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ICJ Submission to the Universal Periodic Review of Sri Lanka
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I. Introduction

The International Commission of Jurists (ICJ) welcomes this opportunity to contribute to the Human Rights Council's Universal Periodic Review of Sri Lanka. This submission raises two issues. The first of these is the deteriorating human rights situation, occurring in the context of an armed conflict and emergency anti-terrorism measures that have weakened the rule of law. The second is the appalling prevalence of impunity for violations of human rights and international humanitarian law and the lack of capacity by state institutions and mechanisms to protect people from increasing human rights violations.

The ICJ is concerned by violations of human rights and international humanitarian law by all parties to the conflict, impacting civilians through deprivation of liberty, targeted killings, torture, enforced disappearances, forced evictions, internal displacement and in general the lack of protection of civilians. The Liberation Tigers of Tamil Eelam (LTTE) and other non-state actors continue to carry out abductions and recruitment of child soldiers and arbitrary killings. Of particular concern are continuous threats and ongoing impunity for attacks on aid workers and other civilians by non-state actors and government forces alike. The ICJ expresses its concern for the end of the 2002 Cease-Fire Agreement on 16 January 2008 and regrets the departure of the Sri Lanka Monitoring Mission, which is unfortunately likely lead to intensified hostilities and increased attacks against civilians.

Given the gravity of the situation and the fact that no state institutions and mechanisms are capable of effectively monitoring and reducing the human rights violations and breaches of international humanitarian law, the ICJ considers that the OHCHR should immediately put in place a monitoring and assisting human rights field presence, even before any sustainable peace agreement between the Government and the LTTE is reached.

II. International Legal Framework

Customary international humanitarian law and Article 3 common to the Geneva Conventions of 1949, governs the legal duties of all the parties to the conflict in Sri Lanka.¹ Notably, all parties are bound to apply Article 3 common to the Geneva Conventions of 1949, and rules of customary international humanitarian law

¹ See e.g. Article 3 common to the Geneva Conventions of 1949 and the rules of the customary international humanitarian law;

applicable to the internal armed conflict.² The Article 3 common to the Geneva Conventions of 1949 applies to conflicts not of an international character and requires humane treatment, without any adverse distinction, of any and all persons taking no active part in hostilities, including those *hors de combat* by detention or any other reason, prohibits acts of violence towards them, outlaws taking them as a hostages, and guarantees them judicial process by regularly constituted courts.³ Moreover, as a State Party to the International Covenant on Civil and Political Rights (ICCPR), Sri Lanka is bound by Article 4 of the ICCPR, prohibiting derogations of certain basic rights.⁴ Sri Lanka is also a party to the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices.⁵

III. Situation in Sri Lanka

Hostilities in Sri Lanka have escalated dramatically since August 2005. There has been heavy fighting between Government forces and the LTTE, in particular in the east of the island. Human rights violations have included extrajudicial executions and enforced disappearances,⁶ as well as violations of international humanitarian law committed against civilians and persons *hors de combat*.⁷

The Ceasefire Agreement of February 2002 has collapsed in practice. In late November 2006, the leader of the LTTE stated that the LTTE no longer felt bound by it. In mid-April 2007, the Secretary of the Ministry of Defense was quoted as having said that the ceasefire no longer had meaning.⁸ On 16 January 2008, the Government of Sri Lanka explicitly withdrew from the Agreement, an action that may lead to intensification of hostilities and attendant attacks against civilians.

Between April 2006 and March 2007, more than 230,000 people were newly displaced, according to the United Nations High Commissioner for Refugees.⁹ Half of them are from Batticaloa District in the east. They have reportedly faced pressure to return to their homes, including threats by local authorities to stop assistance if they remain in Batticaloa town.¹⁰

Concerns have also been raised regarding the functioning and independence of some of Sri Lanka's state institutions.¹¹ Since March 2005, the Constitutional Council, the body responsible for making appointments to independent commissions and for approving appointments to positions of leadership in the justice system, including Supreme Court Justice, Appeals Court Judge, Attorney General, Human Rights Commissioner, and Inspector-General of Police,¹² has not been constituted. The President has instead made direct appointments to the Human Rights Commission, and may begin making appointments to other posts over the coming months, while

² See inter alia International Committee of the Red Cross, *Customary International Humanitarian Law, Volume I, Rules*, Cambridge Press University, 2005. See also The UN *Basic principles for the protection of civilian populations in armed conflicts*, adopted by the General Assembly, Resolution 2675 (XXV);

