# EUROPEAN CENTER FOR CONSTITUTIONAL AND HUMAN RIGHTS



# Study on Criminal Accountability in Sri Lanka as of January 2009

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# List of Abbreviations

BBC	British Broadcasting Corporation
BPCW	Bureau for the Protection of Children and Women
CIA	Central Intelligence Agency
CID	Criminal Investigation Department
CNN	Cable News Network
CAT	Convention against Torture
GS	Grama Sevaka (village official)
HRW	Human Rights Watch
HSZ	High Security Zone
ICC	International Criminal Court
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IDP	Internally Displaced Persons
IIGEP	International Independent Group of Eminent Persons
LTTE	Liberation Tigers of Tamil Eelam
MP	Member of Parliament
NFZ	No Fire Zone
NGO	Non-Governmental Organization
RCT	Rehabilitation and Research Centre for Torture Victims
РТА	Prevention of Terrorism Act
SLA	Sri Lanka Army
TID	Terrorist Investigation Division
TNT	Tamil New Tigers
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNHRC	United Nations Human Rights Council
UNICEF	United Nations Children's Fund
US / USA	United States of America
UNSC	United Nations Security Council
UN SecGen	United Nations Secretary General
	United rations betreatly Ucheral

## **EXECUTIVE SUMMARY**

The decades-long conflict between the Sri Lankan government and the Liberation Tigers of Tamil Eelam (LTTE) greatly intensified in early 2009. In the last few months of this conflict there have been widespread allegations of massive human rights and international humanitarian law violations. Numbers and reports of violations widely vary. As of May 2009 more than 40,000 civilians were reported dead and almost 300,000 were reported as being interned in camps. By not sparing any civilian, both the Sri Lankan government's military strategy to fight the LTTE in northern Sri Lanka as well as the LTTE's counterstrategy, constitutes not only a violation of international law and standards, but also amounts to criminal conduct.

Many attacks on civilians show a specific pattern. Hospitals were continuously shelled in the conflict zone. Human Rights Watch lists thirty hospitals as being shelled during a period of less than four months. Other shelling hit declared no-fire-zones, where women, children and the elderly gathered for shelter. On the 9<sup>th</sup> and 10<sup>th</sup> of May 2009, a small beach area near Mullaitivu, a declared no-fire-zone, was attacked while 50,000 residence gathered, leaving hundreds of civilians dead in a single attack.

Prisoners, surrendered as well as captured persons were shot on the spot or simple disappeared. The infamous white-van-syndrome stands as a symbol of disappearances, in many instances, a white van arrived, a person was forced to enter and was never seen again. Around a dozen senior LTTE-leaders were killed between 16<sup>th</sup> and 18<sup>th</sup> of May 2009, despite security guarantees at their surrender.

The populations of entire villages were forced to move to camps with harshly restricted exit, devastating conditions and no access for international observers. Civilians in such camps are routinely subjected to: sexual violence against women and girls, mistreatment as well as refusal of humanitarian aid, food, water, means of sanitation and medical supplies. Around forty camps were constructed in the northern region, Manik Farm being the largest. Here at Manik Farm, the shortage of water and sanitation are especially dire causing the deaths of many weak and elderly people.

These acts amount to numerous crimes under international law, which is applicable to the conflict in Sri Lanka. Severe human rights violations amount to crimes against humanity, including: murder, extermination, deportation, severe deprivation of physical liberty, sexual violence, persecution and enforced disappearances. Grave breaches of international humanitarian law and the Geneva Conventions constitute war crimes. War crimes are defined *inter alia* as violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture, outrages upon personal dignity, the taking of hostages, executions, gender crimes and displacement of the civilian population, as well as attacks intentionally directed against the civilian population, humanitarian aid workers and operations, hospitals and churches.

Criminal accountability is not only established by the direct perpetrator of the crime, but also by persons commanding, planning and overseeing attacks as well as those who fail to investigate and prosecute war crimes. The entire military chain of command, as well as the role of the civil administration must be investigated. The crimes listed above are some of the most serious crimes under international law and sentences can amount to life-long imprisonment.

International observers still do not have access to large portions of northern Sri Lanka. The former conflict zone is completely under control of the Sri Lankan military. The displacement of the civilian population is inappropriate. Homes are being destroyed, people from other regions are resettling the evacuated villages, cultural heritage, as well as, religious symbols are intentionally being destroyed, while the Tamil language is disappearing.

Within Sri Lanka numerous commissions of inquiry failed to investigate these findings during the last decade. At this time there are no genuine (independent, effective, prompt, gender- sensitive and impartial) investigations or fact-finding missions established. There is no sign of improvement

regarding national efforts to investigate these facts. Moreover, there have been attempts to destroy important evidence of these conditions.

International investigations or fact-finding missions need to be mandated by a competent international body. The International Criminal Court lacks jurisdiction, but could be activated if the United Nations Security Council refers the situation of Sri Lanka. The United Nations Human Rights Council was blocked by many states supporting the Sri Lankan government in its decision on Sri Lanka in May 2009. Positions of governments might slightly change, depending on new facts on crimes committed and public pressure. The United Nations Security Council failed to address the conflict in early 2009. Today, the Security Council does not regard the situation as a threat to peace, thus it is not a matter of concern. The on-going devastation in northern Sri Lanka might lead to a change in the Security Council's view, because of the lack of a transition process, from war to peace after the conclusion of a conflict, constitutes a further threat to future peace.

The United Nations Secretary General established a three person expert panel to advise him regarding possible further steps to curtail the violence. The panel needs all of the support available to enact further steps. Both the United Nations Special Rapporteur on extrajudicial killings and the United Nations Special Rapporteur on torture are already concerned with single issues in this conflict, and would therefore provide an ideal mechanism to focus on specific patterns of incidents. Further, other Special Rapporteurs as well as the Special Representative on sexual violence in conflicts should take up single issues of the conflict.

Only a few months after the conflict, important evidence has been lost and the international community and public forgets the countless civilian whose deaths spot the northern Sri Lankan region after one of the most merciless military campaigns in the new century. The Sri Lankan government attempts to install their regime without the fear of being brought to justice. Repression against the opposition and free media occur on a daily basis. More than a hundred thousand, of mostly Tamil civilians, are spread around the globe or left behind, without a home in their own country.

The few steps taken by the UN Secretary General as well as by UN Special Rapporteurs need to be supported to move towards an independent fact-finding commission. Victims and witnesses who were able to leave the country can give their account of what has happened. Fearless human rights workers and journalists in Sri Lanka need the international support to be able to report from this region. Thus, evidence can be secured step by step. As is the case in many other countries, even many years after a conflict, perpetrators of the most serious crimes are held accountable.

#### **INTRODUCTION**

The following study constitutes a legal analysis of the violent events that took place in Sri Lanka as of January 2009. The survey comprises an assessment of the criminal acts allegedly committed by the Sri Lankan Government and Army as well as the former separatist group Liberation Tigers of Tamil Eelam. It will be maintained that both parties to the internal armed conflict engaged in grave breaches of international law during the last five months of the civil war that raged for two decades. On May 18<sup>th</sup>, 2009 the Sri Lankan Government declared its victory and the end of the war. Background reports from human rights organizations, field reports, including witness testimonies as well as government reports and media documentation will be analyzed and assessed. The study will refer to the case law of the two ad hoc criminal tribunals established by the United Nations, the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda. In a further step the study will focus on the individual criminal responsibility of persons allegedly engaged in criminal conduct during the conflict. Moreover domestic as well as international prospects of how to deal with the grave breaches of international law will be suggested and discussed. The Rome Statute of the International Criminal Court, Customary International Law, International Humanitarian Law - especially the four Geneva Conventions - and Human Rights Law will provide the legal framework for this study.

## I. Historical background to the conflict in Sri Lanka

The island of Sri Lanka is located about 30 kilometers off the southern coast of India. It is home to around twenty million people. The British East India Company declared the island of Sri Lanka a crown colony in 1802. In 1815 the whole territory came under British rule. Due to its rich natural resources, especially the cultivation of tea, cinnamon, rubber, sugar, coffee and coconut, the British brought a large number of indentured workers from the Indian region Tamil Nadu to work in the plantation economy. The ethnic Tamil people were Hindus and spoke their own language. Apart from the Indian Tamils who settled there, the north of the island was always inhabited by a small ethnic Tamil population, which had their distinct language, religion and culture. The native Sinhalese people are Buddhists and speak Sinhalese. Today, the ethnic division in the country is as follows: approximately 73.9 % Sinhalese, 7.2 % Sri Lankan Moors (of Muslim religion), 4.6 % Indian Tamil, 3.9 % Sri Lankan Tamil and around 10 % of other origin.<sup>1</sup>

As Ceylon, the country became independent in 1948. The independence movement was mainly fought by the Sinhalese population, which then strongly influenced the creation and development of the new state. By 1956, the Official Language Act came into effect. It announced Sinhala the only official and national language of Sri Lanka. As a consequence, Tamil speaking employees in the public sector had to resign from their jobs. Subsequently the Sinhalese-led government adopted further measures that were viewed as disadvantageous to the Tamil-minority communities. From that date on Sinhala would also constitute the medium of instruction in schools.<sup>2</sup> For example it resettled Sinhalese farmers' to the Tamil-dominated Eastern provinces of Sri Lanka.<sup>3</sup> Moreover the National Constitution adopted in 1972 made Buddhism the national religion.<sup>4</sup> These measures are partly seen as the root

<sup>&</sup>lt;sup>1</sup> CIA, The World Factbook, www.cia.gov/library/publications/the-world-factbook/geos/ce.html.

<sup>&</sup>lt;sup>2</sup> See A. Sivanandan, 'Ethnic cleansing in Sri Lanka', 9 July 2009,

www.irr.org.uk/2009/july/ha000021.html.

<sup>&</sup>lt;sup>3</sup> C. Wickremesekera, 'Peace through Military Parity? The Tamil Tigers and the Government Forces in Sri Lanka', in D. P. Marston and C. S. Sundaram (eds), *A Military History of India and South Asia* (2006); F. J. Harper, 'Sri Lanka', in B. Szajkowski (ed), *Revolutionary and Dissident Movements of the World* (2004) 454, 456.

<sup>&</sup>lt;sup>4</sup> J. Minahan, *Encyclopedia of the Stateless Nations* (2002), 1847; Wickremesekera supra note 3.

causes behind the formation of the Liberation Tigers of Tamil Eelam.<sup>5</sup> The Liberation Tigers of Tamil Eelam began in 1972 as a separatist militant organization formed under the name of the Tamil New Tigers (TNT). Their aim was the creation of an independent state in the North Eastern part of the island. It was not until 1975 that the organization started its armed campaign, including the assassination of the Mayor of Jaffna. Since 1976 the group has been known as the Liberation Tigers of Tamil Eelam.<sup>6</sup>

The countries name was changed to Sri Lanka in 1972. Inevitably, the origins, objectives and character of Sri Lanka's conflict are contested, not least because it is the result of multiple factors. (An in depth analysis would include the international, security, political, economic and social dimensions of the crisis.)<sup>7</sup> However, this study will merely take into account the social, political and ethnic tensions as they are directly related to the crimes that have been committed. One source of anger is said to be the preference the British colonialists showed towards the Tamil ethnic people. This behavior presumably resulted in the majority Sinhalese population's resentment of the Tamils.<sup>5</sup>

The LTTE argued it was spearheading an armed struggle for self- determination and political independence for the Tamil people in their homeland as a response to institutionalized racism and escalating violence against them by a Sinhala-dominated state. The Sri Lankan Government on the other hand denounced the LTTE's violence as a terrorist challenge to its authority, unity and territorial integrity. The 'fight against terrorism' is viewed by some scholars as rooted in an ethno-religious ideology.9

Tensions between the Sinhalese majority and Tamil separatists erupted into civil war in 1983. After two decades of fighting, the government and the LTTE concluded a cease-fire agreement in February 2002 with Norway brokering peace negotiations. The violence between the LTTE and government forces intensified in 2006 and the government regained control of the Eastern Provinces in 2007. From mid-2008 until May 2009 the country found itself in the heaviest phase of the 26 year long civil war. It is estimated that around 20.000 people died in these months.<sup>10</sup> Both parties to the conflict are accused of having committed grave human rights violations with a total disregard for human life. In May 2009, the remnants of the LTTE leadership announced their capitulation and the Sri Lankan Government declared victory over the LTTE.<sup>11</sup>

# II. Sequences of events that occurred after January 2009

Relevant for the legal assessment of this study are the events beginning in January 2009. Although the conflict started much earlier, this study will focus particularly on the last five months. The conflict officially ceased on May 18th, 2009 when the governing president Mahinda Rajapaksa announced the defeat of the LTTE and hence the end of the war.

<sup>&</sup>lt;sup>5</sup> W. Clarance, *Ethnic Warfare in Sri Lanka and the UN Crisis* (2007) 25.

<sup>&</sup>lt;sup>6</sup> www.armed-groups.org/6/section.aspx/ViewGroup?id=17; see for a detailed discussion: S. Nadarajahand and L. Vimalarajah, 'The Politics of Transformation: The LTTE and the 2002-2006 peace process in Sri Lanka', (2008) Berghof Transitions Series No. 4, 22 et seq.

<sup>&</sup>lt;sup>7</sup> See J. Goodhand, Aid, Conflict and Peace Building in Sri Lanka (2001), p. 8.

<sup>&</sup>lt;sup>8</sup> A. Sivanandan, 'Sri Lanka: racism and the politics of underdevelopment', (1984) 26 Race & Class (1), at 4 et seq.

S. Nadarajah and L. Vimalarajah, supra note 6, p. 20.

<sup>&</sup>lt;sup>10</sup> CNN, available at: http://edition.cnn.com/2009/WORLD/asiapcf/05/29/srilanka.death.toll/index.html, also Times online: www.timesonline.co.uk/tol/news/world/asia/article6383449.ece and Reuters: www.reuters.com/article/idUSTRE54S16520090529.

<sup>&</sup>lt;sup>11</sup> CIA World Factbook, www.cia.gov/library/publications/the-world-factbook/geos/ce.html, also Human Rights Watch: Legacy of Abuse in Sri Lanka, by Anna Neistat, found at: www.hrw.org/en/news/2009/10/27/legacy-abuse-sri-lanka.

## **III. Reliability of the sources**

It must be noted that many sources are publicly available. There is a wide range concerning the reliability of each source. This study focuses on reports by some of the leading non-governmental organizations such as Human Rights Watch, International Crisis Group or Amnesty International. Further, UN documents were taken into consideration as well as two US State Department reports. Nevertheless, testimonies and evidence provided for by other groups may give a hint where to commence further investigations and some indications for witnesses and events that might have taken place.<sup>12</sup> In sections where the study relies on those less credible sources, the authors investigate whether the information about the incidents described is correct, although international standards of cross-checking information and evidence were at times not possible.

<sup>&</sup>lt;sup>12</sup> For more information on Tamil diaspora please see International Crisis Group, 'The Sri Lankan Tamil Diaspora After the LTTE', (2010) *Asia Report N°186*.

### PART ONE: THE FACTS

#### I. The parties to the conflict

In the following section the structures, hierarchies and leadership within the Sri Lanka Army and Government will be summarized. This will be followed by an overview of the structures, hierarchies and leadership of the LTTE.

### A. The structure of the Sri Lankan Military and Government

### 1. The Sri Lanka Army

The 1949 Army Act gave birth to the Ceylon Army.<sup>13</sup> The armed forces are divided into the Sri Lanka Army, the Sri Lanka Navy and the Sri Lanka Air Force. Currently Lieutenant General Jagath Jayasuriya is the Army Commander of the Sri Lanka Army. He assumed office on 15th July 2009 and succeeded General Sarath Fonseka who held position between December 2005 and July 2009.<sup>14</sup> Sarath Fonseka was also serving as Chief of Defence Staff at that time. He was taken into military custody earlier this year on 8<sup>th</sup> February 2010 charged with committing alleged fraudulent acts and military offences. Human Rights organizations as well as the international press view his arrest as a means of getting rid of the only real opponent of current president Mahinda Rajapaksa, in the elections. In January 2010 Rajapaksa defeated Fonseka in the presidential elections, although Fonseka claims that electoral results were manipulated. Sarath Fonseka was the highest ranking official of the Sri Lanka Army in the period between January and June 2009, while the military operations in the northern part of Sri Lanka were conducted by different Divisions and Task Forces of the army. These were in turn led by four Major Generals. In total there were thirteen battle field commanders, also titled Major General, Brigadier and Colonel.

Information about the army commanders who led the major military operations from September 2008 until the end of the conflict can be found on the Sri Lanka Army website. This site cites twenty four military operations between January and May 2009 that took place in the northern region.<sup>15</sup> Therein the different divisions can be differentiated and assigned to single operations.

The organization War without Witnesses issued a list of persons belonging to the Sri Lankan government and military.<sup>16</sup> The following is a list of persons holding the highest positions in the Sri Lanka Army during the conflict. However, specific investigations focusing on individual criminal responsibility are essential to attribute the commission of certain crimes listed below to specific individuals:

Former Lt. Gen. Sarath Fonseka, a US permanent resident, was commander of the Sri Lanka Army. On December 20th "The Sunday Leader" published a clarification by Sarath Fonseka: "As Commander of the Army during the final stages of the war, I did not receive any communication that some LTTE leaders were planning or wanting to surrender. I was not told at any stage they wanted to do so and that some kind of an agreement had been reached that they must come out carrying pieces of white cloth. I can speak conclusively and authoritatively on this particular issue and say categorically

<sup>16</sup> War without witnesses,

<sup>&</sup>lt;sup>13</sup> See Sri Lanka Army, www.army.lk/estab.php.

<sup>&</sup>lt;sup>14</sup> See Sri Lanka Army, www.army.lk/pastcommanders.php.

<sup>&</sup>lt;sup>15</sup> The Daily News, www.dailynews.lk/2009/06/03/supstory.asp?id=s01, also War Without Witnesses, www.warwithoutwitness.com/index.php?option=com\_content&view=article&id=293:satellite-imagery-evidence-showing-sri-lanka-military-purposely-or-intentionally-targeted-ptk-hospital-tag&catid=38:reports&Itemid=61 and www.defence.lk/new.asp?fname=20090518 07.

www.warwithoutwitness.com/index.php?option=com\_content&view=article&id=242&Itemid=67.

that nobody carrying white flags attempted surrender in those final days of the war. Therefore all of the LTTE leaders were killed as forces completely took over a remaining 100m x 100m area of land north of Vellamullivaikkal. Two days after the war ended I learnt through some journalists who were entrenched at the time with then Brigadier Shavendra Silva that an illegal order had been conveyed to General Shavendra Silva by Defence Secretary Gotabaya Rajapaksa. This illegal order was however not carried out at ground level. I take full responsibility for what happened on the ground."<sup>17</sup>

Major General Jayasuriya was the Vanni Commander from August 2007 until the end of the war. President Rajapaksa promoted him to Lieutnant General and appointed him as army commander in July 2009, replacing Sarath Fonseka. He coordinated operations until the end and was the overall commander of the 53<sup>rd</sup>, 57<sup>th</sup>, and 59<sup>th</sup> divisions.<sup>18</sup>

An officer from the Sri Lanka Armoured Corps, Major General G.A. Chandrasiri as the Jaffna Security Forces Commander, commanded troops belonging to the 53rd and 55th offensive Divisions to destroy LTTE's strongest defenses in Muhamalai and Kilali.

It was under the command of Major General Mendaka Samarasinghe when the troops of the Sri Lanka Army launched the humanitarian operation in Mavil Aru in June 2006. They captured the areas in the Trincomalee South including Muttur, Sampur, Upparu, Gangai, Manirasakulam and the areas surrounding the Trincomalee harbour as he commanded the 22nd Division in Trincomalee. Even after assuming duties as Jaffna Security Forces Commander in December 2008 he commanded the troops of the 53rd and 55<sup>th</sup>.

These Divisions had the task to liberate the entire Jaffna peninsula from the clutches of the LTTE and to liberate the entire North Eastern coast up to Mullaitivu North with the deployment of troops of the  $55^{\text{th}}$  Division.

Major General Jagath Dias, a senior officer of the Gajaba Regiment, led the 57th offensive Division in the Vanni Liberation operation in mid-2007 after Brigadier Sumith Manawadu. Major General Jagath Dias commanded his troops to capture sacred Madhu Church in April 25, 2008 - the first significant victory achieved by the 57th Division. The 57th Division went on to capture the significant townships Palampiddi, Periyamadu, Thunukkai, Mallavi and Akkarayankulam, Murikkandi, Iranamadu and Kilinochchi. Later he also commanded his troops to capture Ramanathanpuram and Visuamadu towns.

Another experienced officer from the Gajaba Regiment, Major General Kamal Gunaratne first commanded the 55th Division in Jaffna and later appointed as the GOC of the 53rd Division. He commanded his troops to capture Muhamalai, Pallai, Soranpattu and Elephant Pass. His Division was then moved to Mankulam and later deployed in the battle to capture Puthukudiyirippu. It was his troops who captured the Eastern edge of the Nanthikadal lagoon along with the Task Force VIII troops. In the final battle it was the troops under his command who recovered the body of the Tiger leader Velupillai Prabhakaran on the banks of the Nanthikadal lagoon in Vellamulivaikkal.

Currently the Overall Operations Commander Anuradhapura, Major General Nandana Udawatta was the first GOC of the 59th offensive Division which began operations from Weli Oya sector to clear the entire Mullaitivu jungle including that of the famous 1-4 Base complex of the LTTE. Nayaru, Alampil, Mulliyavali, Thanniuttu and Mullaitivu were major towns passed by the 59th Division under his command.

Having commenced operations from the Vannivilankulam in November 2008, Brigadier Liyanage commanded his troops to capture key junction towns Mankulam on the A-9 road, and Olumadu and Ampakamam to the east of the A-9 road. The troops of the Task Force 111 also recovered huge stocks of LTTE assets in and around Iranamadu Tank area.

An experienced Infantry Officer, Brigadier Prasanna Silva, initially commanded the troops in the Mavil Aru battle and to liberate Vakarai in the year 2006 and 2007. He was later appointed as the General Officer Commanding of the 55th Division in Jaffna to command his troops to capture

<sup>&</sup>lt;sup>17</sup> http://tamilweek.com/news-features/archives/1807.

<sup>&</sup>lt;sup>18</sup> International Crisis Group, supra note 12.

Nagarkovil, Kudarappu, Chempionpattu in the Eastern coast of the Jaffna peninsula. Later he commanded the 55th Division to capture Chundikulam and Chalai as well as the entire North Eastern coast up to Mullaitivu North. During the final battle in the Mullaitivu North Brigadier Prasanna Silva commanded the 59th Division troops to capture Vadduvakkal causeway, clearing the path for the civilians to escape towards military controlled areas.

Another senior officer attached to Gajaba Regiment, Brigadier Shavendra Silva was first appointed as the Commander of the Task Force I which was later elevated to the 58th Division, the second offensive Division to join the Vanni liberation operation. Brigadier Silva commanded his troops from the Mannar towards Pooneryn to liberate fully the North Western coast from the clutches of the LTTE, having already capturing major Sea Tiger bases Vidathalthivu, Iluppakadaval Nachchikuda, Iranativ, Devil's Point to reach Pooneryn. He then commanded his troops to advance along the Pooneryn Paranthan road to capture Paranthan junction at the beginning of 2009 and later to capture key strongholds of the LTTE Kilinochchi and Elephant Pass and to reach the North Eastern coast having capturing Tharmapuram, Visuamadu and Puthukudiyiruppu. On April 20, 2009, he commanded his troops, along with the Commando and Special Forces troops, to contribute towards the last battle in Karyanmullivaikkal in the Mullaitivu North in which LTTE-leader Velupillai Prabhakaran was killed.

Brigadier Chagie Gallage, General Officer Commanding 59th Division, first commanded the commando troops in the Thoppigala liberation operation which was considered the pinnacle of the Eastern liberation operation. He was later appointed as the Task Force I commander and commanded his troops to capture Silavatura in September 2007. Later he was appointed as the Director Training of the Army Headquarters. He was sent specifically to 59th Division to overlook the operational matters. It was under his supervision when the Forward Defences in the entire Mullaitivu front helped to lay siege on the last terrain of the LTTE in Mullaitivu North leaving no room for the LTTE to escape into Mullaitivu jungles.

An engineer officer, Brigadier Rohana Bandara led the troops of the Task Force II (formed in June 2008) from Palamoddai in the West of A-9 road, giving support for the 57th Division to continue their advance towards Kilinochchi. It was his troops who captured Navi village, Puliyankulam, Kanakarayankulam and Udayarkattukulam tank bund during the Vanni liberation operation.

Colonel Nishantha Wanniarachchi commanded the troops of the Task Force IV which was formed in December 2008, to capture Nedunkerni, Oddusudan and Kereridattu towns. He later commanded his troops to capture massive arms and ammunitions stocks and major LTTE- bases along the Oddusudan - Puthukudiyiruppu road.

