General of Police and the Commissioner General of Prisons for opening up the prisons and police detention facilities without restrictions, including the carrying out of unannounced visits, and enabling him to conduct private interviews with detainees."

(37) EC Comment (para.47 of EC report): "So far in the exercise of jurisdiction under the CAT Act, the high court has handed down very few convictions".

GoSL Position: Though convictions are few, a large number of indictments have been filed in the High Court which by itself demonstrates that there is no conscious and deliberate policy of not prosecuting offences falling under the provisions of the CAT Act. Moreover, Sri Lanka's criminal jurisprudence requires the prosecution to prove the guilt of an accused beyond reasonable doubt. In the event of a reasonable doubt being created or of the prosecution failing to discharge its burden of proof beyond reasonable doubt, the accused is inevitably given the benefit of doubt and acquitted.

The Special Rapporteur Professor Nowak seeks to attribute the low rate of convictions to his supposition that the mandatory minimum sentence of seven years imprisonment acts as a disincentive towards judicial conviction. While the Government of Sri Lanka is not insensitive towards this theory, it is the Government's view is that torture by its very nature is so abhorrent an act, as to merit strong penalties against the perpetrators. The Government has also informed the Rapporteur that it would be open and flexible to look at the jurisprudence and the national experiences of other States in this regard.

The Government also wishes to draw attention to a recent judgment by the Supreme Court (SC No.3 of 2008) delivered on 15/10/2008. The Court held that "In the circumstances we hold that the minimum mandatory sentence in s.364(2)(e) is in conflict with Articles 4(c), 11 and 12 of the Constitution and that the High Court Judge is not inhibited from imposing a sentence that it deems appropriate in the exercise of its judicial discretion notwithstanding minimum mandatory sentence".

This recent judgment is binding on the lower Courts including the High Courts, which have jurisdiction to try cases of torture. As such applying the judicial reasoning in this case, the High Court Judge can deviate from the minimum mandatory sentence required in appropriate cases. This would serve to meet any validity in the issue pertaining to concerns relating to sentencing raised by Professor Nowak.

(38) EC Comment (para.47 of EC report): "The lack of a legal framework for witness protection has also hindered effective prosecution of torture cases".

GoSL Position: The Government of Sri Lanka after wide consultation with key government officials, as well as with civil society, tabled in Parliament a proposed law to provide assistance and protection to victims of crime and witnesses. An important feature of this

proposed law is the wide definitions given to the terms "victim of crime" and "witness", so as to include not only victims and witnesses of conventional crimes, but also victims and witnesses of human and fundamental rights violations. Once the proposed law is enacted, it will address problems relating to intimidation, threats, reprisals and other forms of harassment against all victims of crime and witnesses and would necessarily include victims of alleged torture and ill treatment.

Due to the many amendments suggested when it was first introduced in Parliament, the Bill was referred to the Parliamentary Consultative Committee on Justice and Law Reforms, which recently reached consensus on amendments to be moved to the Bill before its enactment. The Bill awaits return for listing for continuation of the debate.

(39) **EC Comment (para.48** of EC report): "Many of the protections against torture contained in domestic laws do not apply in cases of detention under the emergency legislation".

GoSL Position: The Code of Criminal Procedure contains procedural provisions as regards the arrest, detention, and production of offenders before a Magistrate. The production of a suspect before a Magistrate ensures due process being observed in regard to a suspect and no where in the Emergency Regulations is this protection taken away. The proviso to Clause 21(1) of Emergency Regulations No.1405/14 dated 13 August 2005 stipulates that a person arrested under Regulation 19 has to be mandatorily produced before a Magistrate within a reasonable time having regard to the circumstances of the particular case and in any event not later than 30 days after his arrest. It is noteworthy that the Supreme Court has demanded the strict requirement that the detention orders for suspects should be signed by the Secretary/Defence on basis of each individual case and not in batches.

This provision guarantees against deviation from the due process and therefore invalidates the assertion that the Emergency Regulations do not contain protective measures.

(40) **EC Comment (para.48** of EC report): "Emergency Legislation allows to hold suspects for up to one year under preventive detention orders issued by the Secretary of the Ministry of Defence without complying with the procedural safeguards for detainees provided in the Criminal Procedure Code".

GoSL Position: The further assertion at paragraph 48 of the Report that the Emergency Regulations allows to hold suspects for up to one year under preventive detention orders issued by the Secretary of the Ministry of Defence without complying with the procedural safeguards for detainees provided in the Criminal Procedure Code is also erroneous, for the reason that no such incarceration is permitted under the provisions of the Emergency Regulations. It has to be noted that derogation from the right to liberty was used by the UK Government in relation to Prevention of Terrorism (Temporary Provisions Act 1974-1989) permitting the detention of terrorist suspects for a longer period than permitted under ordinary circumstances without production before a Court, was held to be valid in the case of *Brogan* v. *United Kingdom* (1988 11 EHRR 117). The basis of this derogation from the right to liberty was premised on Article 15 of the European Convention on Human Rights that permits a State to derogate from the Convention "in time of war or other emergency threatening the

life of the nation." In the circumstances the adoption of reasonable detention in the Emergency Regulations, is not inconsistent with the standards adopted by the European Union.

Moreover, each month the persons who have been arrested under the Emergency Regulations have to be produced before a Magistrate and there are prison visits in addition to the visits by the Magistrates, that are undertaken.

(41) EC Comment (para.50 of EC report): "Many of the protections in the Code do not apply in cases of detention under the emergency legislation".

GoSL Position: *Please also refer to the comments above pertaining to paragraphs 23 and 26 of the EC Report.*

(42) EC Comment (para.51 of EC report): "Under the 2005 Emergency Regulations (Regulation 19), persons suspected of acting in any manner prejudicial to the national security or the maintenance of public order, or to the maintenance of essential services" may be arrested and held in detention for up to 18 months. Persons may be similarly detained under Section 9 of the Prevention of Terrorism (Temporary Provisions) Act.

GoSL Position: This claim is erroneous. The Supreme Court in May 2008 made an order stating that persons arrested under section 19(1) of the Emergency Regulations could be kept in Police custody only for ninety days and that the said detainee should be transferred to the fiscal custody upon the expiration of 90 days from the date of arrest [SC(FR) No.173/2008, decided on 29 July 2008].

(43) EC Comment (para.51 of EC report): There is also a provision (Regulation 22) for automatic detention of a "surrendee" up to two years for the purposes of "rehabilitation", including persons seeking the protection of the state because "fear of terrorist activities".

GoSL Position: This claim is false. Regulation of the Emergency Regulation No.1 of 2005 states that "any person who surrender to a police officer, to a member of the armed forces or to any other person...such person shall within 24 hours of such surrender be handed over to the Officer in charge of the nearest Police station. It shall be the duty of the Officer in charge to produce such person forthwith before the Magistrate and obtain ***an appropriate order***" (emphasis added). Thus instead of "automatic detention" as suggested by the Report, the Emergency Regulations operate to ensure that the rights of the surrendee are safeguarded through judicial supervision. It is also noted that pursuant to the Emergency Regulations the Magistrate may make an order which is appropriate in the circumstances.

In the event of any misconception having arisen due to the on-going care for "child soldiers", it must be noted that the Government established a protective rehabilitation centre for child combatants in Ambepussa, located in the Kegalle District. The Centre functions on the basis of a policy on the Protective Care, Rehabilitation and Reintegration for Children associated with the armed conflict developed by the National Child Protection Authority, in close collaboration with the Office of the Commissioner General of Rehabilitation and other

professional institutions and Ministries, particularly the Ministry of Child Empowerment and Child Development and the Department of Probation and Child Care. The centre provides opportunities for child combatants who had been forcibly recruited who chose to "surrender", to be reunited with their parents and obtain rehabilitation and protection. Such children are reunited and provided access to education and vocational training, based on their individual needs and capacities. They also have access to health care and psychosocial care and support based on each child's individual needs.

