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CHILDREN IN ARMED CONFLICTS

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Editor's note.....

In this issue we publish the concluding part of the UN Special Rapporteur's Report on Extrajudicial, Summary or Arbitrary Executions. The first part of this report was published in the May issue of the *LST Review*. He notes several shortcomings in the local law and several incidents of extrajudicial killings which have not been investigated by the government and sounds a grave warning regarding impunity among members of the security forces.

Of particular relevance are his recommendations. He urges the government to take steps to minimise delays in bringing members of security forces for violations of human rights to trial. Providing compensation to families of victims, ensuring respect for human rights, strengthening the ordinary justice system in Jaffna, revision of emergency regulations, acceding to the Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity, compilation of emergency regulations, publication of the reports of the Commissions of Inquiry, strengthening the mandate of the Human Rights Commission and establishing an institution for national reconciliation are some of his recommendations. He concludes that the issue of extrajudicial and arbitrary executions in Sri Lanka is ***serious***. The government should take serious note of one of his conclusions:

> ***While considering it inappropriate to affirm the existence of a planned policy of "systematic violation" of human rights, the violations have been so numerous, frequent and serious over the years that they could not be dealt with as if they were just isolated or individual cases of misbehaviour by middle - and lower - rank officers, without attaching any political responsibility to the civilian and military hierarchy***

We also publish a report by Amnesty International on the use of children in armed conflicts. The report discusses the Draft Optional Protocol to the Convention on the Rights of Child which seeks to raise the age to 18 years as the minimum age for participation in hostilities and recruitment into armed forces. The report notes that there are an estimated 250,000 children below the age of 18 years in government forces and/or armed opposition groups and includes Sri Lanka among those countries where such recruitment takes place. It is hoped that this Optional Protocol, when adopted, will succeed in eliminating the practice of using child soldiers in hostilities both by governments as well as by opposition groups.

QUESTION OF THE VIOLATION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS IN ANY PART OF THE WORLD, WITH PARTICULAR REFERENCE TO COLONIAL AND OTHER DEPENDENT COUNTRIES AND TERRITORIES

Extrajudicial, summary or Arbitrary Executions

Report of the Special Rapporteur, Mr. Bacre Waly Ndiaye submitted pursuant to Commission on Human Rights Resolution 1997/61*

Addendum

The concluding part of the Report on Extrajudicial, Summary or Arbitrary Executions

III. APPLICABLE LEGAL INSTRUMENTS

A. Human rights and humanitarian law

62. The applicable standards of international law reside primarily in the obligations undertaken by Sri Lanka as a result of its accession to the following instruments. Sri Lanka has signed the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights. Sri Lanka acceded to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in January 1994. It is legally bound to implement the human rights safeguards required by these treaties, including respect for the right to

* E/CN.4/1998/68/Add. 2, 12th March 1998.

life (Article 6 of the ICCPR) and the right not to be tortured (Article 7 of the ICCPR and the Convention against Torture). Article 4 of the ICCPR clearly states that both rights need to be upheld at all times, even "in time of public emergency which threatens the life of the nation." In addition, Sri Lanka is also a State party to the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Prevention and Punishment of the Crime of Genocide, the Convention on the Rights of the Child, and the Convention on the Elimination of All Forms of Discrimination against Women. In October 1997, Sri Lanka became a party to the Optional Protocol to the International Covenant on Civil and Political Rights. However, Sri Lanka is not a party to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.

63. International humanitarian law requires that minimum norms be respected in internal armed conflicts. The norms and specific standards of international human rights law also apply in situations of armed conflict, and may be deviated from only by permissible derogations. Sri Lanka is a party to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 and is, therefore, bound by its provisions. Article 3 of the Convention (common to the four Geneva Conventions and applicable to situations of internal armed conflict) provides for minimum standards of protection to civilians.

64. In addition to its treaty obligations, Sri Lanka is also obliged to respect the relevant rules of international customary law, particularly those concerning the "elementary considerations of humanity" in times of armed conflict as well as in times of peace as expressed by the principles in common Article 3 of the Geneva Conventions of 12 August 1949. Sri Lanka has not, however, signed Protocol II Additional to the Geneva Conventions of 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, which develops and supplements common Article 3.

65. The following fundamental guarantees contained in common Article 3 to the Geneva Conventions of 12 August 1949 are also applicable in all situations pertaining to Sri Lanka:

> "1. Persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause,

shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) Taking of hostages;

(c) Outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognised as indispensable by civilised peoples."

B. The relevance of the situation of armed conflict

66. International human rights standards as set out above are very clear: torture, disappearances and extrajudicial executions can never be justified under any circumstances, not even in time of war. Regardless of who may be responsible for the initiation of a war, and faced with the reality that war or armed conflicts short of war continue to inflict their pain on humanity, international human rights law requires that its norms continue to be respected.

67. The Special Rapporteur is aware that the LTTE controls several parts of the country in the north and north-east. Under these circumstances, and notwithstanding the continuing validity of human rights standards throughout the duration of the conflict, it is acknowledged that the conflict is of such a nature as to have reached the threshold of applicability of Article 3 common to the four Geneva Conventions of 1949. In addition to these standards, and though Sri Lanka is not a party to the Additional Protocol II, there are

standards in this protocol which are essentially the same as those expressed in the instruments of international human rights law (to which the Protocol explicitly refers in its preamble), namely: protection of the right to life, protection from torture and mutilation, protection against arbitrary punishments, protection against outrages upon personal dignity, protection against pillage, protection against threats of any of the aforementioned, respect for the rights of those in detention against whom penal prosecutions have been initiated, protection of the wounded and of medical personnel and protection of the civilian population in general, including protection of objects indispensable for their survival and cultural objects and places of worship. Indeed, it should be observed that many of those most fundamental protections may be said to be part of the customary law of human rights. It must be stressed that in the case of armed conflict, the response of the Government must always be relevant and proportionate, such that the standards of human rights may be respected for every individual in every case; the existence of an armed conflict does not permit a carte blanche response. Any violations on the part of the insurgents (LTTE), which the Special Rapporteur acknowledges are most likely to have occurred and to continue to occur, cannot be used as an excuse for violations by the Government.

68. The notion of "special" or "exceptional" circumstances is known to international law as such circumstances as may require the application of special standards or permit derogation from the application of normal standards. Such a notion is specifically foreseen by and accommodated in international standards. When addressing Governments and armed opposition groups in the context of armed conflict, the Special Rapporteur is guided in particular by the protection of the individual enshrined in common Article 3 which forbids Governments and armed opposition groups alike to torture, to deliberately kill civilians taking no part in hostilities, to harm those who are wounded, captured or seeking to surrender, or to take hostages.

C. The national legislation

1. Legal framework

69. The Constitution of Sri Lanka of 1978, in its chapters III and IV, guarantees to the people of that country a number of fundamental rights, such as the right to equality, freedom of movement and of choosing their place of residence in Sri Lanka and to leave and return to Sri Lanka, and the right not

to be subjected to torture or to arbitrary arrest and detention. With regard to derogations, Article 15(7) of the Constitution establishes that the exercise and operation of the right to equality and non-discrimination and the freedoms of expression, association, movement and peaceful assembly, "(s)hall be prescribed by law in the interest of national security, public order and the protection of public health or morality."

70. The death penalty is permitted under Sri Lankan law and remains a legal punishment; nevertheless, no death sentence has been carried out since 23 June 1976. Since then courts had to pass sentences of death for offences where this is mandatory, but the sentence has always been commuted by the President in the exercise of his power to do so. Government officials confirmed to the Special Rapporteur while he was in Colombo that there was no intention to implement the death penalty under any circumstances. He was also told that the right to life will be reflected in the new Constitution of Sri Lanka, a draft of which was given to him.

71. The introduction in law of procedures and safeguards is not, however, in itself sufficient to protect human rights. The Special Rapporteur will focus mainly on certain aspects of the regulations related specifically to his mandate, examining laws and procedures which might facilitate the commission of violations of the right to life, and making recommendations for legal and procedural safeguards to protect against them.

72. Of particular concern are the emergency regulations governing arrest and detention procedures and those governing post-mortems and inquests when deaths have occurred in custody or as a result of the official action of the security forces. The regulations still provide for indefinite preventive detention on renewable, three-monthly detention orders. Sri Lanka has been under an almost continuous state of emergency since May 1983. During a declared state of emergency, which has to be renewed monthly by Parliament, the Emergency (Miscellaneous Provisions and Powers) Regulations (ERs) are in force. These regulations are issued under the Public Security Ordinance and are altered from time to time. Official emergency measures override the safeguards contained in the normal law and have granted sweeping powers to the security forces. In addition, there have been repeated allegations of intimidation of lawyers, relatives and others attempting to take remedial action through the courts.

73. The emergency regulations governing post-mortems and inquests have not been altered significantly. The thorough investigation of all relevant deaths is an important means of preventing extrajudicial executions by security forces personnel. The procedures provided under the regulations still fail to provide an adequate investigative procedure and could lead to impunity for those committing extrajudicial executions.

2. Prevention of Terrorism Act

74. In 1979, Sri Lankan Parliament adopted the Prevention of Terrorism Act (PTA) in response to growing political violence in the country, especially in the "Tamil areas." Although the PTA was seen as an effort to contain what by then amounted to civil war, its unusually broad provisions are said to have increased tensions instead. Indeed, the Prevention of Terrorism Act contains a number of disturbing provisions from the human rights perspective. Section 6 of the Act provides that:

> "any police officer not below the rank of Superintendent or any other police officer not below the rank of sub-Inspector authorised in writing by him ... may, without warrant, ... notwithstanding anything in any other law to the contrary
>
> (a) arrest any person;
>
> (b) enter and search any premises;
>
> (c) stop and search any individual or any vehicle, vessel, train or aircraft; and
>
> (d) seize any document or thing connected with or concerned in any unlawful activity."

The Act also provides that a person may be detained for periods of up to 18 months (renewable by order every 3 months), if "the Minister has reason to believe or suspect that any person is connected with or concerned in any unlawful activity" (section 9). The same section provides that such a person may be detained "in such place and subject to such conditions as may be determined by the Minister." This may lead to having persons detained without access to attorneys or to relatives for prolonged periods.

75. The Act does not expressly exclude coerced confession as evidence but rather provides that confessions made by a person orally or in writing, at any time, can be admissible as evidence unless made to a police officer below the rank of Assistant Superintendent (section 16). Thus, confessions made to police under torture or threats may be admitted. It provides that a statement recorded by a magistrate or made at an identification parade shall be admissible in evidence even if the person is dead or cannot be found and thus cannot be cross-examined (section 18(1)(a)). Any document found in the custody of a person accused of an offence under the Act may be produced in court as evidence of the facts stated therein (section 18(1)(b)).

3. Emergency Regulations Act

76. Emergency rule prevailed throughout most of 1994, except just before the parliamentary general elections. The Special Rapporteur understands that there were, however, important changes, both in the geographical areas in which the emergency was in force during different periods, as well as in the content of the regulations. During his visit to Sri Lanka, many persons, including human rights advocates and law enforcement agents, did not agree on what regulations were in force and where. In this section, the Special Rapporteur has relied on information and documents provided to him by the Nadesan Centre, a Sri Lankan non-governmental organisations which keeps track of all the changes and informs the public.