An artillery officer, Colonel G.V. Ravipriya, first contributed towards the Vanni liberation operation, as one of the senior Brigade Commander of the 57th Division and contributed for major victories until the 57th Division captured strategic Akkarayankulam village. It was in the first quarter in the year 2008 that he was appointed as the Commander of the Task Force 8 which initially commenced operations under the 53rd Division. Under his command the troops attached to Task Force 8 achieved numerous military victories in the Puthukudiyiruppu South and foiled major LTTE attempt to flee from the Karayanmullivaikkal area in the last battle.<sup>19</sup>

## 2. The Sri Lankan Government

The President, Mahinda Rajapaksa, is the Head of State, Commander-in-Chief of the armed forces and head of the government. The Sri Lankan military is administered by the Ministry of Defence. Secretary of Defence is the brother of the President, Gotabaya Rajapaksa. The administrative structure

<sup>&</sup>lt;sup>19</sup> This information is taken from a report of the NGO Tamils against Genocide, submitted to the People's Tribunal on Sri Lanka - Dublin, Ireland, as evidence of war crimes. For the list of person see also Daily News, www.dailynews.lk/2009/06/03/supstory.asp?id=s01 and War Without Witnesses,

www.warwithoutwitness.com/index.php?option=com\_content&view=article&id=293:satellite-imageryevidence-showing-sri-lanka-military-purposely-or-intentionally-targeted-ptk-hospitaltag&catid=38:reports&Itemid=61.

of the country includes on the first level the Provincial Council structure, composed by nine provinces, which are headed by Province Chief Ministers with a board of ministers as well as a Provincial Governor appointed by the President. On the second level there is the Civil Service Structure, composed of 25 districts<sup>20</sup> headed by a District Secretary who is appointed by the central government.

Other members of the administration are or were: Karuna Amman, also known as Vinayagamoorthi Muralitharan, Minister of National Integration since 9 March 2009; Basil Rajapaksa, senior adviser to the President; Foreign Secretary Palitha Kohona and Military Spokesman Udaya Nanayakkara.

# **B.** The structure of the LTTE

### 1. Leadership and command structure within the Liberation Tigers of Tamil Eelam

The LTTE leadership was organized along a two-tier structure: a military wing and a subordinate political wing. Overseeing both was a central governing committee, headed by the LTTE chief, Velupillai Prabhakaran.<sup>21</sup> Velupillai Prabhakaran headed the LTTE power structure as chairman of the central governing committee and 'commander-in-chief' of the army. He was assisted by Anton Balasingham, his political advisor, who died in 2006.<sup>22</sup> Velupillai Prabhakaran was killed, presumably on 19<sup>th</sup> May 2009, along with his Intelligence Chief Pottu Amman and Soosai, the head of LTTE's naval wing.<sup>23</sup> The following head figures of LTTE leadership died subsequently. Charles Anthony, Prabhakaran's 24-year-old son and the head of the LTTE's information technology wing, B. Nadesan, LTTE's political wing leader and S. Pulideevan, head of the LTTE's defunct Peace Secretariat.<sup>24</sup> Moreover, several other LTTE members, a significant part of the organizations' leadership, are reported to have been killed during the last months of the war:

Bhanu – LTTE military leader Jeyam- LTTE military leader Ramesh- LTTE special military leader Ilango- LTTE police chief Sudharman – aide to LTTE leader's son Thomas- senior intelligence leader an Luxman – LTTE military leader Sri Ram- senior sea tiger cadre Iseiaravi – LTTE female military leader Kapil Amman – LTTE deputy intelligence leader Ajanthi- female LTTE training in charge Wardha – LTTE mortar in charge Pudiyawan- Secretary to LTTE leader

<sup>&</sup>lt;sup>20</sup> The districts are subdivided in 5-16 divisions with Division Secretaries. For more information: www.ds.gov.lk/dis\_sec/dis\_eng/District\_Secretariats.php.

<sup>&</sup>lt;sup>21</sup> www.satp.org/satporgtp/countries/shrilanka/terroristoutfits/LTTE.HTM.

<sup>&</sup>lt;sup>22</sup> B. Matthews, 'In Pursuit of an Interim Administration in Sri Lanka, s North and East: Opportunity or Peace Trap?', (2004) 93 the Round Table, at 84; Tamilnet, Anton Balasingham Passes Away, 14 December 2006, www.tamilnet.com/art.html?catid=13&artid=20610.

<sup>&</sup>lt;sup>23</sup> http://news.bbc.co.uk/2/hi/8055015.stm.

<sup>&</sup>lt;sup>24</sup> http://sify.com/news/ltte-leadership-wiped-out-news-international-jfsrEbffefg.html.

Jenarthan – Special military leader<sup>25</sup>

# Swarnam and Shasikumar master, two senior LTTE cadres<sup>26</sup>

# 2. The Governing Committee of the LTTE

The governing committee was the organ responsible for directing and controlling several specific subdivisions of the LTTE. The most important of these were the Sea Tigers, a naval arm, the Air Tigers, an elite fighting air force, the Black Tigers, a suicide commando unit, a secret intelligence group and a political office.<sup>27</sup> The central governing committee also comprised of an International Secretariat, which was in charge of the outfit's global network.

Additionally, the LTTE created a judiciary branch and in 1991 it established a police force<sup>28</sup> present in the de facto controlled areas in the north. The organization also collected 'taxes' and established its own law courts, administrative offices, as well as television and radio broadcasting facilities.<sup>29</sup> Furthermore the LTTE created departments dealing with health and educational issues as well as a Northeast Secretariat on Human Rights, which represented the group before international human rights organizations and kept a record of human rights violations.<sup>30</sup>

In 2005 the number of LTTE combatants was estimated to be between 7,000 and 11,000 persons.<sup>31</sup> The Sri Lankan Government repeatedly alleged that the LTTE military strength had increased to around 18.000 fighters between 2002 and 2004, of whom a large percentage were below the age of eighteen and forcibly recruited. A deliberate policy of recruiting women and children into LTTE cadres was initiated after the signing of the Indian Peace Keeping Force Accord in 1987, to offset a severe shortage of manpower caused by ever increasing casualties and the escalation of the conflict.<sup>32</sup> Nearly one-third of the LTTE cadre was comprised of women who were assigned duties on the battlefield, in the kitchen and in medical camps as nurses. LTTE fighters underwent a program of rigorous training. A typical training schedule was spread over four months, during which they received training in handling weapons, battle and field craft, communications, explosives and intelligence gathering, as well as an exhausting physical regimen and rigorous indoctrination.

<sup>&</sup>lt;sup>25</sup> See for the full list the Vancouverite, www.vancouverite.com/2009/05/29/sri-lanka-special-forces-findbody-of-ltte-chiefs-son-top-tiger-officials-also-killed/, also The Sri Lanka Ministry of Defence, www.defence.lk/new.asp?fname=20090518 07 and www.defence.lk/new.asp?fname=20090518 04.

<sup>&</sup>lt;sup>26</sup>Sri Lanka Ministry of Defence, www.defence.lk/new.asp?fname=20090516 13.

<sup>&</sup>lt;sup>27</sup> See South Asia Terrorism Portal, www.satp.org/satporgtp/countries/shrilanka/terroristoutfits/LTTE.HTM. (The Sea Tigers were headed by Soosai, the Air Tigers by Balraj and the suicide commando unit by Pottu Amman. The secret intelligence and the political office were headed by Thamilselvam and Anton Balasingham, widely regarded to be the political advisor and ideologue of the LTTE.) Wickremesekera supra note 3; 'Escalade dans le conflit au Sri Lanka avec le premier raid aérien tamoul,' Agence France Presse, 26 March 2007.

<sup>&</sup>lt;sup>28</sup> K. Stokke, 'Building the Tamil Eelam State: Emerging State Institutions and Forms of Governance in LTTE-controlled Areas in Sri Lanka', (2006) 27.6 *Third World Quarterly* (2006), at 1027.

<sup>&</sup>lt;sup>29</sup> Stokke ibid., at 1029-1035; South Asia Terrorist Portal, Sri Lanka, Liberation Tigers of Tamil Eelam, www.satp.org/satporgtp/countries/shrilanka/terroristoutfits/LTTE.HTM, National Memorial Institute for the Prevention of Terrorism, Liberation Tigers of Tamil Eelam (LTTE).

<sup>&</sup>lt;sup>30</sup> Stokke supra note 28, p. 1029, 1036.

<sup>&</sup>lt;sup>31</sup> IISS Armed Conflict Database, Non-State Armed Groups, Liberation Tigers of Tamil Eelam (LTTE), www.iiss.org/publications/armed-conflict-database; J.-M. Balencie and A. de La Grange, *Les Nouveaux Mondes rebelles* (2005), at 375; South Asia Terrorist Portal, Sri Lanka, Liberation Tigers of Tamil Eelam, www.satp.org/satporgtp/countries/shrilanka/terroristoutfits/LTTE.HTM.

<sup>&</sup>lt;sup>32</sup> South Asia Terrorism Portal, www.satp.org/satporgtp/countries/shrilanka/terroristoutfits/LTTE.HTM.

### II. The alleged acts of the Sri Lankan Government

The following section will summarize the acts presumably committed by or attributable to the Sri Lankan Government and Sri Lankan military forces in the last months of the civil war. In order to prove certain patterns of behavior or policies, some sections contain general observations which are prefixed to the specific sections. The sources are various, whereby it is aimed to sustain a neutral approach towards both sides of the conflict. Newspaper articles, video footage and images provided by NGOs, individual witnesses, as well as reports of Human Rights organizations and governments are used in this section.

## A. The situation in the internally displaced persons camps during and after the end of the conflict

# 1. Introductory remarks

# 1.1 General situation in the camps

'About 1,400 people are dving every week at the giant Manik Farm internment camp', reported by The Times on July 10<sup>th</sup>, 2009.<sup>33</sup> 'The death toll will add to concerns that the Sri Lankan Government has failed to halt a humanitarian catastrophe after announcing victory over the Tamil Tiger terrorist organization in May.<sup>34</sup>

The following section describes the situation of the almost 300.000 civilians that were interned in government-controlled internally displaced persons (IDP) camps last year.

Due to the new outbreak of the conflict between the Sri Lankan Government and the LTTE since 2008, almost 300.000 mainly Tamil civilians had to flee their homes and seek shelter in other parts of the country.<sup>35</sup> These internally displaced persons originated mainly from the Mannar, Vavuniya, Kilinochchi, Mullaitivu and Jaffna districts in the northern and eastern part of Sri Lanka. In total around 40 camps were set up by the Sri Lankan Government, spread across the four districts Mannar, Vavuniya, Jaffna and Trincomalee. Most people fled to Jaffna, situated in the northernmost part of the island, and to the Vavuniya region. The Manik farm in the Vavuniya region is the biggest complex of camps located next to each other. In the period between March 2008 and June 2009 around 280.000 people were detained in these camps, which were called 'welfare centers' by the Sri Lankan Government.<sup>36</sup> According to Human Rights Watch, the Sri Lankan authorities continued to hold more than 129,000 persons in camps as of November 2009, almost six months after the official end of the conflict. It is estimated that over 80.000 of these were children. As of January 2010 around 80.000 persons were still living in the major camps in Vavuniya and other parts of the north.<sup>37</sup>

The camps were intended to be protected areas for civilians fleeing their homes as a result of the armed conflict. They were designed to be temporary emergency facilities, whereas some of them are described by the UNHCR as 'semi permanent' housing facilities.<sup>38</sup> Aid workers claim that the new structures violated UN guidelines on temporary refugee shelters, and suggested that the Government meant to hold refugees for much longer.<sup>39</sup>

<sup>&</sup>lt;sup>33</sup> The Times Online, www.timesonline.co.uk/tol/news/world/asia/article6676792.ece.

 <sup>&</sup>lt;sup>34</sup> The Times Online, www.timesonline.co.uk/tol/news/world/asia/article6676792.ece.
 <sup>35</sup> www.nytimes.com/2009/07/13/world/asia/13lanka.html?\_r=1.

<sup>&</sup>lt;sup>36</sup> See Human Rights Watch, 'Country Summary Sri Lanka', World Report Chapter, January 2010, p. 2.

<sup>&</sup>lt;sup>37</sup> Only 79,965 IDPs remaining in Vavuniya', Government of Sri Lanka, January 7, 2010.

<sup>&</sup>lt;sup>38</sup> See Amnesty International, 'Unlock the Camps in Sri Lanka: Safety and Dignity for the Displaced now - a Briefing Paper', ASA 37/016/2009, August 2009, p. 5.

<sup>&</sup>lt;sup>39</sup> The Times Online, July 3, 2009, www.timesonline.co.uk/tol/news/world/asia/article6626563.ece.

The management of the camps is conducted by Sri Lankan military personnel. 'Camps are guarded by armed personnel, camp managers are often retired military officers and the Ministry of Defense has been actively involved in determining who gets access.'<sup>40</sup> At the height of the conflict the inmates were not allowed to leave the fenced areas at all, turning them practically into closed detention facilities.<sup>41</sup> People were held in de facto custody without any charge or trial. They were not informed about the reason of their detention, the whereabouts of relatives or the criteria and procedure for their return home.<sup>42</sup>

One reason provided by the Sri Lankan Government for detaining the ethnic Tamil population in camps was to screen them for LTTE members.<sup>43</sup> Persons who admitted to have been in contact with the LTTE were separated from the rest of the inmates and transferred to so-called 'rehabilitation centers' for re-education.<sup>44</sup> Details about the screening procedure and official lists of the persons in detention have not yet been revealed by the government. A report of the International Crisis Group said that people are now allowed to leave the camps for a certain time period. However, it appears that the travelers receive a pass that requires them to return by a particular date, generally ranging from five days to two weeks.<sup>45</sup> In some cases people are being told to leave family members behind as a guarantee for their return.<sup>46</sup>

Since the Sri Lankan Government asked the United Nations to leave the Vanni region in September 2008, the World Food Programme had very limited access to the displaced persons in the Vanni. The military camp administration denied humanitarian organizations including the ICRC as well as the media access to the camps, making effective monitoring, protection and reporting almost impossible.<sup>47</sup> The United Nations pressed the Sri Lankan Government to allow unfettered access to the war zone in the country's north. But Red Cross workers have not been allowed to enter Manik Farm, the ICRC's deputy head of operations for South Asia, Monica Zanarelli, said in a statement posted on the agency's Web site.<sup>48</sup> In July 2009, the Red Cross subsequently closed two offices on the order of the Sri Lankan Government. One of them was in Trincomalee and had helped to provide medical care to about 30,000 injured civilians evacuated by sea from the conflict zone in the north east.<sup>49</sup> The other is in Batticaloa, where the Red Cross had been providing "protection services". This involves following up allegations of abductions and extrajudicial killings, practices that human rights organizations say have become recurring motifs of the Sri Lankan Government.

A Sri Lankan spokesman denied the U.N.'s implication that the camps were inadequate and defended the government's restrictions on aid workers and journalists. "These camps are not five-star hotels, but we are trying to accommodate the displaced people as best we can," said Lakshman Hulugalle, director general of the Defense Ministry's media center. "But we are not letting journalists and others go there to treat these people as if they were animals in a zoo."<sup>50</sup>

The Chief Justice of the Sri Lankan Supreme Court, Sarath N. Silva, declared in a public speech in June 2009 that the detention of hundreds of thousands of Tamil civilians in internment camps set up

<sup>46</sup> Ibid.

http://ochaonline.un.org/srilanka/SituationReports/EmergencySituationReport/tabid/5487/language/en-US/Default.aspx.

<sup>&</sup>lt;sup>40</sup> Amnesty International (2009), supra note 38.

<sup>&</sup>lt;sup>41</sup> www.nytimes.com/2009/07/13/world/asia/13lanka.html?\_r=1.

<sup>&</sup>lt;sup>42</sup> Human Rights Watch (2010), supra note 36, p. 3.

<sup>&</sup>lt;sup>43</sup> See International Crisis Group, 'Sri Lanka: A Bitter Peace', Asia Briefing No 99, January 2010, p. 2.

<sup>&</sup>lt;sup>44</sup> See Human Rights Watch, 'Legal Limbo- The Uncertain Fate of Detained LTTE Suspects in Sri Lanka', February 2010.

<sup>&</sup>lt;sup>45</sup> See International Crisis Group (2010), supra note 43, p. 3.

<sup>&</sup>lt;sup>47</sup> Human Rights Watch (2010), supra note 36, p. 3; see also Website of UNOCHA,

<sup>&</sup>lt;sup>48</sup> Washington Post, 21 May 2009, www.washingtonpost.com/wpdyn/content/article/2009/05/21/AR2009052101144.html.

<sup>&</sup>lt;sup>49</sup> www.timesonline.co.uk/tol/news/world/asia/article6676792.ece.

<sup>&</sup>lt;sup>50</sup> Washington Post, 21 May 2009, supra note 48.

by the army and the government was unlawful.<sup>51</sup> He went on to say that Tamil detainees were living outside the protection of the law of the country.

# 1.2 The mass movement of the Tamil population

The UN estimates around 265,000 civilians were displaced in the last month of the Sri Lankan conflict.<sup>52</sup> By May 2009, 280,000 IDPs had been sheltered in the welfare camps in Vavuniya and Jaffna. However, according to a UNHCHR spokesman, around 207,000 IDPs had left the government run welfare villages since the resettlement process started in August 2009, while some 82,000 are still remaining.<sup>53</sup> They have either returned to their original homes or to relatives.

In a *Guardian* interview Gnanakumar, a 25-year-old British Tamil who was caught in the no fire zone and subsequently detained for several months in Manik farm, tells her story.<sup>54</sup> Following a bombardment, she joined thousands fleeing towards the government lines. "We start moving and after walking about one hour or so we saw the Sri Lanka Army. They were saying: 'Come, you are safe now, food will be provided for you.' There were bodies everywhere, like into pieces. We had to just walk." That was when she saw a mother agonizing over what to do with her dead baby. No one had time to bury the bodies, she says. Some pushed them into bunkers and covered them with a little sand. That was the best they could do. That night, they slept in a school; then they were taken by bus to the town of Vavuniya.

On April 8, 2009, IDPs who escaped the no fire zone said that the Sri Lanka Army broadcasted an announcement over speakers instructing residents to come across the lagoon into the government-controlled area immediately, as the Sri Lanka Army was going to advance into the no fire zone. Soon afterwards, the government forces fired a large shell into the midst of the internally displaced, causing heavy casualties.<sup>55</sup>

In a newspaper article of May 2009, aid officials, human rights campaigners and politicians claim Tamils have been driven out of areas in the north-east of the country by killings and kidnappings have been carried out by pro-government militias. According to their observations the government simultaneously encouraged members of the Sinhalese majority in the south to relocate to the vacated villages.<sup>56</sup>

One foreign charity worker told the *Daily Telegraph*<sup>57</sup> that the number of Tamils disappearing in and around Trincomalee, 50 miles south of the final conflict zone in Mullaitivu, had been increasing in the months of March, April and May. He claimed to have known 15 of the disappeared, three of whom had been found dead. He said all three bodies showed signs of torture, while two were found with their hands tied behind their backs and single bullet wounds in their heads. Another aid worker said the killings were part of a strategy to drive out the Tamils. He claimed many villagers had moved out after the army declared their land to be part of a 'high security zone' and Sinhalese had been given incentives to move in to provide support services to new military bases. Many Tamils sold their homes and land at below-market prices after members of their families had been killed or had disappeared, he said.

<sup>&</sup>lt;sup>51</sup> BBC, 'S Lanka judge rebuffed over camps', 5 June 2009, available at: http://news.bbc.co.uk/2/hi/south\_asia/8085403.stm (02.06.2010).

<sup>&</sup>lt;sup>52</sup> The Independent, www.independent.co.uk/news/world/asia/aid-groups-want-access-to-sri-lanka-battlefield-1688067.html.

<sup>&</sup>lt;sup>53</sup> www.unhcr.org/4bd6fcd66.html.

<sup>&</sup>lt;sup>54</sup> Guardian Newspaper, 15 September 2009, www.guardian.co.uk/world/2009/sep/15/sri-lanka-war-on-tamil-tigers.

<sup>&</sup>lt;sup>55</sup> US Department of State, Report to Congress on incidents during the recent conflict in Sri Lanka, 2009, p.
34.

<sup>&</sup>lt;sup>56</sup> The Telegraph, www.telegraph.co.uk/news/worldnews/asia/srilanka/5382676/Sri-Lanka-accused-of-ethnic-cleansing-of-Tamil-areas.html.

<sup>&</sup>lt;sup>57</sup> Ibid.

A western human rights advocate said Tamils in and around Trincomalee were terrified because they believed the police were either complicit in, or indifferent to, the numbers disappearing or found dead. A local campaigner for the families of the disappeared said the killings were speeding the flight of Tamils from the area. He said that much of the "ethnic cleansing" was being done in the name of economic development in which Tamil villagers were being moved out to make way for new roads, power plants and irrigation schemes, while Sinhalese workers were being drafted in with incentives including free land and housing. Ministers have said they want to break the Tamils' identification with the northern and eastern provinces and integrate them into the Sinhalese majority population throughout the country. In Colombo, billboard posters have contrasted the "divided" pre-victory Sri Lanka, with the Tamil north and east shaded red, and the "united" post-war island. Ministers have said billions of dollars will be needed to rebuild the area's roads, buildings, schools, hospitals and water, electricity and communications infrastructure. Community leaders and Tamil politicians fear this will mean a further influx of Sinhalese. R. Sampanthan, the parliamentary leader of the Tamil National Alliance and an MP for Trincomalee said he shared these fears. A new road being constructed from Serubilla, a Sinhalese village in Trincomalee district to Polonaruwa, a Tamil village, was under construction and Sinhalese families were being settled on either side of the road as it snakes further north-east.58

### 2. Entry and exit to the camps

#### 2.1 Situation

The United Nations, Amnesty International, Human Rights Watch, and various Tamil civil society members have expressed their concern about civilians held in "welfare centres" during and after the end of the conflict. They particularly emphasized that those camps, rather than being refugee camps, were facilities where civilians were *de facto* detained.

### Military nature of the camps

The military nature of the camps has been repeatedly denounced.<sup>59</sup> Amnesty International reported that the camps were guarded by armed military personnel,<sup>60</sup> and Human Rights Watch also attested to "a large military presence inside and around the camps". Human Rights Watch reported that "while officially the camps are run by civilian authorities, in reality the military remains in full control, ensuring, as one relief worker put it, that 'nobody gets in or out'."<sup>61</sup> The presence of plainclothes military and paramilitaries in the camps was also reported to Human Rights Watch.<sup>62</sup> In particular, it was told by a UN official that "she and colleagues have seen members of paramilitary groups in different camps".<sup>63</sup>

The US State Department reported that in June 2009, the military had withdrawn from inside the camps but that it continued to provide security around the barbed wire-enclosed perimeter.<sup>64</sup>

<sup>&</sup>lt;sup>58</sup> Ibid.

<sup>&</sup>lt;sup>59</sup>Amnesty International (2009), supra note 38, p. 13; F. Hampson, L. Sevón and R. Wieruszewski, "The Implementation of certain Human Rights Conventions in Sri Lanka, Final Report", Report for the European Commission, September 2009, p. 90; Human Rights Watch, 'War on the displaced. Sri Lanka Army and LTTE Abuses against Civilians in the Vanni', February 2009, p. 32;US Department of State, Bureau of Democracy, Human Rights and Labor, '2009 Human Rights Report: Sri Lanka', March 2010.

<sup>&</sup>lt;sup>60</sup>Amnesty International, supra note 38, p. 13.

<sup>&</sup>lt;sup>61</sup>Human Rights Watch, supra note 36, p. 32. <sup>62</sup>Ibid.

<sup>&</sup>lt;sup>63</sup>Ibid.

<sup>&</sup>lt;sup>64</sup>US Department of State, Bureau of Democracy, Human Rights and Labor, supra note 59.