³ See Art. 3 common to the Geneva Conventions of 1949;

⁴ Art. 4 para. 2 of the ICCPR states that no derogation may be made from Articles 6, 7, 8 (paras. 1 and 2), 11, 15, 16 or 18. However, the General Comment No. 29 of the UN Human Rights Committee "Derogations during a state of emergency" refers also to other non-derogable rights;

⁵ ICRC treaty page, www.icrc.org/ihl.nsf/Pays?ReadForm&c=LK;

⁶ See International Crisis Group, "Sri Lanka's Human Rights Crisis," June 2007, p. 10-11, and "Letter to the Human Rights Council" from the Civil Monitoring Committee and the Sri Lankan Human Rights Commission, March 2007.

⁷ See e.g. International Commission of Jurists, "Sri Lanka - ICJ inquest observer finds flaws in investigation into killing of ACF aid workers," April 2007;

⁸ Associated Press, Colombo, 12 April 2007;

⁹ UNHCR, "More than 40,000 civilians flee latest fighting in eastern Sri Lanka," Colombo, 13 March 2007.

¹⁰ See Inter-Agency Standing Committee Sri Lanka, "Sri Lanka fact sheet: Batticaloa district - 29 Mar 2007";

¹¹ Asian Legal Resource Centre submission, "Sri Lanka: Serious Concerns Affecting Sri Lanka's Judiciary," May 2007; International Crisis Group, "Sri Lanka's Human Rights Crisis," June 2007;

¹² Constitution of the Democratic Socialist Republic of Sri Lanka Arts. 41A-C,

remaining intransigent on the appointment of Constitutional Council members.

The LTTE has been responsible for widespread human rights abuses, including political killings, abductions, recruitment of child soldiers, torture of persons *hors de combat* and threats and intimidation of journalists and others seen as critical of them. In addition, LTTE has involved civilian population in the armed conflict through military compulsory training. There have been also reports of killings, abductions and forced recruitment of child soldiers by the Karuna Group, a breakaway faction of the LTTE. Observers, including Allan Rock, the Special Advisor to the United Nations Special Representative for Children and Armed Conflict, have concluded that certain elements of the Government security forces have been complicit in the recruitment of children by the Karuna Group.¹³

i) Failure to Resolve Killings of Aid Workers and Other Civilians

The Sri Lankan authorities have proved unable or unwilling to solve the growing number of targeted killings of employees of international aid organizations in government territory. In August 2006, 17 *Action Contre la Faim* workers were shot to death in Muttur. The police investigation into their deaths has lacked impartiality, transparency, or willingness to cooperate with outside forensics experts.¹⁴ In a meeting with the ICJ's Secretary General in June 2007, the President of Sri Lanka pledged to set up an independent task force within the regular criminal justice system to vigorously renew investigations in the case of *Action Contre la Faim*, as well as the case of the killing of five students in Trincomalee in January 2006. At a meeting with the ICJ on September 5, the Minister of Justice and the Attorney General denied any recollection of the commitment, and to date the task force has not been established.

In the absence of effective investigations, the number of killings has increased. In June 2007 two Sri Lankan Red Cross workers were abducted by unknown gunmen from the Fort Railway Station in Colombo and later murdered; another Red Cross worker was kidnapped from his home in Jaffna and killed on December 14.¹⁵ These three killings remain unsolved. In total, the Asian Human Rights Commission documented 57 killings and disappearances of local and international humanitarian aid workers between January 2006 and September 2007. Government officials routinely blame these killings on LTTE, without conducting effective investigations; the LTTE, meanwhile, habitually denies involvement. Both sides in the conflict also routinely engage in terror attacks on civilians, while later denying responsibility or, as in the case of many attacks on journalists, justifying them as legitimate military activities.¹⁶ In total, at least 105 civilians were killed in the first five weeks of 2008, according to government figures.¹⁷ Notably, many of these deaths are caused by Claymore mines placed by LTTE forces on highways or in built-up areas, in violation of a prohibition, under international customary law, to use weapons, which are by nature indiscriminate.¹⁸

¹³ www.un.org/children/conflict/pr/2006-11-13statementfromthe127.html;

¹⁴ ICJ, Press Release, 5 July 2005;

¹⁵ ICRC, "Sri Lanka - ICRC Bulletin No. 18 / 2007";