Emergency regulations relating to inquests into the death of persons due to actions of police officers or members of the armed forces

77. Inquests into deaths under the normal law are dealt with by the Code of Criminal Procedure Act No. 15 of 1979 which contains very salutary provisions relating to inquests into deaths, with inquirers and magistrates being given wide powers to ascertain the cause of death, e.g., summoning witnesses, post-mortem examinations, etc. However, the emergency regulations permit derogation from these provisions; the relevant provisions are to be found in regulations 43 through 47 of the Emergency (Miscellaneous Provisions and Powers) Regulations No. 4 of 1994 published in the Official Gazette 843/12 of 4 November 1994.

78. Regulation 43 makes provision for deviation from the normal law in instances where a police officer (rank not stipulated) or a member of the

armed services (rank not stipulated) has reason to believe that the death may have been as a result or in the course of armed confrontation between the police, armed services or any member of any supplementary forces (established under law) and forces engaged in waging war against the Government of Sri Lanka. In such a situation the Superintendent of Police or the commanding officer of the armed forces unit (as the case may be) "shall, notwithstanding anything to the contrary in chapter XXX and section 9 of the Code of Criminal Procedure Act .... or the provisions of any other written law, report the facts relating to the death to the Inspector-General of Police or to the nearest Deputy Inspector-General of Police".

79. The salient features of this provision are as follows:

(a) The purpose of an inquest is to determine the manner and circumstances of death and a proper means of doing this is provided by the normal law. The bypassing of the normal law by the emergency regulations is, however, made dependent on significant questions of fact, including (i) that the death took place in the course of an "armed confrontation" and (ii) that the victim was engaged in waging war against the Government. How are these questions to be determined except by a proper judicial inquest?

(b) The words "where a police officer or a member of the armed services has reason to believe ...." are the key. What triggers off the whole process of avoiding an inquest is the claim, by any police officer or any member of the armed services, that there was an armed confrontation and that the victim was waging war, etc..

(c) It is sufficient for the police or security officer to make the claim of armed confrontation for an inquest to be avoided.

80. This emergency provision remains wholly inadequate for the full and impartial investigation of a death caused by security forces and could be used to cover acts of extrajudicial execution committed by the security forces.

81. According to regulation 44 (report of an incident), once the IGP or the DIG receives information as provided for by regulation 43, he has to direct

an officer not below the rank of Assistant Superintendent of Police to proceed to the scene of the incident and record his observations and the statements of persons who appear to be acquainted with the circumstances relating to such death. If the body is found, the death must forthwith be reported to the Magistrate.

82. What is contemplated here is that the death should be investigated by a responsible police officer and reported to the Magistrate in instances where the body is found. These are commendable provisions, but what needs to be looked into is the extent to which they are in fact complied with.

83. Under regulation 45 (post-mortem and burial or cremation), the Magistrate shall, upon the receipt of the facts from the IGP or the DIG, direct the Government Medical Officer to hold a post-mortem, and will also make an order that at the conclusion of the post-mortem the body shall be handed over to the DIG for disposal. The DIG in turn can hand over the body to any relation who claims it, subject to conditions or restrictions imposed in consideration of national security or public order, or otherwise authorise the burial or cremation of the body in accordance with steps he may deem necessary in the circumstances. It would appear that although the Magistrate has to be informed forthwith in instances where the body is found (regulation 44), there is no provision which enables him to order a post-mortem on his own; he has to await the receipt of facts from the IGP or DIG.

84. This procedure can be invoked by the police on the basis of a statement by any security forces officer that a death resulted from armed confrontation. Once the IGP decides to apply for a high Court inquiry under the emergency procedures, no other inquiry into the cause of death can be held according to the procedures provided under the normal law. The proper investigation of deaths caused by the security forces can thus be prevented, and this procedure could be used to allow impunity.

85. According to regulation 46, the High Court in Colombo is vested with exclusive jurisdiction to inquire into the death of any person caused or purported to have been caused in circumstances specified in regulation 43. Upon application by the IGP, the High Court shall hold an inquiry into the cause of death of the person named as deceased in such application, and if there are any proceedings pending in any Magistrate's Court in respect of the same death, such proceedings shall be transferred to the High Court. The

High Court may hold such inquiry or part of such inquiry in any part of Sri Lanka, having regard to the interest of national security and public order. The Government Medical Officer who conducted the post-mortem has to forward his report to the High Court and he shall not disclose anything contained therein to any person unless authorised to do so by the High Court. The IGP has to forward to the High Court the report of the preliminary observations and other documents necessary for conducting the inquiry, and the judge of the High Court shall record such evidence as may be placed before him by the IGP on his representative. At the conclusion of the inquiry the judge of the High Court has to transmit the record of evidence and a report of the circumstances under which the death was caused, together with any other documents, to the Attorney-General.

86. There are many unsatisfactory features in this provision:

(a) The inquiry into the death takes place only upon the application of the IGP and there are no criteria to guide him in the exercise of his function. Indeed it would be difficult to expect impartiality from him where his own officers would be involved. This may put him in an unacceptable and difficult situation;

(b) The post-mortem report should not be kept secret when death occurs in circumstances specified in regulation 43. Relatives or their representative should have access to it;

(c) It might be necessary to have more courts than just the High court in Colombo [to] inquire into such deaths;

(d) It is unsatisfactory that the recording of evidence by the Judge should be confined to "evidence as may be placed before him by the IGP or his representative." The judge should also be permitted to receive evidence as he deems fit. This was reportedly the case in an earlier version of the regulations which empowered the Court to hear "the evidence of any other person who appears to be acquainted with the circumstances relating to the death under inquiry," but this was deleted in 1989;

(e) There should be provision for relatives or any other person representing the dead person to intervene in the proceedings. The findings of the High Court should also be made available to them.

87. Under regulation 47, if the Attorney-General is satisfied, upon the receipt of evidence and other documents transmitted to him by the High Court, that the commission of an offence has been disclosed, he may institute appropriate legal proceedings against the perpetrators.

88. When the Special Rapporteur met with the Attorney-General he was given the following statistics relating to the arrests and detention of persons from the north and east of Sri Lanka under the Prevention of Terrorism Act and the emergency regulations:

(a) Year 1996:

(i) From the Eastern Province - 321; from the Northern Province - 378;

(ii) Number of concluded matters - 679; the remaining matters would be concluded once the necessary documents are available,

(b) (i) From the Eastern Province - 127; from the Southern Province - 221;

(ii) Number of concluded matters - 238; the remaining matters would be concluded expeditiously. In most of the unattended cases the delay could be attributed to the non-availability of some of the documentary evidence such as the government analyst's report, the ballistics expert's report etc. Once the reports are made available by the relevant authorities these matters would be finalised speedily.

89. Both the ERs and PTA give the security forces wide powers to arrest suspected opponents of the Government and detain them incommunicado and without charge or trial for long periods. The ERs allow for detainees to be

held in preventive detention on the order of the Secretary, Ministry of Defence, for one year without being brought before a court. After that, indefinite extensions are possible, although only on the order of the Magistrate. The Magistrate, however, has limited powers to exercise discretion, and must apparently reach a decision solely on the basis of a report from the Secretary, Ministry of Defence. People suspected of actually having committed an offence under the ERs can be detained for up to 60 days if their arrest takes place in the north or east and relates to offences committed in that area. In Colombo and surrounding areas, this period is seven days. The PTA allows for detention on an order by the Minister of Defence for three months. This period can be extended up to a maximum of 18 months. In addition, there are no laws governing conditions in places of detention other than prisons such as army compounds and police stations.

90. The Special Rapporteur wishes to note that preventive detention could be a source of torture, cruel, inhuman and degrading treatment, disappearances and extrajudicial executions. Lengthy preventive detention is not in conformity with international standards and safeguards on human rights; it denies the rights to due process, presumption of innocence, fair trial and personal freedom.

IV. ACTION BY THE GOVERNMENT OF SRI LANKA REGARDING CASES OF EXTRAJUDICIAL, SUMMARY OR ARBITRARY EXECUTIONS

A. Investigation of cases of human rights violations

91. When he met with the Attorney-General, the special Rapporteur requested information about any follow-up action taken with regard to certain cases and was told that the Government had taken action to investigate several incidents of human rights violations that occurred in the country. In this regard, the Special Rapporteur was provided with information about the following well-known cases.

92. Embilipitiya case. Between 1 August 1989 and 30 January 1990, 25 school children from Embilipitiya Central College and nearby schools were abducted from their homes and places of residence. They disappeared thereafter. The Criminal Investigation Department (CID) was called in to investigate the matter in 1992. It was revealed during the investigations that

the abductors were army personnel from the Sevena camp at Embilipitiya. The CID forwarded their notes of investigation to the Attorney-General who indicted nine suspects in the High Court of Ratnapura. The first accused is the Principal of Embilipitiya Central College, the second to sixth accused are army officers, one of them a Brigadier; the seventh to ninth accused are ordinary soldiers. The second accused is the son of the first accused. The indictment contains 83 charges in relation to the abducted students. The trial commenced on 22 January 1996 and is still continuing. The Special Rapporteur was told that this case was due to be concluded during the course of 1997.

93. Kumarapuram and Mailantenna incidents. These cases relate to the killing of 24 villagers and 35 villagers in February 1996 and August 1992, respectively, in Trincomalee and Batticaloa districts. In relation to both incidents, investigations commenced promptly and several army personnel were arrested. In the Kumarapuram incident an identification parade was held at which seven army personnel were identified by witnesses. Proceedings were pending in the Magistrate's Court of Trincomalee, but the Magistrate refused to entertain the proceedings for reasons of territorial jurisdiction. On the advice of the Attorney-General, proceedings were transferred to the Magistrate's Court of Mutur where 101 charges have been filed against 7 suspects, who remain in custody. In relation to the Mailantenna incident, 21 army personnel have been committed for trial. The case has been transferred to the High Court of Colombo, which was due to hear the case on 17 September 1997. The suspects remained in custody.

94. Alawwa, Bolgoda and Diyawanna-Oya incidents. Investigations have been conducted by the CID following the discovery of 21 partly decomposed bodies in Alawwa (5 bodies), Bolgoda (11 bodies) and Diyawanna-Oya (5 bodies) during the period 31 May 1995 to 14 August 1995. The investigations have not as yet produced any evidence relating to the murder of the 21 persons or the disposal of their bodies. According to the initial findings of judicial medical officers, the cause of death was either strangulation by ligature or drowning. By the external appearances of the bodies, the investigators have concluded that they were persons of Tamil ethnicity. Hence, they have started to collect information relating to disappearances (if any) of Tamil persons during the relevant period. Information has been collected relating to the disappearances of 15 persons.

95. Thereafter, the investigations has taken two directions. Investigators have collected material relating to the disappearances of these 15 persons. In certain cases, evidence of abduction has been collected. There is no evidence indicating that any of the 15 persons are still alive. Investigators have also attempted to ascertain whether any of the 15 persons were amongst the 21 bodies found. Photographs of the bodies and personal effects found with the bodies have been shown to relatives and friends of the 15 persons, but no identifications have been made.