Persons unable to leave the camps or communicate with the outside world

It has been reported that freedom of movement is limited even within the camps between the different zones and little is done for the reunification of families split over several camps.<sup>65</sup> IDPs are also not able to communicate with the outside world and they are not free to leave even though they could stay with relatives; IDPs requiring medical assistance are brought the Vavuniya hospital.<sup>66</sup> Amnesty International reported that the camps were surrounded by razor fencing and barbed wire.<sup>67</sup> Human Rights Watch made the following description of the camps: "The perimeters of the sites are secured with coils of barbed wire, sandbags, and machine-gun nests". Human Rights Watch also reported that, at Manik Farm, the military had installed a second line of barbed wire to ensure that the outsiders could not approach the people in the camp close enough to talk to them.<sup>68</sup> It was reported to Human Rights Watch "people from outside were not allowed to approach their relatives in the camp. I was a witness to a heartbreaking scene, when a mother with a very small child came to the gate because her husband came to see her. The child ran to the father, but the military grabbed him. We had to interfere and pushed them very hard to allow the father at least to kiss his son."<sup>69</sup> According to Human Rights Watch, international agencies were not provided with IDP registration lists from different camps which would have enabled them to assist with family reunification.<sup>70</sup>

On 9 July 2009, the Office of the UN Resident Coordinator noted: "Freedom of movement remains the overriding issue with nearly 280,000 IDPs confined within the camps, restricting their ability to access employment, attend regular schools, visit family and friends, and ultimately choose their place of residence. To date, some 4,300 IDPs, mostly elderly, have been released and the Government has announced that another 9,000 have been cleared for release. While these developments are welcome, the UN continues to advocate for the timely release of other persons with specific needs as well as the broadening of categories of people for release."<sup>71</sup>

The former Chief Justice of the Sri Lankan Supreme Court, Sarath N. Silva, had declared in a public speech that the detention of hundreds of thousands of Tamil civilians in internment camps set up by the army and the government was unlawful, which he reiterated on June 4 at an opening ceremony for a new court complex at Marawila, northeast of Colombo.<sup>72</sup>

The US State Department indicated that: "The Manik Farm camps had originally held approximately 250,000 IDPs, without freedom of movement, from the end of the war in May until late October. IDPs remaining in Manik Farm were not given freedom of movement until December, when a system of temporary exit passes was implemented for those who had not yet been returned to their districts of origin and remained in Manik Farm."<sup>73</sup>

#### The question of resettlement

The Sri Lankan Government has repeatedly risen that screening for LTTE members justified the detention of the civilian population in camps. It also invoked the need to remove mines in the war zones and prepare it for resettlement, a suggestion that was met with concern by the international community.

Human Rights Watch reported that Rajiva Wijesinha, Secretary of the Ministry of Disaster Management and Human Rights, had told the media "Of course, it will not be voluntary—we need to check everyone."<sup>74</sup> According to Human Rights Watch, Sri Lanka's past record in resettlement of IDPs

<sup>&</sup>lt;sup>65</sup>Hampson et al, supra note 59, p. 90.

<sup>&</sup>lt;sup>66</sup>Human Rights Watch, supra note 36, pp. 32-33.

<sup>&</sup>lt;sup>67</sup>Amnesty International, supra note 38, p. 13.

<sup>&</sup>lt;sup>68</sup>Human Rights Watch, supra note 36, p. 33.

<sup>&</sup>lt;sup>69</sup>Ibid.

<sup>&</sup>lt;sup>70</sup>Ibid, p. 34.

<sup>&</sup>lt;sup>71</sup>"Update on United Nations Humanitarian Support to Sri Lanka, 9 July 2009," Office of the United Nations Resident Coordinator and Human Rights Coordinator in Sri Lanka.

<sup>&</sup>lt;sup>72</sup>BBC, supra note 51.

<sup>&</sup>lt;sup>73</sup>US Department of State, Bureau of Democracy, Human Rights and Labor, supra note 59.

<sup>&</sup>lt;sup>74</sup>Human Rights Watch, supra note 36, p. 36.

"gives reason to be concerned that the government will end up interning those placed there indefinitely."<sup>75</sup>

The US Department of State reported that the legality of the long-term detention of IDPs had been questioned by international observers and local legal experts, and that the government had released IDPs arbitrarily. It reported as well that, in September, several small groups of IDPs had been released from Manik Farm but then detained for several weeks in closed "transit" camps for rescreening.<sup>76</sup> The US Department of State also stated the following:

"Among the long-term displaced were tens of thousands of Muslims evicted from Jaffna in 1990 by the LTTE, many of whom remained in camps in Puttalam. During the year the government announced these Muslims would be allowed to return to Jaffna. A small number had reportedly moved back by the end of the year, but many others were either unaware yet of the change in policy, or had younger family members who felt more at home in Puttalam. The government had not permitted other IDPs, primarily Tamils, to return home because their places of origins were declared HSZs (High Security Zones), despite announcements during the year that these HSZs would soon be reduced or eliminated."<sup>77</sup>

Amnesty International emphasized that the Sri Lankan Government had originally said it would hold camp inmates for three years but had then revised that policy to bring resettlement plans forward. Nonetheless, Amnesty International reported that in a July letter of intent to the International Monitoring Fund and subsequent official interviews the figure to be resettled had already dropped from 80% to 60%.<sup>78</sup>

### 2.2 Cases: The Sri Lankan High Court's decision and the legality of detention in the camps

Amnesty International reported on the following proceedings before the Sri Lankan Supreme Court, which illustrate individual cases concerning the camp situation. In these two cases it was argued that the continued detention of displaced people is a violation of their fundamental rights under the Sri Lankan Constitution.

The first case was filed on behalf of five detained members of a family of seven who became separated by the conflict and was detained in separate camp facilities by the authorities. They appealed for family reunification, outside medical care for an injured child, and argued that all should be released from detention because they had a place to stay outside the camp. The court was quick to rule in favor of family reunification, but postponed its decision on their request for release. Manikarajah Sivapakiam (age 68) and her husband Kathirkamu Manikkaraja (70, the only member of the family to be released from detention); three grandchildren Sopika (13), Nesana (10), Kishore (now deceased) and their parents, Surendranathan Jeyarani and Ponnusamy Surendranathan, were displaced by fighting from the village of Puliyampokkanai in December 2008 and headed toward Vishvamadu. After several subsequent relocations driven by intense shelling, they ended up at a Hindu temple in Suthanthirapura north of Mullaitivu, where a makeshift camp had been established. The case was initiated by Manikarajah Sivapakiam's sister, Annapakiyam Sithamparapillai, who is an attorney. In late June, 13-year-old Surendranathan Sopika was reunited with her parents who are detained in Vavuniya. On June 17, the Supreme Court ordered her transfer, noting that the State recognized the family as the basic unit of society. The court also ordered that Sopika should be permitted to access specialized medical care. On 28 June, Sopika was brought to the Vavuniya Government Hospital by the Town Commander for a medical examination, as ordered by the Supreme Court on 24 June. But Sopika's legal counsel told the court on July 10 that no x-ray or scan had been done and she had not been examined by a consultant. On July 10, the court directed the Medical Superintendent of Anuradhapura to have Sopika examined and submit a report on its findings to the court. On 20 July the

<sup>75</sup> Ibid.

<sup>&</sup>lt;sup>76</sup>US Department of State, supra note 55.

<sup>&</sup>lt;sup>77</sup>US Department of State, supra note 55.

<sup>&</sup>lt;sup>78</sup>Amnesty International, supra note 38, p. 14.

court directed the Commander of the Security Forces Headquarters, Wanni to admit Sopika immediately to the Anuradhapura General Hospital for medical treatment.

The case, which was filed by the Sri Lankan Centre for Policy Alternatives on 12 June, 2009 has been subject to delays. When it came before the Supreme Court on 18 June, Deputy Solicitor General Sanjay Rajaratnam reportedly requested a postponement, saying he needed more time to obtain instructions from the Attorney General. On 10 July, the Court directed the Deputy Solicitor General to file any objections the state might have to its proceeding with the case within a period of two weeks and fixed the next hearing for 6 August. On 28 July, the Attorney General reportedly filed its objections to the Sri Lankan Center for Policy Alternatives petition, telling the Court that the internally displaced persons in northern Sri Lankan camps were not detained under emergency regulations and arguing that there was no legal basis for the Sri Lankan Center for Policy Alternatives case. The Attorney General also noted that some 8,000 internally displaced people were LTTE members (...). "<sup>79</sup>

#### 3. Obstruction to humanitarian access

Human Rights Watch reported that until early February 2009 only UNHCR and ICRC were allowed into the camps, but that the massive arrival of displaced persons led the authorities to allow various UN agencies and international humanitarian agencies to set up necessary facilities and provide emergency assistance in the camps. Nonetheless, Human Rights Watch emphasized that each entry to the camps was subject to an authorization decision that "seems to be made on an ad hoc basis by military commanders in charge of the camps." Human Rights Watch gave the example of an international agency providing assistance and necessary equipment to the handicapped whose access to one of the camps was denied on 11 February, 2009. Human Rights Watch also expressed its concern regarding the fact that humanitarian personnel were constantly prevented by militaries from talking to the persons living in the camps, and threatened with the withdrawal of their authorization, "while local relief workers simply feared for their lives should they get noticed, especially by the paramilitaries."<sup>80</sup>

As reported by Amnesty International, in May 2009 the Government of Sri Lanka had announced its decision to restrict access to displaced persons for NGOs and the UN, a policy it soon revised. It then allowed UN agencies, the ICRC, some other international NGOs, and some Sri Lankan NGOs to provide assistance to the displaced, although not without any limitations: the vehicles of those organizations were not allowed to enter the camps and the humanitarian personnel was prevented from talking to the persons living in the camps. Negotiations in early June permitted a limited number of vehicles to enter the camps but, Amnesty International reported, "organizations had to apply in advance and personnel were required to stay within 15 meters of the vehicle, a policy that prevented relief workers from moving freely inside the camps."<sup>81</sup>

The U.S. State Department reported that although the government had cooperated with the UNHCR and other humanitarian organizations in assisting IDPs, it had "ended access for ICRC's protection work in IDP camps in July, requesting that a new, post-war operating mandate be negotiated before such work could be resumed." The U.S. State Department noted that this negotiation had not been completed by the end of 2009.<sup>82</sup>

### 4. Conditions of detention

In July 2009 aid workers and the British Government warned that conditions in the camps were inadequate. Most of the deaths were the result of water-borne diseases, particularly diarrhea, a senior relief worker said on condition of anonymity. Witness testimonies obtained by *The Times* in May described long queues for food and inadequate water supplies inside Manik Farm. Women, children

<sup>&</sup>lt;sup>79</sup>Amnesty International, supra note 38, pp. 17-18.

<sup>&</sup>lt;sup>80</sup>Human Rights Watch, supra note 36, p. 34.

<sup>&</sup>lt;sup>81</sup>Amnesty International, supra note 38, pp. 11-12.

<sup>&</sup>lt;sup>82</sup>US Department of State, supra note 55.

and the elderly were shoved aside in the scramble for supplies.<sup>83</sup> Sarasi Wijeratne, an ICRC information officer in the country's capital of Colombo, said in a telephone interview with the Washington Post in January 2009: "We're most worried about the sick and wounded. There hasn't been a regular flow of aid into the area for a while now."<sup>84</sup>

### 4.1 Water

Amnesty International reported that the sudden and massive arrival of displaced people in late April 2009 had worsened the access to food and water. It stated that: "Food and water shortages were acute and had dangerous ramifications, including an incident where two children were reportedly crushed to death by a crowd at a food distribution site at the end of April. Two months later, food and water distribution systems had reportedly improved, although displaced people still complained about the quality and composition of food aid (including low quality or spoiled food and a lack of vegetables)."<sup>85</sup>

Human Rights Watch reported that conditions in the camps deteriorated in October 2009. It reported a shortage of water from 5 October which has led to a restriction of the amount of water per family to 30 liters. Human Rights Watch was told by persons held in those camps that the deterioration of the conditions had created tensions among camp residents and triggered clashes with the military. Brad Adams, Asia director at Human Rights Watch, said that "with all these people penned up unnecessarily in terrible conditions, the situation in these camps is getting tense and ugly" and that "if they aren't out of there before the monsoons hit, their lives and health will be in serious danger." (...).

Human Rights Watch reported the following testimonies:

"This morning I managed to get only 20 liters for our family of five. I won't be able to get more until tomorrow and this water is all we have for drinking, cooking, washing and bathing. For the last three days we have not been able to take a bath or clean properly. It is agony, and the camp administration here does not seem to care about us." 38-year-old "Jeevitha", camp resident in Zone 2.

"I stood in line for four-and-a-half hours today, but I gave up in the end. I am so tired. Yesterday, I lined up around midnight and I was only able to get water at nine in the morning. I got 30 liters for me and my one-year-old son. We managed with that, but I know of families with 10 or more family members who have to survive on the same amount." 30-year-old "Aanathi", a woman living in Zone 2 with her 1-year-old son.

"Maadhavi," a 32-year-old resident in Zone 1, said that people are getting desperate because of the water shortage. On the morning of October 7, when the water suddenly came back for about 30 minutes, people were scrambling to fill their buckets and a fight broke out: "People were shouting and throwing stones at each other. We went to the camp administration, but they just told us that we have to endure it. If they don't get us water by tomorrow, we will tear down the fences and go to find water ourselves!"

#### *4.2 Food*

It has been reported to Amnesty International by Dr. Vinya Ariyaratne, Executive Director of the Sri Lankan NGO Sarvodaya that 15 to 20% of the 30,000 to 35,000 children in the Vavuniya camps were malnourished as of late June 2009. Amnesty International said that food supplies in the last stage

<sup>&</sup>lt;sup>83</sup> The Times Online, 10 July 2009, www.timesonline.co.uk/tol/news/world/asia/article6676792.ece.

<sup>&</sup>lt;sup>84</sup> Washington Post, 29 January 2009, www.washingtonpost.com/wp-

dyn/content/article/2009/01/28/AR2009012802009.html; see also personal account of an IDP inmate in Manik farm from March to July 2009 at: http://transcurrents.com/tc/2009/10/my\_life\_in\_menik\_farm\_idp\_camp.html. <sup>85</sup>Amnesty International, supra note 38, pp. 19-20.

of the conflict have been "drastically inadequate in part because government bureaucracy delayed and obstructed delivery of emergency food aid to civilians in the north."<sup>86</sup>

The following description was made to Amnesty International in June 2009: "Until December and early January food was available. People had experience of surviving the economic embargo and saving supplies but after February stocks dwindled and food was a crisis. Food was brought in by ICRC ships but the delivery depended on the government and the rations were not always enough. Even to receive the little amount of dried rations people had to wait in long queues. People used to go to grinding mills and search for old husks of rice. People would go for days without eating rice."<sup>87</sup>

Amnesty International reported a survey assessing the nutritional status of 1,137 IDP children and 84 pregnant women in Vavuniya, conducted by Sri Lanka's Medical Research Institute between May 13 and May 30, and which found that: "46.9% were underweight; 35.6% exhibited signs of wasting and 30% had stunting. The highest levels of malnutrition were found in Zone 2, where more than half (57.7%) of children were underweight and a third were stunted. The survey also recorded the prevalence of child illnesses in the two weeks prior to the survey, including diarrhoeal diseases, acute respiratory tract infections and lower respiratory tract infections. All zones surveyed had high levels of acute respiratory infections (between 58.1% in zone 2, and 67.3% in zone 4). Roughly one third to one half of all children surveyed suffered from diarrhoeal diseases."

In its report, the U.S. State Department reported that it has received information indicating "instances of severe food shortages; malnutrition, particularly among the very young and old, and surgeries being performed with little or no anesthetic", as well as "significant gaps between food, medicine".<sup>89</sup>

#### 4.3 Sanitation and accommodation

Amnesty International reported the description World Vision who stated that "sanitation facilities in the largest camps... are woefully inadequate and at least 11,500 more latrines are needed in the camps to comply with international minimum standards." It also reported the UN Resident Coordinator in Sri Lanka's statement that in some cases 100 people were using a single latrine made to accommodate about 20, and that some latrines were overflowing.<sup>90</sup>

Human Rights Watch reported that rains in mid-August had "caused serious flooding, as water destroyed tents and other shelter, made cooking impossible for many, and caused roads to collapse, preventing delivery of crucial aid, such as drinking water. Water also flooded latrine pits, causing raw sewage to flow among the tents. Since then, shelter in Manik Farm - most of which was set up during the large influx of displaced persons in April and May - has further deteriorated. The emergency tents or shelter kits in which most people live were designed to last for three to six months."<sup>91</sup>

The former Chief Justice of the Sri Lankan Supreme Court, Sarath N. Silva, after a one day visit in the camps in May 2009, declared to the BBC on June 4, 2009 that ten people live in one tent in these camps. He also reported that people there could stand straight only in the centre of these tents.<sup>92</sup>

Amnesty International reported that according to UNHCR participatory assessments in early July 2009, displaced people continued to report overcrowded camp conditions. Amnesty International expressed its concern that most zones in Manik Farm were overcrowded in June and July 2009,

<sup>&</sup>lt;sup>86</sup>Amnesty International, supra note 38, p. 19.

<sup>&</sup>lt;sup>87</sup>Ibid.

<sup>&</sup>lt;sup>88</sup>Ibid.

<sup>&</sup>lt;sup>89</sup>US Department of State, 'Human Rights Report to Congress on Incidents during the Recent Conflict in Sri Lanka', (2009), supra note 55, p. 4.

<sup>&</sup>lt;sup>90</sup>Amnesty International, supra note 38, p. 19.

<sup>&</sup>lt;sup>91</sup>Human Rights Watch, 'Sri Lanka: Tensions Mount as Camp Conditions Deteriorate', 9. October 2009, www.hrw.org/en/news/2009/10/09/sri-lanka-tensions-mount-camp-conditions-deteriorate.

<sup>&</sup>lt;sup>92</sup>BBC, supra note 51.

despite the creation of a 5<sup>th</sup> zone. It reported that in "Zone 2, the most populated of the camps still held about 68,000 people as of July 9; more than twice its capacity according to UNHCR standards."<sup>93</sup>

Over the past two weeks, the Manik Farm camps have also been hit by strong winds, causing damage to shelters and exacerbating the already difficult living conditions. Twenty-year-old "Kumaravel," who lives in one of the camps with his family of five, told Human Rights Watch: "The winds are tearing branches off the trees and tin sheets off the huts, which then fall on the tents. We are forced to cook outside and the wind blows dust and mud into our food, making it practically inedible. It is very difficult to live here."<sup>94</sup>

#### 4.4 Witnesses statements

Several witness statements were published in reports by international organizations. These statements shed some more light on the camps and the experiences of individual persons.

Amnesty International reported the following witness report on the conditions in the camps:

"In the camp, 10 persons are in one tent. There are around 50,000 to 60,000 persons in the camp. The camp is located at Karadipokku, at a distance of 1.5 km from the A9 highway – a half an hour walk. Nobody can come out of the camp. They cannot pass any information from the camp. It is surrounded by barbed wire fencing and is run by the Sri Lanka Army, with support from civilian administrators. The camp has severe water problems – 30 litres per day is allotted to every person, which has to be got by standing in a queue. This amount is to be used for everything, including personal hygiene, washing clothes, bathing etc. Toilets are rudimentary and there are long queues in front of them since morning. The elderly and the children and pregnant women find it really hard to manage in the camp. There is very little vegetation or trees and everyone has to sweat it out inside the makeshift tents which are now becoming rag-tagged. Life is either an indefinitely agonizing wait either inside the tents or in the food or toilet queues. The place has no substantive medical facilities and sick persons need to be taken to Vavuniya. Food is distributed by civilian administrators, but supplies can get exhausted as the queues are long. (...)"<sup>95</sup>

### In December 2009 The Observer published the following testimony:

"Kumar, 25, from Essex, was released from internment in September (...). Kumar said that on arrival at the camp, near the northern town of Vavuniya, she was put in a large tent with several people she did not know. The camp was guarded by armed soldiers and ringed with high fences and rolls of razor wire. "The first two or three days I was alone there still scare me. When I arrived at the camp I put my bag down and just cried. That feeling still won't go. I just don't want to think about those two or three days in the camp, the fear about what was going to happen to me. "For the first few days I didn't eat anything. We didn't know where to go to get food. I thought, 'Am I dreaming or is this really happening?' I never thought I would end up in a camp." Tens of thousands of people were crammed into flimsy tents which provided little respite from the intense heat. Toilets and washing facilities could not cope with the demands and food and water were in short supply.

Kumar was held in the best-equipped part of the camp, but even there conditions were dire. "It is not a standard a human being can live in. The basic needs like water and food [were] always a problem. Most of the time you were queuing for water. "The toilets were terrible, and there was not enough water, so we could not clean them. There were insects and flies everywhere. After two or three days of continuous rain, the sewage was floating

<sup>&</sup>lt;sup>93</sup>Amnesty International, supra note 38, p. 20.

<sup>&</sup>lt;sup>94</sup>Human Rights Watch, supra note 91.

<sup>&</sup>lt;sup>95</sup>Amnesty International, supra note 38, p. 22.

on the water and going into the tents and everyone [was] walking through it, up to knee height." She was finally released into the custody of the British High Commission in early September."<sup>96</sup>

The following was reported by the University Teachers for Human Rights:

"Mr. and Mrs. Kailash who sailed by ICRC ship on 28th April, landed at Pulmoddai and were subsequently interned at a nearby camp at Sahanagama. Sahanagama 'Welfare Centre' as it was officially called had just under 7000 persons in Sites 1&2, including for those who had escaped south by sea from the no-fire-zone. The conditions of the camp in an out of the way jungle spot with international agencies practically kept out, say much about the rationale behind the detention of IDPs. The Kailashes never thought that they would come out of this alive. They were brought to a piece of cleared jungle and lived in tents. The inhabitants gave themselves light relief by christening the place "Snake Farm" after Manik Farm for those sent to Vavuniya. The place was full of very fierce looking poisonous snakes, the likes of which they had never seen in their parts of the Vanni. It had been remarkably common for the inmates to wake up in the morning and discover that they had kept close company with some of these reptiles during the night. They think that it is the mercy of God that no one was bitten by these creatures through their several months there.

The camp had another remarkable feature. Its fenced border was lit by electric lamps as a precaution against inmates getting ideas of saying good bye to Snake Farm. However the central area, containing the residential tents was in pitch darkness barring moonlit nights. During the evening meals the people had to sit around and eat in the dark.

The Kailashes said that the World Concern's liaison took an interest in this matter and followed it up incurring much hassle and embarrassment with the authorities. As the result of his efforts, each family received a torch and batteries. This gave the people much relief in the nights and also gave them opportunity to scrutinise their food while eating. As however the months dragged on most of their torches became unusable. In the nights many of them ate their food along with the insects that all too easily got into their plates. One redeeming feature was that they found the younger officers embarrassed and concerned, and tried their best. But at higher levels the management was unyielding (...).<sup>\*97</sup>

# 5. Violence in the camps

## 5.1 General violence

The same witness quoted above in relation to detention conditions, Vany Kumar, offered *The Observer* valuable information on the violence, both physical and psychological, in the camps:

"Vany Kumar, who was locked up behind barbed wire in the Manik Farm refugee camp for four months, also claims prisoners were punished by being made to kneel for hours in the hot sun, and those suspected of links to the defeated Tamil Tigers were taken away and not seen again by their families.

Kumar was released from internment in September, but has waited until now to reveal the full scale of her ordeal in the hope of avoiding reprisals against friends and family held with her. They have now been released after the Sri Lankan Government bowed to

<sup>&</sup>lt;sup>96</sup>G. Chamberlain, 'Sri Lankan guards 'sexually abused girls' in Tamil refugee camp', *The Observer*, 20 December 2009.

<sup>&</sup>lt;sup>97</sup>University Teachers for Human Rights, 'Let Them Speak: Truth about Sri Lanka's Victims of War' (2009), University Teachers for Human Rights Special Report No: 34, pp. 130-133.

international pressure this month and opened the camps. Kumar, a biomedical graduate, was incarcerated in May in what she describes as a "concentration camp", along with nearly 300,000 Tamil civilians (...). Speaking at the family home in Chingford, she accused the Sri Lankan Government of persecuting Tamils as it sought to round up rebels who had escaped the fighting. "It was a concentration camp, where people were not even allowed to talk, not even allowed to go near the fences," she said. "They were kept from the outside world. The government didn't want people to tell what happened to them, about the missing or the disappearances or the sexual abuse. They didn't want anyone to know.

She said prisoners who complained about their treatment were singled out by the guards. "One time I saw an old man was waiting to visit the next camp and this military officer hit the old man. I don't know what the argument was, but the officer just hit him in the back.

"In the same area people were made to kneel down in the hot weather for arguing with the officers. Sometimes it lasted for hours."

Sometimes white vans appeared in the camp and took people away. White vans hold a particular terror in Sri Lanka, where they are associated with the abduction of thousands of people by death squads. "They were asking people to come in and take their names down if they had any sort of contact [with the LTTE]. They did an investigation and then a van would come in and they would take them away and nobody would know after that. I know people still searching for family members."<sup>98</sup>

Human Rights Watch reported that "the mounting frustration among the displaced caused by the deteriorating conditions and lack of free movement has led to conflicts with the military guarding the camps." In particular, it reported on an incident from September 26, 2009, during which soldiers opened fire on a group of camp residents, wounding at least two. Although the military claimed that stones and a hand-grenade thrown to the guards trying to prevent an escape had compelled them to fire, witnesses reported a different version to Human Rights Watch, which reported the following:

"At around 5:30 p.m. on that day, a long line of people were waiting for permission to cross the road separating the camps when a soldier called on a man carrying firewood to come forward. Four witnesses independently told Human Rights Watch that the soldiers suddenly attacked the man. (...). Two witnesses told Human Rights Watch that after the soldiers had dispersed the crowd, the first soldier placed a hand grenade among the wood the man had been carrying and photographed it with his cell phone. Witnesses said that the man was taken away and that the wounded were taken to hospitals. The government said 19 displaced men were arrested after the incident. Human Rights Watch has obtained credible information that at least some of the arrested were beaten during their detention. At least some of those detained were later released."<sup>99</sup>

The same incident was also reported by the University Teachers for Human Rights, who stated that six persons including a woman and two children of three and six years were injured, the latter seriously.<sup>100</sup>

The University Teachers for Human Rights also reported that the frustration in the camps had led the soldiers to become "more hostile". They reported that people trying to communicate with the outside were "punished like criminals". They also affirmed that persons had been beaten by the military if caught talking on a cell phone, and that people had been given "military type punishments such as being made to carry a load and run till they are close to collapse or made to stand a day in the sun, and in rare cases even shot in the leg, for crossing through barbed wire to talk to a relative or family member in an adjacent camp."<sup>101</sup>

<sup>&</sup>lt;sup>98</sup>G. Chamberlain, supra note 96.