New regulations have been framed and gazetted under Section 5 of the Public Security Ordinance by the President of Sri Lanka in order to introduce "Child Friendly" procedures and processes related to the "surrender" and "release" of children who were forcibly recruited as combatants. The new regulations came into effect on 15th December 2008. A plan of action for the implementation of such regulations has been formulated by the Commissioner General of Rehabilitation and the Ministry of Justice. UNICEF is closely involved in providing technical and financial support for these activities.

(44) **EC Comment (para.52** of EC report): "Court scrutiny and discretion to overturn an order made under Regulation 19(1) is in fact expressly excluded....".

GoSL Position: The Supreme Court has time and again decided on matters dealing with the Emergency Regulations as highlighted above in the comments pertaining to paragraph 51 of the EC Report.

(45) **EC Comment (para.52** of EC report): "...where the Secretary to the Ministry of Defense has ordered detention under Regulation 19 or 21, the court "shall order" continued detention".

GoSL Position: This claim is erroneous. Under the doctrine of separation of powers, the executive cannot, and will not, demand compliance by the judiciary. The Executive has always fallen in line with due process safeguards and all directions given by the judiciary have been scrupulously followed with a view to upholding the rule of law.

(46) **EC Comment (para.53** of EC report): "The only remedy for a person under Regulation 19 detention is to make objections to an advisory committee... this is inconsistent with article 9 (4) of the ICCPR which provides that any detained person is entitled to take proceedings before a court".

GoSL Position: There is no inconsistency with Article 9(4) of the ICCPR. In addition to any Advisory Committee mechanism, a person detained wrongfully is also entitled in law to seek relief by way of Writ or Habeas Corpus.

(47) **EC Comment (para.54** of EC report): "Presidential directions are guidelines only and their exact legal status and impact are unclear".

GoSL Position: These are directions given by the President in his capacity of the Head of State and Government and the Commander in Chief of the Armed Forces. The Armed Forces officers in turn are duty bound to fully implement them and they remain answerable to the President. Hence these directions have all the necessary legal status for their due

implementation. To view them as mere "guidelines" as the Report has done, would be to grossly under estimate their status. Any contravention of these directions would render the recalcitrant officers liable to be prosecuted under the Armed Forces Act and the with respect to the Police, the Establishment Code.

(48) **EC Comment (para.55** of EC report): "The emergency and anti terrorism legislation has been used to arrest and detain-in some cases without charge-critical journalists, newspaper operators and political opponents of the government a notable example is... prominent journalist, J.S. Tissainayagam".

GoSL Position: Mr. Tissanayagam was found guilty of the charges after due process and was given the minimum possible sentence as prescribed by law. He now has the option of appealing his judgment in the Court of Appeal and thereafter, if necessary, taking the matter up to the level of the Supreme Court. Until the appeal process is exhausted, the President cannot exercise the prerogative of executive clemency.

Reference must also be made to the third and most serious of the charges faced by Mr. Tissainayagam, in that he was in receipt of funds from the LTTE and used such funds to propagate the LTTE cause of terrorism. During the trial, Mr. Tissainayagam did not deny these facts.

It is therefore unfair and misleading to insinuate that Mr. Tissainayagam was convicted merely for criticizing the Sri Lankan Army in two publications.

(49) **EC Comment (para.56** of EC report): "In every case referred to it the UN working group found the detention to be arbitrary because of the conditions arrest allowed under the emergency regulations".

GoSL Position: Even under the Emergency Regulations, the reasons for arrest have to be informed. This legal requirement is in accordance with the provisions of the Constitution and the Criminal Procedure Code. The detention order served on a detainee after arrest would also specify the place of detention.

Any person alleging arbitrary arrest and detention has a constitutional right to challenge such an arrest and detention in the Supreme Court.

(50) **EC Comment (para.57** of EC report): "the UNHCR reported in April 2009 that the TMVP was continuing to conduct arbitrary detentions and abductions in the East of Sri Lanka".

GoSL Position: This allegation is based on UNHCR Report UN High Commissioner for Refugees, UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka, April 2009, available at: http://www.unhcr.org/refworld/docid/49de0b6b2.html [accessed 30 October 2009]. The footnote in the Report relating to this particular allegation accepts it is based on news items drawn from, amongst others Asia Times and from Tamil Net, which was then operated by the LTTE. Therefore this is an allegation without credibility.

(51) **EC Comment (para.58** of EC report): "The emergency regulations authorize the creations of counter terrorism detention camps which are not subject to inspection by the NHRC".

GoSL Position: Sri Lanka does not have "counter terrorism detention camps" and furthermore the Human Rights Commission of Sri Lanka (HRCSL) has a legal mandate to visit any detention centre. Furthermore, under a Presidential Directive, HRCSL should be notified of arrests and detention.

(52) **EC Comment (para.59** of EC report): "The UN High Commissioner for Human rights stressed in September 2009 that in Sri Lanka internally displaced persons are effectively detained under conditions of internment".

GoSL Position: This very question has been put before the Supreme Court by an NGO filing a public interest lawsuit. This is proof that the legal system has remedies available where these kinds of questions can be raised before the highest judicial authority. The fact is that over 40% of IDPs have moved out since the conflict ended (i.e., almost 100,000 persons to either stay with host families or to go back to their original areas of habitation). This large scale outward movement in a relatively short period and the declared commitment of the Government of Sri Lanka to the resettlement of the vast majority of the IDPs by 31 January, is ample proof of the political will to ensure a return to normality for these conflict-affected individuals. Any temporary limitation of movement stems from the need to de-mine the areas of habitation in order to allow for safe return and occupation.

The de-mining process for which Sri Lanka has acquired state of the art apparatus is also well in progress.

(53) **EC Comment (para.60** of EC report): "Although it remains possible to apply for habeas corpus in the High Court and Court of Appeal, such applications have been rarely successful in gaining release. Relief against arbitrary arrest and detention can also be found by filing a fundamental rights application in the Supreme Court, but distance, difficulty of travel of access to a Supreme Court lawyers create very significant barriers to most litigants".

GoSL Position: Habeas Corpus applications that are brought before appropriate Courts require the Petitioners to establish the fact of unlawful detention to the satisfaction of Court. In the absence of such proof, the Courts are unable to grant redress.

As regard fundamental rights applications it has to be noted that a letter written by an aggrieved person to the Chief Justice is sufficient to initiate the invocation of the jurisdiction (Epistolary Jurisdiction).

As regards distance, decentralization of the powers of the Courts of Appeal granting High Courts of each Province writ jurisdiction has made it easier for people to seek justice. Additionally, extensive public interest litigation and the provision by the Legal Aid Commission of services of lawyers *Pro Bono* without any burden to the litigant, have helped overcome these difficulties. It must also be remembered that Sri Lanka's land area of 65,000

has a well connected road and rail network, distance and difficulty to travel are not issues that obstruct such access.

(54) **EC Comment (para.62** of EC report): "Sri Lanka has among the highest number of disappearances in the world since 2006".

GoSL Position: The disappearances reported to the UN Working Group on Enforced and Involuntary Disappearances in Sri Lanka date back to the 1980's with the vast majority of the cases predating 2006.

A Central Registry has been established by the Ministry of Human Rights and Disaster Management of Sri Lanka to look into cases on alleged disappearances reported by the UN Working Group. After entering all the names given by the Working Group the Ministry has identified 450 cases of possible duplication. This information has been sent to the Working Group and the Ministry of Human Rights is awaiting their clarification on the same.

The Ministry is also actively engaging with the Working Group to resolve the existing backlog. The Police have been requested to investigate and report on progress in all cases with a special focus on cases in the recent past.

In fact it is important to note that the UN Working Group on Enforced or Involuntary Disappearances itself, in its data, reflects a steep downward trend with regard to disappearances. There have been only 3 three reported incidents of disappearances in 2009, in comparison to 120 incidents alleged to have taken place in 2008. Even the 2008 figures represent a significant drop from the number of 206 reported figures in 2006.

(55) **EC Comment (para.64** of EC report): "The TMVP continued to abduct children during the period covered by the investigation reports indicates that Sri Lankan Security Forces were complicit in these abductions".