96. As the next step, the 21 skulls were sent for forensic analysis to the University of Glasgow in the United kingdom, together with photographs of 14 of the missing persons mentioned earlier, to conduct facial reconstruction and video superimposition of these skulls using, amongst other things, the photographs. The analysis was not able to identify the skulls with certainty, mainly due to the inability to undertake DNA analysis. It is being considered whether further material could be obtained in order to undertake such an analysis.

97. Based on the investigation's findings, 22 suspects have been arrested by the CID. All but one were police officers who, at the time of arrest, had been attached to the Special Task Force headquarters in Colombo.

98. Rape and murder of Krishanthi Kumaraswamy and three others in Jaffna. This incident took place on 7 September 1996 at a security checkpoint manned by a group of military personnel. Prompt action was taken by the police upon receiving the complaint and at the conclusion of the investigations 11 suspects, consisting of 8 army soldiers and 3 police, were arrested, produced before the Magistrate and placed in remand custody. It was decided by the Attorney-General to grant a pardon to two suspects who were not directly involved, on condition that they testify against the others.

99. On the basis of the available evidence, the remaining suspects were charged in the Magistrate's Court of Jaffna under section 357 of the Penal Code for the abduction of Krishanthi Kumaraswamy, and under section 296 for committing the murder of Krishanthi and three other persons. The case was transferred from Jaffna to Colombo upon the Attorney-General's application. However, giving due consideration to the nature and the circumstances of the offences involved, especially being mindful of the fact that the offences were committed by military personnel against civilians

resident in the northern region of the country, a decision was taken by the Attorney-General to forward a direct indictment against the accused to the High Court of Sri Lanka and to have the matter placed for hearing before a trial-at-bar. This course of action will ensure an expeditious consideration of the matter by three judges of the High Court of Sri Lanka. Further, a trial-at-bar will also prevent the matter being heard by a jury, which could aggravate communal tensions. It would be noteworthy to mention that this is an extraordinary step, taken in order to expeditiously mete out justice, and is only the fourth such instance in Sri Lankan legal history.

100. The indictment is against the following eight army soldiers and one policeman: R.D.S. Rajapakse (corporal), J.M. Jayasinghe (soldier), G.P. Priyadharshana (reserve police constable), A.S. Priyashantha Perera (soldier). W.S. Wijayananda Alwis (soldier), D.D. Muthu Banda (soldier), D.M. Jayatilleke (corporal), D.V. Indrajith Kumara (corporal), A.P. Nishantha (soldier).

B. Human Rights Commission

101. The Human Rights Commission of Sri Lanka (HRCSL) was established by Act No. 21 of 1996 and is vested with monitoring, investigative and advisory powers in relation to human rights. It has been set up as a permanent national institution to investigate any infringement of a fundamental right declared and recognised by the Constitution and to grant appropriate relief. The powers of the Commission are said to be wider than those of the Supreme Court and will complement the existing national framework for the protection of human rights. There are no time-limits for filing a complaint before the HRCSL, unlike under the 1978 Constitution.

102. The Commission is made up of five members: three Sinhalese, one Tamil and one Muslim, who were appointed in March 1997. The Commission is headed by retired Supreme Court Judge O.S.M. Seneviratne. The other members of the Commission are:

Dr. A.T. Ariyaratne	- Head of Sarvodaya (a humanitarian NGO)
Prof. Arjun Aluvihare	- Former Chairman, University Grants Commission
Mr. T. Suntharalingam	- Retired High Court Judge

Mr. Ahmed Javid Yusuf - Former Sri Lankan Ambassador to Saudi Arabia

The appointments were made by the President on the recommendations of the Prime Minister, in consultation with the Speaker and the Leader of the Opposition in Parliament. It should be noted that the opinions of Tamil and Muslim political parties were also sought.

103. The Special Rapporteur was told when meeting the members of the Commission that they were still in the process of recruiting staff to perform legal and investigative functions. Members of the Commission mentioned their difficulties in finding suitable candidates, particularly lawyers. They attributed this difficulty to the fact that they were not proposing adequate salaries. At the time of his visit, there were 7 investigative staff members in Colombo and 33 based throughout the country in Ampare, Kalmunai, Batticaloa, Trincomalee, Vavuniya, Malake and Anuradhapura. With regard to Jaffna, the Commission faced some difficulties in opening its office, due to difficulties in recruiting staff. All the employees of the Commission benefit from immunity from prosecution in the course of their functions.

104. Section 4 of the Act provides that the Commission may on its own motion, or on a complaint made to it by an aggrieved person or group of persons, or by a person acting on behalf of an aggrieved person, investigate an allegation of the infringement, or imminent infringement, of a fundamental right of such a person, and where appropriate provide for resolution through mediation or conciliation (section 15(2)).

105. According to section 15(3) of the Act, where an investigation conducted by the Commission discloses the infringement of a fundamental right, the Commission may recommend to the appropriate authorities that prosecution or other proceedings be instituted against the person or persons infringing such fundamental right. Alternatively, it may refer the matter to any court having jurisdiction to hear and determine such matters. The Commission may also make such recommendations as it may think fit, to the appropriate authority or person or persons concerned, with a view to preventing or remedying such infringement or the continuation of such infringement. The Commission also has the power to order costs where necessary.

106. The HRCSL is also vested with the power to monitor the welfare of detained persons by regular inspection of their places of detention. In order to facilitate this function, all arrests and detentions under the Emergency Regulations, and the Prevention of Terrorism Act must be reported to the Commission within 48 hours of arrest. Wilful failure to report an arrest or detention will attract penal sanctions under the HRCSL Act. Members of the Commission have free access at all times to all prisons of the country, but the Special Rapporteur does not know whether visits could be undertaken without notice.

107. The Act also envisages that the Commission may establish subcommittees at provincial level to exercise certain powers which are delegated by the Commission. This would help create greater awareness of the availability of redress by the Commission and provide easier access to the Commission.

108. Section 29(1) of the founding legislation stipulates that the State will provide the Commission with adequate funds. It would have been preferable if the word Parliament had been used rather than State, so as to better serve to ensure the independence of the Commission. In contrast, the salaries of the Commission members are determined by the Parliament, as provided for in section 8 of the Act.

109. Section 31(1) of the Act raises another concern regarding the autonomy of the Commission. The section permits the Minister to make regulations "...in respect of any matter which is required by this Act to be prescribed..." Thus, the authority to create regulations which will affect the Commission rests with one person. Such a provision, when worded in such broad terms, reduces the independence and autonomy of the members. Subsection 2 further permits the Minister to "... make regulations prescribing the procedure to be followed in the conduct of investigations under this Act." One of the most important functions of a national institution relates to its power to initiate investigations upon receipt of a complaint from an individual, but again the Minister has the authority to prescribe the procedure regarding investigations. Subsection 3 provides that any regulations which the Minister makes come into force on the date that they are published in the official Gazette, unless a later date is specified. It is only afterwards that the regulation is brought before Parliament for discussion. Moreover, subsection 4 is unclear as to when the regulation should be brought before Parliament, stating only that it

should be "... as soon as convenient after its publication in the Gazette..." The regulation will be rescinded should Parliament withhold its approval. Thus, a regulation which may not succeed in obtaining the approval of the Parliament will remain in force until such time as it is convenient to bring it before the Parliament.

110. The HRCSL has received complaints of human rights violations. It has also had a number of visits from Colombo-based diplomatic missions. The HRCSL subsumed the duties and functions of the Human Rights Task Force (HRTF) on 30 June 1997. At the date of the visit of the Special Rapporteur, no cases of extrajudicial executions had been reported to the Commission.

C. Commissions of Inquiry into Involuntary Removal and Disappearances

111. While in Colombo, the Special Rapporteur met with the President and other members of the Commissions of Inquiry into Involuntary Removal and Disappearances. He was briefed about the activities of the Commissions as follows.

112. Three commissions were appointed by the Sri Lankan Government in January 1995 to inquire into and report on involuntary removals and disappearances from 1 January 1988. This mandate expired on 31 May 1997. Each commission had jurisdiction over a geographical area, namely, the north-east, central and south-west zones. Each commission was responsible for examining the evidence available to establish the allegations, the present whereabouts of the persons concerned, the identity of the persons responsible, the legal action which could be taken and the relief, if any, which could be afforded. It was subsequently ruled that cases of abduction or involuntary removals followed by death also fell within the ambit of these commissions.

113. The commissions submitted interim reports to the President containing the names of the persons responsible for the disappearances, where such evidence was available. The Presidential Secretariat reported that the findings of the reports were forwarded to the IGP for further investigation by a special team, where such investigation was necessary for further legal action. The IGP has also been directed to take action, where appropriate, against offending police officers.

114. On 3 September 1997, the commissions presented their final reports to the President. It was intended that both the interim and final reports would be published and action would be taken on their recommendations, including by initiating prosecutions in those cases where the commissions had found prima facie evidence. However, the final reports have not yet been published and the Special Rapporteur is not aware of any follow-up undertaken by the Government to the findings and recommendations of the commissions. This is particularly important since the commissions can only identify the persons responsible but cannot initiate the necessary legal process required to bring offenders before the courts.

D. Drafting of a new constitution

115. When he met with the authorities in Sri Lanka, the Special Rapporteur was told that the Government was engaged in a process of constitutional reform. The text of 18 chapters of the draft new Constitution of the Republic of Sri Lanka was given to the Special Rapporteur.

116. The fundamental rights under the draft constitution are wider in scope than those in the present Constitution, thus bringing the new Constitution into line with the International Covenants on Human Rights. The Fundamental Rights chapter of the draft constitution introduces a number of new rights not contained in the old chapter, the most important of which are the right to life (Article 8); the right of an arrested person to communicate with a relative or friend [Article 10(4)]; the right to retain legal counsel [Article 10(5)]; the right to be told the reasons for arrest and a 24-hour limit of custody prior to production before a judicial officer [Article 10(6)]; the right to reasonable bail [Article 10(7)(a)], the right to be charged or released without unreasonable delay [Article 10(8)].

117. Government representatives told the Special Rapporteur that the text of the draft new constitution will be submitted to Parliament. In order to be adopted, it will require a two-thirds majority in Parliament and also the approval of the people in a referendum.

118. The Special Rapporteur encourages any steps taken by the Government to bring its national legislation into conformity with international standards, especially human rights standards. In this regard, he hopes that restrictions to the fundamental rights through the application of the ERA and PTA will be

lifted. While the fundamental right to life is reflected in the draft constitution, the Special Rapporteur notes that the death penalty is not prohibited. Although the death penalty is not yet prohibited under international law, the Special Rapporteur believes that its abolition is most desirable in order to enhance respect for the right to life.

V. IMPUNITY

119. Effective impunity encourages political violence and is a serious destabilising element in all contexts of the Sri Lankan socio-political system. Respect for the rule of law is essential to maintain order and stability and to protect human rights in any country. Impunity perpetuates the mass violation of human rights. There have been periodical extrajudicial executions, but few perpetrators have been brought to justice. Furthermore, impunity is an obstacle to democratic development and peace negotiations, and makes reconciliation difficult. This culture of impunity has led to arbitrary killings and has contributed to the uncontrollable spiralling of violence.