<sup>&</sup>lt;sup>99</sup>Human Rights Watch, supra note 91.

<sup>&</sup>lt;sup>100</sup>University Teachers for Human Rights, supra note 97, p. 140.

<sup>&</sup>lt;sup>101</sup>Ibid, p. 138.

#### 5.2 Sexual violence against women and girls

The international community has for many years been monitoring the human rights situation in Sri Lanka, and has repeatedly expressed its concern in regards to the sexual violence perpetrated against women. The Rehabilitation and Research Centre for Torture Victims (RCT) in Denmark sponsored a study on the use of torture by Sri Lankan law enforcement. The study showed evidence that sexual violence has been used against women by law enforcement as a method of torture.<sup>102</sup> The study emphasized that cases of sexual abuses were "often not 'discovered' and reported, even by organizations or persons working at the local level, due to issues of fear, stigma, shame, etc."<sup>103</sup>

In 2009, the U.S. State Department issued a report on the human rights situation in Sri Lanka, in which it stated that sexual violence was a "pervasive societal problem". This shows that sexual violence and gender-based violence is a generalized issue in Sri Lanka. For instance, U.S. report indicated that the Bureau for the Protection of Children and Women (BPCW) received 714 complaints of grave violent crimes and 2,391 minor crimes against women in 2009. It noted "reports that individual cases of gender-based violence perpetrated by members of the security forces occurred more frequently during the conflict". It further indicated that, "according to the BPWC, 175 reported incidents of rape occurred through August, but reported incidences of rape were unreliable indicators of the degree of this problem, as most victims were unwilling to file reports."Although other reports indicated that military officials were willing to prosecute the offenders, the U.S. State Department emphasized that no information was provided regarding the prosecutions and that only a few number of victims had reported the assault.<sup>104</sup>

The U.S. State Department also reported that human rights groups in northern districts had alleged that "the wives of men who had been killed as a result of the conflict often fell victim to prostitution because of their economic vulnerability" and the U.S. State Department reported that "trafficking in women for prostitution and forced labor also occurred."<sup>105</sup>

#### Situation in the camps

The U.S. State Department reported that "there were allegations of crimes and sexual assaults inside the camps, both by outside persons and by other IDPs, but access was not allowed to independent observers to evaluate these reports or to determine if there was significant variance in the number of such crimes over the level expected for a non-refugee population of similar size.<sup>106</sup>

It was also reported to the University Teachers for Human Rights that "there are many stories within the camps of young girls being singled out – especially those with links – and taken away for questioning; and of their allegedly being sexually abused", and that victims would not speak up until they were effectively protected. It was further reported to the University Teachers for Human Rights that "at Manik Farm, the CID comes in the night and makes a count of the children" and that "young women, who are ostensibly suspected of having received LTTE training, are taken away in ambulances at night and brought back in the morning." The witness underlined the silence surrounding what happens to the women. The University Teachers for Human Rights also mentioned having seen "letters sent from Manik farm making very similar allegations about the treatment of ex-women LTTE cadres."<sup>107</sup>

*The Observer* also reported that "Tamil women interned after escaping the horrors of the civil war in Sri Lanka were sexually abused by their guards who traded sex for food", and that "the Sri Lankan Government had confirmed to *The Observer* that it had received reports from United Nations agencies

<sup>&</sup>lt;sup>102</sup>M. K. Andersen and B. Fernando, *The Phantom Limb: Failing Judicial Systems, Torture and Human Rights Work in Sri Lanka, A Study of Police Torture in Sri Lanka, (2009), pp. 48-49.* 

<sup>&</sup>lt;sup>103</sup>Ibid, p. 10.

<sup>&</sup>lt;sup>104</sup>US Department of State, supra note 55.

<sup>&</sup>lt;sup>105</sup>Ibid.

<sup>&</sup>lt;sup>106</sup>Ibid.

<sup>&</sup>lt;sup>107</sup>University Teachers for Human Rights, supra note 97, p. 142.

of physical and sexual abuse within the camps, but maintained that it had not been possible to substantiate the allegations." *The Observer* provided the testimony of Kumar, above mentioned, who also reported on the wide-spread sexual abuses taking place in the camps. She said: "Sexual abuse is something that was a common thing, that I personally saw. In the visitor area relatives would be on the other side of the fence and we would be in the camp. Girls came to wait for their relatives and military officers would come and touch them, and that's something I saw. The girls usually didn't talk back to them, because they knew that in the camp if they talked anything could happen to them. It was quite open, everyone could see the military officers touching the girls. Tamil girls usually don't talk about sexual abuse, they won't open their mouths about it, but I heard the officers were giving the women money or food in return for sex. These people were desperate for everything." She also reported that people "have to bathe in an open area in front of others, which I find very uneasy. I stayed next to the police station, so every day I had a bath with the police officers looking at me, men and women. Everyone can see you when you are having a bath. So I would get up early in the morning about 3.30am, so it was dark."

*The Observer* noted that although the Sri Lankan Government says it is aware of allegations of sexual abuse and punishment of prisoners, it denies large-scale abuse. The newspaper reported the words of Rajiva Wijesinha, permanent secretary to the Ministry of Disaster Management and Human Rights, who admitted that "there was a lot of sex going on" inside the camp but claimed that most reports involved abuse by fellow detainees.<sup>108</sup>

Diakonie also reported that there had been credible reports of prostitution networks in the camps which function with the knowledge and involvement of Sri Lankan security forces. It reported the following: "Many women, with no other means of financial support, have found themselves forced into selling sex for money and supplies. The large number of female-headed households among those families being resettled raises additional protection concerns given that many are returning to isolated areas patrolled by large numbers of Sri Lankan police and military. There have also been regular reports from a variety of credible sources that significant numbers of women held in the camps have been raped or sexually assaulted. According to some sources, women have been removed from the camps with police and military assistance and then assaulted. According to others, former LTTE female fighters have been raped while held in detention centers. The women involved are reportedly too afraid to report the crimes. With levels of high fear and with no independent monitors allowed access to the camps, it has not been possible to confirm or disprove these allegations."<sup>109</sup>

Tamilnet also reported various acts of sexual violence in 2009. One incident concerned the hostage-taking of 130 females for sexual abuse according to a statement by Tamil National Alliance MP S. Gajendran Saturday, citing information he received from the inmates of internment camps and from his contacts in Vavuniyaa.<sup>110</sup> Another incident dealt with prostitution of Tamil women interned in at least one of the militarized camps for displaced people. The newspaper The Australian reported in July 2009: "it's been brought to the attention of senior government officials but no one seems to be doing anything about it," an aid worker, who requested anonymity for fear of reprisal, told the paper."<sup>111</sup> Aid workers told The Australian that officials at the internally displaced people's camp in Pulmoddai, a remote northeast region, are running the prostitution ring using women kept in the camp. Sri Lankan Foreign Minister Palitha Kohona described the claims as "absolute rubbish", but confirmed that the government was investigating the reports. "These (the military) are the guys who were winning the war - they could have raped every single woman on the way if they wanted to. Not one single woman was raped," Kohona told The Australian. "I am sure in a mass of people there may be individuals who want to make a quick buck one way or another, but you have to remember the tents

<sup>&</sup>lt;sup>108</sup>G. Chamberlain, supra note 96.

<sup>&</sup>lt;sup>109</sup>Diakonie, Sri Lanka Advocacy Network, Aide Mémoire Human Rights in Sri Lanka, February 2010.

<sup>&</sup>lt;sup>110</sup>TamilNet, 'Grand scale murder, rape of screened civilians feared, TNA MP alerts', *TamilNet*, 14 February 2009, www.tamilnet.com/art.html?catid=13&artid=28413.

<sup>&</sup>lt;sup>111</sup>The Australian, 'Tamil refugees forced into sex rackets', *The Australian*, 1 July 2009; TamilNet, 'Kohona: 'Victorious soldiers could have raped every single woman', *TamilNet*, 3 July 2009, www.tamilnet.com/art.html?catid=13&artid=29705.

are so close together you can't do anything without the entire neighborhood knowing. If you had a racket going, thousands of people would know about it." (...)."<sup>112</sup>

In May, Channel 4 managed to sneak a camera into one of these internment camps. The report showed absolutely deplorable conditions under which civilians were being held. It showed the daily humiliation visited upon female prisoners who were forced to go naked before male guards and raised allegations of rape and chronic food shortages in the camp.<sup>113</sup>

#### Cases

TamilNet reported the following: "Sri Lanka Army (SLA) intelligence officers operating in the internment camps of Vanni have been allegedly involved in several rape cases during the past months. At least three cases of young victims, aged 14, 15 and 16, appeared in front of Vavuniyaa District Judge in October 2009. Sri Lanka Army soldiers have also raped a 14-year-old mentally retarded Tamil girl inside the Vavuniyaa hospital.<sup>114</sup>

There have been many alleged rapes in Zone-2 and Zone 3 internment camps. A 17-year-old girl was reportedly raped by the Sri Lanka Army intelligence official who alleged that the girl was a former LTTE under-age cadre and threatened that she would be taken to detention centre where LTTE cadres were kept imprisoned. She was later sent to detention centre. There are also two other girls aged 17 and 19, who have been raped by the Sri Lanka Army officers.

Evidences have come to light through primary and secondary sources and TamilNet refrains from revealing the sources due to security concerns.

In the month of July, injured Tamil girls admitted in the Padawiya hospital were taken for naked open-air bath by Sinhala nurses using hose pipes to the amusement of Sinhala soldiers watching it, according to an eyewitness.

Reports have also surfaced from several sources that an influential humanitarian worker attached to a global body has been making use of women, who have been struggling to find out the plight of their husbands detained by the Sri Lanka Army inside undeclared detention centers. "I was shocked to learn that there were also Tamils involved in rape cases with the support of the Sri Lanka Army intelligence personnel," an activist documenting the evidences told TamilNet on Monday. "We have three cases registered on this 'influential' international worker".

In May, 2009, three dead bodies of young girls were located at the riverbed near the internment camp. The dead bodies were handed over to Vavuniyaa hospital. Eyewitnesses, who have seen the corpses, report that they identified bite marks and signs of sexual harassments.

Recently, when US State Secretary Hillary Clinton condemned use of sexual violence as a tactic of war, declared rape by soldiers as a war crime and indicted Sri Lanka engaging in such a crime in the 'past', Sri Lankan authorities responded angrily. Sri Lanka's Prime Minister went so far as to personally attack the US State Secretary.

"Everybody knows that it is not a past activity of Colombo, but an ongoing crime facilitated by the entire International Community to leave hundreds of thousands in the camps at the mercy of a hostile army," said an exiled Tamil activist who is documenting the rape cases.

"Humanitarian workers who have authentic evidence for the crime and for the perpetrators of the crime in the island, challenge the IC on whether it can prove its credentials by taking action if evidences are provided to it," he further said.<sup>115</sup>

<sup>&</sup>lt;sup>112</sup>The Australian, supra note 111; TamilNet, supra note 110.

<sup>&</sup>lt;sup>113</sup> www.undispatch.com/node/8816.

<sup>&</sup>lt;sup>114</sup> TamilNet, 'Credentials of IC challenged while widespread rape by SLA alleged in Vavuniyaa', *TamilNet*, 24 November 2009, www.tamilnet.com/art.html?catid=79&artid=30672.

<sup>&</sup>lt;sup>115</sup>Ibid.

## **B.** Treatment of suspected LTTE members

Numerous individuals have been detained by Sri Lankan law enforcement and army on the suspicion of being affiliated to the LTTE.

A report to the European Commission indicated that individuals have been detained in "counterterrorism detention camps" under Emergency Regulations. The report provides the example a camp set up in Boosa, a southern town in Galle where 118 people (predominately Tamils) were detained without charge. The report further underlines that because of the limited information available, it is difficult to determine "how long detainees are held in those camps, whether they have access to independent third parties, such as doctors and lawyers, and to what conditions of detention they are subjected."<sup>116</sup>

Human Rights Watch reported the Sri Lankan Government's statements indicating that more than 11,000 people suspected of LTTE involvement were detained, including at least 556 children. They have been detained immediately after fleeing the conflict zone (screening checkpoints) or were taken away from the camps in the ensuing months. Human Rights Watch reported that the government claimed that "detainees had 'surrendered' to the authorities and were then transferred to 'rehabilitation centers' for former LTTE cadres where they receive vocational training and other services." But Human Rights Watch indicated that its research had actually shown that "many of the 'surrendees' were in fact detained against their will, either at military checkpoints or taken from the camps." Human Rights Watch further reported that "Media accounts have cited military officials who suggest some suspected LTTE cadres were taken into custody based on information gathered by the army's intelligence wing 'following revelation about their presence by their detained colleagues." It added that LTTE suspects continued to be arrested and detained after the conflict ended, even in December, Human Rights Watch said.<sup>117</sup>

Human Rights Watch also expressed its concern in regards to the fate of the detainees, saying that "A National Framework Proposal for Reintegration of Ex-Combatants into Civilian Life in Sri Lanka was announced by the Ministry of Disaster Management and Human Rights in July 2009 but the proposal does not afford improved due process rights for detainees and does not even mention a role for the judicial system in determining the culpability of alleged LTTE suspects. Instead, it leaves such determinations up to the attorney general, with involvement by TID (Terrorist Investigation Division), CID (Criminal Investigation Department), and the Military Intelligence Corps."<sup>118</sup>

### 1. Screening procedures

The Sri Lanka Army has been screening the civilians fleeing from the conflict zone and in camps to identify and separate LTTE members.

Human Rights Watch reported that Sri Lankan security forces subject people fleeing from the conflict zones to several stages of screening, and expressed its concern that those procedures were not transparent and did not comply with the requirements of international humanitarian and human rights law. It also underlined that the fate of the persons detained during those screenings remained unknown and expressed its concern that enforced disappearances and extrajudicial killings may have occurred.<sup>119</sup> Human Rights Watch described the screening procedure as follows: "The military and the police Criminal Investigation Department have set up several screening points for displaced persons leaving the Vanni. Most displaced persons are initially screened during their first encounter with military forces after they have crossed the front line. The army currently transports the displaced persons to one of the hospitals in Kilinochchi where they spend up to 36 hours, being questioned by the security forces. In Kilinochchi, the security forces encourage people to reveal any affiliation that they have with the LTTE voluntarily." Human Rights Watch was also informed that the army

<sup>&</sup>lt;sup>116</sup>Hampson et al, supra note 59, p. 74.

<sup>&</sup>lt;sup>117</sup>Human Rights Watch, supra note 36, p. 6.

<sup>&</sup>lt;sup>118</sup>Ibid, pp.15-16.

<sup>&</sup>lt;sup>119</sup>Human Rights Watch, supra note 36, p. 29.

conducted a more thorough screening process at the screening point Omanthai checkpoint, during which the army had separated dozens of men and women aged 18 to 35, as well as some teenage children, from their families, allegedly for further questioning.<sup>120</sup>

Human Rights Watch said that very little information is available regarding the first two stages of screening and that it is not possible to verify whether and to what extent detentions occur in these locations. It regretted that there was no information available on who had been arrested, the number or registration lists of people arriving at Kilinochchi. Nonetheless, Human Rights Watch affirmed that persons are arrested at Omanthai checkpoint and expressed its concern regarding the fate of the detainees whose fate remains unknown.<sup>121</sup> It was told by one representative of an international agency who has been working in the IDP camps in Vavuniya that during the week of February 2 the military separated 70 to 80 young people from their families at Omanthai checkpoint and detained them. Two days later, many of the young people were brought to the IDP camps, yet the fate of others remained unknown. The agency representative said that at least two mothers approached her saying their children had gone missing. Another international relief worker told Human Rights Watch that on 8 February 2009, she was approached by about 50 families whose relatives had been detained at Omanthai checkpoint. Neither the families nor the international worker had any information as to the fate and whereabouts of the detainees. A local relief worker told Human Rights Watch that "One woman in the camp told me that she was crossing the Omantai checkpoint with her husband and child on February 3. The husband was detained there, and for a week now she has no information about him. People like her call us all night long, trying to get information about their missing relatives."<sup>122</sup> The University Teachers for Human Rights were also told about LTTE cadre who, after having identified themselves at Omanthai checkpoint, "were sent to IDP camps and were later picked up by the Army as an investigative triumph".<sup>123</sup>

The University Teachers for Human Rights were told by witnesses that soon after the IDPs were brought to camps, the army required all those who belonged to the LTTE to come forward and identify themselves. Those who did were sent back and later picked up in groups for questioning during which they were beaten. As this illegal detention was prolonged, the University Teachers for Human Rights reported that screening degenerated into a protection racket. For women the situation was often worse.<sup>124</sup>

The University Teachers for Human Rights reported that the Sri Lanka Army had started to screen the civilians returning to their villages and, in this process, had used former LTTE cadres to assist the screening, as well as paramilitaries such as members of the Karuna group.<sup>125</sup> It also reported that white vans were used during the screening procedures to take away identified LTTE affiliates.<sup>126</sup>

### 2. Disappearances

The U.S. State Department indicated that "according to reports, Sri Lankan Government forces or Sri Lankan Government supported paramilitaries abducted and in some cases then killed Tamil civilians, particularly children and young men. Sources reported that in some cases the victims were abducted in white vans without number plates ("white van syndrome") and were taken to undisclosed locations without any further information being provided to the relatives. IDP checkpoints and camps were alleged to be particularly vulnerable areas."

The U.S. State Department reported the following exemplary incidents:

One woman in an IDP camp reported to an organization that when she was crossing the Omanthai checkpoint with her husband and child, her husband was detained there by government forces. As of a

<sup>&</sup>lt;sup>120</sup>Ibid, p. 29.

<sup>&</sup>lt;sup>121</sup>Ibid, pp. 29-30.

<sup>&</sup>lt;sup>122</sup>Ibid, pp. 30-31.

<sup>&</sup>lt;sup>123</sup>University Teachers for Human Rights, supra note 97, p. 140.

<sup>&</sup>lt;sup>124</sup>Ibid, pp. 140-141.

<sup>&</sup>lt;sup>125</sup>Ibid, p. 139.

<sup>&</sup>lt;sup>126</sup>Ibid, p. 135.

week later, she had no information about him (February 3, 2009). U.S Embassy Colombo received a report that buses were taking all boys and men between 14 and 35 from two schools in Vanuniya. The men and boys were told that they were being taken under the Prevention of Terrorism act to a police station for screening. However, the young men reportedly had not turned up at any police station, and their location was unknown to the reporting organization (April 27, 2009).

The U.S. State Department indicated that "Illegal detentions and forced disappearances have been reportedly a well-established practice of the Sri Lankan Government during the conflict with the Tamil rebels. The perpetrators of such kidnappings and those who give commands for such an exercise can all take cover behind anonymity. The use of white vans is a common pattern in such operations. Anti-terrorism measures introduced during the war allow security forces to hold suspects for long periods without reference to courts."<sup>127</sup>

Human Rights Watch expressed its concern regarding "the lack of transparency in the detention process, particularly the authorities' consistent failure to inform families of the basis for the detainees' arrest and their whereabouts" which, according to Human Rights Watch, "raises serious concerns that some detainees may have been victims of enforced disappearance." Human Rights Watch recalled that over 20,000 people already "disappeared" during armed conflicts in the 1980s and 1990s, and that the "collapse of the ceasefire between the government and the LTTE in 2006 was accompanied by a new wave of "disappearances" committed by Sri Lankan security forces and pro-government paramilitary groups." Human Rights Watch further indicated that "Over two years, more than 1,500 people, the vast majority of them ethnic Tamils, were forcibly disappeared, placing Sri Lanka among the countries with the highest number of new cases in the world."<sup>128</sup>

Human Rights Watch provided the following example: "Jenitha told Human Rights Watch that her 18-year-old son, who had been forcibly recruited by the LTTE while he was still in school and managed to escape a month later, was detained at Omanthai checkpoint on May 16. More than a month later, Jenitha had no information about her son's fate or whereabouts. She said: "When we arrived at Omanthai, they separated us. The army took him away from me. They told me that they would just ask him some questions and then they would release him. They tricked me. [Because we were separated] they registered him on his own, not with our family. I have no news from him yet. It has been more than a month. If I could just get some news about my son— that would give me some peace."<sup>129</sup> Human Rights Watch also provided the following example: "In the afternoon of July 27, two men in civilian clothing, driving a white van, took away 39- year-old Partheepan from Manik Farm camp. His wife, Naathaveni, told Human Rights Watch that the men, who said they were from the TID (Terrorist Investigation Division), came to the family's tent and said they needed to take her husband away for questioning, but that he would be returned after a week." Naathaveni told Human Rights Watch: "I did not protest, because this is usual here. They come and take people away. Sometimes they return people. Sometimes they don't. We don't dare to protest. There is nothing we can do. I didn't dare because they behaved roughly. Sometimes they even beat people. When they took him, I rushed to the van and I saw that 4 or 5 people were already inside, so perhaps 6 people were taken away that day." Naathaveni said that several days after her husband's arrest she received an arrest slip—but it merely indicated "Colombo" as current location, and her attempts to find out more about her husband's fate or place of detention yielded no results. Neither the camp administration nor the government representative in her block knew anything about the detention. She said, "I complained to the GS [government representative], but he said that he did not dare to record these complaints right now. 'I don't think it is advisable for me to involve myself with such matters,' he said." Using the public phone in the camp, Naathaveni informed the ICRC about her husband's detention. She said that the ICRC replied that they had not received any detention lists from the TID (Terrorist Investigation Division) for more than a month and a half and that they therefore could not verify whether her husband was in TID (Terrorist Investigation Division) custody. Naathaveni told Human Rights Watch that she was particularly worried because of the manner in which her husband was arrested. In Sri Lanka, white vans have in recent years become associated with enforced

<sup>&</sup>lt;sup>127</sup>US Department of State, supra note 55, pp. 47-48.

<sup>&</sup>lt;sup>128</sup>Human Rights Watch, supra note 36, pp. 10-11.

<sup>&</sup>lt;sup>129</sup>Ibid, p. 11.

disappearances. In numerous cases previously documented by Human Rights Watch and other organizations, white vans have often been used by perpetrators of arbitrary arrests or abductions that result in "disappearances". Most of these people were never seen again or found dead."<sup>130</sup>

Human Rights Watch indicated that "Security forces carrying out the arrests at Manik Farm and other camps often refuse to inform the families or government representatives (grama sevakas) in the camps where they take those arrested. Even the Human Rights Commission on Sri Lanka, which needs to be informed about an arrest according to the Presidential Directives on Arrest and Detention, has not been informed in the cases documented by Human Rights Watch. The families, particularly those held in the camps, have no ability to search for their missing relatives."<sup>131</sup>

Human Rights Watch reported that "The lack of transparency and information about the fate of the detainees has caused great anxiety among their relatives, many of whom were themselves in centers for displaced persons. On at least one occasion their indignation led to public protest. On September 23, residents at the Poonthotham camp in Vavuniya district attacked soldiers and police officers and their vehicles after the police took one of the camp's residents away. The riot, which lasted for three hours, ended when the police brought the man back. The number of people whose whereabouts are unknown after having been detained at checkpoints or in the camps cannot be determined. Sri Lankan authorities themselves have admitted that thousands of people remain unaccounted for. According to the government representative in Vavuniya, more than 10,000 people are missing from the camps. Although the missing might also include those who have escaped or bribed their way out of the camps, the large number unaccounted for raises concerns of enforced disappearances.

This concern is aggravated by the authorities' rejection of any involvement by UN agencies, humanitarian organizations, or other independent observers in the screening and detention process. Furthermore, the authorities have denied access to the registration lists of the displaced to these agencies and even to the Human Rights Commission of Sri Lanka, making it difficult for them to help families locate their missing relatives.

The International Committee of the Red Cross, the organization usually tasked with searching for missing people during and after armed conflicts, was initially able to locate some of the detainees, as illustrated in some of the cases above. However, since mid-July, ICRC has also been barred from accessing the detention centers and the main camps for displaced persons, nor do they have access to the registration lists.