GoSL Position: On the allegation that the TMVP continued to abduct children during the period covered under the investigation, it is noted that since December 2008 only 1 child is reported to have been recruited, according to information provided by the UNICEF as at 30 September 2009.

While there have been allegations concerning the complicity of the Security Forces in turning a blind eye to the possible recruitment of children by the TMVP, which in the situation of conflict that then prevailed was illegally functioning as an armed group, these are uncorroborated and unsubstantiated.

For example the allegations do not indicate the date, time and place at which members of the Armed Forces or the Police supposedly wilfully ignored the phenomenon of children being abducted for recruitment and the service identification such as rank and regimental number of those alleged to be involved.

(56) **EC Comment (para.65** of EC report): Although the government has created at least 9 special bodies to investigate disappearances among other human rights violations,

reports indicate that these bodies have failed so far to carry out effective investigations into alleged disappearances and to bring an end to disappearances".

GoSL Position: As stated in the comments to paragraph 62 of the EC Report the number of allegations of disappearances has reduced drastically.

(57) **EC Comment (para.67, 68, 69** of EC report): "Emergency law and regulations allow for the imposition by Government officials of curfews, restrictions on travel outside of Sri Lanka and prohibition of movement in particular areas (zones) with considerable power given to Secretary Ministry of Defence and the competent authority to restrict or authorize movement".

GoSL Position: FR Application Nos.646/2003 and 647/2003 were filed in the Supreme Court by petitioners claiming that they had been denied access to their houses on the basis of the houses being situated in the High Security Zone.

The Court directed the Divisional Secretary, Jaffna to submit a report as to the number of persons who have been displaced in such a manner.

During the course of the proceedings, 7,456 families indicated willingness to resettle on conditions stipulated by court as follows;

a. They would submit themselves for interview by the District Secretary and representatives of the Security Forces to establish their identity, claims to the particular portion of land and other relevant particulars;

b. They would form into Citizens Committees and ensure that the Security Forces are in no way imperilled in the area due to any armed or terrorist activity;

c. Engage in agricultural and other activities as may be agreed upon between the persons re-settling and the relevant authorities.

The Court ordered for a Judge, nominated by the High Court Judge set up a committee to conduct such interviews in order to facilitate speedy resettlement.

(58) **EC Comment (para.70** of EC report): "Permission is required to enter security areas. Mass evictions have also occurred; for e.g., in 2007 hundreds of Tamils were expelled in Colombo. This decision was challenged by the NGOs CPA through a fundamental rights case submitted to the Sri Lanka Supreme Court in 2007. The Supreme Court reversed the decision and ordered the eviction to stop".

GoSL Position: Since the judgment of the Supreme Court in 2007, no mass evictions have taken place. In fact, the Report hails (in particular paragraph 70) the decision of the Supreme Court to halt the "mass eviction"... "of Tamils from Colombo". Restrictions placed on entry to security areas are applicable irrespective of ethnicity. Such restrictions, if any, have been imposed for reasons of security. Moreover, with the end of the conflict situation, these restrictions are being progressively relaxed.

(59) **EC Comment (para.71, 72** of EC report): "Displaced persons who have sought to return to their homes have faced several obstacles" ..."the existence of effective remedies to challenge restrictions of movement of people or denial of access to areas would continue to ensure that any such measures taken are strictly necessary and proportionate".

GoSL Position: *See comments above pertaining to paragraph 59 of the EC Report and paragraphs 67-68 of the EC Report on the resettlement process.*

(60) **EC Comment (para.75** of EC report): "Implementation of right to freedom of expression remains the serious problem. Sri Lanka has been ranked as one of the most dangerous countries for journalists in the world... journalists who criticized the government have reportedly been subject to verbal and physical attacks, harassment, restriction on access and vilification. A considerable number Sri Lankan journalists have been driven into exile".

GoSL Position: Sri Lankan media continues to have a wide diversity of views. A perusal of the country's print and electronic media on any given day would afford a wide diversity of views with some of them being virulently anti-Government. Despite these views being on occasion even vituperative and targeted at personalities, it is nevertheless recognized that this is the price to be met for upholding the democratic norm of a free and vibrant media. The isolated incidents against a small minority of journalists are being investigated, when credible allegations are made and formal complaints registered.

See also comment above in relation to paragraph 41 of the EC Report.

(61) **EC Comment (para.77** of EC report): "The judiciary is reportedly subject to political pressure there have been unjustified threats of impeachment and some judges have been dismissed or transferred without objective reasons".

GoSL Position: With the doctrine of separation of powers, the judiciary at all levels, enjoys absolute independence. The only impeachment of a Judge took place nearly two decades ago. Transfer and dismissal of Judges of Courts of First Instance is the responsibility of the Judicial Services Commission comprising the Chief Justice and two senior Judges of the Supreme Court. In fact, the Report which states that the judiciary is vulnerable to political influence also hails (in particular in its paragraph 70) the decision of the Supreme Court to halt the "mass eviction"... "of Tamils from Colombo".

(62) **EC Comment (para.78** of EC report): The vast majority human rights violations are never subject to legal proceedings. Those cases that are tried rarely conclude with a conviction. Since 1994 only three persons have been convicted of torture and fewer 30 for abduction or wrongful imprisonment. In only one case has a member of the security forces been convicted of murder".

GoSL Position: Legal proceedings are instituted when complaints of human rights violations have been made. Upon a complaint being made, investigations are conducted and until the completion of investigations no legal proceedings can be instituted. All cases filed in Court

are tried and concluded. If the convictions are few it is due to the Courts at all times upholding the fundamental legal principle of presumption of innocence. In upholding this presumption, the prosecution is required by law to prove the guilt of an accused beyond reasonable doubt. In the event a reasonable doubt is created or the prosecution fails to discharge its burden of proof beyond reasonable doubt, the accused is given the benefit of doubt and acquitted.

The alleged offenders against whom petitions are filed in the Supreme Court are also dealt with administratively if they happen to be public officials. In addition if there is a prima facie case of torture, the Attorney General chooses not to appear on behalf of the public official.

In this regard, please also see the comments made above in response to paragraph 25 of the EC Report.

(63) **EC Comment (para.78** of EC report): "It is noted that in 2008, following requests by the Commission of Inquiry (COI), the IIGEP facilitated video conferencing from abroad from witnesses of serious human right violations. The sudden decision in May 2008 by the President's Secretary to suspend testimony through video conferencing pending the approval of the future witness protection law was a major setback to the functioning of the COI".

GoSL Position: The reception of evidence by a CoI has some flexibility in terms of the Evidence Ordinance, but any evidence recorded by it has to have probative value and it has to be in conformity with the legal framework if, for instance, that evidence is to be used in a future prosecution. The law as it stands does not explicitly permit the reception of contemporaneous video testimony and there are no safeguards to guarantee the quality of recorded testimony. This measure was taken out of an abundance of caution and not as an attempt to stifle the discovery of the truth.

(64) **EC Comment (para.79** of EC report): "Reports indicate that the Karuna Group subsequently known as the TMVP continued to abduct children in government controlled areas during 2006 to 2008. Reports also indicated that certain elements of the government's security forces supported and sometime participated in those abductions".

GoSL Position: *Please see the comments above in relation to paragraph 64 of the EC Report.*

(65) **EC Comment (para.80** of EC report): "It is too early to assess whether the action plan will achieve the desired effects, but preliminary information indicates that not all child soldiers have been released... according to UNICEF data bases as of 31.08.2009 there were 94 outstanding cases of underage recruitments by the TMVP... the country task force has received and followed up a small number of reports of children been recruited and harassed by the pro-government People's Liberation Organization of Tamil Elam (PLOT), and other human right agencies have reported incidents of violations and abductions, including against children by this group. It is noteworthy that to date there has been no conviction in Sri Lanka in relation to child recruitment".