120. The systematic absence of investigation, either civil or military, into violations of the right to life facilitates impunity. Investigations are rarely conducted, and when they are, they do not lead to the appropriate convictions or penalties.

121. During the Special Rapporteur's visit to Sri Lanka, most of the human rights advocates with whom he met as well as relatives of victims of human rights violations stated that in Sri Lanka, soldiers and policemen who commit fundamental human rights violations such as killings, torture and acts of disappearances are rarely punished. Neither are they fully held accountable for their acts.

122. Several relatives of disappeared people and human rights organisations from all areas of Sri Lanka have expressed concern that many members of the security forces and others allegedly responsible for grave human rights violations in the recent past continue to hold official posts in the same areas where the violations took place and may try to interfere with the investigations. This was a particular concern in relation to the hearings held by the commissions of inquiry in the areas allocated to them, most notably in the north-east, where concern pertains not only to members of the police but also the army, the home guards and various armed militant groups.

123. The Attorney-General and the Government, throughout its correspondence with the Special Rapporteur with regard to cases of executions in recent years, expressed their willingness and intention to bring to justice members of the security forces believed to be responsible for human rights violations. Unfortunately, the Special Rapporteur notes that little progress has been reported in those cases submitted by him since the creation of the mandate. The Attorney-General said that every effort was being made to expedite those cases, but that the Government had no control over court proceedings and the steps taken by the defence in such cases to protect the interest of the accused. However, while recognising that the Government cannot intervene once a trial has started, the Special Rapporteur wishes to point out that the Attorney-General himself has recognised that there are delays in actually bringing members of the security forces suspected of involvement in human rights violations to trial.

124. With regard to all the following cases, the Special Rapporteur wishes to stress the importance of carrying out exhaustive and impartial investigations into all allegations of human rights violations, with a view to clarifying the facts, identifying those responsible and bringing them to justice, and granting adequate compensation to the victims or their families. As experience gained in other countries has shown, establishing the truth about the past is essential for preventing renewed human rights violations in the future. The following cases illustrate this point.

125. The case of Richard de Zoysa. Richard de Zoysa, a well known journalist and actor, was at the time of his abduction and murder in charge of the Colombo office of the International Press Service. De Zoysa lived with his mother, Dr. Saravanamuttu. On the night of 17/18 February 1990, an armed group entered their home, removed Mr. de Zoysa and drove away without explanation. Dr. Saravanamuttu immediately went to the Welikada police station and lodged a complaint. The next day, 19 February 1990, de Zoysa's dead body was found in the sea at Moratuwa, some 12 miles south of Colombo. He had been shot in the head and the throat, and his jaw was fractured. At the inquest the following day, Dr. Saravanamuttu said that she could identify two of the abductors..Three months later, she recognised a man on television as the man who had taken her son. He was a high-ranking police officer. She informed her solicitor who brought it to the notice of both the Magistrate conducting the inquiry into the incident and the police. However, the suspect was not arrested nor was an identity parade held, nor

has Dr. Saravanamuttu's identification been heard by a judicial officer. Both Dr. Saravanamuttu and her lawyer, Batty Weerakoon, have received death threats. Police officers assigned to guard Batty Weerakoon have also received such threats.

126. There are a number of reasons why the investigation into this case is unsatisfactory, and need to be investigated themselves. In principle, it is unsatisfactory that the police investigate matters in which their own members are suspected of being involved. This has been recognised as far back as 1970, when a Commission headed by a former Chief Justice recommended independent machinery to look into such complaints. In addition, there are special reasons for unease regarding the conduct of the police and the way the investigations were carried out. They include the following:

(a) It was possible, in the middle of Colombo, in a residential housing estate, close to the police station, to abduct a well-known personality, in what could be describe as a military-style operation. The perpetrators must have felt that they could do this unimpeded, especially as they had alerted a person known to de Zoysa that they were on their way (see below);

(b) A person who knew the victim was forced at gunpoint to disclose de Zoysa's address. He immediately telephoned a friend, who in turn notified a Senior Superintendent of Police of the risk to Richard de Zoysa. This officer in turn rang Welikada police station which is situated very close to de Zoysa's house. Had this telephone call been made and acted on promptly, the Welikada police should have been able to prevent the abduction or apprehend the abductors. (Note that Richard de Zoysa's own house had no telephone so his friends were unable to warn him themselves);

(c) When the police did arrive at the scene, after the abduction, they did not take the usual investigatory steps such as testing the premises for fingerprints;

(d) Despite the fact that Dr. Saravanamuttu claimed she could identify two of the abductors, she was never asked by the police to give a description of them;

(e) A possible motive for the killing was revealed by the State-owned news agency, Lanka Puwath, which stated that police has informed the agency that investigations revealed that de Zoysa was an activist for the Sinhalese Nationalist Party, the Janatha Vimukthi Peramuna (JVP), and that he had been sending false messages regarding human rights violations overseas. In a written statement read out to Parliament the head of Lanka Puwath said, "I obtained this news item from a reliable police source whom I have found totally responsible and accurate in my past experience." Moreover, the State Minister for Defence has earlier read a statement to Parliament concerning people who were sending "false information" about human rights violations abroad, to influence donors and prevent aid flows to Sri Lanka. A subsequent news item in a State-controlled newspaper stated that intelligence sources had submitted to the Defence Ministry a list of "80 names of influential people" who had supported the subversives;

(f) Once Dr. Saravanmuttu made the identification of the man who had abducted her son, it was a clear duty of the police to question neighbours and other witnesses as to whether they had seen a person so described on the night of the abduction;

(g) There was a distinct lack of interest on the part of the police to investigate the death threats received by Dr. Saravanmuttu and her lawyer. In the latter's case, the language of the threat, with its reference to foreign aid, clearly reflects the sentiments described in paragraph (e) above. Indeed, several complainants, witnesses and lawyers have been subjected to death threats, harassment, or allegedly killed;

(h) There was apparent collusion between the police and the lawyers for the suspect, to such an extent that the Magistrate felt compelled to comment, "(at this stage I inquire from (prosecutor) Gamini Perera as to whether Mr. Godfrey Gunasekera, who appears with him, is in this court on behalf of the prosecution or to conduct the defence. I have seen him on several occasions secretively whispering certain things to counsel for the suspect." Mr. Gunasekera is a Senior Superintendent of Police who appeared in court that day for the

first time, the day the police had been ordered to produce the suspected police officer.

127. This case is an example of the large majority of investigations into human rights violations which in Sri Lanka are not carried out by an authority which is fully independent of those suspected to be responsible for the human rights violations.

128. The Special Rapporteur urges that reports of threats of intimidation of complainants, witnesses, lawyers or other involved in the bringing of those responsible for human rights violations to justice be fully investigated, and legal action taken against those responsible. The Special Rapporteur further urges that adequate protection be provided to anybody threatened in the course of an investigation into human rights violations. He notes that the police officers assigned to protect Batty Weerakoon also received death threats, and it is unlikely that their names and assignments would be known outside police circles.

129. Case of Mr. Sarath Karaliadda. In a report to the Commission on Human Rights (E/CN.4/1990/22, para. 389), the Special Rapporteur described the case of Mr. Karaliadda, a lawyer who was found dead on 27 October 1989 together with four other persons, a few hundred metres away from his home in Teldeniya in Kandy district. He was reportedly abducted on 26 October 1989 by three armed men, including one in army uniform. According to the information received, Mr. Karliadda had been representing, in a magisterial inquiry, the relatives of a 16-year-old student, Jayantha Bandara, who had been shot by police during demonstration at Teldeniya in June 1989. It was reported that seven police officers of Teldeniya police station were questioned in the inquiry and that two of the witnesses had been killed since the start of the inquiry. In its reply to the Special Rapporteur (E/CN.4/1991/36, para. 475 (c), the Government of Sri Lanka stated that an investigation revealed that on 26 October 1989, eight armed persons dressed in civilian clothes entered Mr. Karaliadda's house in Teldeniya police area. These persons had ransacked the house and removed jewellery and cash. They led Mr. Karaliadda away from the house, and his dead body was subsequently found about quarter of a mile away. A magisterial inquest was held by the Teldeniya magistrate and was to be resumed after further investigations.

130. The Special Rapporteur did not receive any further information regarding this case. It appears that the authorities did not resume the inquiry into the death of Mr. Bandara or hold any further investigations regarding the killing of the lawyer and the witnesses.

131. On 17 May 1985, 23 young men from Naipattimunai, Amparai district, were allegedly arrested by Special Task Force (STF) personnel from Kallady camp and made to dig their own grave. Subsequently, they were allegedly shot. Mr. Paul Nallanayagam, President of the Kalmunai Citizens' Committee, was arrested and charged with spreading rumours and false statements after speaking to foreign journalists about the incident. During his trial before the Colombo High Court in mid-1986, a lot of evidence emerged about the disappearances of the 23 young men but no further action against those responsible has been taken since. Paul Nallanayagam was acquitted of all charges on 17 July 1986. It was reported that the Government of Sri Lanka did not take any action and that the official position remains that none of the disappeared had been arrested. Although a lot of evidence was available at the time about the arrests and subsequent disappearances by the STF, the police did not make any further attempts to investigate the incident.

132. The Special Rapporteur urges the Government to establish a full and impartial investigation into the disappearance and alleged killings of the 23 young men. He is concerned that no action has been taken by the Government to establish the fate or whereabouts of these men, nor who was responsible for their arrest and killing in custody. He hopes that the alleged perpetrators namely the STF officers, would be brought to justice and that compensation paid to the relatives.

133. Case of Mr. Wijedasa Liyanarachchi. On 2 September 1988, Mr. Liyanarachchi, a lawyer, died while in custody at Colombo hospital with multiple injuries resulting from torture. He had been arrested on 25 August 1988 as a suspected member of the JVP. The alleged perpetrators, three police officers from Tangalle police station, were convicted in March 1991 after the charges against them had been reduced to illegal detention and conspiracy to detain illegally. They were sentenced to suspended sentence and fined. A Deputy Inspector General of Police (DIG) was also suspected of involvement in the illegal arrest and detention of Mr. Liyanarachchi and in attempting to cover up his death due to torture, but has not been charged. The court recommended that investigations be reopened to establish who was

responsible for the murder of Wijedasa Liyanarachchi and particularly to investigate the role played by the DIG. The way in which the Government proceeded after the court recommended that investigations be reopened in this case is an indication of the lack of political will to prosecute members of the security forces implicated in human rights violations in this period in the south.