Representatives of international humanitarian agencies working in the camps told Human Rights Watch that camp residents continue to report that relatives have been detained or are missing. They begged international organizations to help locate them, yet there is nothing the agencies can do. One humanitarian worker said: "Every time we go into the camps, everybody is asking about missing relatives, but we don't have access to the registration lists so there is nothing we can do. We have even stopped gathering information about missing people because we do not want to create expectations."<sup>132</sup>

In its Report on Enforced or Involuntary Disappearances, the Working Group of the UN Human Rights Council sent four cases under its urgent action procedure to the Government of Sri Lanka.<sup>133</sup> Three of the cases occurred between December 2008 and June 2009. Vijayanathan Vellasamy disappeared in December 2008 in Trincomalee District. It is believed that Security Forces are responsible for his disappearance. Sivanantharuben Sivarasa was abducted on 20 April 2009. It is believed that the Navy is responsible for his disappearance. The third case concerned Sountherrajan Kandasamy Sountherraja, who was abducted by police officers in Vavuniya Kachcheri, Vavuniya, on 13 June 2009. The Working Group also sent three urgent communications to the Government. The

<sup>&</sup>lt;sup>130</sup>Ibid, pp. 11-12.

<sup>&</sup>lt;sup>131</sup> Ibid, p. 11.

<sup>&</sup>lt;sup>132</sup>Human Rights Watch, supra note 36, pp. 13-14.

<sup>&</sup>lt;sup>133</sup>Report on Enforced or Involuntary Disappearances, published on 21 December 2009, Human Rights Council, thirteenth session; Agenda item 3 Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, UN GA Res. Doc. GE.09-17704; A/HRC/13/31. Document available at: http://ap.ohchr.org/documents/dpage\_e.aspx?c=173&su=172.

first one was sent on 11 May 2009, jointly with the Special Rapporteur on the situation of human rights defenders and concerned Sinnavan Stephen Sunthararaj, abducted in Colombo on 7 May 2009.  $^{134}$ 

## 3. Arrests and detentions

Human Rights Watch reported that "The authorities frequently arrest LTTE suspects without regard to the requirements of domestic or international law. Eyewitnesses to arrests told Human Rights Watch that plainclothes members of the security forces have taken persons into custody without identifying themselves or informing those arrested or their families of the grounds for arrest. They frequently failed to provide arrest receipts to the family, as required by Sri Lankan law, and, when they did, the arrest receipts often did not specify the reasons for detention or the location where the person was being taken."<sup>135</sup>

Human Rights Watch provided the following example: "the army detained 32-year-old Jeganathan on May 15, 2009, after he crossed into government-controlled areas with his wife and one-year-old son. Jeganathan's wife, Aanathi, told Human Rights Watch that when they arrived at the Omanthai checkpoint, soldiers informed them that everybody who had been involved with the LTTE had to surrender. Jeganathan, who had worked for the LTTE, decided to register. Aanathi said: "When we went to register, the military told us that my husband had to register separately because he had been involved with the LTTE, but that he would join me in the camp two days later. I initially refused to go alone, but they forced me. After two days, the camp administration said that he would come in two weeks. After two weeks he was still not there. I lost all hope. I thought that I would never see him again." Aanathi never received official notification of her husband's whereabouts from the authorities. A relative who lives in Vavuniya kept looking for Jeganathan in every camp in the district, and finally managed to locate him in the Rambaikulam camp and notified Aanathi. However, in the absence of official notification, it was impossible for her to make a request to visit him or obtain information about his fate. Eventually, Aanathi received a document from the International Committee of the Red Cross (ICRC), which then had access to the camps that confirmed her husband was at Rambaikulam. Nearly three months after he had been detained, she finally managed to visit him."<sup>136</sup>

Human Rights Watch added that suspected LTTE supporters were also arrested in the camps, initially by uniformed military personnel and then, gradually, by authorities in civilian clothes, "sometimes identifying themselves as being from the police Terrorist Investigation Division (TID) or the Criminal Investigation Department (CID)". It indicated that, on "several occasions, the military or CID rounded up dozens and even hundreds of people and took them away."<sup>137</sup>

Human Rights Watch reported that persons whom had been involved with the LTTE were required by the administration of the camps to come forward to surrender, providing then the following example: "Karunainathan, 24, was taken into custody in early April, about 20 days after he had arrived at Manik Farm. His brother Mathivaanan told Human Rights Watch that Karunainathan went to register with the military authorities because he had been forced to work for the LTTE just days before he managed to escape to government-controlled areas. According to Mathivaanan, his brother thought he would be pardoned, but the military detained him on the spot and asked his relatives to bring his belongings. Mathivaanan said that later that day, about 20 buses arrived and took away his brother and several hundred others who had notified the authorities of their involvement with the LTTE. The military authorities did not provide any specific information to those arrested or their families as to where they were being taken: "When the military detained him, they said that he would be interrogated and then receive vocational training. They gave us no arrest receipt. They did not inform

<sup>&</sup>lt;sup>134</sup> On disappearances see also: The Guardian, Traumatised Tamils live in fear of new crackdown in Sri Lanka, 5 April 2009, www.guardian.co.uk/world/2009/apr/05/sri-lanka-forces-tamil-tigers/print

<sup>&</sup>lt;sup>135</sup>Human Rights Watch, supra note 36, pp. 6-7.

<sup>&</sup>lt;sup>136</sup>Ibid, p. 7.

<sup>&</sup>lt;sup>137</sup>Ibid, pp. 7-8.

the government representative in the block either. For 20 days we heard nothing from him. We started to get very concerned."<sup>138</sup>

Human Rights Watch was also told by Manik Farm residents about similar incidents on October 5 and 7, and Human Rights Watch underlined that "Family members whose relatives have been taken into custody rarely know the legal basis under which their relatives are being held.<sup>139</sup> Basic due process protections are routinely ignored, including being charged with an offense, having the right to contest the basis for detention before a court, and having access to legal counsel. Concerns of ill-treatment in detention have also been raised."<sup>140</sup>

Amnesty International reported the words of the UN Resident Coordinator who stated that "approximately 9,400 individuals with links to the LTTE have been separated from the civilian population and accommodated in 'rehabilitation' facilities. Transfer of these "surrenderees" to the authority of the Commissioner General for Rehabilitation is an initial step in the Government's rehabilitation process. At the same time, the application of Constitutional rights and the process for persons taken into custody must be ensured. Notification to families and the role of the Human Rights Commission of Sri Lanka to track those arrested is particularly important to avoid stress and anxiety among the displaced. UNICEF continues to work closely with the Office of the Rehabilitation Commissioner and other Government partners with regard to children leaving armed groups. These children fall under the care of the Government Emergency Regulation for Child Soldiers, adopted in December 2008. Since the beginning of the year, 343 former child soldiers have been identified, and have been, or are in the process of being, transferred to child rehabilitation centers."<sup>141</sup>

# 4. Treatment

Following his visit to Sri Lanka in 2009 UN Special Rapporteur on Torture Manfred Nowak expressed his concern regarding the widespread use of torture by the Sri Lankan law enforcement services and reported various cases of persons having been tortured in detention.<sup>142</sup>

For many years now, the Asian Human Rights Commission has reported numerous cases of torture by the Sri Lankan police.<sup>143</sup>

4.1 Situation

<sup>142</sup> Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, published on 25 February 2010, thirteenth session; Agenda 3 item Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, UN GA Res. Doc. GE.10-11514; A/HRC/13/39/Add.1. Document available at: http://ap.ohchr.org/documents/dpage e.aspx?c=173&su=172.

<sup>143</sup>See, for example, Sri Lanka: Police strip and sexually torture man in custody to force confession, Asian Human Rights Commission, Urgent Appeal Case: AHRC-UAC-037-2010, 31 March 2010, www.ahrchk.net/ua/mainfile.php/2010/3408/; Sri Lanka: Teenage torture victim wins fundamental rights case, Asian Human Rights Commission, Urgent Appeal Update: AHRC-UAU-017-2010, 8 April 2010, www.ahrchk.net/ua/mainfile.php/2010/3418/; Sri Lanka: Police, doctors and magistrates are complicit in a man's torture, Asian Human Rights Commission, Urgent Appeal Case, AHRC – UAC – 166 – 2009, 2 December 2009, www.ahrchk.net/ua/mainfile.php/2009/3329/; Sri Lanka: Police, doctors and magistrates are complicit in a man's torture, Asian Human Rights Commission, Urgent Appeal Case: AHRC-UAC-166-2009, 2 December 2009, www.ahrchk.net/ua/mainfile.php/2009/3329/; Sri Lanka: A criminal investigation is needed into the paralysis of a man in custody, Asian Human Rights Commission, Urgent Appeal Case: AHRC-UAC-164-2009, 27 November 2009, www.ahrchk.net/ua/mainfile.php/2009/3327/; Sri Lanka: The Nikaweratiya Police use severe torture to extract a confession from an innocent man, then offer him a cup of tea; hospital staff proscribe paracetamol, Asian Human Rights Commission, Urgent Appeal Case: AHRC-UAC-090-2009, 31 July 2009, www.ahrchk.net/ua/mainfile.php/2009/3223/; Sri Lanka: A police officer on trial for the murder of Gerald Perera remains in service at Gampaha Police Station, Asian Human Rights Commission, Urgent Appeal Update: AHRC-UAU-017-2009, 17 July 2009, www.ahrchk.net/ua/mainfile.php/2009/3212/.

<sup>&</sup>lt;sup>138</sup>Ibid, p. 8.

<sup>&</sup>lt;sup>139</sup>Ibid, pp. 8-9.

<sup>&</sup>lt;sup>140</sup>Ibid, p. 14.

<sup>&</sup>lt;sup>141</sup> Amnesty International, supra note 38, p. 24.

The Asian Centre for Human Rights stated the following: "thousands (precise numbers unknown due to the lack of monitoring) of ethnic Tamils are being detained as suspected LTTE cadres. Sri Lanka has a well established record on its treatment of LTTE suspects. It is clear that they are being held incommunicado and being subjected to torture and other human rights violations."<sup>144</sup>

In its 2009 Sri Lanka Report, the Asian Human Rights Commission stated the following: "The government continues to show disdain and unwillingness to meaningfully address violations, evidenced by the lack of credible investigations and prosecutions concerning the many cases of torture, disappearances and other grave abuses, giving rise to concerns about continuing impunity."<sup>145</sup> It also informed that "The Prevention of Terrorism Act (PTA) continues to give very wide powers to the security apparatus. All legal safeguards available through the normal law can be suspended through use of the PTA. Most of its provisions cannot be justified to deal with an emergency; their real purpose is to arbitrarily extend state power. But the security apparatus does not feel limited to the provisions of the PTA. It can do anything whether the PTA allows it or not, because with the loss of the meaning of legality there is nothing to stop it from acting completely outside the law. There is no way for the parliament or the judiciary to monitor or intervene. Within the last few years there have been no investigations into complaints against the security apparatus. Calls for such investigations are actively opposed. The mentality developed during the conflict, which persists today, is that demands for investigations are treacherous, analogous to acts of sabotage or the aiding and abetting of terrorism. The security apparatus has consistently attacked the media from this ideological position."146

#### 4.2 Cases

In a number of cases, family members interviewed by Human Rights Watch stated that their detained relatives complained of ill-treatment and poor conditions in custody.

The last time Aanathi went to see her husband, in October 2009, he told her that the CID, with the help of former LTTE members, was continuing to interrogate him. She told Human Rights Watch: "He told me that they have started beating people with their fists and with sticks now, saying that they are not telling the truth. He didn't say that he had been beaten, but I think that he is hiding something from me."

Mathivaanan learned from the ICRC that his brother, Karunainathan, was held in detention in Nellikulam camp. The family received a letter from him, which he managed to have smuggled out of the camp. He told his family that the military had beaten him twice and that conditions were poor. He also said that he was not undergoing any vocational training and had no information as to whether and when he would be released. Mathivaanan said the family felt desperate because there was nothing they could do to help Karunainathan, especially because they too were effectively being detained at the time: "Since we are not able to leave this camp, we don't know whom to approach for help. I don't think there is a court decision to keep them there, but I have no way to find a lawyer for him."<sup>147</sup>

The two following violent incidents were reported by a Sri Lankan Human Rights organization, the University Teachers for Human Rights:<sup>148</sup>

"K. Thayapararajah, a graduate of the Engineering Faculty at Peradeniya, was the head of the Vanni Institute of Technology, as both a teacher and administrator. He left the no fire zone with his family in late March 2009, identified himself to the Sri Lanka Army and was questioned before being sent on. He joined his family in Vavuniya for some time and then went to Colombo to find his way abroad. He was arrested in September 2009 in Colombo and tortured at a security camp in Avissawela, was shot and injured on 13<sup>th</sup>

<sup>&</sup>lt;sup>144</sup> Asian Centre for Human Rights, Weekly Review 227/2009.

<sup>&</sup>lt;sup>145</sup> Asian Human Rights Commission, The Stat of Human Rights in Sri Lanka in 2009, pp.2-3.

<sup>&</sup>lt;sup>146</sup> Asian Human Rights Commission, The Stat of Human Rights in Sri Lanka in 2009, pp.8-9.

<sup>&</sup>lt;sup>147</sup> Human Rights Watch, supra note 36, p. 8.

<sup>&</sup>lt;sup>148</sup> See also Guardian Article, which refers to the report of the UTHR,

www.guardian.co.uk/world/2009/jun/11/sri-lanka-tamil-tigers-civil-war.

September while being taken to court under escort and died at Kalubowila Hospital two days later. The Government did not acknowledge the incident, leave alone investigate it, nor did the Press report it."<sup>149</sup>

"Above the third floor is a penthouse, also known as the Fourth Floor, to which the staff is at present denied access. This place is alleged to be used for torture and interrogation. The person in charge of 'paramilitary' personnel at the Hospital is reportedly an ex-LTTEer called Ranjit who is seen to enjoy considerable power over the Sinhalese under him. Once a person taken up, the hospital staff heard, was brought down in a poor state, revived and then taken back."<sup>150</sup>

The University Teachers for Human Rights also reported the following encounter at Kilinochchi hospital:

"This encounter, which was reported to a friend by a cadre (who we refer to as R) involved in reconnaissance duty behind enemy lines during February 2009 for the operations above, was given to us by the friend. The friend, who first gave a hint of the story in passing, in the course of several subsequent conversations gave a detailed and consistent picture. To this friend, R had committed the care of his wife and child, should he ever fail to return from a mission. We judge the story to have a strong ring of truth.

By late February the Army was hammering on the gates of PTK. An LTTE reconnaissance unit wearing army uniforms had gone about five miles behind army lines to Suthanthirapuram, by then bereft of civilians. In one of the deserted houses they encountered two girls in a very dishevelled state. The girls first thought them to be from the Army and tried to run away but the unit stopped them. On learning that the youths were from the LTTE, they reluctantly told their story. From earlier that month civilians escaping the shelling and worse to come began surrendering to the Army, initially at Visuamadu. The girls said that the Army separated some of the young boys and girls ostensibly on suspicion of being LTTE members and sent them to unknown destinations. These girls, who were civilians, were taken to the hospital in Kilinochchi, which was then under the control of the Army. The hospital had new buildings acquired during the ceasefire. The larger building had good rooms upstairs for patients and consulting rooms and other rooms for the staff on duty downstairs.

The girls said that there were about fifty girls in their position. They did not say much about the other girls. Some male detainees were also brought there for menial work. The girls were kept in the doctors' quarters and in the nights they were taken to a larger building. This was being used as a guest house for officers. The ground floor was used as a mess serving food and drinks. The girls had said they were taken upstairs and sexually abused. The girls understood that they were rotated and the girls finishing their stint at Kilinochchi Hospital were sent away in buses, as they were told, to IDP camps. As to what eventually became of the girls and boys, one could only guess.

The two girls who were from the Kilinochchi area, and knew the terrain, decided to escape along with three other boys. The Hospital, which was on the east side of the Kandy Rd., has a drain 50 yards behind, close to where they were. The drain carried rainwater northward to Kilinochchi Kulam (Tank). They waited for a time when things were quiet, broke through the wired fence, got into the drain, which gave them cover, and later made their escape eastward towards the jungle. At one point there was an alarm over an army patrol and the boys got separated from the girls. The girls were familiar with the place as far as Suthanthirapuram. They found a deserted house where the people had fled leaving behind some provisions, from which they cooked and ate. They were anxious about proceeding further because they did not know where they might run into the Army. This was when they met the reconnaissance unit. R questioned them closely and on hearing their story, believed them. Even though the girls did not have the same skills in

 <sup>&</sup>lt;sup>149</sup> University Teachers for Human Rights, supra note 97.
 <sup>150</sup> Ibid.

moving covertly, R at some risk took them to Putumattalan in the NFZ, partly to expose their experience. The girls were questioned for intelligence, but R's superior officer did not want detailed publicity on the matter so as not to alert the Army to their planned mission behind army lines. The girls were enjoined to silence and handed over to the office in Valaignarmadam that connects people with relatives, and relatives collected the girls.

A further check on the authenticity of the story is the manner in which it was featured in the pro-LTTE pathivu.com and three days later in TamilNet of 27 February 2009 under the caption, 'Slave camp suspected in Ki'linochchi hospital building'. It said: "A slave camp consisting male and female members 'chosen' from the fleeing civilians by the Sri Lanka Army (SLA) is reportedly setup in the abandoned Ki'lnochchi hospital building, reported TamilNet correspondent in Vanni, citing unverified information reaching Mullaiththeevu from males who escaped from the camp. According to the sources, men are kept at the downstairs for forced labour and women kept in the upstairs for abuse by the SLA soldiers who are on temporary leave. Wailing and screaming of women are commonly heard from the upstairs, the sources revealed. The screening of the civilians who fled took place at two centers, in Visuvamadu and in Ki'linochchi."

Pathivu.com had published a similar story on 24 February without saying anything about the sources. We understand that the Pathivu report originated in the Voice of the Tigers broadcast in the Vanni which was routinely dispatched to the Diaspora in electronic form (V of T continued broadcasts until 15th May 2009). TamilNet, which relays news to the Diaspora and claims to be reliable, chose not to repeat the local Tamil media. Instead, it conducted further checks and released its story three days later, along with a hint about the story's origins. The major operation the LTTE had planned was still ten days away.

Our source also told us that when one of the units operating behind army lines, captured the artillery point at Theravil, based on the information given by the girl escapees, its gunners also aimed artillery shells at Kilinochchi Hospital. R also said that he had been contemplating sending his wife and child out of the war zone by putting her down as a care giver for an injured patient being carried by ICRC ship. But he decided against it after meeting the girl escapees.

When journalists were given a conducted tour of Kilinochchi around mid-January, the new hospital showed no signs of habitation, but was newly painted and squeaky clean.

# (...)

According to sources with close contacts in the security forces, many soldiers were said to possess photographs of naked women LTTE cadres in their cell-phone cameras, taken after they were dead. They thought it an unlikely situation that women from the war zone were herded into a brothel. (...)<sup>151</sup>

# **<u>C. The killing of captured or surrendered LTTE members</u>**

There are numerous accounts of allegations of murder, such as the extrajudicial killings of captives and LTTE members by the Sri Lankan security forces and the military.<sup>152</sup> In December 2009, Sarath

<sup>&</sup>lt;sup>151</sup>Ibid, pp. 47-49.

<sup>&</sup>lt;sup>152</sup> The Times Online, www.timesonline.co.uk/tol/news/world/asia/article6956569.ece; also in The Times of India, www.timesofindia.indiatimes.com/world/south-asia/Lanka-Army-killed-surrendering-LTTE-militants-Ex-General/articleshow/5333730.cms.

Fonseka, the then head of the army, accused the Defense Minister Gotabhaya Rajapaksa of ordering the murder of surrendered LTTE leaders rather than taking them prisoner.<sup>153</sup>

#### 1. The alleged execution of nine LTTE prisoners in January 2009

In August 2009 the British television station Channel 4 aired a video<sup>154</sup> claiming to show the summary execution of nine captured LTTE fighters by Sri Lankan military forces. The video was supposedly filmed by a soldier present at the scene.

The video footage shows nine naked persons, handcuffed and blindfolded, lying on the ground. Five of the men seem to have already been shot. Another man in military uniform, presumably a Sri Lankan soldier, forces one of the captives to lie on the ground, kicks him from the back and then shoots him in the head from approximately two meters distance. Another presumably Tamil captive is shot subsequently in the same manner. "It's like he jumped", the executor laughs.<sup>155</sup> A second man in uniform appears next to the perpetrator. In Sinhala accents, they jokingly argue over who gets to shoot whom. They take turns, mockingly play- acting the popular folk game 'kurupiti gahanawa wage' – 'Your Turn, My Turn.'<sup>156</sup>

Journalists for Democracy in Sri Lanka obtained the material and claim it was filmed in January 2009 in the northern region, when the international media were prevented by the Sri Lankan Government from covering the conflict zone.<sup>157</sup> The Sri Lankan Government claimed the video footage was fabricated. An analysis for *The Times* by Grant Fredericks, an independent forensic video specialist, suggests otherwise. He found no evidence of digital manipulation, editing or any other special effects. On the contrary, 'subtle details consistent with a real shooting, such as a discharge of gas from the barrel of the weapon used, were visible.'<sup>158</sup> Philip Alston, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, commissioned three experts in forensic pathology, forensic video analysis, and firearm evidence to examine the video, after concluding that the investigations carried out by the Government had not been thorough or impartial. 'The conclusion clearly is that the video is authentic', he told at a news conference in New York. He urgently called for an impartial inquiry into possible war crimes committed during the conflict.

# 2. <u>The alleged killing of senior LTTE leaders and their families between May 14 and May 18,</u> 2009

There are several indicators that suggest that the LTTE leadership decided around May, 15, 2009 to end fighting and to capitulate. Nonetheless most of the leadership was shot in the time between May 16 and May 19, 2009. Balasingham Nadesan, head of the LTTE's political wing, and Seevaratnam Pulidevan, the head of LTTE's Peace Secretariat, were allegedly killed by Sri Lankan military forces in the early morning of May 18, 2009, as they tried to surrender.<sup>159</sup> According to NGO sources, the two men and a few other LTTE figures sought to turn themselves in, preferably to a third party, the

 $<sup>^{153}</sup>$  The Sunday Leader, www.thesundayleader.lk/2009/12/13/%E2%80%9Cgota-ordered-them-to-be-shot%E2%80%9D-%E2%80%93-general-sarath-fonseka/.

<sup>&</sup>lt;sup>154</sup> The Times Online, www.timesonline.co.uk/tol/news/world/asia/article6956569.ece.

<sup>&</sup>lt;sup>155</sup> The Times Online, www.timesonline.co.uk/tol/news/world/asia/article6956569.ece.

 <sup>&</sup>lt;sup>156</sup> http://blogs.channel4.com/snowblog/2009/08/26/authenticating-the-sri-lanka-war-crimes-footage/.
 <sup>157</sup> Channel 4,

www.channel4.com/news/articles/world/asia\_pacific/execution%20video%20is%20this%20evidence%20of%20war%20crimes%20in%20sri%20lanka/3321087.

<sup>&</sup>lt;sup>158</sup> The Times Online, www.timesonline.co.uk/tol/news/world/asia/article6956569.ece.

<sup>&</sup>lt;sup>159</sup> The Independent, www.independent.co.uk/news/world/asia/tamil-leaders-killed-as-they-tried-tosurrender-1687790.html; also The Times Online, from the Sunday Times, 24 May 2009, www.timesonline.co.uk/tol/news/world/asia/article6350563.ece.

International Committee of the Red Cross, and asked for help on how to surrender. Erik Solheim, Norway's Environment Minister and the chief intermediary for the two men, was contacted by the LTTE leadership on May 17, 2009 and informed about the planned surrender. The ICRC as well as the Sri Lankan Government were notified subsequently. The government's response, communicated by the foreign secretary Palitha Kohona, was that the persons should obtain a white flag and give themselves up. After that, contact to the two men was lost and no further information received.

Marie Colvin, a *Sunday Times* correspondent, was in contact with Balashingam Nadesan and Seevaratnam Puleedevan during their last days. She had known them since being smuggled into rebel territory eight years ago. The journalist reported that the two men asked for guarantees of security from the US administration and the British Government in case of their surrender. Furthermore, they made clear that they would lay down their arms if they would receive assurance from the Sri Lankan Government that it would pursue a political process that would guarantee the rights of the Tamil minority. Marie Colvin delivered the requests to the UN special envoy in Colombo, Vijay Nambiar, chief of staff to Ban Ki-moon.<sup>160</sup> Vijar Nambiar, in turn, relayed the conditions of surrender to the Sri Lankan Government and said he had been assured by the Sri Lankan President Mahinda Rajapaksa that Nadesan and Puleedevan would be safe in surrendering.

LTTE officials in exile claim the two men were killed by government troops as they approached them bearing a white flag. The government on the other hand claims that Mr Nadesan and Mr Pulidevan were shot by LTTE cadres who found out that they wanted to escape.