GoSL Position: With regard to the claim that it is too early to assess whether the action plan will achieve the desired effects, it is submitted that since the entry into force of the Action Plan in December 2008, only 1 child is reported to have been recruited, according to information provided by the UNICEF as at 30 September 2009. Thus, in light of the above, to argue that it is too early to assess the effectiveness of the Action Plan shows bias and a lack of objectivity. (Please see Annex (a) for the list of all known recruited children as at 30 September. Source: UNICEF.)#

The claim of 94 outstanding cases of under aged recruitment by the TMVP on the basis of the UNICEF databases, is false. On the contrary UNICEF has clearly stated in its database as of 30 September 2009, that there are only 14 outstanding cases. In regard to these cases while regular investigations of all possible leads is carried out by a joint team consisting of police and UNICEF officials, it has still not been possible to ascertain their whereabouts, for the purpose of commencing their rehabilitation process.

On the allegation that "to date there has been no conviction in Sri Lanka relating to child recruitment", it must be stated that consequent to the successful completion of operations against the LTTE, the investigation process into allegations of child recruitment have become more productive. Accordingly two persons were arrested, thereby enabling the commencement of judicial proceedings against them.

With regard to the allegations of recruitment of children by PLOT, it is noted that the UNICEF has informed the GOSL in October 2009 that it is unable to provide information on the name/s of the child/children recruited by PLOT and information on witnesses to any such claimed acts. These two elements, particularly determining the accuracy of the allegations providing facilitatory material for the investigations, are essential pre-requisites under UN SC Resolution 1612 before the allegation with regard to child recruitment can be accepted.

Accordingly as provided for by UNSC Resolution 1612 itself, the claims made against PLOT cannot be treated as anything more than unsubstantiated and uncorroborated evidence.

Editor's comment: This annex is not re-printed in this issue.

INTERIM REPORT BY AN EXPERT COMMITTEE OF THE EUROPEAN COMMISSION IN RESPECT OF RENEWAL OF THE SPECIAL INCENTIVE ARRANGEMENT FOR SUSTAINABLE DEVELOPMENT AND GOOD GOVERNANCE (GSP+) TITLED 'THE IMPLEMENTATION OF CERTAIN HUMAN RIGHTS CONVENTIONS IN SRI LANKA' – AUGUST 19, 2009

According to Article 9(1) of Council Regulation No.980/2005 of 27 June 2005, a GSP+ arrangement may be granted to a country which *inter alia* has ratified and effectively implemented the conventions listed in Part A of Annex III of the Regulation among them, the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture (CAT) and other Cruel, Inhuman or Degrading Treatment of Punishment and the Convention on the Rights of the Child (CRC). According to Article 16(2), the GSP+ may be temporarily withdrawn in respect of all or certain products in particular if the national legislation no longer incorporates the conventions or if that legislation is not effectively implemented.

On 14 October 2008, the European Commission initiated an investigation into the implementation of the three conventions in issue in Sri Lanka. President Leif Sevon (former judge of the Court of Justice of the European Community and former President of the Supreme Court of Finland, Professor Francoise Hampson (former member of the UN Sub-Commission on the Promotion and Protection of Minorities and currently holding a chair at the University of Essex) and Professor Roman Wieruszewski (former member of the UN Human Rights Committee and ad hoc judge at the European Court of Human Rights) constituted the Panel. The Panel was expected to make an assessment of the situation and provide independent legal advice on the relevant questions. The interim report in question was prepared with this objective in mind looking at not only the relevant national legislation but also as to whether the conduct in practice of national authorities including courts which have the potential to violate rights.

The Interim Report focuses mainly on the events and actions after the GSP+ benefits were obtained by Sri Lanka on 27 June 2005 and is based on existing laws and practices rather than on 'undertakings and announcements' (at p. 8 of the Interim Report). It is stated at the outset that the evaluation deals with the actions by the Sri Lankan government and authorities and does not deal with violations by the Liberation Tigers of Tamil Eelam (LTTE). However, the focus on the government action must not be understood as disregarding or minimizing the significance of the LTTE violations or those of any other group.

Though the Commission requested permission for the Panel and representatives of the Commission to conduct an on-site visit in Sri Lanka, this was rejected. Consequently, the Report was prepared taking into account representations made to the Panel by organization as well as by examining documents in the public domain such as domestic legislation, court reports, reports and statements from the United Nations bodies, reports by international organizations, media reports, NGO reports, academic commentaries and other material. In order to confront such information thus gathered with the position of the Government of Sri Lanka, meetings with representatives of the Government were sought but not obtained.

Institutions with the responsibility for providing remedies far alleged violations of human rights

The National Police Commission

The National Police Commission was created by the 17th Amendment to the Constitution of Article 155(a) in 2001 and then appointed in 2002. It is in charge of disciplinary control over all officers except the Inspector General (Article 155, G(2)).[1] However, this procedure was only established in January 2007 and therefore no conclusions are yet available regarding its effectiveness. The legitimacy and credibility of the National Police Commission was called into question due to Presidential appointments of Commissioners in 2006.[2]

The Courts

The Constitution provides that the institutions for administration of justice shall be the Supreme Court, the Court of Appeal, the High Court and other such courts of first instance, tribunals and such institutions as Parliament may from time to time ordain and establish[3].

The Supreme Court hears and determines as first and only instance any question relating to the infringement or imminent infringement by executive or administrative action of any fundamental right declared and recognized by Chapter III of the Constitution[4]. A petition to that effect shall be brought within one month of the alleged infringement.[5]

Where in the course of a hearing in the Court of Appeal into an application for orders in the nature of a writ of *habeas corpus*, *certiorari*, *prohibition*, *procedendo*, *mandamus* or *qua warranto*, it appears to such Court that there is prima facie evidence of an infringement or imminent infringement of the provisions of Chapter III or Chapter IV by a party in such application, such Court shall forthwith refer such matter for determination by the Supreme Court.[6]

The President may refer a question to the Supreme Court for its opinion.[7]

Since 2005 the President has made appointments to the Supreme Court without a recommendation of the Constitutional Council as prescribed in the Constitution[8].

In order to safeguard the independence of the judiciary it is provided that a judge shall not be removed from office except by an order: of the President made after an address of Parliament

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1 Report of the Special Rapporteur on torture, para.56-58, p.16-17. Report from Philip Alston, UN Special Repportur Extrajudicial Executions, A/HRC/8/3.Add 3 14 May 2008, para. 59, p.16.
2 *Ibid.*
3 Article 105.
4 Article 126(1).
5 Article 126(2).
6 Article 126(3).
7 Article 129(1).
8 International Bar Association, *Justice in retreat: A report on the independence of the legal profession and the rule of law in Sri Lanka*, May 2009, p.24. It should be noted that Sri Lanka emphasized the 17th Amendment to the Constitution in the Status Report, but certain elements of the amendment do not appear to be applied in practice.

supported by a majority of the total number of Members of Parliament (including those not present) has been presented to the President for such removal on the ground of proved misbehaviour of incapacity.[9]

There is a Judicial Service Commission which shall consist of the Chief Justice and two Judges of the Supreme Court. The appointment transfer, dismissal and disciplinary control of judicial officers are vested in that Commission. "Judicial officer" does not include a Judge of the Supreme Court or the Court of Appeal or of the High Court.[10]

The National Human Rights Commission

The National Human Rights Commission (NHRC) was created by legislation in 1997 and recognized under 17th Amendment of Constitution. It was empowered to conduct investigations into complaints of violations of fundamental rights, such as violations of Article 11 of the Constitution prohibiting torture (Article 14 of Establishment Act No.21).[11] The NHRC can refer the matter for reconciliation or mediation.[12] If this procedure fails, the NHRC may recommend initiating a prosecution of an alleged perpetrator.[13] The NHRC is empowered to inquire into complaints of infringement of any of the fundamental rights set out in the Constitution. The NHRC is only empowered to make recommendations.[14]

Since 2005 the President has made appointments to the NHRC without a recommendation of the Constitutional Council as prescribed in the Constitution.[15]

On 26 October 2007 the sub-committee on accreditation of the International Coordinating Committee (ICC) of National Human Rights Institutions took the decision to downgrade the NHRC from 'A' to observer 'B' status (not fully compliant with Paris Principles) due to two primary concerns: 1) It was not clear that the appointment of Commissioners was in compliance with the Paris Principles: and 2) in practice, it was not clear the NIHRC remained balanced, objective and un-political particularly with regards to the discontinuation of follow-up to 2.000 cases of disappearances in July 2006.[16]