134. Shortly after the judgment, the first accused reportedly committed suicide. The DIG was appointed head of a special police team (Bureau of Special Operations), but subsequently took early retirement. In march 1992, at the request of the CID, the Maligakanda Magistrate's court ordered a fresh investigation into the case. It directed that the passport of the retired DIG be impounded to prevent him from leaving the country. He then went underground and issued a number of statements to the press in which he spoke of death squad activities in the south of the country, providing, for instance, a list of 830 persons whom he said had been killed between July and November 1989 in the Central Province. He later repeated these allegations in sworn statements. Instead of ensuring that such serious allegations were properly investigated, the authorities immediately filed a case in the High Court against the retired DIG and several newspapers that had published the statements, charging them with bringing the Government into disrepute and creating disharmony among different communities. Soon afterwards, the retired DIG left the country in circumstances which were not clear. In June 1993, however, he returned. The next day, he appeared in the High Court and was granted bail. The Attorney-General's Department was quoted as saying that they would consider withdrawing the charges against him if in turn he would withdraw the allegations he had made in the various sworn statements. On 8 July 1993, the retired DIG filed such a sworn statement, also implying that some of the earlier statements had not originated with him. The Attorney-General then withdrew all charges relating to the sworn statements. The investigations into his role in the abduction, torture and illegal detention of Wijedasa Liyanarachchi, as recommended by the High Court, remains to be implemented. On 29 July 1993, the retired DIG was appointed Vice-Chairman of the Sri Lanka Ports Authority, a senior position in the government service.

135. The Special Rapporteur believes that those thought to be responsible for extrajudicial executions must be held to account regardless of whether they are officials of a past or current Government, or whether they are members of the

security forces or of semi-official paramilitary groups. Those against whom there is sufficient evidence of their involvement in human rights violations should be tried and their trials should conclude with a clear verdict of guilt or innocence. All trials should be conducted in full conformity with internationally recognised norms for fair trial. The present situation does not encourage soldiers and policemen to respect human rights; on the contrary, disproportionate criminal sentencing emboldens policemen and soldiers to continue to violate basic human rights principles.

136. In a report to the Commission on Human Rights (E/CN.4/1993/46, paras. 539, 543), the Special Rapporteur reported that on 29 April 1992, 89 Tamil villagers, including 20 minors, were allegedly killed by a group composed of policemen and muslim home guards in the villages of Muthugal and Karapola, Polonnaruwa. These killings reportedly took place in reprisal for a massacre, which took place some hours earlier, of 54 Muslim villagers by members of the LTTE. Most of the victims were said to have been shot or hacked to death. Six persons were reportedly captured by home guards in the surrounding countryside, and one person was said to have been taken into police custody. Their bodies were found in an irrigation ditch on the following day. A special investigation into the case was reported to have been opened, but no disciplinary or judicial procedures were said to have been opened against those responsible, nor did the families of the victims receive any compensation.

137. Information received from the Government of Sri Lanka by the Special Rapporteur is contained in the same report to the Commission (para. 543). The Government stated that the attacks had been carried out by Muslim villagers from a nearby village, in retaliation for an attack by LTTE "terrorists" which had cost the lives of 56 people. This was part of the ethnic cleansing strategy used by the LTTE to drive Muslim and Sinhalese villagers out of the territory they claimed as their homeland. In the reprisal attack on Muthugal and Karapola, 74 Tamil villagers were killed and 44 others wounded. The Ministry of Defence of Sri Lanka appointed a committee to inquire into the two attacks, with a view to ascertaining who was responsible and establishing whether there was any lapse on the part of the security personnel, and to recommend measures to prevent the recurrence of incidents of this nature.

138. On 22 September 1993, the Special Rapporteur sent a follow-up letter to the Government of Sri Lanka in which he referred to a reply received from the authorities in 1992 concerning the killing of 130 villagers in Alanchipothana, Karapola and Muthugal in April 1992 (see E/CN.4/1993/46, paras. 539 and 543). The Government informed him that a committee chaired by a retired judge of the Supreme Court had been appointed to inquire into the killings. The Special Rapporteur requested to be kept informed about the progress of the investigations. He also asked the Government to provide him with detailed information about the working of the committee, in particular the legal basis for its inquiries, the procedures followed, its relations with other, judicial or administrative, investigations, etc..

139. On 30 and 31 December 1993, the Government provided the Special Rapporteur with information in reply to his letter of 22 September 1993 (see E/CN.4/1994/7, para. 555). The Government informed the Special Rapporteur that a three-person committee, appointed by the Ministry of Defence to investigate the incidents, had presented a confidential report containing conclusions and recommendations. The committee had found that the killings at Karapola and Muthugal were carried out by villagers and some home guards of Alanchipothana, in reprisal for the earlier killings by the LTTE at their village. Reportedly, the Karapola police post did not attempt to prevent the violence. The committee also stated that there had apparently been no control over the issue of arms and ammunition, particularly to home guards, and recommended inter alia, a disciplinary code of conduct for the home guards who should be placed under a defined authority such as the army or the police; the creation and training of a paramilitary force to supplement the home guards in the defence of border areas against the LTTE; investigations into all complaints and action, if necessary, against any member of the group.

140. In a letter dated 23 September 1994, the Special Rapporteur requested further details on the investigation carried out by the committee, particularly with regard to the date on which the report was submitted and the follow-up given to the recommendations. The Special Rapporteur also inquired follow-up given to the recommendations. The Special Rapporteur also inquired whether anyone had been brought to justice in connection with the killings at Alanchipothana, Karapola and Muthugal, and whether any judicial or disciplinary measures had been taken with regard to those based at the Karapola police post.

141. While welcoming the Government's prompt action to investigate this incident, the Special Rapporteur is concerned that the full report of the committee's findings has not been made public. The Special Rapporteur has not received any further information about the prosecution of police officers, home guards and villagers allegedly involved in the reprisal killings of the villagers of Muthugal and Karapola. The Special Rapporteur has also received reports about two further instances of reprisal killings, where police investigations were announced without any independent investigative body being appointed. The first took place at Mailanthanai in Batticaloa district on 8 August 1992. Twenty-four soldiers were accused on 83 charges relating to the murder of 39 Tamil men, women and children. The preliminary hearings in the case were concluded at Polonnaruwa Magistrate's Court in March 1994, having been transferred there from Batticaloa without any explanation in mid-1993. Of the 24 soldiers, 3 were discharged and 21 were committed to stand trial in the High Court. The second case in which a police investigation was ordered is the reported killing by soldiers of about 10 people at Velaveli in Batticaloa district on 24 October 1992. The then Prime Minister Dingiri Banda Wijetunga was reported as saying that these killings would be investigated by the police, but there has been no subsequent evidence that an investigation had started.

142. Through the above-mentioned cases of executions, it appears that the most severe punishment ever handed out to human rights violators is suspension from duty, despite the gravity of the offences, including extra-legal executions with which they were charged. While civilians who peacefully exercise their fundamental civil and political rights are charged and sentenced to years of imprisonment, soldiers and policemen who flagrantly violate the rights of innocent civilians are charged before their own peers and sentenced to only months of imprisonment. This situation encourages impunity. The Special Rapporteur believes that penalties should be imposed that relate to the seriousness of the offences in order to deter further human rights violations. Respect for the rule of law cannot be promoted unless all trials are conducted in full conformity with internationally recognised standards.

143. Impunity for those responsible for human rights violations remains a serious concern. Progress in a few court cases against members of the security forces charged in connection with disappearances and extrajudicial executions is slow, as are investigations into many other cases. While in Colombo, the Special Rapporteur met with Mr. W.C.N. Rajapakse who

recounted the case of his sister, Ms. W.W. Chandrawathie. She was 22 years old when, on 26 September 1990, she was forcibly taken from her house in Eppawala, Anuradhapura district, by a sub-inspector of police accompanied by other officers of the Eppawala police station. According to her father and other relatives, she was dragged to the nearby jungle and allegedly raped by the sub-inspector, who subsequently shot her. They also alleged that her body was later burnt on tyres at a nearby quarry. Officials at the local police station refused to assist the family when they attempted to lodge a complaint. Her family then contacted the Deputy Inspector General of Police of the area, who initiated investigations, the results of which were presented to the Magistrate's Court.

144. As a result of the magisterial inquiry into the rape and death of Ms. W. Chandrawathie, it has ben alleged that her relatives received several death threats. Her brother, Mr. Rajapakse, was allegedly arrested on the first day of the inquiry by members of the Anuradhapura police and held at Anuradhapura police station for 12 days, during which time he was allegedly beaten. The father of the victim and one of several people who identified the sub-inspector and a constable as being responsible received several threats.

145. The Government of Sri Lanka has repeatedly announced that relevant authorities have been asked to expedite court cases against members of the security forces suspected of human rights violations. It appears, however, that this case has been postponed six times now. When in Colombo, the Special Rapporteur met with the victim's brother and was informed that in the meantime, his father had died without living to witness the offenders being brought to justice. He was also told that witnesses could not afford to travel to Colombo only to have the case postponed. The continual delays were time-consuming and a financial burden for the family and the witnesses.

146. The Special Rapporteur brought this case to the attention of the Attorney-General during their meeting and he was told that the trial had been fixed for 20 October 1997 in Colombo High Court.

147. The Special Rapporteur stresses the need to re-establish accountability among the security forces by bringing to justice those responsible for past human rights violations, for the sake of the victims and their relatives, and also to prevent such abuses from happening again. A system of compensation for the families of victims should be developed, as well as a system to protect

witnesses and their families who participate in criminal investigations and give testimony.

VI CONCLUSIONS

148. The visit of the Special Rapporteur to Sri Lanka, at the invitation of the Government, was facilitated by the efforts, cooperation and courtesy extended to him by the officials of the Government. All requests from the Special Rapporteur to meet with government representatives were met, except for the meeting with the President and Secretary of Defence.

149. The Special Rapporteur wishes also to express his appreciation to the UNDP Resident Representative for facilitating his stay in Colombo and his visits to Jaffna, Batticaloa and Ratnapura.

150. The Special Rapporteur is of opinion that the question of extrajudicial and arbitrary executions in Sri Lanka is serious, and results from the interaction of multiple factors. The principle cause is the prevailing abuses against the right to life which has taken root within the internal armed conflict. The perpetrators are the armed forces and police themselves, who kill suspected insurgents and civilians perceived as supporting them; LTTE members who kill members of the security forces, members of opposing factions, those who refuse to continue the armed insurgency or to continue to support the LTTE, including civilians; paramilitary organisations allegedly linked to the security forces (home guards) who are also responsible for extrajudicial executions.

151. Human rights violations are most frequent in the context of operations carried out by the security forces against the armed insurgency. While considering it inappropriate to affirm the existence of a planned policy of "systematic violation" of human rights, the violations have been so numerous, frequent and serious over the years that they could not be dealt with as if they were just isolated or individual cases of misbehaviour by middle - and lower-rank officers, without attaching any political responsibility to the civilian and military hierarchy. On the contrary, even if no decision had been taken to persecute the unarmed civilian population, the Government and the high military command were still responsible for the actions and omissions of their subordinates.

152. The pervasive violence generated by armed LTTE members and their increasing attacks against the armed forces and civilians are further indicators of the general deterioration of the situation and the prevalent insecurity in certain parts of Sri Lanka.

153. The Special Rapporteur understands the difficulties faced by the Government when confronted with insurgents and other armed groups who are responsible for numerous acts of violence and clearly lack respect for the lives and physical integrity of State agents and civilians. However, this does not justify excessive and arbitrary use of force on the part of the security forces. There is no excuse for extrajudicial, summary or arbitrary executions, nor for their encouragement through impunity.