Strong evidence supports the assumption that the LTTE leaders were shot as they tried to surrender. The US State Department Report refers to the morning of May 18, where Nadesan and Puleedevan presumably led a group of approximately one dozen men and women out to the Sri Lanka Army troops, waving a white flag. According to a Tamil witness who later escaped the area, the Sri Lanka Army started firing machine guns at them. According to reports, everyone in the group was killed.<sup>161</sup>

Moreover the ex-Army chief General Fonseka accused the Defence Secretary Gotabhaya Rajapakse of ordering the then 58th division commander Shavendra Silva not to accommodate LTTE leaders surrendering with white flags in the early hours of May 18th.<sup>162</sup> He claimed he had not received any information in the final days of the war that three key LTTE leaders had opted to surrender to Sri Lanka's armed forces but that communications were instead confined between the LTTE leaders, Norway, various foreign parties and Basil Rajapaksa, the powerful senior adviser to the president. 'Later, I learnt that Basil had conveyed this information to the Defence Secretary Gothabaya Rajapaksa, who in turn spoke with Brigadier Shavendra Silva, Commander of the Army's 58th Division, giving orders not to accommodate any LTTE leaders attempting surrender and that "they must all be killed."<sup>163</sup>

# D. The bombardment of government proclaimed no fire zones

By May 2009 the Sri Lanka Army had regained control over most of LTTE held territory in the northern part of the country. As a result of the heavy fighting many civilians had fled the war zones and gathered in a government established no fire zone. The first no fire zone was created by the Sri

<sup>&</sup>lt;sup>160</sup> The Times Online, www.timesonline.co.uk/tol/news/world/asia/article6350563.ece.

<sup>&</sup>lt;sup>161</sup> US Department of State, supra note 55, p. 45 et seq.

<sup>&</sup>lt;sup>162</sup> Tamil Week, http://tamilweek.com/news-features/archives/1807; also The Times of India, http://timesofindia.indiatimes.com/world/south-asia/Lanka-Army-killed-surrendering-LTTE-militants-Ex-General/articleshow/5333730.cms; also The Indian express, www.indianexpress.com/news/gothabayainstructed-to-kill-surrendering-lt/553581/; and The Guardian, www.guardian.co.uk/world/2009/jun/11/sri-lankatamil-tigers-civil-war.

<sup>&</sup>lt;sup>163</sup> The Sunday Leader, www.thesundayleader.lk/2009/12/13/%E2%80%9Cgota-ordered-them-to-be-shot%E2%80%9D-%E2%80%93-general-sarath-fonseka/.

Lankan Government on 21 January 2009 and replaced by a new safe area on 12 February 2009. Whereas the old safety zone was located inland and comprised an area of 35 square kilometers, the new safety area was located along the East coast, naturally limiting the possibilities of movement for the refugees. Initially it comprised a territory of 14 square kilometers. However, the Sri Lanka Army continued shelling and bombarding these areas. A regional health doctor, working in the Pulmoddai field hospital, located in the new safety zone, Thangamutha Sathiyamorthy, told the *Observer* newspaper that civilians were still being killed and injured by shelling inside the zone. He also reported of a number of helicopter attacks. According to his testimony many people had dug shelters in the sand to try to escape the shelling. 'The fighting is continuing. Shells are falling. But these people have no alternative. They cannot move. Most of the injuries we are treating are from shells and bullets. Today we received 58 injured civilians, including 16 children.'

# 1. The armies advance into the no fire zone on April 19, 2009

The Sri Lanka Army began its advance into the no fire zone just before mid-night on 19 April after shelling the bund on its northwestern strip, forcing the civilians to squeeze into a two mile strip of land between Vellaimullivaykkal to the north and Vattavaikkal to the south, near Mullaitivu town in the southern half of the eight mile strip that formed the original no fire zone.<sup>164</sup> Also the northeastern shore of the strip facing the ocean was shelled heavily.<sup>165</sup> Evacuees on the east said that the commencement of the operation was also marked by aerial bombing of the eastern seaboard of the northern sector. This was the area of embarkation for the injured, sick and elderly boarding ICRC vessels which came regularly. *The Guardian* newspaper reported that hundreds of civilians had been killed or seriously injured in artillery and gun attacks as the Sri Lanka Army attempted to finish off the last Tamil Tigers trapped in a shrinking pocket of land.<sup>166</sup>

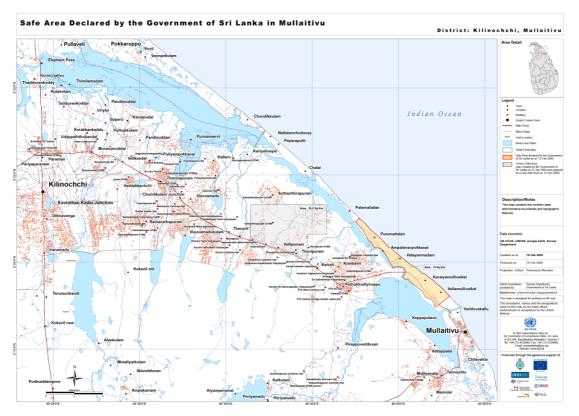
According to the doctor who was in charge of Putumatalan Hospital, the fighting started at 2.30 am. In the wake of the fighting, the no fire zone itself being crowded, many people on the west of the strip, where the fighting was taking place, moved eastwards, creating an impression that the army used people who had escaped to the other side of the lagoon earlier during the night, as a human shield to move in. Gnana Gunalan, chairman of the local Sri Lankan Red Cross and a doctor who treated the flood of casualties as they arrived by a Red Cross ship, said: "Most of the people have shell blast injuries and gunshot injuries. Some people have lost their limbs, other people have lost other parts of the body; some people have wounds in the abdomen, some in the chest."<sup>167</sup>

<sup>&</sup>lt;sup>164</sup> University Teachers for Human Rights, 'A Marred Victory and a Defeat Pregnant with Foreboding' (2009), University Teachers for Human Rights Special Report No: 32, p. 7.

<sup>&</sup>lt;sup>165</sup> Ibid, p. 23 et seq.

<sup>&</sup>lt;sup>166</sup> The Guardian, www.guardian.co.uk/world/2009/apr/19/tamil-tigers-sri-lanka.

<sup>&</sup>lt;sup>167</sup> The Guardian, 19 April 2009, www.guardian.co.uk/world/2009/apr/19/tamil-tigers-sri-lanka.



UN Office for the Coordination of Humanitarian Affairs (OCHA), *Map of the Safe Area Declared* by the Government of Sri Lanka in Mullaitivu, 16 February 2009, OCHA/LK/COL/Nor. StrategicPlan/003/V4, available at: http://www.unhcr.org/refworld/docid/49a661de2.html [accessed 6 September 2010]

Testimony was also received regarding the many civilians who were killed in the northeastern sector of the strip, due to shells and missiles. This area housed many elderly people and very young persons in addition to the sick and injured who were waiting for the Red Cross carrier vessels to pick them up.<sup>168</sup>

# 2. The bombardment of the no fire zone close to Mullaitivu on May 9 and 10, 2009<sup>169</sup>

V. Shanmugarajah, a doctor working on behalf of the Sri Lankan Government, told the Associated Press that a few hundred civilians had been killed and more than 1,100 wounded on 9 and 10 May, during intensive shelling of a boggy sliver of beachfront where Sri Lankan troops had surrounded Tamil separatist fighters.<sup>170</sup> About 50,000 civilians, mostly Tamils, were caught there along with a holdout force of between 200 and 500 rebel fighters.

Gordon Weiss, the UN spokesman in Sri Lanka, said in an interview with the *New York Times*, on Monday, 11 May: "The large-scale killing of civilians over the weekend, including the deaths of more than 100 children, shows that that bloodbath has become a reality."<sup>171</sup>

<sup>&</sup>lt;sup>168</sup> University Teachers for Human Rights, p. 24.

<sup>&</sup>lt;sup>169</sup> Map showing the 2 miles strip of land where around 50.000 people were trapped due to attacks and fighting on 9<sup>th</sup> and 10<sup>th</sup> May 2009: www.army.lk/opdetail.php?id=95.

<sup>&</sup>lt;sup>170</sup> The New York Times, www.nytimes.com/2009/05/12/world/asia/12lanka.html.

<sup>&</sup>lt;sup>171</sup> UN Dispatch, www.undispatch.com/node/8216; also BBC news, http://news.bbc.co.uk/2/hi/8043169.stm.

# E. The bombardment of hospitals

The following sheet comprises a list of attacks on hospitals in the Vanni Region between December 15, 2008 and May 2, 2009. The information was compiled by Human Rights Watch from interviews with aid agencies and witnesses.

Date	Hospital	Description
12/15/08	Mullaitivu General Hospital	Shelling: 2 patients injured, damage to ward and medical equipment.
12/19/08	Mullaitivu General Hospital	11:30 a.m. Five shells hit hospital causing damage to wards, operating theater, and the Medical Superintendent's HQ: 2 staff wounded.
12/20/08	Mullaitivu General Hospital	Shells hit inside hospital grounds.
12/22/08	Kilinochchi General Hospital	6:20 a.m. Aerial bombing hit near hospital, causing shrapnel damage. No injuries reported.
12/25/08	Kilinochchi General Hospital	Shells hit hospital grounds, narrowly missing staff. Damage to newborn nursing section, outpatient department, and reception.
12/30/08	Kilinochchi General Hospital	4 p.m. Shells hit hospital causing damage to the building. No injuries reported.
01/08/09	Tharmapuram Hospital	1:20 p.m. Shells hit Tharmapuram Junction 75 m from the hospital, killing 7.
01/13/09	PTK Hospital	10 a.m. Hospital hit by shells: 1 killed, 6 wounded. Patients fled to the wards to seek shelter from the shelling.
01/19/09	Vallipuram Hospital	Shell landed in hospital yard: 6 people in out-patient ward injured
01/21/09	Vallipuram Hospital	7 p.m. One shell hit hospital
01/22/09	Vallipuram Hospital	Morning. Shells hit hospital compound: killing 5 and injuring 22.
01/26/09	UDK Hospital	Shells hit hospital: 12 killed, 40 injured.
01/31/09	PTK Hospital	Shrapnel from shells hit hospital.
02/01/09	PTK Hospital	Three attacks. First attack: 1 person injured by shrapnel inside the hospital. Second attack: 1 shell hit the hospital: 1 killed, 4 injured. Third attack: 1 shell hit the women and children ward (no casualty information).
02/02/09	PTK Hospital	One shell hit hospital: 7 killed, including

		a nurse, 15 injured.
02/03/09	PTK Hospital	Two attacks – operation ward, staff headquarters, and female ward hit. At least 2 killed and several injured.
02/05/09	Ponnampalam Memorial Hospital	Shelling: 60 casualties inside and outside the hospital.
02/09/09	Putumattalan hospital (make- shift hospital for PTK)	Around 10 p.m., one shell struck about 10 meters east of the hospital compound. No casualties, but the compound wall was damaged by shrapnel.
02/10/09	Putumattalan	Shelling: 16 people killed.
03/16/09	Putumattalan hospital	Around 11 a.m. an RPG struck inside the compound, killing two people.
03/23/09	Putumattalan hospital	An RPG hit in front of the hospital; at least one killed (a child); two shells hit close to the hospital, injuring at least 15.
04/09/09	Putumattalan hospital and Putumattalan mother and child center	Several shelling attacks; 22 killed and at least 300 injured.
04/20/09	Putumattalan hospital	Heavy shelling and gunfire attacks during the night; hundreds of civilians injured and at least 13 killed; 2 medical staff sustained gunshot wounds; hospital roof and surgery ward destroyed.
04/21/09	Valayanmadam make-shift hospital	Aerial attack; 4 or 5 killed; more than 30 wounded; one doctor killed.
04/23/09	Mullivaikkal hospital	Three shells hit the hospital; no information on killed/wounded.
04/28/09	Mullivaikkal Primary Health Center	Heavy shelling and aerial attacks; at least 6 killed (previously injured patients receiving treatment); 1 member of medical staff injured.
04/29/09	Mullivaikkal Primary Health Center	One shell; 6 patients killed.
04/29/09	Mullivaikkal Hospital	Shelling; roof of one of the wards significantly damaged; at least 9 killed and 15 injured.
04/30/09	Mullivaikkal Hospital	Shelling: 9 killed, 15 injured.
05/02/09	Mullivaikkal Hospital	Shelling: two attacks, at 9 a.m. and 10.30 a.m.; 68 killed, 87 injured, including medical staff.

Further incidents which followed were reported and summarized in the US State Department report which was published in October 2009:<sup>172</sup>

During January the Puthukkudiviruppu Hospital was heavily shelled several times and caused civilian casualties. Due to heavy shelling within a kilometer of the Puthukkudiviruppu Hospital on 28 January, at least 21 people were killed. Aerial bombing of a petrol station and bus depot 250 meters from Mullaittivu General Hospital killed four people and injured eight.

During February Puthukkudiyiruppu Hospital was again shelled causing the death of at least nine patients. The Associated Press quoted a witness stating "there's heavy shelling where there are civilians... [The shells] are coming from the [Sri Lankan] army side." Sri Lankan Government troops were within one kilometer of Puthukkudiyiruppu and did not take any special precautions to avoid hitting it. The hospital was subsequently evacuated in the midst of heavy shelling. The incident is corroborated by two witnesses. In March the Mattalan hospital was shelled and 2 people killed.

The Guardian newspaper reported in detail of the shelling of a temporary hospital in Mullivaikal on 11 May, killing 47 people.<sup>173</sup> 25 year old Vany Kumar, an administrative officer who worked at the makeshift hospital, was in the office working, when the shell hit. 'It was definitely a shell; there is no doubt about that. I was about 20 meters away and I was sure that it landed inside the hospital, so I went to the shelter. I got the news from the doctors that there were people injured and dead. There was constant shelling so I couldn't leave the shelter.<sup>174</sup>

## F. Civilian casualties and the destruction of civilian objects

#### 1. The general situation

According to the former United Nations spokesman in Colombo, Gordon Weiss, the final weeks of Sri Lanka's civil war saw up to 40,000 civilians killed, many within the safe zones.<sup>175</sup> He told the Australian Broadcasting Corporation: "I have heard anything between ten and forty thousand people and that's from reliable sources that had a presence inside the zone." By the last weeks of the conflict the Red Cross appealed for access to the war zone to aid anyone still left there, but the government said it does not need assistance, according to Paul Castella, the head of the Sri Lanka office of the International Committee of the Red Cross.<sup>176</sup> "Yes we have concerns, yes we are asking for access," he said. "We have no information from the ground to document these concerns." As the military encircled the rebels and pushed ahead with the final battle last week, government doctors reported about 1,000 wounded civilians were trapped in a makeshift hospital and the surrounding area with little food and no medical care. Military spokesman Brig. Udaya Nanayakkara said troops rescued more than 60,000 civilians caught in the fighting in the final days of the war. UN officials complained that even after the defeat of the Tamil Tigers aid groups did not have unrestricted access to the northern parts in order to evacuate the civilians still trapped there.<sup>177</sup>

<sup>&</sup>lt;sup>172</sup> US Department of State, supra note 55.

<sup>&</sup>lt;sup>173</sup> The Guardian, www.guardian.co.uk/world/2009/may/12/sri-lanka-eyewitness-civil-war.

<sup>&</sup>lt;sup>174</sup> Videos available at: Guardian, Reuters and War Without Words,

www.guardian.co.uk/world/video/2009/sep/16/sri-lanka-tamil. <sup>175</sup> The Independent, www.independent.co.uk/news/world/asia/up-to-40000-civilians-died-in-sri-lankaoffensive-1897865.html. <sup>176</sup> The Independent, www.independent.co.uk/news/world/asia/aid-groups-want-access-to-sri-lanka-

battlefield-1688067.html.

<sup>&</sup>lt;sup>177</sup> Washington Post, 21 May 2009, www.washingtonpost.com/wpdyn/content/article/2009/05/21/AR2009052101144.html.

# 2. Cases

The US State Department published in its report a chronological list of events, which shows nearly daily incidents involving civilian casualties.<sup>178</sup> Some pattern of warfare can be observed in the report: Many deaths and injuries resulted from shelling of residential areas and villages. Also attacks hitting no fires zones are constantly reported. Certain military operations in different parts of northern Sri Lanka can be identified. In one incident on 30 January shelling destroyed the Vanni headquarters of the Human Development Centre of Caritas Jaffna, the social arm of the Catholic Church in the Jaffna Diocese. The shelling destroyed humanitarian supplies, fuel reserves, and documents of the HUDEC Caritas office.

Another incident on 11 March led to 72 people killed and 91 injured by continued shelling in the no fire zone. A multi-barrel rocket launcher sent 40 shells into the no fire zone in one barrage, and 21 of the 72 deaths were of individuals who were in line to receive their food ration.<sup>179</sup>

Human Rights Watch reported on 23 March a phone conversation with a source at the makeshift hospital in Putumattalan, inside the government-declared no fire zone, which was audibly interrupted by shelling. Later in the day, the source said that the hospital had received 14 corpses and 98 wounded persons that day. He told Human Rights Watch that the shelling appeared to come from the direction of government positions three kilometers to the west. An artillery shell had struck approximately 250 meters from the hospital, killing two civilians and wounding seven others. Another shell struck about a kilometer from the hospital, also killing and wounding civilians. Another Human Rights Watch source near Mattalan reported shelling in Putumattalan, Mullivaikkal, and Valayanmadam. One hundred and forty-two people were injured, 16 died in the hospital, and many people were killed on the spot. A source in Valayanmadam reported that 102 people were killed in shell attacks.<sup>180</sup>

A witness who escaped the no fire zone reported to Human Rights Watch that a multibarrel attack occurred very close to the Hindu temple in Pokkanai on 25 March. About 20 rockets had struck the area. "Mothers were crying and there were a lot of dead children. The bodies were seriously damaged and some of them were missing heads and limbs. Several tents had burned down. Over 75 people were injured. They didn't think that the area would be targeted because it was purely a humanitarian settlement. The area was thickly populated by tents and there were no permanent houses. When I arrived, many had already been taken to the hospital. Only people with minor injuries were still left." The witness recognized that the LTTE had multi-barrel weapons, but that firing came from the direction of Puthukkudiyiruppu which was controlled by the government. The hospital reported 10 civilians killed, but it is assumed that not all dead bodies were taken to the hospital.<sup>181</sup>

On 8 April a local source reported heavy shelling in the no fire zone. The source could not cite precise figures but noted that one shell had exploded in the immediate vicinity of a health center where women and children were waiting to receive vaccinations. It is unclear whether this is the same incident cited by an organization's local source in Valayanmadam, who reported shell attacks in Pokkanai at the primary health center killing 18 people, all mothers with babies. Human Rights Watch also reported a shelling attack at 7:30 a.m. near the Pokkanai primary health center. Hundreds of civilians were waiting in line near a food distribution center when four or five artillery shells hit the area, killing at least 13 civilians immediately and wounding over 50 others. A witness who examined the site two hours after the attack said that the shells were 120mm rounds and appeared to have been fired from Sri Lanka Army positions to the south. After another shelling incident in the same area, the hospital in Putumattalan admitted 296 wounded patients and received 46 corpses.<sup>182</sup>

On 1 May Al Jazeera aired an interview with Sri Lankan Foreign Secretary Palitha Kohona in which he admitted that the Government had shelled the no fire zone despite earlier Government denials. The admission came after Al Jazeera showed satellite imagery with analysis that documented shelling and air bombing damage within the designated no fire zone between February 15 and April

<sup>&</sup>lt;sup>178</sup> US Department of State, supra note 55, p. 16.

<sup>&</sup>lt;sup>179</sup> Ibid.

<sup>&</sup>lt;sup>180</sup> Ibid.

<sup>&</sup>lt;sup>181</sup> Ibid. <sup>182</sup> Ibid.

<sup>-</sup> Ibid.

19. While admitting that the Government had shelled the no fire zone, Kohona maintained that this occurred before any civilians had actually entered the safe areas. Al Jazeera [then] showed footage from an earlier interview with Kohona and with military spokesman Udaya Nanayakkara, which aired on 19 April, the same day that the satellite images were taken, in which Kohona insisted that the Government was not shelling [these areas] due to civilian presence in them—a position inconsistent with the claim that the shelling occurred before civilians entered these areas.

On 10 May a local source in the no fire zone reported that a congested civilian area was under heavy shell attack with many houses and vehicles burning. Many civilians' temporary tarpaulin houses were struck by shells and many hundreds of civilians were killed. A local source for an organization also reported heavy shelling with an estimated 1,000 killed and another estimated 1,000 injured. A source in the no fire zone reported to the BBC that the bodies of 378 people had been registered at the hospital that day and 1,122 others had been injured. More bodies were on the beaches and along road sides. The source said that heavy arms appeared to have been fired from government controlled territory into a mainly civilian area under LTTE control. The Associated Press also reported that two overnight artillery barrages hit the area over the weekend, with several shells landing inside the newly demarcated no fire zone. Allegedly, this is where the government had urged civilians to gather. A source said that a total of 430 ethnic Tamil civilians, including 106 children, were either brought to the hospital for burial or died at the facility after the attacks. The death toll is thought to be closer to 1,000; many of those killed would have been buried in the bunkers where they were slain, and many of the gravely wounded never made it to the hospital for treatment.<sup>184</sup>

A local source reported that the new makeshift hospital in Mullivaikkal was attacked at 8:00 am on 12 May. The attack came during a busy time of day, when many civilians were present. One shell landed in front of the admission ward, killing 26 people instantaneously. Among the casualties was the Administrative Officer of Mullaittivu Regional Director of Health Services, who was killed while arranging a patient's admission to the hospital. This same incident was reported by Human Rights Watch, which said that nearly 1,000 patients were in the hospital at the time of the attack, including many wounded during the May 9-10 attacks. A shell reportedly exploded in front of the admission ward during visiting hours, when many relatives came to visit patients and doctors usually arrived for work. Local sources reported that the attack killed 49 people (29 immediately, with others succumbing to their injuries later); another 31 injured were treated in the hospital. A witness at the hospital said that the shelling came from the direction of Iraddayvaikkal, which Sri Lankan Government forces had recently captured. Another source said that in addition to the 49 killed, scores of others were wounded, and he expected the death toll to rise. Shells were still hitting the area hours later, including one that landed about 150 yards from the hospital. A witness at the makeshift Mullivaikkal hospital told The Guardian that a shell had exploded at the hospital, killing 47 people. She also said that shelling had become an everyday occurrence.<sup>185</sup>

# 3. The destruction of churches

The Washington Post displayed a picture of a destroyed church in the town of Mullaitivu on 29 January 2009.<sup>186</sup> On 28<sup>th</sup> January Rev. Anukoolan, the priest in charge of the American Mission Church at Suthanthirapuram, reported that an air force bomb fell in the church premises with many displaced persons, killing 17 and injuring 39 persons, including a priest Rev. Anandarajah.<sup>187</sup> On 1<sup>st</sup> February afternoon between 3.00 and 4.00 pm Puthukkudiyiruppu Hospital was struck by two shells, according to ICRC statements, hitting first the kitchen and then the church. Two persons were killed. A statement on that day quoted Morven Murchison-Lochrie, an ICRC medical coordinator present in Puthukkudiyiruppu, "The staff is under acute stress, surrounded as they are by the sound of the ongoing fighting and the influx of new patients. Ambulances are constantly arriving, but people are

<sup>&</sup>lt;sup>183</sup> Ibid.

<sup>&</sup>lt;sup>184</sup> Ibid.

<sup>&</sup>lt;sup>185</sup> Ibid.

<sup>&</sup>lt;sup>186</sup> Washington Post, www.washingtonpost.com/wpdyn/content/article/2009/01/28/AR2009012802009.html.

<sup>&</sup>lt;sup>187</sup> University Teachers for Human Rights, supra note 97, p. 33.

also being brought in by wagon, pick-up truck, tractor and even motor scooter." She added that despite this, the staff remained inventive and committed to caring for the injured and sick who had made the dangerous trip to the hospital."188 On 22 April a single shell fell into a church in Valaignarmadam and injured one person. The church was subsequently evacuated on the next day.<sup>189</sup>

# 4. Attacks on humanitarian aid workers

The United Nations said dozens of its workers and their families came under heavy artillery fire over the weekend of January 24 and 25, 2009 when they sought refuge inside the government-declared "safe zone" established for Tamil civilians.<sup>190</sup> The aid workers allege Sri Lankan Government forces to have carried out the attacks, which the government denies. Castella, the head of the Sri Lanka office of the International Committee of the Red Cross said, 19 local Red Cross workers along with their families were missing.<sup>191</sup> "These people were together with the population there and taking an active part in the medical evacuations. They have the same fate as the rest of the population," he said. "We don't know where they are and, as you can imagine, we are extremely worried."

<sup>&</sup>lt;sup>188</sup> Ibid, p. 35. <sup>189</sup> Ibid, p. 75.