¹⁶ Crisis Group Asia, "Sri Lanka's Human Rights Crisis" Report N°135, 14 June 2007 page 14; HRW, "Sri Lanka: Rebels and Government Should Cease Attacks on Civilians," 30 Nov 2007;

¹⁷ AFP, "At least 31 killed in recent Sri Lanka fighting," 26 Jan 2008; AP, "Bus Bombing Marks Sri Lanka Anniversary," 5 Feb 2008

¹⁸ IRIN News "SRI LANKA: Claymore mines used to lethal effect," 5 Feb 2008;

ii) Inadequacy of Domestic Human Rights Mechanisms

As the conflict in Sri Lanka has escalated, state institutions and mechanisms have become insufficient to protect civilians. The capacity to protect human rights in Sri Lanka is limited by the longstanding climate of impunity, the dangerous security situation in which human rights defenders have come under attack by both sides, and the sheer scale of the crisis, which has displaced hundreds of thousands of people since late 2005.¹⁹

The Human Rights Commission of Sri Lanka (HRC), set up in 1996, has a mandate to investigate incidents of specific violations of fundamental rights and recommend remedies and measures. But time and again it has been unable to fulfill its mandate, primarily due to the lack of cooperation from the Government and the LTTE. The Commission lacks sufficient political weight to access sites of human rights violations or ensure implementation of its recommendations. After a fact-finding mission in December 2003, the HRC stated, "no national or regional human rights entity will be able to effectively monitor and implement human rights standards in the north and the east. No organization or individual enjoys that kind of universal authority and legitimacy." It repeated this concern in April 2005, noting that it had no ability to function in LTTE-controlled areas and so could not investigate LTTE abuses. The HRC's work is further hampered by witnesses' reluctance to testify, given that Sri Lanka lacks a witness protection program, although a bill to create one has been under debate in the parliament for months. In addition, the HRC's independence is increasingly in doubt, as the President of Sri Lanka has begun to directly appoint its members, contrary to the usual procedures set out in the Constitution for making appointments to independent bodies.²⁰

The President of Sri Lanka has also established a Presidential Commission on Inquiry (CoI) to investigate 15 specific human rights violations, including the assassination of the Foreign Minister Lakshman Kadirgamar in August 2005 and the Muttur and Trincomalee massacres. The observers of the Independent International Group of Eminent Persons (IIGEP) monitor the Commission's work and provide technical assistance as necessary. Commissions of inquiry have been set up in Sri Lanka in the past; unfortunately, very few of their recommendations have been implemented and very few of the 4000 cases recommended for further investigation and prosecution have so far resulted in convictions.²¹ The IIGEP reports that the current CoI has not fully exercised its authority, in that it has failed to question officials from the Attorney General's Department on their involvement in prior failed investigations, nor used its power to bring contempt proceedings against government witnesses who refuse to answer its questions by invoking "national security."²² The CoI has also yet to hold a single public inquiry, more than a year after its inception.²³ The IIGEP considers that the government's disregard for its concerns about the CoI has rendered its work irrelevant.²⁴ The CoI's mandate has recently been extended by a year.²⁵

¹⁹ ICJ, "Discussion Paper on a Human Rights Field Presence in Sri Lanka," Oct 2007, pp. 4-5;

²⁰ Ibid. p. 6;

²¹ Ibid. pp. 8-9;

²² IIGEP, "Public Statement," 19 Dec 2007, p. 2;

²³ Ibid.;

²⁴ Ibid. p. 3;

²⁵ Ibid.;

III. Failure of International Human Rights Mechanisms

The Sri Lankan Monitoring Mission (SLMM), originally composed of 60 European Cease-Fire Agreement monitors, was forced to restrict its activities after the LTTE rescinded guarantees of security for its European Union members in June of 2006, and finally withdrew from the country completely after the Government of Sri Lanka repudiated the Cease-Fire Agreement on 16 January 2008. Although the SLMM was never able to fulfill its mandate completely, it played an important role in investigating and documenting killings and other hostile acts against civilians, on occasion even resolving outstanding disappearances. The end of its monitoring mission will likely further the climate of impunity in the country.