154. The Special Rapporteur is particularly concerned about the massacres and extrajudicial, summary or arbitrary executions among the civilian population, especially women and children, which have become an almost ubiquitous feature of daily life in Sri Lanka.

155. The Special Rapporteur is concerned about the numerous reports he received which indicate that in many cases of violations of the right to life no compensation was provided.

156. The Special Rapporteur is also concerned about certain laws and regulations which have been enacted in Sri Lanka and which allow impunity to persist and which in some cases grant security officers immunity from prosecution. Of particular concern are the emergency regulations governing arrest and detention procedures and those governing post-mortems and inquests when deaths have occurred in custody or as a result of the official action of the security forces.

157. The Special Rapporteur is also worried by the paralysis of state institutions, particularly the judiciary in the areas of armed conflict, which is generating impunity and hence the perpetration of human rights violations.

158. The Special Rapporteur remains concerned at the contrast between statements indicating high sensitivity to, and awareness of, human rights issues at the top level of the armed forces and their practices in the field, which very often fail to respect human rights.

159. Impunity enjoyed by human rights violators in Sri Lanka is very pervasive. The judiciary is competent to deal with cases involving security forces personnel accused of human rights violations. The justice system can be tough and effective in prosecuting and punishing disciplinary offences involving manifest disobedience of orders. However, it has proved itself equally effective in guaranteeing impunity for violations of the ordinary criminal law in respect of acts (murder, torture, kidnapping) committed in the line of duty. Thus, Sri Lanka fails to fulfil its obligations under international law to carry out exhaustive and impartial investigations with a view to identifying those responsible, bringing them to justice and punishing them. Although in a number of cases, tribunals have granted compensation to victims, or their families, for damages suffered at the hands of state agents, the tribunals conducting criminal proceedings against the same agents do not find grounds for their conviction. This strongly suggests the lack of institutional willingness to hold the authors of human rights violations responsible.

160. Neither the Sri Lankan population, the main victims, nor the international community, a powerless witness to the frequent killings and disappearances, seem capable of halting the violence. The failure by the Sri Lankan authorities to take concrete measures which would have immediate effect and put an end to this violence and further prevent its degeneration into a civil war has also contributed to shaping the present situation.

161. The Special Rapporteur would like to stress the importance of linking the humanitarian and human rights issues involved in the challenge of peace. Throughout his mission, he stated that without peaceful management or resolution of the conflict, there can be no effective and durable answers to the problem of the protection of the right to life. Throughout his discussions with Sri Lankan authorities, individuals and representatives of non-governmental organisations, he felt that there was an understanding that unless a political solution to the conflict is found, there can be little hope of ending it. Some of the authorities are trying to differentiate between the LTTE as an insurgent group and the Tamils as a community which is entitled to political rights equal to those of any other citizen in Sri Lanka. In making this differentiation, they are considering continuing the war with the LTTE and finding a political solution with the Tamils. However, there appeared to be a determined desire on the part of the armed forces, who control the military situation, to privilege a military solution.

162. It will only be possible for the State to reassert itself effectively, that is, with the respect and support of the population, if it can reform itself in the area that is central to the legitimacy of any State, namely, the establishment of the rule of law. Of course, this cannot be done in a vacuum. There needs to be serious attempts made to pacify the country, not just by using discrediting counter-insurgency techniques which violate international human rights and humanitarian law, but also by seeking a political accommodation. The importance of peace for the enjoyment of human rights in areas of insurgent activities and military counter-insurgency operations cannot be overemphasised. In this regard, the Special Rapporteur welcomes the efforts made by the Government with a view to restoring a normal life in Jaffna.

163. Finally, on several occasions, the Government of Sri Lanka has acknowledged the existence of problems relating to violations of human rights and repeatedly declared its commitment to act on them. The Special Rapporteur welcomed measures taken by the Government of Sri Lanka to strengthen the protection of human rights, through the establishment of the Human Rights Commission, and the three commissions of inquiry into past disappearances, but he feels that a lot has yet to be done in order to ensure that these institutions can operate as effective instruments.

164. The recommendations that follow are aimed at reinforcing and supporting the efforts of the Sri Lankan Government to translate its commitment into reality. Particular emphasis is laid on measures that could contribute to the prevention of further human rights violations.

VII RECOMMENDATIONS

165. The Special Rapporteur acknowledged that peace would create the most favourable circumstances for improving the human rights situation in Sri Lanka. He therefore urges all the parties to the armed conflict to seriously seek and negotiate a peaceful solution to the conflict and, to the extent that the parties would find this helpful, suggests that the United Nations would be willing to assist in this process. However, no such peace agreement should create obstacles to providing justice for the victims of human rights violations within the mandates of the Special Rapporteur.

166. The Special Rapporteur considers it of the greatest importance to create a mechanism which would encourage confidence-building between the

Sinhalese and the Tamils. Such a mechanism would aim at providing security and protection to all the people of Sri Lanka. In this regard, the Government of Sri Lanka should refer to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities and, in that context, should take all measures required to ensure that persons belonging to minorities may exercise fully and effectively all their human rights and fundamental freedoms without any discrimination and in full equality before the law.

167. Reform and transformation of the security forces of Sri Lanka are needed in order to allow Tamils equal access to them; the security forces may thus come to represent the whole society, and hence enjoy the confidence of the population.

168. All efforts which might be initiated by the Government of Sri Lanka to coordinate the functions of all the security forces responsible for ensuring law and order should be strengthened. The training programmes provided by the Office of the High Commissioner for Human Rights for the security forces and which is being implemented in other countries might be a possibility. They should take into account the need to provide specialised and distinct training to both army and police officers. The relevant international standards developed by the United Nations, such as the Code of Conduct for Law Enforcement Officials, should be part of such training.

169. All sources consulted agree on the quasi-monoethnic composition of the army. Predominantly Sinhalese, the army has recruited more on the basis of ethnicity than on a truly national basis. This has provoked grave suspicions that the army is prejudiced, a fear fuelled by the fact that repeated searching operations are carried out mainly against Tamils, and that the army personnel do not speak the Tamil language. Changing the recruitment policy, perhaps by means of a quota for Tamils, should be considered. Enhancing cultural sensitivity among the soldiers should also be considered.

170. Within this context, it is important that the national police force be accepted by both communities and have as its main responsibility the protection of the civilian population and the prevention of communal violence. One of the priority tasks of the national police force would be to ensure the security and protection of all people in Sri Lanka. The police should be given the requisite substantive training in order to enable it to fulfil its role of

maintaining public order. However, all elements of the police who have been involved in summary executions, massacres or other grave violations of human rights should be excluded from the national police force.

171. The armed forces must be required to accept as a priority the taking of effective action to disarm and dismantle armed groups, especially the home guards, many of which they have set up and/or cooperated with closely. Given the numerous abuses committed by such groups, as well as their ambiguous status, this is a necessity. Furthermore, it would go some distance towards establishing the credentials of the armed forces as impartial upholders of the rule of law. It would also begin to make a reality of the democratic State's need to have a monopoly over the use of force, within the limits established in the pertinent international standards.

172. If they are not disarmed or dismantled, any such auxiliary force should be subject to strict control by the security forces. The Special Rapporteur recommends, inter alia, a disciplinary code of conduct for the home guards who should be placed under a defined authority such as the army or the police. In view of the experience of other countries where paramilitary groups are responsible for numerous and grave human rights violations, the Government may prefer to strengthen the regular security forces in areas of armed conflict, rather than creating a paramilitary body.

173. The Special Rapporteur also recommends that efforts to disarm the civilian population be intensified and their efficiency increased. Strict control of weapons in the possession of civilians would be an important measure, with a view to lowering the level of common and political crime and violence in Sri Lanka.

174. Adequate provision should be made for the protection of all those who have laid down their arms and are willing to reintegrate themselves into civilian life. In particular, former combatants who organise themselves in political movements to participate in the democratic process should be able to do so without fear of suffering reprisals.

175. While initiatives to raise awareness of human rights among members of the security forces and the population in general through educational and other measures are to be welcomed as a necessary step, the Special Rapporteur wishes to emphasise that respect for, and thus enjoyment of human

rights can only be improved if impunity is effectively fought. The Special Rapporteur calls on the Government to fulfil its obligation under international law to conduct exhaustive and impartial investigations into all allegations of extrajudicial, summary or arbitrary executions and torture; to identify, prosecute and punish those responsible; grant adequate compensation to the victims or their families; and take all appropriate measures to prevent the recurrence of such acts.

176. The need to bring the perpetrators of extrajudicial executions to justice has been established as an obligation in international human rights standards. Paragraph 18 of the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions provides that "Governments shall ensure that persons identified by the investigations as having participated in extra-legal, arbitrary or summary executions ... are brought to justice ... This principle shall apply irrespective of who and where the perpetrators or the victims are, their nationalities or where the offence was committed." The Principles also provide that persons alleged to have committed these grave human rights violations should be suspended from any official duties during the investigation and removed from any position of control or power, whether direct or indirect. They also state that steps should be taken to ensure that all those involved in the investigations, including the complainant, counsel, witnesses and those conducting the investigation, are protected against ill-treatment, violence, threats of violence or any other form of intimidation or reprisal.

177. The Special Rapporteur urges that all necessary steps be taken to minimise the delays in bringing to trial members of the security forces suspected of committing human rights violations.

178. The Government and prosecuting authorities should take follow-up action to conclude the cases that have already been initiated by the State.

179. The Government should act in accordance with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power which provide, inter alia, that victims should be entitled to access to (*sic*) the mechanisms of justice and to prompt redress for the harm that they have suffered. Families of the deceased and their legal representatives shall be informed of, and have access to any hearing as well as to all information relevant to the investigation, and shall be entitled to present other evidence. The family of

the deceased shall have the right to insist that a medical or other qualified representative be present at the autopsy. When the identity of a deceased person has been determined, a notification of death shall be posted and the family or relatives of the deceased shall be informed immediately. The body of the deceased shall be returned to them upon completion of the investigation.

180. The rights of victims or their families to receive adequate compensation is both a recognition of the State's responsibility for the acts committed by its personnel and an expression of respect for the human being. Granting compensation presupposes compliance with the obligation to conduct investigations into allegations of human rights abuses with a view to identifying and prosecuting the alleged perpetrators. Financial or other compensation provided to the victims or their families before such investigations are initiated or concluded, however, does not exempt Governments from this obligation.

181. A system of compensation for the families of victims should be developed, as well as a system to protect witnesses and their families who participate in criminal investigations and give testimony.

182. With regard to persistent allegations of deaths of civilians in military counter-insurgency operations, the Special Rapporteur calls on the authorities to take all necessary measures to ensure full respect for the restrictions on the use of force and firearms contained in the pertinent international instruments. Counter-insurgency operations by the armed forces must be carried out in full respect for the rights of the civilian population. Under no circumstances should the army use heavy weapons against the civilian population, as has been the case on several occasions.