Commissions of Inquiry

Under the Presidential Commission of Inquiry, Act No.17 of 1948 the President can set up a Commission of Inquiry to investigate the administration of public departments, offices or agencies or allegations of misconduct by a member of the public service.[17] The President is authorized to set the terms of reference for the commissions and appoint its members. He or

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[9] Article 107(2).
[10] Article 114.
[11] Report of the Special Rapporteur on torture and torture cruel, in human or degrading treatment or punishment, Manfred Nowak, A/HRC/7/3/Add.6,26 February 2008, para. 59, p.17.
[12] *Ibid.*
[13] *Ibid.*
[14] Status Report p.4.
[15] International Bar Association, *Justice in retreat: A report on the independence of the legal profession and the rule of law in Sri Lanka*, May 2009, p.24.
[16] International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights. Report and Recommendations of the Subcommittee on Accreditation Geneva 22-26 October 2007.
[17] Section 2(1) Commissions of Inquiry Act.

she can also revoke the warrant establishing a commission at any time. The Act does not require Commissions' reports or recommendations to be made public. Whether the report or any part of it is to be made public is subject to presidential discretion.

Since 1991 there have been nine Commissions of Inquiry to investigate enforced disappearances and a number of other human rights inquiries.[18]

On 4 September 2006 the President announced that the government would invite an *international independent commission* to probe abductions, enforced disappearances and extrajudicial executions. But on 6 September 2006 he announced that he would invite an international independent group of eminent persons (IIGEP) *to act as observers* of the activities of a local commission.[19] Subsequently on 2 November 2006 the President created a Commission of Inquiry to investigate and inquire into 15 cases of alleged serious violations of Human Rights arisen since 1 August 2005. Later a 16th case was added. The Presidential Warrant authorized the Commission of Inquiry to conduct "independent and comprehensive investigations" and to "examine the adequacy and propriety of the investigations already conducted pertaining to such incidents amounting to serious violations of human rights."[20]

In 2007 the Commission created a victim and witness assistance and protection unit and on 8 May 2007 it adopted a scheme for the providing assistance and protection to victims and witnesses. For a short period of time the Commission used video conferences when hearing witnesses living abroad. However, the Presidential Secretariat ordered the suspension of witness testimony through video conferencing. The Presidential Directive cited future witness protection laws.[21]

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

The term of the Commission of Inquiry came to end in June 2009. At that stage hearings into seven cases were concluded and reports on five cases finalized. According to the Chairperson of the Commission the Commission had by then not started the hearings in two cases and decided nor to embark on two other cases.[22]

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

Effective implementation of human rights treaties

Legislative Steps

After the ruling by the Supreme Court in the *Singarasa* case the government prepared the ICCPR Act. It sought an advisory opinion of the Supreme Court as to the extent of compliance of the Sri Lankan Constitution and law with the rights contained in the ICCPR.

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[18] Amnesty International, *Twenty Years of Make-belive: Sri Lanka's Commissions of Inquiry*, 2009, p.10.
[19] *Ibid*, p.12.
[20] *Ibid*, p.15.
[21] *Ibid*, p.35-36.
[22] Interview with retired Supreme Court Judge Nissanka Udalagama in the *Sunday Times* and the *Daily Mirror*.

The Supreme Court arrived at the conclusion that "the legislative measures referred to in the communication of the President dated 04.03.2008 and the provisions of the Constitution and of other law, including the decisions of the Superior Courts of Sri Lanka give adequate recognition to the Civil and Political Rights contained in the International Covenant on Civil and Political Rights and adhere to the general premise of the Constitution that individuals within the territory of Sri Lanka derive the benefit and guarantee of rights contained in the Covenant.[23]

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

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

Article 16 of the Constitution ensures the continuation in force of laws that existed when the Constitution entered into force notwithstanding any inconsistency with constitutionally declared fundamental rights; Article 16 thus undermines the protection of fundamental rights that are in fact recognized by the Constitution. For example, provisions of criminal law or laws on land and succession that are discriminatory against women remained in force.[24]

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

The Sri Lankan legislation does not include provisions corresponding to all the rights covered under the ICCPR. An example is the right to life.[25] The right to life has nevertheless been protected by the courts in a number of cases.[26] It has therefore been suggested that the right to life is well entrenched into the domestic law of Sri Lanka.[27] However, the omission of a provision on the right to life runs contrary to the objective stated in the opening language of the ICCPR Act, i.e., to give effect to certain Articles in the ICCPR which have not been given recognition through legislative measures.

A number of problems also arise in the context of restrictions in Article 15 of the Sri Lankan Constitution. In the ICCPR the distinction between "'limitations" and "restrictions" is a

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[23] Supreme Court (S.C.) Ref. No.1/2008.
[24] Submission 13 February 2009 by the Centre for Policy Alternatives (CPA), p.4-5.
[25] *Ibid*, p.8.
[26] See, e.g. Legal opinion by Sanjeeva Jayawardeena, June 2008, p.23-24. The opinion is attached to the submission by 19 Sri Lankan lawyers. See also that submission, p.14-19.
[27] Submission by 19 Sri Lankan lawyers, June 2008, p.18

safeguard. Some human rights may legitimately be limited in their enjoyment and exercise and may be suspended in exceptional circumstances such as states of emergency.

The Sri Lankan bill of rights speaks of "restrictions" on points where the ICCPR uses the expression "limitation". The bill of rights does not follow the ICCPR expressly setting out a list of non-derogable rights but identifies them by implication. The rights which are susceptible of restriction under the Constitution are not as extensive as those provided for in ICCPR Article 4(2). The Constitution does not refer to the substantive controls of necessity and proportionality. The Supreme Court of Sri Lanka has in some cases by interpretation imposed a requirement of reasonableness on the imposition of restrictions on rights. However, this requirement has been introduced on an *ad hoc* basis and has not introduced a change that is generally and universally applicable. Further, the general nature of Article 15(7) of the Constitution has the effect of undermining many of the limits on permitted restrictions enumerated in the other subsections of the Article, as it permits restrictions as may be prescribed by law, for instance, in the interest of national security, public order and the protection of public health and morality.[28]

It has been held that these restrictions, some of which are not strictly within the permitted scope of derogations set out in: Article 4 (1) of the Covenant, nevertheless appear to have been included in the collective interest of the community of persons and the general well being of the nation, and in this perspective may be argued to be justified.[29] To this has been added that the emergency regulations are subject to monthly review by the Legislature and judicial scrutiny by the Supreme Court[30]

Neither of these arguments is convincing. Article 4(1) of the Covenant cannot be given an extensive interpretation. The conditions for declaring an emergency and enacting emergency laws are strictly and narrowly defined and limited to exceptional circumstances, with safeguards to ensure that the rights of the population in general are not abused under the colour of law. These limits must be observed to ensure that the emergency laws are an extension of the rule of law rather than an abrogation of it.[31] The scrutiny by the Legislature and the Supreme Court does not remove the problems unless they take such an approach to the limits. That does not seem to be the case.

Further problems arise out of the emergency regulations. Only some of them are raised here.[32]

The principle of legality requires criminal offences to be clearly defined in unambiguous language. The HRC has stressed that vague, imprecise and ambiguous definitions of the offences of terrorism in domestic legislation are in breach of the principle of legality of offences.[33] Many of the provisions in the emergency regulations do not meet this requirement

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[28] Submission on 13 February 2009 by the Centre for Policy Alternatives (CPA), p.8-10.
[29] Legal opinion by Sanjeeva Jayawardeena, June 2008, p.18-21.
[30] Submission by 19 Sri Lankan lawyers, June 2008, p.7.
[31] International Commission of Jurists, Sri Lanka: Briefing Paper. Emergency Laws and International Standards March 2009,p. i.
[32] For an extensive analysis see ibid., passim.
[33] Concluding remarks oithe HRC on, *interalia*, Belgium, CCPR/CO/18/BEL, 12 August 2004, para. 24, Canada; CCPR/CC/CAN/CO/5, 20 April 2006, para 12. See also Report of the Special

as it is difficult to know with certainty what acts will be considered unlawful. For instance, ER 2006 creates the offence of engaging in terrorism or "acts of terrorism" (Regulations 6 and 20) and criminalizes certain activities, transactions and communications with persons or groups committing terrorist offences (Regulation 7, 8 and 9).