<sup>&</sup>lt;sup>190</sup> Washington Post, 29 January 2009, www.washingtonpost.com/wp-

dyn/content/article/2009/01/28/AR2009012802009.html; International Crisis Group, 'War Crimes in Sri Lanka' (2010) Asia Report N°191, at 10-15. <sup>191</sup> The Independent, www.independent.co.uk/news/world/asia/aid-groups-want-access-to-sri-lanka-

battlefield-1688067.html.

# **III. The alleged acts of the LTTE**

#### A. Preventing civilians from fleeing the conflict zone

Human Rights Watch informed that "LTTE has long placed restrictions on freedom of movement of those living in LTTE- controlled areas. Movement in and out has been sharply regulated, not only for security, but as part of forced recruitment efforts and for "taxation" purposes."<sup>192</sup>

Human Rights Watch also reported that the LTTE had deliberately prevented civilians under its effective control from fleeing to areas away from the fighting. It also reported that, as "the LTTE has retreated in the face of SLA (Sri Lanka Army) offensive operations, it has forced civilians to retreat with it, not only prolonging the danger they face, but moving them further and further away from desperately needed humanitarian assistance." Human Rights Watch also underlined that as the trapped civilian population had become concentrated in this area, it increased "the risk of high casualties in the event of attack and placing greater strains on their living conditions."<sup>193</sup>

Human Rights Watch stated that, early 2009, 200,000 civilians, some already displaced more than 10 times, were believed to be trapped inside the Vanni war zone, among whom were than 250 national staff members of international organizations.<sup>194</sup> It further informed that, as "civilians have become more desperate and the LTTE has increasingly lost control, more and more people have tried to flee LTTE-controlled areas. The LTTE has forcibly tried to block these efforts, including by deliberately firing on civilians. In one case reported to Human Rights Watch, on 7 February a group of about 3,000 people tried to cross the front lines, but LTTE cadres stopped them and turned them away. They could not go back because of the heavy shelling in the area and, according to a source, 'were stuck on the road,' with no shelter and at great risk." Human Rights Watch added that, "In several cases, the LTTE has deliberately attacked civilians in an effort to prevent them from fleeing."<sup>195</sup>

Human Rights Watch also reported the following statements:

"Human Rights Watch learned that displaced persons who had arrived in Vavuniya on February 9 reported that when LTTE forces were retreating in the Suthanthirapuram area, they tried to push civilians back to prevent them from crossing over to the government side. LTTE cadres opened fire on the civilians and injured 17 people. LTTE forces on February 6 also fired on civilians when they tried to cross the front line in Moongkilaaru, killing and injuring an unknown number of people."<sup>196</sup>

"Displaced persons in Pampaimadu camp in Vavuniya reported that because the governmentdeclared "safe zone" was no longer safe and SLA forces were advancing, on February 6 a group of about 80 people began walking towards the front line in Visuamadu. The LTTE did not have any fortified positions in Visuamadu, just a few hundred meters from the government lines, but there were several LTTE cadres there. When the group tried to cross, the LTTE cadres opened fire, wounding one or two people. And on February 4 and 5, LTTE cadres fired upon civilians who tried to cross the front line in the Moongkilaaru area. The mother of a 3-year-old boy with a gunshot wound to the right thigh reported that the LTTE had fired on her family as they were trying to flee to the government-controlled area. Her husband was shot dead and her 8-year-old daughter went missing during the incident."<sup>197</sup>

Human Rights Watch reported the following testimony from a 35-year-old father of three, who had just arrived at the College of Education camp in Vavuniya:

<sup>&</sup>lt;sup>192</sup>Human Rights Watch, supra note 36, p. 6.

<sup>&</sup>lt;sup>193</sup>Ibid, p. 5.

<sup>&</sup>lt;sup>194</sup>Ibid, pp. 5-6.

<sup>&</sup>lt;sup>195</sup>Ibid, pp. 6-7.

<sup>&</sup>lt;sup>196</sup>Ibid, p. 6.

<sup>&</sup>lt;sup>197</sup>Ibid, p. 7.

"When we came to Suthanthirapuram, it was full of dead bodies. Bodies were lying along the road. Nobody cared about them. They smelled. We didn't have food for two days. We slept in the field. Some 150 people started out together, but when we tried to leave, at Suthanthirapuruam, the LTTE tried to stop us. There was only a narrow path to leave by. The LTTE caught us. There was fighting, arguments. They were shooting at us. Many people were injured and killed. It was shocking to see. Only 65 were in my group when we came out. We were separated from the rest along the way. One father was carrying his child on his back. As they were running from the LTTE, he was holding him by the arms so hard—in order not to lose him—that he broke both of the child's arms."<sup>198</sup>

Human Rights Watch also reported the following incidents:

"In another reported case from early February, a group of civilians was hiding in a bunker near a stream in Murasummodday during heavy SLA shelling of LTTE positions. When there was a pause in the shelling, the group left the bunker and started running towards SLA positions that were relatively near. LTTE cadres started firing at them from behind, trying to prevent them from fleeing. And as they approached the SLA positions, the army also opened fire, possibly thinking that they were advancing LTTE forces, although the group was carrying a white flag. Several people were injured."<sup>199</sup>

"In another incident, on February 10, 2009 at Udaiyaarkaddu on the western edge of the safe area, 17 to 23 people were killed and 69 injured by LTTE as they were trying to escape to the government-controlled areas. Survivors told an international agency that the actual number of casualties may have been significantly higher as they had to leave many of the dead and seriously wounded behind."<sup>200</sup>

Human Rights Watch concluded by stating that the "wounds of those who said they were fired upon by LTTE forces when fleeing support their accounts. Several dozen patients admitted to Vavuniya hospital after February 7 had gunshot wounds in the lower parts of the body, suggesting that the shots were meant to stop their flight, rather than to kill, a view confirmed by a member of the hospital's medical staff."<sup>201</sup>

The US State Department reported the following exemplary incidents:<sup>202</sup>

An organization's source reported to US Embassy Colombo that during their experiences in the Vanni they witnessed LTTE cadres taking civilians with them when they re-deployed (January 16-29, 2009).

The US Embassy Colombo received a report from a foreign government that the LTTE killed 60 civilians who were fleeing by boat at night. According to reports received by an organization, the LTTE then promised to arrest and detain, rather than shoot, those who sought to escape in the future in order to ease tension between the LTTE and the civilian population (February 13, 2009).

The University Teachers for Human Rights reported this excerpt from *Vanni Experience* with regards to the LTTE preventing civilians from fleeing the conflict zone:

"Vanni Experience says, the 'people were defying the LTTE's punitive surveillance and trying to escape from the Vanni. It was not a large number. They did so facing heightened danger using less known jungle routes, sea routes and treacherous paths through the marshland...The Tigers could not prevent people escaping to the Army even as the LTTE fired at them. Some succeeded while the rest of their family succumbed to gun fire. Some were injured or caught by the LTTE. While the Tigers obstructed escape, the Army's attacks on the people too intensified amidst dwindling supplies of food and medicine...'

<sup>&</sup>lt;sup>198</sup>Ibid, p. 7.

<sup>&</sup>lt;sup>199</sup>Ibid, p. 8.

<sup>&</sup>lt;sup>200</sup>Ibid, p. 8.

<sup>&</sup>lt;sup>201</sup>Ibid, p. 8.

<sup>&</sup>lt;sup>202</sup>US Department of State, supra note 55, pp. 16-41.

"Persons conscripted and forcibly taken to the battlefront died by the hundreds. There was among the Tigers not an iota of remorse for these deaths. They roamed as drunken men abducting persons without number, showing no trace of civilization or humanity. A Tiger media man himself admitted that with their end so near, they no longer needed the people's support."<sup>203</sup>

The University Teachers for Human Rights reported the two following exemplary testimonies:

"Rajaratnam from Puthukkudiyiruppu, (...), was with his joint family, but when it came to escape different members decided separately. Rajaratnam, his wife, with the wife's mother, decided to escape with their three children. Rajaratnam's mother, Thavamany, decided to stay on with her 85-year-old father, her two sisters and the family of the one who was married. Rajaratnam decided that he would even fight with the LTTE to get out.

They were about to leave about the end of March. Two LTTE cadres told Rajaratnam, "When on the border, don't stop. If our people come, grab their gun and fight. Keep going, never look back. There may be small groups posted further up front specially to shoot those who have got close to the other side. These are mainly orphans brought up by the movement. They will do anything the movement tells them and will show no pity."

Rajaratnam's group went in a line with others, crossed the barbed wire, and climbed over the bund. Rajaratnam got his party into a small ditch before the water and looked back. He saw civilians who had come behind them on top of the bund fighting with the LTTE, trying to grab their guns. Using the distraction, Rajaratnam's party began to cross. He had told his wife and mother-in-law that they are for now on their own, while he rushed forward as fast as he could carrying his three children.

Rushing forward, when Rajaratnam got close to the other side, he saw a girl whom the LTTE had shot in the leg begging for help. (...).<sup>204</sup>

"It must be placed on record that, in the estimate of a school principal who was there in the NFZ, about 25% of the civilian casualties in the NFZ, averaging about 15 to 20 a day, were of people killed by the LTTE when trying to escape. Other estimates are similar.

The Principal told us that every dawn about a thousand were ready and waiting to make a run for it and escape. The bund by the narrow strip of lagoon was 2  $\frac{1}{2}$  miles long. Whence there were bound to be places where the LTTE's guard was weak.

When a weak spot was identified, the people ran to it clutching their children and meager belongings to jump over the bund and into the water. When the LTTE noticed it, often their police or military wing whose job it was to prevent the civilians from escaping would come running to the place and open fire. About 50 to 100 would make it, 15 to 20 would get killed. Some would return with injuries and a few would also make it with injuries. He said that he had seen soldiers wade into the water risking LTTE fire to help injured persons on to the other shore of the lagoon. Impressions about the Army too vary with such experiences.

The principal described a typical scene he witnessed. After waiting for a chance of escape, a father ran clutching his grown up daughter and son, who was an LTTE conscript. The latter was the principal reason for attempting escape. His wife followed clutching a four-year-old child on her waist. Behind the wife followed her aunt and another lady. Being quicker, the father and two grown up children made it. An LTTE man shot at the wife hitting her on the head. She fell dead with her child who suffered an injury. The aunt and the other lady picked up the child and went back.

(...)

The principal described something else he had seen. 15 escapees had been shot dead opposite the Putumattalan Hospital. Along with the daily quota of dead resulting from army shelling,

<sup>&</sup>lt;sup>203</sup>University Teachers for Human Rights, supra note 97, p. 74.

<sup>&</sup>lt;sup>204</sup>Ibid, pp. 75-76.

these bodies too were placed in a space ringed by ropes on a side of the hospital. With the help of labourers, the doctor looked at the bodies and pronounced the cause of death. The distinction was clear between shell injuries and bullet injuries. The doctor regularly pronounced all of them to have died due to army firing. The principal remarked, "I wonder how he did it?" This went on day after day and perhaps above a thousand died trying to cross the strip of water.

Before we judge, we must keep in mind practices that had come to be accepted as normal under the provenance of terror. No doctor in an LTTE-controlled area dared to certify the LTTE as the cause of a death. Often they were spared this dilemma. When the wife of someone executed by the LTTE for political reasons went to the local headman in Jaffna, which was by then under army control, to make an application for a death certificate, he without batting an eyelid wrote or altered the cause of death to army shelling. Practices in the Sinhalese South during the late 1980s JVP insurgency were not very different. There it was often a question of whose terror was more potent in a particular place at a particular time. Such dilemmas paralysed human rights groups in the South and led to deaths of lawyers and human rights advocates."<sup>205</sup>

# **B.** Civilian casualties

The University Teachers for Human Rights reported the following with regards to LTTE actions which caused civilian casualties:<sup>206</sup>

"People clashing with the LTTE and burning their vehicles happened regularly, while the LTTE shot and killed hundreds of those who tried to escape. Persons so injured though hospitalised were not allowed to board the ICRC ship which came to collect the injured. Sometimes escapees were attacked with RPGs. The author of Vanni Experience says, 'At this juncture, the people began speaking openly about the LTTE's repression against Muslims, their anti democratic activities such as banning and physically eliminating members of other militant groups, and their killing and intimidation of intellectuals. Several of them cursed Prabhakaran openly.'

(...)

A senior officer who lost close relatives due to army shelling, and is just coming out of a prolonged depression, blamed the LTTE for much of the suffering and said emphatically that the LTTE fired shells on civilian institutions such as hospitals. A woman officer came out even more strongly. She recounted angrily the violence used by the LTTE during conscription, dragging people out of bunkers, beating them along with their parents and shooting those who followed the abductors pleading and protesting. She spoke of an instance where a mother who had given birth five months earlier, ran after a conscription gang who abducted her son. The abductors beat her up with a pachchai mattai (the raw stem of a Palmyra leaf). The officer herself saw the mother's injuries. This officer had been interrogated by the Sri Lankan military.

Generally, people were angry and so negative about the LTTE that they were quite ready to say and believe that many cases of civilian places being shelled were the work of the LTTE. One man said that the LTTE would fire two shells at civilians from Chalai and then two shells at the Army, provoking it to fire at the civilians, so that the people would blame the Army. He was very positive that the shelling of PTK Hospital was by the LTTE."

The University Teachers for Human Rights also reported the following testimony:

"(...) During mid March nearly a thousand people had escaped by boat to Jaffna from the coast near Putumattalan. Once even two or more Sea Tigers had taken one of their boats and escaped to India. In order to stop this, the Tigers wanted to shift the civilians further interior from the

<sup>&</sup>lt;sup>205</sup>Ibid, pp. 76-78.

<sup>&</sup>lt;sup>206</sup>Ibid, p. 69.

coast. Around 20th March, the LTTE brought some of its mortars near the coast in the area of St. Anthony's Church and fired towards the Army. The Army fired with cannon paying back many times over. While Maniam cannot say how many were killed, but he is aware that seven persons including a mother were killed when a shell blasted a vehicle. TamilNet gives several instances during this period when the coast was shelled. (...). Maniam kept his family with a group of people who were, towards March end, planning to run up to the lagoon and wade across. The LTTE which observed them came to know this. The LTTE went near the group, fired mortar shells towards the Army and withdrew. The Army's shells came back like an answer to a prayer. One fell into a bunker where civilians were sheltering killing seven persons. Maniam was himself injured in a leg. "<sup>207</sup>

#### C. Military installations close to civilians and civilian objects

Human Rights Watch reported that "forced to retreat by SLA offensive operations, the LTTE drove civilians into a narrow strip of land on the northeastern coast of Sri Lanka. They effectively used several hundred thousand people as human shields. On at least several occasions, the Tamil Tigers shot at those trying to flee to government-held territory. LTTE forces also deployed persons near densely populated areas, placing civilians in greater danger from government attacks. As the fighting intensified, the LTTE stepped up its practice of forcibly recruiting civilians, including children, into its ranks and into hazardous forced labor on the battlefield."<sup>208</sup>

Human Rights Watch denounced the "LTTE practice of forcing civilians to retreat with its forces, rather than allowing them to flee to safer areas", which meant that LTTE forces were increasingly deployed near civilians and using them as "human shielding". It was reported to Human Rights Watch that "LTTE forces appeared to be making deliberate use of civilians to shield their positions from attack."<sup>209</sup>

Human Rights Watch was told by a relief worker that "the LTTE placed their positions near an IDP camp in Chundikulam".<sup>210</sup> The man stated the following: "People were really packed together, so wherever the SLA bombed or shelled, there were civilian casualties. But the LTTE also put their positions right in front of the IDP camps. I saw that in Chundikulam where I stayed in a camp. When they did this we obviously couldn't go and argue with them because they could just beat or even shoot us."<sup>211</sup>

Human Rights Watch also reported that "When the 11th United Nations Humanitarian Convoy was held back at PTK for about a week in January due to heavy fighting (...), LTTE forces immediately set up firing positions close to the convoy and started firing artillery. The SLA responded with its own artillery—one shell struck 100 meters from the convoy—but no one was injured."<sup>212</sup>

<sup>&</sup>lt;sup>207</sup>Ibid, p. 70.

<sup>&</sup>lt;sup>208</sup>A. Neistat, 'Legacy of abuses in Sri Lanka', *Human Rights Watch*, 27.10.2009, www.hrw.org/ja/news/2009/10/27/legacy-abuse-sri-lanka.

<sup>&</sup>lt;sup>209</sup>Human Rights Watch, supra note 36, p. 8.

<sup>&</sup>lt;sup>210</sup>Ibid, p. 8.

<sup>&</sup>lt;sup>211</sup>Ibid, p. 9.

<sup>&</sup>lt;sup>212</sup>Ibid, p. 9.

# **D.** Children fighting for LTTE

The abduction and recruitment of children by the LTTE since 1983 has raised the concern of the international community, in particular UNICEF.213 The Karuna Group has also been condemned by UNICEF and Human Rights Watch for its force recruitment and use of child soldiers.<sup>214</sup>

The US State Department reported that, "on numerous occasions during the January to May 2009 reporting period the LTTE took both male and female children, some as young as 12, to join LTTE cadres. In some instances, sources alleged that when parents or children resisted they were beaten or killed. The children were trained to use weapons and sent to the front lines for fighting, cleaning weapons, and performing other chores for the LTTE."<sup>215</sup>

Human Rights Watch reported that, "on February 17, the UN Children's Fund, UNICEF, issued a statement expressing grave concern for the safety of children in conflict areas. 'We have clear indications that the LTTE has intensified forcible recruitment of civilians and that children as young as 14 years old are now being targeted,' said Philippe Duamelle, UNICEF's representative in Sri Lanka. 'These children are facing immediate danger and their lives are at great risk. Their recruitment is intolerable.'"<sup>216</sup>

The US State Department also collected various reports from organizations working in the conflict area.<sup>217</sup> Ongoing LTTE forced recruitment of children was observed. A young person who resisted being forcibly recruited had both his arms broken by the LTTE as punishment. Numerous reports point to the age of the children recruited, often 12 or 14 years old. The recruitments occurred in NFZ, but also in other places of the LTTE-controlled area. Recruitment often came along with the abduction of the children, protests by family members were answered with beatings and shootings, often resulting in deaths. In one instance HRW sources in the conflict zone reported that the LTTE rounded up over 400 youths who had sought refuge in Valaiganar Catholic Church, and immediately took the children to training camps by bus. A similar account was reported by another organization's local source on March 23; this source estimated the number of youths taken at over 250.

The 3 May edition of the New Indian Express ran the account of a woman who had recently escaped from the NFZ. She witnessed the LTTE's capture of some 600 teenagers who were hiding in a Valayanmadam church in April. The article quoted her as saying, "People had gathered there to hide from the army shelling, and also from the Tigers who were trying to recruit youngsters. But one day the Tigers arrived in 12 vehicles, firing their guns in the air, and forcibly took away around 600 girls and boys who had been hiding in the church. They were screaming and crying, but we were helpless."<sup>218</sup>

On 5 May the Sydney Morning Herald reported an account of a 14- year-old girl who was abducted by the LTTE in March and forced to undergo military training. She performed drills using dummy weapons in preparation for battle and, as with many female recruits, her hair was cut short. The girl's mother was able to smuggle her out of the LTTE camp and they were able to escape to the camp in Vavuniya. The Herald quoted Major-General Jagath Dias of the Army's 57th Division saying that his men had been fighting girls as young as 11: "It's very difficult [to shoot at children] but when someone has a weapon and is firing it at you, it doesn't matter what age, you have to shoot." Brigadier Shavendra Silva of the 58th division told the Herald that most of the LTTE cadres captured since April 23 were between 11 and 18-years-old. "There were many young girls aged 13 and 14. All of them had short hair. ... They don't have the numbers of fighters they need so they conscript civilians forcefully."

<sup>&</sup>lt;sup>213</sup> www.unicef.org/media/media\_34677.html.

<sup>&</sup>lt;sup>214</sup> www.unicef.org/media/media\_34677.html; www.hrw.org/en/news/2006/11/27/sri-lanka-stop-child-abductions-karuna group.

<sup>&</sup>lt;sup>215</sup>US Department of State, supra note 55, p. 11.

<sup>&</sup>lt;sup>216</sup>Human Rights Watch, supra note 36, p. 10.

<sup>&</sup>lt;sup>217</sup>US Department of State, supra note 55, pp. 11-14.

<sup>&</sup>lt;sup>218</sup>Ibid.

#### **E. Forced enrolment**

Human Rights Watch reported that the LTTE has placed civilians "at serious risk by forcibly recruiting civilians for untrained military duty and for labor in combat zones." Human Rights Watch added that "since September 2008, the LTTE has increasingly forced people with no prior military experience to fight or perform supportive functions on the front lines, a practice which has led to many casualties."<sup>219</sup>

A Vanni resident reported to Human Rights Watch: "It used to just be one person per family, but now everybody above 18 years old had to go [join the LTTE]. All men and young people had to fight, and if they couldn't, they were forcibly taken to work for the LTTE at the front.

They [the LTTE] got the lists of IDPs from the GS [grama sevaka, a village official]—every family had to register there—and then visited every family several times. If anybody tried to hide their sons and daughters, they would come back at night and search the house. Even when families paid them to save their sons and daughters from recruitment, another group [of LTTE cadres] would come back and recruit them anyway. They visited my house three times, looking for my husband.

The workers were taken to the frontline to dig bunkers, collect weapons from killed cadres and SLA soldiers, and so on. It was very dangerous for civilians—about 25 of my neighbors were killed while doing this work. They did not receive any training—the LTTE cadres fetched them from their homes and the next day brought their dead bodies back. Every day, many people were crying in my neighborhood because they lost young children; some even beat up LTTE cadres when they brought the bodies back.<sup>220</sup>

The University Teachers for Human Rights reported the following with regards to force enrolment in the LTTE:<sup>221</sup>

"The first half of March a conscription gang, including an administrative head, tried to abduct an 18-year-old boy in Valaignarmadam. The boy grabbed the gun from the administrative head, shot him dead and ran, firing at his pursuers, injuring three of them. Finally before his ammunition ran out, he took his own life. Maniam was later told by the boy's uncle that the LTTE came the next day, took the boy's 55-year-old father and executed him.

During this period, a mother near Pillayar Kovil, attacked with an axe a conscription gang of five who came for her son, hitting one of them on the back. The injured man ran away with the rest, his dress disheveled, when according to the same report, a mortar shell from the Army exploded, injuring all of the gang.

In the coming days a clash broke out between the LTTE and the people over conscription. The LTTE shot dead three protesting civilians. The people, irate at the events, carried the dead to the beach to show ICRC representatives who had come to collect injured civilians. LTTE Police tried to block the demonstrators carrying the dead, and in the clash the Police killed one youth. During these disturbances civilians boarded several small boats and put out to sea as the LTTE fired at them. 643 civilians, about half of them children, in 35 boats were found by the Navy on 18<sup>th</sup> March and taken to Pt. Pedro in the Jaffna Peninsula.

<sup>&</sup>lt;sup>219</sup>Human Rights Watch, supra note 36, p. 9.

<sup>&</sup>lt;sup>220</sup>Ibid, pp. 9-10.

<sup>&</sup>lt;sup>221</sup>University Teachers for Human Rights, supra note 97, pp. 68-69.

# PART TWO: THE LAW

The subject matter of this dossier will be offences of crimes against humanity, war crimes and genocide. These offences are laid down in Articles 6, 7 and 8 of the Rome Statute of the International Criminal Court (ICC). These articles also represent customary international law. Thus, their content is applicable to all states, regardless whether the states did or did not ratify the Rome Statute.

The assessments of the facts at the end of each crime take into consideration all publicly available information. However, it has to be noted that the evidence available through NGO reports, newspaper articles and other publications does not suffice as evidence used in criminal proceedings before a court. Much more witness statements, documents and expert opinions are necessary. The criminal responsibility of individual persons cannot be determined beyond any reasonable doubt, as an international criminal tribunal would make its findings, but initial grades of suspicion can be established. To verify these allegations and to find evidence for single incidents as well as for attributive conduct within the chain of command, a professional, independent and impartial investigation is indispensable.

## I. Article 7 of the ICC Statute: Crimes against Humanity

## A. The general elements of crimes

Article 7 of the Statute, entitled 'Crimes against Humanity', reads as follows:

1. For the purpose of this Statute, "Crime against Humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (d) Deportation;

(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

(f) Torture;

(g) Rape, enforced prostitution or any other form of sexual violence of comparable gravity;

(h) Persecution against any identifiable group or collectively on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

(i) Enforced disappearance of person;<sup>222</sup>

2. For the purpose of paragraph 1:

<sup>&</sup>lt;sup>222</sup> Only the most relevant acts of the crime against humanity are included in this study.