183. The excavations, exhumation and evaluation by experts in the forensic sciences of remains which may belong to victims of extrajudicial, summary or arbitrary executions are an integral part of the obligation to conduct thorough investigations as referred to above. They must be carried out in accordance with the highest standards of expertise by specialists in forensic archaeology, anthropology and biology. In this context, the Special Rapporteur wishes to refer to the Model Protocol for Disinterment and Analysis of Skeletal Remains, included in the Manual for the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, a United Nations publication. The Special Rapporteur calls on the

Government to ensure that the necessary forensic expertise and ballistic analyses are made available throughout the country with a view to obtaining maximum evidence in each case under investigation. In this regard, the Government of Sri Lanka might wish, through the Office of the High Commissioner for Human Rights, to request the assistance of international forensic experts to aid local experts in establishing a local forensic unit.

184. The Special Rapporteur calls on the authorities to take the necessary steps with a view to strengthening the ordinary justice system in Jaffna so as to make it more efficient in all circumstances. To this effect, there should be an allocation of the necessary human and material resources to carry out prompt and effective investigations into alleged human rights violations. For instance, it might be necessary to have more courts than only the High Court in Colombo to inquire into deaths which fall under the ERA.

185. The Government of Sri Lanka should consider accession to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. The Government of Sri Lanka is also urged to sign Protocol 11 Additional to the Geneva Conventions of 12 August 1949.

186. The emergency regulations should be revised in order to bring them into line with accepted international standards. These reforms would need to include the following elements:

(a) Removal of provisions which dispense with post-mortems and inquests when deaths have occurred in custody or as a result of official action of the security forces. This could be simply done be returning to normal inquest procedures under ordinary law;

(b) The Government should allow public access to the records of all inquiries, into deaths in custody or as a result of action by the security forces held in the High Court under the provisions of the ERs;

(c) Time-limits for bringing a person before a judge following his arrest should not exceed a reasonable maximum time-limit;

(d) The emergency regulations should be compiled and codified.

187. The fundamental right to life should be reflected in the new Constitution and the death penalty abolished in order to fully reflect the de facto situation.

188. The Government should publicise the reports of the three commissions which examined the cases of alleged disappearances, and prosecuting authorities should prepare cases against identified offenders.

189. Legislation for the issuance of death certificates in respect of missing persons should be enacted and provincial mechanisms for the implementation thereof should be established.

190. The Human Rights Commission should be strengthened, in accordance with the Principles relating to the status of national institutions (Paris Principles), annexed to Commission on Human Rights resolution 1992/54 and General Assembly resolution 48/134. Such an institution should be based on the recommendations of the Commission on Human Rights concerning the competence, responsibilities, composition, guarantees of independence and pluralism, methods of operation, status and functions of national human right institutions. The Human Rights Commission might consult the Office of the High Commissioner for Human Rights for advice and technical cooperation

in this particular field. Such a Commission should, inter alia, be able to achieve the following goals:

(a) Give a full public accounting of the scope and extent of the crimes committed in the name of the State and the political and institutional factors that contributed to the impunity of their authors;

(b) Formally identify the individual responsibility for such crimes, including the direct perpetrators and those who may have given the explicit or implicit orders for their commission;

(c) Instigate the corresponding criminal and disciplinary proceedings to be carried out by the competent organs;

(d) Ensure effective reparation to the victims or their dependants, including adequate compensation and measures for their rehabilitation;

(e) Make recommendations that would help to prevent further violations in the future.

Members of the Commission should have access to all places of detention without prior notification, be assured of repeated visits and meet prisoners in private.

191. The Government of Sri Lanka should continue to elaborate and implement without delay the policy to improve security, which would enable the displaced and dispersed Tamil populations of the country to return to their homeland and would facilitate their reintegration and reinstallation. The international community should be ready to respond to requests by the Government of Sri Lanka for assistance in this matter.

192. The Government of Sri Lanka should also implement the recommendations made by the representatives of various United Nations human rights mechanisms that visited Sri Lanka, such as the Working Group on Enforced or Involuntary Disappearances and the Special Representative of the Secretary-General on internally displaced persons.

193. The level of violence, both politically motivated and due to the internal conflict, has risen in the recent past, despite legislative reforms and other initiatives taken by successive Governments. The current Government recognises the gravity of the human rights situation, has identified its causes, in particular impunity, and has repeatedly expressed its willingness to take radical measures to redress the situation. It is clear that the Government will encounter resistance from various powerful quarters defending their interests. The Special Rapporteur believes that the international community should support the Government's efforts to translate its expressed political willingness into practice. The advisory services and technical assistance programme of the Office of the High Commissioner for Human Rights should consider favourably any request from the Government of Sri Lanka to help it to put the above recommendations into effect. The involvement in this process of the United Nations Development Programme (which already provides assistance to the Government on human rights issues) would be welcome. In this context, the Special Rapporteur wishes also to emphasise the importance of the role of non-governmental human rights organisations in Sri Lanka and the need to strengthen them and provide them with adequate protection. Their full participation in human rights assistance programmes is essential for their effectiveness.

194. The Government of Sri Lanka should establish a national institution to find ways and means for national reconciliation. This institution will provide a forum for a discussion on crucial issues facing Sri Lankan society - peace, security and confidence-building measures to attain protection of human rights, the protection of minorities, strengthening of democracy, reconciliation and coexistence, national unity and restoration of confidence in the institutions of the Government. Non-governmental organisations and civil society should be fully involved in this process.

AMNESTY INTERNATIONAL

'Old enough to kill but too young to vote'

Draft optional protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts*

Summary

The UN Working Group drafting the optional protocol on the involvement of children in armed conflicts is scheduled to meet in Geneva from 2 to 13 February 1998.

There are an estimated 250,000 children and young people under the age of 18 years in government armed forces and/or armed opposition groups. These young combatants are not only the victims of grave human rights abuses but all too often the perpetrators of such abuses.

Amnesty International has drawn attention to abuses in the context of child recruitment both by government and/or armed opposition groups. For more than a decade non-governmental organisations (NGOs) have campaigned for 18 years to be the minimum age for recruitment into armed forces, whether voluntary or compulsory. As the world spins towards the 21st century the use of children as soldiers is a moral outrage. The involvement of children in armed forces is not inevitable. There is no excuse or acceptable argument for abusing and exploiting children as combatants. The recruitment and participation of children in armed conflicts is a decision made by governments

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* AI Index IOR/51/01/98, January 1998.
DISTR: SC/PG/PO.

or by leaders of armed opposition groups. It is unforgivable that children and young persons are encouraged to commit barbaric acts as well as being the victims of grave human rights abuses. It is time to exclude children from participating in war and an optional protocol which raises to 18 years as the minimum age for participation in hostilities and recruitment into armed forces will be a significant contribution to this goal.

Amnesty International is committed to a higher standard of protection in international law for children at risk of participating in hostilities and recruitment into armed forces. To this end Amensty International is campaigning for the adoption of a draft optional protocol which includes the following provisions:

1. Prohibit persons below 18 years of age from participating in hostilities;

2. Prohibit the compulsory or voluntary recruitment of persons below 18 years of age into government armed forces;

3. Prohibit the recruitment of persons below the age of 18 years into armed opposition groups.

AMNESTY INTERNATIONAL

'Old enough to kill but too young to vote'

Draft optional protocol to the Convention on the Rights of the Child on the involvement of Children in armed conflicts

"One of the most alarming trends in armed conflict is the participating of children as soldiers"
Ms Graca Machel**

Children as combatants

JO[1] was one of a group of children recruited by the Lords Resistance Army in Uganda who was made to kill soldiers shortly after his abduction. "Later on, the new recruits were asked to finish off all the wounded UPDF [Uganda Peoples' Defence Force] soldiers. One officer was stabbed with a bayonet... Two UPDF soldiers were captured. The army commander said, 'the new recruits can now feed themselves on these two soldiers.' Three of us were instructed to hit these two soldiers, twice each."[2] There are an estimated quarter of a million children and young people under the age of 18 years in government armed forces or armed opposition groups.[3] These young

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** Impact of armed conflict on children, A/51/306, para 34. The UN Secretary-General appointed Ms Graca Machel as his expert to study the impact of armed conflict on children. In August 1997 the Secretary-General, in accordance with UN General Assembly resolution 51/77, appointed Olara Otunnu as his Special Representative to study the impact of armed conflict on children.

1 This child's name has been changed to protect him.

2 Uganda "Breaking God's commands:" the destruction of childhood by the Lord's Resistance Army, September 1997, AI Index: AFR 59/01/97.

3 *R. Brett and M. McCallin; Children The Invisible Soldiers* (Radda Barnen Swedish Save the Children, 1996) and Joint Statement by UNICEF and UNHCR to the Special Committee on Peacekeeping Operations, 11 April 1997.

combatants are not only the victims of grave human rights abuses but are all too often the perpetrators of such abuses. Some children fight alongside adult soldiers, others are recruited into separate units. Many children are killed or maimed as a direct result of participating in armed conflicts, others suffer from psychological trauma or are captured and detained in 'prisoner of war camps.' Some children join armed forces voluntarily while others join in order to obtain food, clothing and shelter. There are also many situations where children have been forcibly recruited, with brutal methods used to ensure their subordination. Child soldiers are used not only for support activities such as carrying munitions or supplies and as lookouts but in many cases they are armed and ordered to engage in combat.[4] Many child soldiers are also sexually abused. It has been suggested that those in command prefer to send children into combat because their youth makes them less likely to appreciate the perils they face and more fearless.[5]

Amnesty International has drawn attention to abuses in the context of child recruitment both by government and/or armed opposition groups in countries such as Colombia, Sierra Leone, Sri Lanka and Uganda. The involvement of children in armed forces, particularly in situations or armed conflict, has been shown to have devastating effects on their physical and mental integrity. There are frequently higher casualty rates among children due to their inexperience and lack of training. Because of their size and agility children may be sent on particularly hazardous assignments. Child recruits are often subjected to brutalizing treatment in order to subordinate them to authority. In conflicts around the world, the conscription of child soldiers has also involved the abduction of children, particularly young girls for use as soldiers and for sexual abuse. Invariably the use of children as soldiers will violate rights enshrined in the United Nations (UN) Convention on the Rights of the Child including: children should not be separated from their parents (Article 9), protection from physical or mental harm (Article 19), enjoyment of the highest attainable standard of health (Article 24), the right to education (Article 28), the right to rest and leisure (Article 31) and protection from economic exploitation and hazardous work (Article 32). The raising of the minimum age for recruitment (whether voluntary or compulsory) to 18 is

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[4] See for example *Uganda "Breaking God's commands:" the destruction of childhood by the Lord's Resistance Army*, September 1997, AI Index: AFR 59/01/97.

[5] R. Brett and M. McCallin; *Children the Invisible Soldiers*. See in particular see Chapter 6 Military Attitudes to Child Soldiers.

therefore an important means for preventing these abuses from recurring.

For more than a decade non-governmental organisations (NGOs) have campaigned for 18 years to be the minimum age for recruitment into armed forces, whether voluntary or compulsory. As the world spins towards the 21st century the use of children as soldiers is a moral outrage. The involvement of children in armed forces is not inevitable. There is no excuse or acceptable argument for abusing and exploiting children as combatants. The recruitment and participation of children in armed conflicts is a decision made by governments or by leaders of armed opposition groups. It is unforgivable that children and young persons are encouraged to commit barbaric acts as well as being the victims of grave human rights abuses. It is time to exclude children from participating in war, and an optional protocol which raises to 18 years as the minimum age for participation in hostilities and recruitment into armed forces will be a significant contribution to this goal.