ER 2005 and Presidential orders made under the PSO delegate sweeping powers to the military personnel to perform functions normally carried out by law enforcement officials, including powers of investigation, search, arrest and detention. Under Regulation 19 the Secretary of the Ministry of Defence may order the arrest and detention of a person for up to one year. The ordinary courts are expressed excluded from questioning the making of a Regulation 19 order The HRC has previously expressed concerns about the secretary of Defence having the power to order detention.[34] It has also stared that if administrative detention is used, for reasons of public security, it must be controlled by the same provisions governing detention while under arrest or awaiting trial. It must not be arbitrary, and must be based on grounds and procedures established by law (ICCPR Article 9(1)), information of the reasons must be given (IICPR Article9 (2)) and court control of the detention must be available (ICCPR Article 9(4)) as well as compensation in the case of breach (ICCPR Article 9(5)).[35]

Basic fair trial rights are guaranteed in international law and the Constitution of Sri Lanka, and should be respected even during a state of emergency. The Sri Lankan emergency laws undermine the right against self-incrimination by permitting the use of confessional evidence and creating a "duty" for persons to answer police questions. Provisions under ER 2005 also reverse the normal burden of proof, undermining the principle of presumption of innocence. The HRC has consistently affirmed that the burden of proof should always be on the prosecution, based on the principle of presumption of innocence.[36]

Finally, people whose rights are limited or infringed because of an emergency law should be able to challenge the legality of measures taken against them, and stares are obliged to conduct prompt effective, impartial and independent Investigations and to bring to justice those responsible for violations. The ICCPR and other international standards require States to bring to trial and punish those guilty of human rights violations. HRC considers that amnesty laws, or other similar measures, help to create a climate of impunity for the perpetrators of human rights violations and undermine efforts to re-establish respect for human rights and the rule of law, in breach of the ICCPR. Failure to investigate or bring to justice perpetrators of human rights violations may in itself give rise to a breach of the ICCPR. States Parties to the ICCPR may not relieve such perpetrators from personal responsibility.[37]

Rapporteur an Fundamental Freedoms while Countering Tcrrorism, Martin Scheinin, A/HRC/10/3/Add.l, para. 236 - 238.

[34] HRC, concluding observations of Sri Lanka, CCPR/C/79/Add56,27 July 1995, para. 19.

[35] HRC, General Comment 8, Rights to liberty and security of persons, 30 June 1982, para. 4.

[36] HRC, General Comment 13, para.7. See also International Commission of Jurists, *Sri Lanka: Briefing Paper, Emergency Laws and International Standards*, March 2009, p.21.

[37] HRC, General Comment No.31 (The Nature of General Legal Obligations Imposed on States Parties), 21 May 2004, CCPR//C/74/CRP.4/Rev.6, para. 18.

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

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

Non-legislative measures

The 17th Amendment to the Constitution has been allowed to fall into abeyance by the government notwithstanding the emphasis placed on it by the government in the Status Report. That amendment provides for important checks and balances on the executive presidential powers by providing that appointments of independent commissions and persons to senior positions in the public service are subject to recommendations or approvals by the Constitutional Council. That is the case with for instance, the Attorney General, the Inspector General of police, the chief justice and other judges of the Supreme Court and the court of Appeal.[38] In the absence of a Constitutional Council, the President has appointed commissions and persons to senior positions directly.

This affects the institutions discussed below in this subsection and has been a matter of concern.[39] It has been suggested that many of the institutions have lost much of their independence because of the President's handling of the Amendment.[40] This has adversely affected at least some of the institutions.[41]

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

Investigations carried out by the police

States must effectively investigate all allegations of serious human rights violations with certain minimum standards. Such an investigation shall include the collection of and analysis of all physical and documentary evidence and statements from witnesses.[42] The duty effectively to investigate crimes becomes paramount particularly in those cases where there are allegations of serious human rights violations by the State's security forces in order to bring those responsible to justice, including persons responsible for crimes committed by State security forces, police and law enforcement agents, or paramilitary groups so that the

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[38] International Bar Association Human Rights Institute, *Justice in retreat: A report on the independence of the lega profession and the rule of law in Sri Lanka*, May 2009, p.23.

[39] *Ibid.*

[40] International Crisis Group, *Sri Lanka's Human Rights Crisis*, Asia Report No.135. 14 June 2007, p.19.

[41] See Section 3.3.2., *supra.*

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

State sends a clear message that such killings are neither condoned nor sanctioned by government officials or personnel.[43]

Section 56(d) of the Police Ordinance of Sri Lanka places a positive duty on all police officers to detect crime and bring offenders to justice.[44] Police officers also have a positive duty to investigate crime under Part V of the Code of Civil Procedure (CCP).[45] All investigations must be completed without delay.[46]

In an interview the Chairperson of the recent Commission of Inquiry noted that the "Commission was unique because we were asked to do the investigations based on the premise that Police investigation was not satisfactory. At the end of the police investigation, they concluded that there were no witnesses and closed the case.[47]

The efficiency of police investigations has been strongly criticised. For instance, on 14 May 2008 Philip Alston, UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, submitted a report to the 8th Human Right Council pointing out that during his visit to Sri Lanka he had found that the police failed to respect and ensure the right to life. He also stated that the government's response to human rights violations by the police was unsatisfactory.[48] ICJ noted in its submission to the Human Right council Universal Periodic Review that the Sri Lankan authorities had proved unable or unwilling to solve the grooving number of targeted killings of employees of international organisations in government territory. The police investigation into the killings in August 2006 of 17 *Action Contre la Faim* (ACF) workers had lacked impartiality, transparency or willingness to cooperate with outside forensic experts. In the absence of effective investigations, the number of killings had increased.[49] The investigation into the ACF killings has recently also been strongly criticised by University Teachers for Human Rights (Jaffna).[50] In June 2007 the International Crisis Group sated that in the face of the explosion of political crimes and rights violations, law enforcement agencies and the judicial system have failed almost completely. There had been almost no credible police investigations and very few arrests or indictment in any of the hundreds of killings, abductions, and disappearances over the preceding year and half. There was no evidence of real investigation, even as Karuna forces operated openly throughout the Batticaloa district and the rest of the Eastern Province. The police were accused not only of a failure to act, but of an active obstruction of justice in order to cover up the role of government force in rights violations.[51]

There are two different types of flaws in the investigatory system. The first is the attitude and conduct of those responsible for the investigations and the second is the structural weakness

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[43] HRC Resolution 2004/37, Article 6.
[44] Police Ordinance (as amended), 1956, volume 111, Chapter 53.
[45] Code of Criminal Procedure Act, No.15, 1979 (as amended), Article 109(5).
[46] Code of Criminal Procedure Act, Article 120.
[47] Interview with retired Supreme Court Judge Nissanka Udalagama, Sunday Times 21 Junc 2009.
[48] Press release, www.2.ohchr.org/English/bodies/hrcouncil/8session/reports.htm.
[49] ICJ, Submission to the Human Right Council 2nd Session of the Universal Periodic Review, 5-16 May 2008, p.3.
[50] Special Report No.33, 4 August 2009, Third Anniversary of the ACF Massacre, passim.
[51] International Crisis Group, *Sri Lanka's Human Rights Crisis*, Asia Report No.135, 14 June 2007, p.16-17.

of institutions designed to ensure that the police perform their role properly and independently.

The attitude of the police may have been affected by the shift in their role under the emergency legislation. They have increasingly become a counter-insurgency force, rather than a body which maintains public order in the interest of the community and investigates crimes.[52] Police, Military and the government are reportedly more interested in distorting facts: perverting the evidence and silencing witnesses rather than conducting any real investigations.