Since mid-2004, a Senior Human Rights Adviser (SHRA) has been posted in Sri Lanka. The role of the SHRA is limited by its mandate and its size. Its principal role is to provide advice and support on strategies to protect human rights and build the human rights capacity of local institutions, civil society and the United Nations itself. Its principal achievement has been to deploy some volunteers to support the HRC's regional offices and facilitate cooperation among human rights agencies.²⁶ In comparison with OHCHR country missions, the SHRA's capacity is negligible.

IV. Need for Human Rights Field Presence

Both the OHCHR and a wide variety of domestic voices have been calling for the establishment of an international human rights field presence in Sri Lanka. Following her October 2007 visit to Sri Lanka, the UN High Commissioner for Human Rights stated, "... in the context of the armed conflict and of the emergency measures taken against terrorism, the weakness of the rule of law and prevalence of impunity is alarming. ... (T)here has yet to be an adequate and credible public accounting for the vast majority of these incidents. In the absence of more vigorous investigations, prosecutions and convictions, it is hard to see how this will come to an end." Over the course of 2007, Sri Lanka's two largest opposition parties, the LTTE Peace Council, and the Civil Monitoring Commission, a multiparty committee for monitoring enforced human rights violations, have all said that they would welcome the establishment of international human rights monitoring.²⁷ On 15 January 2008, the UN High Commissioner recalled, in her press release on the end of ceasefire in Sri Lanka, a critical need for independent public reporting on the human rights situation in the country and the readiness of her Office to assist in this regard.

V. Mandate of the OHCHR's Human Rights Field Presence

An international human rights field presence would need to have a range of monitoring, investigative, and capacity-building functions. It would need to be able to verify allegations of human rights violations by all parties to the conflict and be present throughout the country. It would need to have access to all LTTE-controlled areas, to government and state authorities, and other parties involved in the conflict. The Memorandum of Understanding (MoU) would need to allow the presence to interview anyone freely and in private and to receive information from all sources, including local human rights organizations, combatants, civilians, and government personnel. The field presence would need to have the right to issue public statements and reports and would report to the High Commissioner for Human Rights. The

²⁶ ICJ, "Discussion Paper on a Human Rights Field Presence in Sri Lanka," Oct 2007, p. 7;

²⁷ Ibid. 10; ICJ, Press Release, 11 Dec 2007.

MoU would also need to include a commitment from the authorities to take responsible and remedial action necessary to comply with Sri Lanka's human rights obligations, including investigating and prosecuting those responsible for violations.

Past experience also shows that it is possible to set up an international human rights field presence in the absence of a peace agreement between warring parties. In fact, experience in Guatemala and El Salvador shows that implementing human rights obligations can serve as a confidence-building measure helping to set the stage for further development of a peace process.

VI. Conclusions

The ICJ calls on the Human Rights Council to:

- **Condemn attacks by all parties on civilians, including aid workers;**
- **Express concern at the end of Cease-Fire Agreement on 16 January 2008;**
- **Urge the Government of Sri Lanka:**
 - i) **To respect international humanitarian and human rights law, and refrain from disproportionate and indiscriminate use of force;**
 - ii) **To investigate the violations of human rights, and disproportionate and indiscriminate use of force and other violations of international humanitarian law committed by Government and LTTE forces;**
 - iii) **To ensure the adequate completion of investigations into the killings of aid workers by restoring the impartiality of the Presidential Commission of Inquiry and encouraging it to use its legal investigative powers to their full extent, with the continued assistance of the International Independent Group of Eminent Persons;**
 - iv) **To ensure the ability of existing relevant institutions to adequately safeguard against the gross violations of human rights and serious violations of international humanitarian law;**
 - v) **To appoint members of the Constitutional Council, allowing this body to return to existence and resume its constitutional function of approving high-level appointments within the justice system;**
 - vi) **To move with all due speed to complete the creation of a witness protection program;**
 - vii) **To agree to the establishment of an OHCHR field presence, which mandate would allow for unfettered access to monitor and investigate human rights violations and abuses by all parties to the internal armed conflict, and promote remedial measures, including criminal prosecution and capacity-building of domestic human rights mechanisms;**
 - viii) **To consider ratifying the International Convention for the Protection of All Persons from Enforced Disappearance and the Rome Statute of the International Criminal Court.**
- **Call on the LTTE and other armed groups**
 - i) **To abide by the relevant international human rights and humanitarian obligations, including protection of person *hors de combat* and civilians**
 - ii) **To refrain from widespread human rights abuses, including political killings, abductions, recruitment of child soldiers, torture of prisoners and threats and intimidation of journalists.**