Article 1 of the Convention on the Rights of the Child defines a child as *"every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier."* Increasingly international law uses the benchmark of 18 years as the age below which special protection should be afforded.[6] The vast majority of states recognise 18 years as the age when individuals reach the necessary intellectual maturity to participate in the political process including voting in elections. The link between enfranchisement and conscription is important because it raises the question of whether unenfranchised individuals (children) should be asked to risk their lives as a result of decisions taken in a political process from which they are excluded.[7] Others have argued that the physical, emotional and social impact of armed conflict should also preclude persons under 18 years

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[6] See for example non application of the death penalty in Article 37(a) Convention on the Rights of the Child and Article 6(5) of the International Covenant on Civil and Political Rights, and ILO Convention No. 138 on Minimum Age 1973 which sets 18 years as "the minimum age for admission to employment or work which by its nature or circumstances in which it is carried out is likely to jeopardise the health, safety or morals of young persons." Furthermore, 'voluntarism' of execution or dangerous work is not considered an acceptable reason for reducing the age for either the death penalty or hazardous occupations.

[7] G. Goodwin-Gill and I. Cohn: *Child Soldiers* (Clarendon Press, Oxford, 1994), p7.

from involvement in hostilities.[8]

Towards an international consensus

The Convention on the Rights of the Child enshrines the right of those under 18 to protection "from all forms of physical or mental violence, injury or abuse..."[9] although Article 38, which deals specifically with children in situations of armed conflict, established 15, not 18 years as the minimum age for recruitment into armed forces of states parties and participation in hostilities. International humanitarian law, however, goes further than Article 38 by prohibiting the recruitment of children under 15 into the armed forces of governments *and* armed political groups.[10] Furthermore, the African Charter on the Rights and Welfare of the Child defines a child as "every human being below the age of 18 years"[11] and prohibits the recruitment of children.[12] The age of recruitment remained highly controversial throughout the drafting of the Convention on the Rights of the Child. Although the majority of states argued for higher minimum age a minority of states consistently blocked any consensus to raise the age from 15 years and on 20 November 1989 the Convention on the Rights of the Child was adopted unanimously by the UN General Assembly.

An increased international awareness about the involvement of children in situations of armed conflict and the intense debate about the minimum age in Article 38 did ensure that the concern for child soldiers was placed firmly on the international agenda. In October 1992 the Committee on the Rights of the Child, which oversees implementation of the Convention, held a discussion on children in situations of armed conflict. NGOs and representatives of UN agencies were invited to discuss with members of the Committee and make recommendations. The Committee adopted a number of recommendations but

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8 See Brett and McCallin: *Children: The Invisible Soldiers.*

9 Article 19, Convention on the Rights of the Child.

10 Article 4(3)(c) Additional Protocol II to the 1949 Geneva Conventions.

11 Article 2, Definition of a child. This convention has not yet been ratified by the required 15 states to enter into force.

12 Article 2, Definition.

in particular it recommended a study on the impact of armed conflict on children and the drafting of an optional protocol to the Convention which would raise the age for the recruitment and participation of children in hostilities to 18.[13] The 1993 World Conference on Human Rights (Vienna Declaration and Programme of Action) strongly supported the Committee's proposal to initiate a study and the question of raising the minimum age of recruitment into armed forces.[14] Later that year the UN's General Assembly authorised a study into the "Impact of armed conflict on children."[15] The two-year investigation was undertaken by Ms Graca Machel, former Minister of Education of Mozambique, on behalf of the UN Secretary-General and overwhelmingly endorsed by the General Assembly in 1996. The comprehensive study proposes an agenda for action for children in situations of armed conflict and in particular it recommends that: *"[S[tates should ensure the early and successful conclusion of the drafting of the optional protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts, raising the age of recruitment and participation in the armed forces to 18 years."*[16] In 1997 the UN General Assembly gave its support to a resolution expressing grave concern about the use of children as combatants.[17] The US delegation proposed amendments to the paragraphs concerning child soldiers but the proposed changes were not acceptable to the 114 co-sponsors of the resolution. Rather than call for a vote the delegate of the USA withdrew the draft amendment.

Other bodies have also taken a position on the age of recruitment. Both the United Nations Children's Fund (UNICEF) and the United High Commission for Refugees (UNHCR) advocate 18 years as the minimum age for recruitment and participation in armed conflicts. In a joint statement to the United Nations Special Committee on Peacekeeping Operations these two

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[13] For further information see UN documents CRC/C/SR.38, CRC/C/SR.39 and CRC/C/19.

[14] Para 50, Part II World Conference on Human Rights: The Vienna Declaration and Programme of Action, June 1993.

[15] General Assembly resolution 48/157 of 20 December 1993.

[16] *Impact of armed conflict on children*, UN document A/51/306, 26 August 1996, para 62(d).

[17] The rights of the child, A/Res/52/107.

organisations stated *"[i]t is a matter of priority that States conclude the drafting process of a new optional protocol to the Convention on the Rights of the Child to prohibit the recruitment and participation of children below the age of 18 in armed conflicts, applying the same principle to voluntary enlistment."*[18]

In December 1995 the Council of Delegates of the Red Cross and Red Crescent Movement adopted a "Plan of Action Concerning Children in Armed Conflict." This action plan includes, *inter alia*, the commitment "[t]o promote the principle of non-recruitment and non-participation in armed conflicts of children under the age of 18 years." In particular there is a commitment to "promote national and international standards (such as an optional protocol to the Convention on the Rights of the Child) prohibiting the military recruitment and use of persons younger than 18 years of age, and also the recognition and enforcement of such standards by all armed groups (government and non-governmental)." In addition to the Plan of Action the 26th International Conference of the Red Cross and Red Crescent adopted by consensus a resolution which, *inter alia*, supports the drafting of an optional protocol to the Convention on the Rights of the Child *"to increase the protection of children involved in armed conflicts."*[19] While such resolutions are not legally binding, they are nevertheless very significant because they are adopted at meetings open to all states parties to the 1949 Geneva Conventions and 1977 Additional Protocols as well as representatives from national Red Cross and Red Crescent societies.

Similarly in 1997 the Labour and Social Affairs Commission of the Organisation of African Unity adopted the Arusha Recommendations which, *inter alia*, "[c]ondemn recruitment and conscription of children under the age of 18 years in the armed forces or armed groups..."[20]

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[18] Joint Statement by UNICEF and UNHCR to the Special Committee on Peacekeeping Operations by Nigel Fisher Director, Office of Emergency Programmes, UNICEF, 11 April 1997.

[19] Geneva, December 1995.

[20] Report of the Secretary-General on the Twentieth Session of the Labour and Social Affairs Commission, CM/2014(LXVI), para 84.

Drafting the protocol: consensus and veto

In response to growing international pressure to prevent the involvement of children in armed conflicts the UN Commission on Human Rights decided in 1994 to establish a Working Group to draft an optional protocol on the involvement of children in armed conflicts.[21] Key issues under discussion are whether the prohibition on participation in hostilities should be limited to taking a "direct part in hostilities"[22] or should include taking "any part" in hostilities and the minimum age for voluntary recruitment into government armed forces. Article 38 of the Convention on the Rights of the Child prohibits children under 15 from taking a 'direct part' in hostilities while Additional Protocol II to the 1949 Geneva Convention applicable to internal armed conflict situations, does not include this qualification, stating that children should not be "allowed to take part in hostilities."

The issue, however, which is causing most controversy is whether the age specified in the text should be 18 years or a lower age. At the Working Group's third session in January 1997 the USA refused to accept a consensus on a minimum age of 18 years for participation in hostilities.[23] While the USA was not alone in preferring the age of 17 years, no other state was prepared to block the position of the overwhelming majority of states from all regions of the world. The USA position is somewhat ironic given that the protocol is **optional** and can only be ratified by states which are parties to the Convention on the Rights of the Child. The USA is one of only two states in the world which has yet to ratify this Convention, the other being the collapsed state of Somalia.[24]

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[21] Commission on Human Rights, resolution 1994/91 entitled "Implementation of the Convention on the Rights of the Child."

[22] The term "direct participation in hostilities" is open to debate but is understood to mean taking a direct part in the fighting. Thus soldiers providing support to front line troops such as moving supplies or intelligence gathering could be interpreted as "indirect participation in hostilities."

[23] For a full report of the Working Groups third session see Un document E/CN.4/1997/96.

[24] 191 states have now ratified or acceded to the Convention which means the Convention has achieved almost universal recognition.

The practice of drafting standards by consensus has given any government the opportunity to block action to defend and protect human rights. Drafting groups can become hostage to a few states and are all too often faced with the stark choice of accepting the lowest common denominator or abandoning the drafting exercise. But this need not be the case. Drafting by consensus is a relatively recent development. Provisions of the International Covenant on Civil and Political Rights (ICCPR), for example, were voted upon by the drafters. Consensus decision-making should no longer be used unquestioningly as the working method for standard-setting initiatives. It is true that a balance has to be struck between drafting a text that enough states will ratify and maintaining the highest standard of human rights protection. New treaties, however, are meant to provide greater protection, not merely reflect the status quo. The balance has to be struck between sufficient international support for a standard and the strongest possible text. The majority of states in favour of a strong text should make every effort to persuade the few states obstructing adoption of a consensus text to reconsider their position. Yet one state, or a small minority of states, should not be allowed to undermine a broad international consensus on a strong text. Ultimately, in order to avoid the lowest common denominator approach, voting on the text may be necessary.

Amnesty International's recommendations

Amnesty International is committed to a higher standard of protection in international law for children at risk of participating in hostilities and recruitment into armed forces. To this end Amnesty International is campaigning for the adoption of a draft optional protocol which includes the following provisions:

1. Prohibit persons below 18 years of age from participating in hostilities.

   The prohibition should not be limited to direct participation. This is the position taken by most states.

2. Prohibit the compulsory or voluntary recruitment of persons below 18 years of age into government armed forces

Some of the debate on the recruitment of persons below the age of 18 years into armed forces has centred on the feasibility of excluding young persons from a fighting force. Having trained with a unit it may prove impractical if not impossible to withdraw young recruits before hostilities begin, for example where under 18s are serving on board naval ships. There is a division in the Working Group over the issue of whether prohibition of voluntary recruitment should include admission of under 18s into military schools. Amnesty International concerned that making an exception for institutions, which are formally part of the armed forces, could, in situations of armed conflict, result in children being seen as legitimate targets for attack.

3. Prohibit the recruitment of persons below the age of 18 years into armed opposition groups

The current draft optional protocol obliges states to take measures to prevent recruitment of under 18s by armed opposition groups. Amnesty International considers the text should contain explicit prohibition of recruitment of under 18s by armed opposition groups, particularly as the use of child soldiers by armed political groups in situations of armed conflict is increasingly widespread and, arguably, the most pressing reason for strengthening the protection offered by international standards. Although armed opposition groups cannot become a party to the draft optional protocol they should nevertheless be invited to declare their adherence to its provisions.