The failure to carry out effective investigations is, however, a long-standing problem and not simply the product of the situation since the end of the cease-fire. The Panel was repeatedly told by interviewees that there is a 4% clear-up rate of all crimes.[53] The danger in such a situation is that people think there is no point in complaining to the police and they may then take the law in their own hands.[54] The lack of any effective system of witness protection also acts as a disincentive to submitting complaints.[55]

Cases of investigation and prosecution and investigations of violations allegedly committed by the police, armed forces and government officials are thus inadequate, scant and number in single digits.[56] The failing cannot be attributed solely to the difficulties caused by the armed conflict in Sri Lanka. For instance, the investigation of deaths in custody, where all the evidence is in the hands of the authorities, is no more successful. The causes of lack of successful investigations also include lack of training, lack of adequate forensic expertise and lack of witness protection. Above all, the inadequate number of successful prosecutions is a product of lack of political will and an attitude of complacency towards the inadequacy of the legal system.[57] During the period under review there is no evidence of any attempt to improve the effectiveness of investigations. All, the recommendations made by the Special Rapporteur in his report in 2006, with one exception have been ignored.[58] In the same period, the incidence of unlawful killings from whatever cause has increased.

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[52] Report by Philip Alston, UN Special Rapporteur on Extrajudicial Executions, A/HRC/8/3/add.3, 14 May 2008, para. 53.

[53] The basis for these figures is not clear.

[54] E.g., the Bindunuwewa massacre. Report of Philip Alston, Special Rapporteur, Civil and Polilical Rights, Including the Question of Disappearances and Summary Executions, Mission to Sri Lanka, 28 November-6 December 2005, E/CN.4/2006/53/ (27 March 2006), para.60.

[55] The Special Rapporteur reported that several of his interiocutors said, that it was better to be a victim than a witness.

[56] Statement by Special Rapporteur of Extrajudicial Killings, HCR. 5 September 2006; Press Satement by UN (High Commissioner for Human Rights on Conclusion of Her Visit to Sri Lanka, 13 Ocrober 2007, available at http//www.unchr.ch/hurricane/hurricane_nfs; Report by Philip Alston, UN Special Rapporteur on Extrajudicial Executions, A/HRC/8/3/add.3, 14 May 2008. para.8, p.5; International Crisis Group, *Sri Lanka's Human Rights Crisis*, Àsia Report No.135, 14 June 2007, Executive Summary & Report, p.16-18; Asian Human Rights Commission, *State of Human Rights in Eleven Asian Nations*, 2007, p.298-300.

[57] Report by Philip Alston, UN Special Rapporteur on Extrajudicial Executions, A/HRC/8/3/Add.3, 14 May 2008, para. 52.

[58] The suggestion that there should be an increase in the number of Tamils and Muslims in the police force. The government recruited 175 Tamil speaking personal to the Police Department serving in the Eastern province. Joint Apparel Association Forum, Submission 20 January 2009, p.II.

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

In many cases,[59] the Supreme Court called upon the National Police Commission, the Police Department and the Prisons Department to take strict steps to subject erring individual officers to appropriate disciplinary action. None of these directions were implemented.[60]

The role of the Attorney General's Department

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

According to a report by the International Crisis Group many believe that the Attorney General's Department has become "increasingly politicised" during President Rajapakse's tenure.[61]

It has been suggested that the Attorney General's Department does not vigorously prosecute criminal cases involving serious human rights violations. "Cases against State officials, when they do happen, take "many years" to prosecute, and the delays in torture cases are "even longer" than on other charges".[62] Given the laxity with which the perpetrators of torture are indicted by the Attorney General's Department (in certain cases omitting on even the officer-in-charge of the police station who consented and acquiesced in the torture perpetrated upon the victim), it is not a matter for surprise that there is reluctance to indict perpetrators who inflict suffering, or for that matter, mental pain".[63]

The Attorney General has the power to compel a Magistrate to transmit the case proceedings to the Attorney General and suspend the magistrate's inquiries.[64] Should the Attorney General be of the opinion that a case is disclosed against a perpetrator by investigative proceedings taken by the Police and the Magistrate, but that the work of the police or the Magistrate is defective, the Attorney General has the power to order and instruct the Magistrate to re-investigate in the manner desired by the Attorney General. The Magistrate is bound to comply with such an order.[65] Even if a Magistrate is of the view that there is sufficient evidence to commit a person to stand trial and so orders, the Attorney General has

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[59] *Perrea* v. *Iddamalgoda*, (2003) 2 SLR 63; *Wewalage Rani Fernando* case, SC(FR) No.700/2002, SCM 26.07.2004; *J. Wagaachige Dayraratne* v. *IPG and others*, SC(FR) 337/2003, SCM 17.05.2004; *Sanjeeva* v. *Surawera* (2003) 1 SLR 317.

[60] Kishali Pinto-Jayawardena, *Status of Sri Lanka's obligations under CAT and ICCPR*, p.17.

[61] International Crisis Group, *Sri Lanka's Judiciary: politicized courts, compromised rights*, Asia report No.172, 30 June 2009, p.9.

[62] *Ibid.*, p.21.

[63] Kishali Pinto-Jayawardena, *Status of Sri Lanka's obligations under CAT and ICCPR*, p.9.

[64] CCP Article 398.

[65] CCP Article 397(1)(2), 398(2) and 399.

the power to quash the order and direct the Magistrate to discharge the complaint and the accused.[66]

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

The conflict of interest regarding the Attorney General's Department was one of the reasons why the IIGEP concluded its work.[67]

The Courts

The judicial system of Sri Lanka has not been capable of meeting the challenges caused by the explosion of political crimes and human rights violations.[68]

The judiciary is, or has been, vulnerable to two forms of political influence: from the government and from the former Chief Justice. Since the operation of the Constitutional Council ceased in 2005, presidential nomination of judges has not been the subject of any additional appraisal and approval process prior to formal appointment. This makes the judiciary vulnerable to executive interference and jeopardises its independence. However, many would not dispute the merits of the President's appointments.[69]

The perception that the judiciary suffers from political influence has arisen in recent years due to the excessive influence of the former Chief Justice, the apparently inconsistent jurisprudence of the Supreme Court in relation to certain issues, and through tensions between the judiciary and the executive.[70] It is commonly believed that the former Chief Justice used the administration of the case allocation procedure as a tool to sideline senior Supreme Court judges from hearing politically sensitive cases.[71] It has also been suggested that the contempt of court powers of the Supreme Court have been used inappropriately, particularly by the former Chief Justice to stifle criticism from the civil society.[72] Efforts to enact contempt of court legislation have failed.

High Court judges exercise a particularly important role in respect of criminal prosecutions in the High Court under the CAT Act. However, it has been reported that this is not a jurisdiction that has been exercised in a manner that justifies the objectives with which the CAT Act was enacted in 1994.[73]

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[66] CCP Article 196.
[67] IIGEP, Public Statement, 6 March 2008, available at http//www.iigep.org/prelease/estatement6.pdf.
[68] International Crisis Group, *Sri Lanka's Human Rights Crisis*, Asia Report No.135, 14 June 2007, p.16.
[69] International Bar Association Human Rights Institute, *Justice in retreat: A report on the independence of the legal profession and the rule of law in Sri Lanka*, May 2009, p.26.
[70] International Bar Association Human Rights Institute, *Justice in retreat: A report on the independence of the legal profession and the rule of law in Sri Lanka*, May 2009, p.7.
[71] *Ibid.*, p.32.
[72] *Ibid.*, p.35.
[73] Kishali Pinto-Jayawardena, Status of Sri Lanka's obligations under CAT and ICCPR, p.18.

The National Human Rights Commission

The NHRC can only make recommendations and is not empowered directly to approach the courts. It therefore lacks the capacity to conduct detailed criminal investigation into complaints of torture[74]. Additionally, the NHRC is not adequately funded or resourced and was therefore not capable of dealing with an exponentially worsening human rights crisis.[75]

The NHRC enjoyed a good reputation during the first I0 years of its existence and was granted 'A' status by the International Coordinating Committee of National Human Rights Institutions (ICC). However, an impasse at the Constitutional Council resulted in the President directly appointing his own members to the NHRC which flew in the face of the Constitution[76]. UN Special Rapporteurs have questioned the enforcement capacity of the NHRC and expressed concern that the enabling legislation grants very limited powers to the NHRC[77]. The Bar and academics are unanimous that the NHRC is not seen as having the will or power to address the more serious human rights issues.[78] Reduced capacity and willingness to investigate complaints, abandonment of the previous practice of holding hearings and a fractious relationship with civil society led to loss of public confidence in the NHRC. Serious concerns with the NHRC include: it is generally viewed as inactive, not prosecuting cases effectively through human rights investigations; incompetent or inactive senior staff in Jaffna; and an excessively hostile relationship with many NGOs.[79] It has been suggested that these defects have the effect that human rights cases are passed off to a mediation body that has no human rights mandate or teeth, resulting in civil and political rights not being appropriately dealt with through the mediation procedure.[80] However, the government had announced its intention to increase the powers of NHRC.

so, in 2007 the NHRC sent internal circular No.7 dated 20.06.2007 that the secretary of the HRC had set down a prescriptive period for receiving complaints of 3 months meaning that ll complaints of torture, extra-judicial killings, disappearances etc. were prescribed unless complaints were made within 3 months of the date of the violation.[81] The NHRC also withdrew services such as visits to police stations and its 24 hour hot line for making complaints.[82] On 21 October 2007, the NHRC imposed a 'blackout' on its sub-offices

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[74] *Ibid*, p.9.

[75] Minority Rights Group International Report, "One year on: counter-terrorism sparks human rights crisis for the Sri Lanka minorities," 13 December 2007, p.8.

[76] International Crisis Group, *Sri Lanka's Human Rights Crisis*, 14 June2007, Executive Summary & Report and p.19-20.

[77] Address by Louse Arbour, UN High Commissioner for Human Rights, 6th Session of the Human Right Council, 11 December 2007; Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatmmt or punishment, Manfred Nowak A/HRC/7/3/Add.6, 26 February 2008, para.61-62, p.17-18; Report from Philip Alston, UN Special Rapporteur on Extrajudicial Executions, A /I - 1 RC / 8/3/Add 14 May 2008 , para.47, p.11-14; (p.54).

[78] *Ibid.*

[79] See sources cited *supra* note 30.

[80] *Ibid.*

[81] Asian Human Rights Commission, *State of Human Rights in Eleven Asian Nations, 2007*, Sri Lanka Chapter, p.327-328; Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, A/HRC/7/3/Add.6, 26 February 2008, para.60, p.17.

[82] *Ibid.*

(including Jaffna)[83]. In effect, the NHRC placed a 'gagging' order on human rights abuses. According to representatives of the NHRC, it received 405 complaints of torture in the first nine months of 2007.

Commissions of Inquiry

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

On 7 January 2007 Kishali Pinto-Jayawardena published an article stating, *inter alia*, that putting the primary focus on the Commission of Inquiry (aided as it is supposed to be by a team of international observers) and thus shifting attention away from the due functioning of the "normal" rights protection monitors such as the National Human Rights Commission, is unbelievable.[84]

In October 2008 Louise Arbour, UN High Commissioner for Human Rights noted that the Commission of Inquiry is an ad hoc response to a series of particularly shocking incidents and should not be a substitute for effective action by relevant law enforcement agencies.[85]

The IIGEP expressed in its first public statement concern that there were no adequate victim and witness protection provisions under Sri Lankan law.[86] On 19 September 2007 the IIGEP issued a public statement according to which the IIGEP concluded that the investigation and inquiry process to date had failed to comply effectively with international norms and standards.[87]

On 17 March 2008 the IIGEP took the decision to cease its activities on the ground that the proceedings of inquiry and investigation had fallen short of transparency and compliance with basic international norms and standards. The IIGEP had time and again pointed out the major flaws of the process: first and foremost the conflict of interest at all levels, in particular with the Attorney General's Department. Additional flaws included the restrictions on the operation of the Commission though lack of proper funding and independent support staff, poor organisation of the hearings and lines of questioning, and refusal of State authorities at the highest level to fully cooperate with the investigations and inquiries. Underlying it all was the impunity that had led to the prior fruitless investigations. There was a climate of threat, direct and indirect, to the lives of anyone who might identify persons responsible for human rights violations, including those who are likely to have been committed by the security forces. There had been and continued to be a lack of political and institutional will to investigate and inquire into the cases before the Commission.[88]

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[83] Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment: Manfred Nowak, A/HRC/7/3/Add.6, 26 February 2008, para.60, p.17.

[84] Kishali Pinto-Jayawardena, Focus on Rights, the *Sunday Times*.

[85] Amnesty International, *Twenty Years of Make-believe: Sri Lanka's Commission of Inquiry*, p.9.

[86] International Independent Group of Eminent Persons, Public Statement, 11 June 2007, www.iigep.org.pdf, p.2.

[87] www.iigep/org/prerelease/statement4/pdf.

[88] IIGEP, Public statement of 6 March 2008, www.iigep.org/prclease/estament6.pdf.

In a final public statement on 15 April 2008 the IIGEP noted that the victims and witness protection programme enjoyed no statutory basis, lacked fully trained staff and did not have sufficient funds to offer adequate assistance to those in need of protection. The Commission had not ensured the protection of victims and their families from intimidation and their representation by legal counsel. There was no provision to extend the protection arrangements beyond the life of the Commission.[89]

In its report of 2009, published before the Commission of Inquiry had concluded its work, Amnesty International noted that the inquiries had not focused on the failures of the investigations by the police and the Attorney General's department investigations into the same cases. Amnesty International also criticises the fact that the progress of the Commission's inquiries was slow and that investigations were held in camera during the first year.[90] The security forces may have obstructed the investigations, refusing to provide information on grounds of national security. Public hearings had been disrupted by private counsel who, both in the context of the hearings and in public statements, had attacked witnesses, members of the Commission and the IIGEP in inflammatory and political terms. There have also been problems with the translation of statements made by witnesses.[91]

According to the Chairperson of the Commission of Inquiry, the IIGEP had from the beginning been confrontational. They had questioned the independence of the Commission. They had also been complaining over the delays but the Chairperson was of the view that the Commission had taken time for good reasons. The Commission had to have the Commission of Inquiry Act amended but that had taken eight months.[92]

Conclusion

The National Human Rights Commission is deeply flawed and has lost all credibility after being stocked by political appointees. Other domestic institutions are increasingly politicized or dysfunctional. The law enforcement agencies and the judicial system have failed almost completely. There had been almost no credible police investigations and very few arrests or indictments in any of the hundreds of killings, abductions and disappearances over the past year and a half of sustained violence.[93]

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[89] IIGEP, Public Statement of 11 June 2007, www.iigep.org/pressrelease/statcment8.pdf, p.2.
[90] Amnesty International, *Twenty Years of Make-believe. Sri Lanka's Commission of Inquiry*, p.13-14.
[91] *Ibid*, p.23-24.
[92] Interview with retired Supreme Court Judge Nissanka Udalagama in *Sunday Times*, 21 June 2009.
[93] International Crises Group, *Sri Lanka's Human Rights Crises*, p.16, executive summary in www.crisisgroup.olg/home/index.cfm?Ibid.=4896&l=l.

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JOINT SINHALA-TAMIL TRANSLATION OF –
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by B. Skanthakumar.
(Originally published in the *LST Review* on the theme 'Dysfunctional Oversight: Continuing debates on Sri Lanka's Human Rights Commission', v.20, n.262, August 2009.)

In recent years, violations of international humanitarian law, extra-judicial killings, abductions and 'disappearances', verbal and physical attacks on journalists and human rights defenders, spiraling intolerance for dissent, and wanton disregard for constitutional provisions and democratic norms have come to epitomise Sri Lanka's human rights environment.

In this context, the expectations on the National Human Rights Commission of Sri Lanka are inevitably greater; and its alarming unwillingness to recognise the urgency and seriousness of the human rights crisis, are of greater disappointment and enormous concern.

This paper is a review of the role and impact of the Human Rights Commission of Sri Lanka.

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