(a) 'Attack directed against any civilian population' means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

(b) 'Extermination' includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

(d) 'Deportation or forcible transfer of population' means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

(e) 'Torture' means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

(g) 'Persecution' means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(i) 'Enforced disappearance of persons' means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

# 1. General remarks

Crimes against Humanity are mass crimes committed against a civilian population.<sup>223</sup> Article 7 (1) ICC Statute lays down the general requirements that need to be established before turning to an analysis on the specific elements of crimes. First of all a Crime against Humanity is committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. Article 7 does not mention an armed conflict as a precondition for its application, unlike Article 5 of the Statute of the International Criminal Tribunal for the former Yugoslavia.<sup>224</sup> A widespread and systematic attack against a civilian population does hence not have to meet the threshold of an armed conflict. It rather has to be defined along the lines of what constitutes as a minimum a widespread and systematic attack on a civilian population may therefore consist in whole or in part of an armed attack.<sup>225</sup> Crimes against Humanity can take place in war and in peacetime, when legally an armed conflict has ceased or not yet started.

Regarding the situation in Sri Lanka, Crimes against Humanity could have been committed during the armed conflict until 18 May 2009, but also after the proclaimed end of the armed conflict, even until today. Whether such crimes were committed, depends on the fulfillment of further requirements.

# 2. Civilian population

Crimes against Humanity are directed against a civilian population as such, not solely an individual. This does not mean, however, that the entire population of a state or territory must be affected by the attack.<sup>226</sup>

<sup>&</sup>lt;sup>223</sup> G. Werle, *Principles of International Criminal Law* (2005), at 216, para. 633.

<sup>&</sup>lt;sup>224</sup> Article 5 ICTY Statute also defines what constitutes a Crime against Humanity.

<sup>&</sup>lt;sup>225</sup> ICTY, *Tadić* Appeal Judgment, para. 251; see also *Kunarac* Appeal Judgment, para. 86.

<sup>&</sup>lt;sup>226</sup> Werle Principles of International Criminal Law, at 221, para 647.

Article 7 ICC Statute does not elaborate on the meaning of 'civilian population'. The ICTY defines the term 'civilian population' extensively.<sup>227</sup> Thereby the term civilian encompasses at the least all persons 'taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause'.<sup>228</sup> In the *Kordic* Judgment the Yugoslavia Tribunal held that a civilian population 'must simply be *predominantly* civilian in nature'<sup>229</sup>, meaning that also non-civilians can be within this group of people. A 'population' is described as a sizeable group of people who possess some distinctive features that mark them as targets of the attack.<sup>230</sup> Population refers to the collective nature of the crime, thus excluding attacks against individuals.<sup>231</sup>

The situation in northern Sri Lanka includes different stages within the conflict. Moving people to no fire zones and to specific camps and thus affecting entire villages and even large areas shows that a civilian population in its entirety was concerned. Large parts of the persons in the camps were civilians not taking part in the conflict. Thus the civilian population living in the northern and north-eastern parts of the country fulfils the general element of a Crime against Humanity.

# 3. Attack

Article 7 (2) (a) ICC Statute defines the term 'attack' as a course of conduct involving the multiple commission of acts referred to in paragraph (1). The multiple commissions of acts of violence<sup>232</sup> should be understood as to distinguish them from isolated and random acts of violence.<sup>233</sup> Likewise the word 'multiple' emphasizes the collective nature of the crime. The term as used in Article 7 (2) (a) ICC Statute should be thus interpreted and applied in the light of the foresaid.

The first part of this study shows that there were many incidents of the same kind. Shelling of no fire zones occurred almost every day, murder of people and sexual violence were committed frequently, the movement of the population to the camps and the camp situation as a whole lasted for months and is still on-going. Generally, the incidents amount to an attack in the meaning of Art. 7 ICC Statute.

#### 4. Widespread and systematic

The terms widespread and systematic relate to the scale and intensity of the attack. It is generally accepted that the requirement that the attack against a civilian population be widespread or systematic is a disjunctive one.<sup>234</sup> In other words, merely proof of one of the attributes will need to be established.

<sup>232</sup> With reference to the case law of the ad hoc tribunals, "attack" means a course of conduct involving the commission of acts of violence." (ICTY, *Kunarac* Trial Judgment, para. 415; ICTY, *Krnojelac* Trial Judgment, para. 54; ICTY, *Tuta and Štela* Trial Judgment, para. 233 (citations omitted).

<sup>&</sup>lt;sup>227</sup> See for example ICTY, *Tadić* Trial Judgement, paras. 639-643.

<sup>&</sup>lt;sup>228</sup> Common Article 3(1) to the four Geneva Conventions 194, see also Article 8 (2) (c) ICC Statute.

<sup>&</sup>lt;sup>229</sup> ICTY, *Kordić* Trial Judgment, para. 643; see also *Blaškić* Trial Judgment, at para. 214; *Bagilishema* Trial Judgment, para. 79 and *Semanza* Trial Judgment, para. 330.

<sup>&</sup>lt;sup>230</sup> ICTY, *Kunarac* Trial Judgment, para. 423.

<sup>&</sup>lt;sup>231</sup> See Werle supra note 223, at 221, para 647.

<sup>&</sup>lt;sup>233</sup> See Werle supra note 223, at 221, para 647.

<sup>&</sup>lt;sup>234</sup> ICTY, *Kordić* Trial Judgement, para. 178. See also ICTY, *Kunarac* Trial Judgement, para. 427; ICTY, *Krnojelac* Trial Judgement, para. 57; ICTY, *Kunarac* Appeal Judgement, para. 97; ICTR, *Ntakirutimana* Trial Judgement, para. 439. However, the French text of Article 3 of the ICTR Statute uses the terms "généralisée et systématique", and the Arabic version uses similarly conjunctive language. The ICTR, *Akayesu* Trial Judgement, para. 579, footnote 144 noted that as "customary international law requires only that the attack be either widespread or systematic, there is sufficient reasons to assume that the French version suffers from an error in translation." The Trial Chamber in the *Semanza* case stated that the jurisprudence of the ICTR "consistently held that, in line with customary international law, the requirements of "widespread" and "systematic" should be read disjunctively in accordance with the English version of the Statute, rather than cumulatively in accordance with the French text." The *Semanza* Trial Judgement noted that although the jurisprudence of the ICTR did not "fully articulate the basis of such a custom", it did not see "any reason to depart from the uniform practice of the two Tribunals" (*ibid*, para. 328).

The 1996 International Law Commission Draft Code defined "widespread" attacks as acts committed on a "large scale" and "directed at a multiplicity of victims". Moreover an attack is systematic if 'its organized nature and the improbability of the random occurrence of the violent acts' can be shown.<sup>235</sup> In other words it must be obvious that the attack was executed on the basis of a plan and not just arbitrarily. It is likely that the two criteria widespread and systematic will often occur simultaneously 'since an attack targeting a large number of victims generally relies on some form of planning or organization.<sup>236</sup>

The subsequent requirement that the accused's act must be related to a widespread or systematic attack on a civilian population<sup>237</sup> denotes merely that the offence in question is performed as part of the widespread or systematic attack, but must not necessarily constitute the attack itself.<sup>238</sup> The ICTY explained in the *Kunarac* judgment that the act of the accused and the attack need not be identical a tempori et a loci, meaning that 'a crime that is committed before or after the main attack against the civilian population or away from it could still, if sufficiently connected, be part of that attack.<sup>239</sup> Moreover an attack can also consist of an accumulation of *different* crimes.<sup>240</sup>

All publicly available information points to planned attacks by both parties to the conflict. Whereas the Sri Lankan armed forces acted in a systematic way to defeat the LTTE, the LTTE used certain strategies to defend itself as well as possible. The Sri Lanka Army fired shells in no fire zones and targeted hospitals. Also the movement of the population to different camps shows a systematic pattern. Further, the warfare used by the Sri Lanka Army led to widespread attacks against the civilian population. Hundreds of thousands moved to camps and the constant shelling of no fire zones amounts to a widespread commission of acts. Incidents did not only occur individually. Rather, witnesses and independent reports discuss patterns of similar attacks over a period of several months.

#### 5. Knowledge of the attack

The subjective element to Article 7 ICC Statute is the knowledge of the perpetrator that his/her conduct was part of or that he/she intended the conduct to be part of a widespread or systematic attack against a civilian population. In order to be convicted of a Crime against Humanity, the mental state of the accused must encompass the wider context in which his/her conduct occurs. In other words the *mens rea* requirement is an additional element besides the specific intent to commit one of the crimes listed in Article 7 (1) of the Statute. It concerns the consciousness of the broader context in which the crime is committed as well as the greater dimension of the criminal conduct.<sup>241</sup>

Although it is very difficult at this stage of investigations and without many witness testimonies, the knowledge by military commanders as well as political leaders of the widespread and systematic character of the attacks in northern Sri Lanka seems to exist. Statements to the press during the conflict as well as in political talks point to a general knowledge of the persons at highest positions in the government as well as the military of what was happening in the conflict and even of a common strategy on how to win the conflict by any means.

<sup>&</sup>lt;sup>235</sup> ICTY, *Kunarac* Trial Judgement, para. 429, *Kunarac* Appeal Judgement, para. 94. See also ICTY, *Krnojelac* Trial Judgement, para. 57 and the ICTR *Ntakirutimana* and *Niyitegeka* cases, where the Trial Chamber stated that ""systematic" refers to an organised pattern of conduct, not a mere random occurrence" (ICTR, *Ntakirutimana* Trial Judgement, para. 804; ICTR, *Niyitegeka* Trial Judgement, para. 439).

<sup>&</sup>lt;sup>236</sup> ICTY, *Blaškić* Trial Judgement, para. 207.

<sup>&</sup>lt;sup>237</sup> ICTY, *Kordić* Trial Judgment, para. 178. The Chamber draws on the *Tadić* Appeal Judgement: "The Trial Chamber correctly recognised that crimes *which are unrelated to widespread or systematic attacks* on a civilian population should not be prosecuted as crimes against humanity" (*Tadić* Appeal Judgement, para. 271 (italics added)).

 <sup>&</sup>lt;sup>238</sup> See Commentary to Article 7, C. Common elements of crimes against humanity 1.5, ICC Case matrix.
 <sup>239</sup> ICTY, *Kunarac* Appeal Judgement, para. 100.

<sup>&</sup>lt;sup>240</sup> ICTR, See inter alia Kayishema and Ruzindana Trial Judgement, para. 122.

<sup>&</sup>lt;sup>241</sup> See ICTY, *Kupreškić* Trial Judgement, para. 556 (italics added). See also ICTR, *Semanza* Trial Judgment, para. 332: "The accused must have acted with knowledge of the broader context of the attack;" also ICTR, *Kayishema* Trial Judgment, paras. 133, 134.

# **B.** Specific elements of crimes

In the following, the specific elements of crimes against humanity will be defined and analyzed.

Of relevance to the present case are the offences of murder, extermination, deportation, unlawful imprisonment, torture, rape, persecution and enforced disappearances.

### 1. Murder

According to the case law of the ICTY the elements of willful killing or murder are as follows: The victim is dead; the death of the victim resulted from an unlawful act or omission of the accused or a subordinate; the accused or a subordinate intended to kill or inflict grievous bodily harm on the victim or inflicted grievous bodily harm on the victim knowing that such harm was likely to cause the victim's death or being reckless as to whether or not death ensued.<sup>242</sup>

The ICC Commentary to Article 7 (1) (a) ICC Statute notes that the term killed is interchangeable with the term "caused death". Moreover the perpetrator must have acted with intent and knowledge. Article 7 ICC Statute must be interpreted in the light of the definitions of intent and knowledge in Article 30. The necessary material element for murder is willfulness, *i.e.* direct intent to kill or recklessness that death may ensue as a foreseeable consequence of the accused's conduct, but excluding ordinary negligence.<sup>243</sup> The more recent case law of the ICTY referred to *dolus eventualis* as sufficient to establish the mental requirement for the crime of murder.<sup>244</sup>

The evidence collected by human rights organizations as well as the media reveals reasonable grounds to believe that many persons were killed by shelling civilian areas intentionally, especially proclaimed no fire zones. Furthermore, numerous attacks directed against hospitals caused deaths of hundreds of persons. Shelling incidents were reported almost on a daily basis from January to May 2009, regularly causing deaths of civilians. A chronological list of shelling incidents is contained in the report of the US State Department. There is evidence available describing the direction of shelling as coming from positions held by Sri Lankan armed forces. It cannot be excluded that some areas were also attacked by shelling resulting from LTTE positions. However, the largest part of evidence points to firing position under Sri Lanka Army control. Further investigation could clarify the front line and witness testimonies would support the determination of shelling positions to attribute these acts to one of the parties. It is established that a large number of civilians was killed by shells and missiles.

#### 2. Extermination

According to Article 7 (2) (b) ICC Statute extermination includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population. In *Akayesu* the Trial Chamber of the ICTR was the first to pronounce on the elements of extermination before the *ad hoc* Tribunals largely adopted its formulation.<sup>245</sup>

<sup>&</sup>lt;sup>242</sup> ICTY, *Čelebići* Trial Judgment, para. 424, ICTY, *Kordić and Čerkez* Trial Judgment, para. 236, ICTY, *Krstić* Trial Judgment, para. 485, ICTY, *Kvočka* Trial Judgment, para. 132, ICTY, *Stakić* Trial Judgment, para. 584, ICTY, *Vasiljević* Trial Judgment, para. 205.

<sup>&</sup>lt;sup>243</sup> Indeed, the *Blaškić* Trial Judgement has found that the mental element constituting all violations of Article 2 of the Statute includes both culpable intent and recklessness which may be likened to "serious criminal negligence." (ICTY, *Blaškić* Trial Judgement, para. 152).

<sup>&</sup>lt;sup>244</sup> See ICTY, *Stakić* Trial Judgement, para. 587.

<sup>&</sup>lt;sup>245</sup> ICTR, *Akayesu* Trial Judgment, para. 589. According to this judgement, the *actus reus* required to establish the offence of extermination is the following: (1) the accused or a subordinate participated in the killing of (2) certain named or described persons (*ibid*, para. 592). See also ICTR, *Rutaganda* Trial Judgment, para. 83; ICTR, *Musema* Trial Judgement, para. 218; ICTY, *Krstić* Trial Judgement, para. 492.

One material element of the crime requires that the perpetrator killed one or more persons, including by inflicting conditions of life calculated to bring about the destruction of part of a population. By killing is meant either a direct or an indirect act. Hence extermination as a form of killing can be committed either by an act or omission.<sup>246</sup> Extermination includes not only the implementation of mass killing or conditions that lead to mass killing, but also, planning these acts or omissions.<sup>247</sup> The infliction of such conditions may include the deprivation of food, inadequate protection from extreme weather, and denial of medical care.<sup>248</sup> As possible examples of indirect causing of death, the Rwanda Tribunal mentioned imprisoning a large group of people while depriving them of necessities.<sup>249</sup>

The second material element requires that the conduct constituted or took place as part of a mass killing of members of a civilian population. Thereby is meant that "the scale of killing required for extermination must be *substantial*."<sup>250</sup> In contrast to murder the crime of extermination must constitute mass destruction. The difference between murder and extermination can hence be drawn with regards to the scale of the killings.<sup>251</sup> The International Law Commission noted that 'in this regard, extermination is closely related to the crime of genocide.<sup>252</sup> With regard to the scale of killing the case law of the ad hoc Tribunals has tightened and now requires the perpetrator to have caused directly or indirectly the death of a 'numerically significant part of the population'<sup>253</sup> or in other words the 'death of a large number of people'.<sup>254</sup>

There is relevant evidence to suggest that the Sri Lankan government deliberately hindered the access of humanitarian aid to the IDP camps. On several occasions the ICRC, The World Food Programme and other organizations complained of being denied access to the camps. The UN also accused the Sri Lankan government of purposely publishing false numbers on the amount of persons living in the camps, hence pretending not much help from the international community was needed. Newspapers reported of hundreds of people who died of hunger or from their wounds in the camps facilities and hospitals, as not enough nourishment and medical care was supplied. The mainly Tamil civilian population was the target of these measures. Moreover it has to be kept in mind that while people were fleeing their habitual places of residence, they were hoping to be provided with the basic means to live and survive. The announcements by the Sri Lankan government that the civilians should move to government controlled areas, either the so called established safe zones or the IDP camps proved little protection. While the safe zones were constantly hit by shells and massive casualties were caused, the delivery of food and medical equipment was made practically impossible. Further investigations would be able to prove the numbers of persons deceased in the camps and the circumstances allowing these deaths, such as deprivation of water, food and medical care.

# 3. Deportation or forcible transfer of population

According to Article 7 (2) (d) 'Deportation or forcible transfer of population means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.'

<sup>&</sup>lt;sup>246</sup> ICTR, Kayishema Trial Judgment, para. 146.

<sup>&</sup>lt;sup>247</sup> ICTR, Kayishema Trial Judgment, para. 146.

<sup>&</sup>lt;sup>248</sup> ICTR, Kayishema Trial Judgment, para. 146. See also Article 7(2)(b) of the ICC Statute (infliction of such conditions can include the deprivation of access to food and medicine).

<sup>&</sup>lt;sup>249</sup> See Werle supra note 223, at 235, para. 680 referring to D. Marcus, 97, American Journal of International Law, 2003, p. 245 at pp 271 et seq. <sup>250</sup> See ICTR, *Semanza* Trial Judgment, para. 340.

<sup>&</sup>lt;sup>251</sup> ICTR, *Akayesu* Trial Judgment, para. 591, also ICTR, *Kayishema* Trial Judgment, para. 142. Extermination, by its very nature, is directed against a number of individuals (ICTR, Kavishema Trial Judgment,

para. 591 *et seq*). <sup>252</sup> International Law Commission, Report of the International Law Commission on the work of its fortyeighth session (6 May-26 July 1996), A/51/10 (1996), at 48.

<sup>&</sup>lt;sup>253</sup> ICTY, Krstic Trial judgement, para. 490 et seq.

<sup>&</sup>lt;sup>254</sup> ICTY, *Vasiljevic*, para. 227.

According to the first material element of the crime the perpetrator deported or forcibly transferred without grounds permitted under international law, one or more persons to another State or location. by expulsion or other coercive acts. Forcible transfer of population does not require the crossing of a national boarder from one country to another, whereas deportation does according to some of the ICTY case law. However, a tendency towards a non-territorial approach can be observed as a whole when examining the case law of the ad hoc tribunals as well as literature.<sup>255</sup> This conclusion can also be drawn from the fact that Article 7 ICC Statute as a whole is applicable during internal armed conflicts and even in situations of widespread or systematic attacks against any civilian population. In the ICC context, the notions "deported" or "forcibly transferred" as crimes against humanity are fully interchangeable.<sup>256</sup> However, the flight of civilians from their homes merely because of fear of being caught in hostilities between armed forces does not satisfy the definition of the crime.<sup>257</sup>

Another material element requires that such person or persons were lawfully present in the area from which they were so deported or transferred. The forcible transfer of persons is allowed under certain circumstances. Article 49 of the fourth Geneva Convention for example allows the mass transfer of protected persons from an 'occupied territory', when the transfers or evacuations are necessary for the security of the population or "imperative military reasons". The ICRC Commentary describes such an evacuation as "a provisional measure entirely negative in character", which is "taken in the interests of the protected persons themselves."<sup>258</sup> When the presence of protected persons in an area hampers military operations, evacuation is also permitted, however only when overriding military considerations make it imperative; if it is not imperative, the evacuation ceases to be legitimate.<sup>259</sup>

Article 8 (2) (e) (viii) ICC Statute also allows for the displacement of the civilian population for reasons related to an internal conflict, if the security of the civilians involved or imperative military reasons so demand.

Deportation is illegal only when forced.<sup>260</sup> The notion of "force" is not interpreted in a restrictive manner in the Tribunal case law, such as being limited to physical force.<sup>261</sup> The *Tuta and Štela* Trial Judgment noted that the determination as to whether a transferred person had a genuine choice should be made on a case by case basis and in the light of all relevant circumstances.<sup>262</sup> The Krnojelac Appeal Judgment found that despite the ostensible agreement of 35 non-Serb detainees to be transported across the Montenegrin border, the all-pervasive climate of fear and the overall coercive context of the detention of non-Serb civilians at the detention center KP Dom is by its nature negative towards any notion of genuine choice.<sup>263</sup> Finally in *Krstić* the Chamber found that "the threats to Srebrenica residents far transcended mere fear of discrimination".<sup>264</sup> Noting the coercive circumstances that prevailed in Srebrenica in mid-July 1995, the Trial Chamber found that "despite the attempts by the VRS to make it look like a voluntary movement, the Bosnian Muslims of Srebrenica were not

 <sup>&</sup>lt;sup>255</sup> See *e.g.* ICTY, *Stakić* Trial Judgement, para. 680, ICTY, *Krnojelac* Appeal Judgement, para. 218.
 <sup>256</sup> The ICC Elements of Crimes defines the war crime of unlawful deportation and transfer (occurring in an international armed conflict) in Article 8(2)(a)(vii) as covering the movement of persons "to another State or to another location". Similarly, for the war crime of displacing civilians in Article 8(2)(e)(viii) (occurring in noninternational armed conflicts), the ICC Elements of Crimes do not require proof of crossing of a border or boundary; only that the civilian population was *displaced*.

<sup>&</sup>lt;sup>257</sup> See also ICTY, *Krstic.*, (Trial Chamber), judgment of 2 August 2001, para. 524.

<sup>&</sup>lt;sup>258</sup> O. Uhler and H. Coursier, Commentary on the Geneva Conventions of 12 August 1949. Volume IV (1958) at 280.

<sup>&</sup>lt;sup>259</sup> ICRC Commentary, Geneva Convention IV, at p. 280, and ICRC Commentary on Article 49 (V).

<sup>&</sup>lt;sup>260</sup> Article 49, Geneva Convention IV; see also ICTY, Krstić Trial Judgement, para. 528; ICTY, Krnojelac Trial Judgement, para. 475; ICTY, Stakić Trial Judgement, para. 682.

<sup>&</sup>lt;sup>261</sup> Commentary to Geneva Convention IV, at p. 279; ICTY, *Tuta and Štela* Trial Judgement, para. 519: "Transfers motivated by an individual's own genuine wish to leave, are lawful". <sup>262</sup> ICTY, *Tuta and Štela* Trial Judgement, para. 519. See also ICTY, *Krnojelac* Appeal Judgement, para.

<sup>229 (</sup>noting that expressions of consent must be analysed in their context, so as to take account *inter alia* of the atmosphere which governed at the KP Dom, the unlawfulness of detention, threats, use of force and other forms of coercion, fear of violence and the vulnerability of the detainees).

<sup>&</sup>lt;sup>263</sup> ICTY, Krnojelac Appeal Judgement, para. 233.

<sup>&</sup>lt;sup>264</sup> ICTY, Krstić Trial Judgement, para. 530.

exercising a genuine choice to go, but reacted reflexively to a certainty that their survival depended on their flight."<sup>265</sup>

The perpetrator was aware of the factual circumstances that established the lawfulness of such presence. The *Stakić* Trial Judgment usefully clarified, with regard to a subsequent legal evaluation by a warring party, that assistance to the victims by humanitarian agencies is not a factor rendering a displacement lawful.<sup>266</sup>

From the facts listed above the following assumptions can be inferred: Around 300.000 persons of mainly Tamil origin were forced to leave their habitual residences as a consequence of the fighting between Sri Lankan government troops and the LTTE. The Sri Lankan government decided on a policy to move the civilian population from the LTTE held territory in order to better fight the LTTE and regain territorial control over the north. It subsequently established no fire zones, where the civilian population fled to. Furthermore, special camps were set up for the displaced persons. The end of the conflict saw 300,000 interned persons, mainly of civilian nature. From that can be at least followed that a genuine choice of the mainly Tamil population whether to move out of the local areas was non-existent. To leave their villages seemed the only chance to survive, thus there is no voluntary element in the decision to enter no fire zones or one of the camps. Another indication is the separation of many families over various camps - a fact indicating that the transfers were not voluntary and that the people were not allowed to chose where to go. It can further be maintained that the Sri Lankan government could hardly justify as imperative military reasons the displacement and internment of 300.000 persons. It is not argued that the removal of civilians in the war zone was illegal, but it is contended that the mass movement to areas where the persons were bombarded and subsequently transferred to internment camps is illegal and does not constitute an imperative military reason.

## 4. Imprisonment or other severe deprivation of physical liberty

Article 7 (1) (e) ICC Statute encompasses 'imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law'. The elements of crimes require that the perpetrator have imprisoned one or more persons or deprived them of their liberty of movement.

The term imprisonment includes cases in which a person is, literally, imprisoned in an enclosed space and thus hindered from moving to another place.<sup>267</sup> It is hence used in a broader sense than the notion of imprisonment after conviction and is meant to encompass a wide range of restrictions on physical liberty. The ICTY concluded in the *Krnojelac* judgment that "imprisonment as a crime against humanity is not restricted by the grave breaches provisions of the Geneva Conventions" and that "any form of arbitrary physical deprivation of liberty of an individual might constitute imprisonment under Article 5(e) as long as the other requirements of the crime are fulfilled."<sup>268</sup> One can derive from that an extensive use of the term "imprisonment".

Severe deprivation of liberty can be assumed in cases in which a person can continue to move in a specific area, for example within a ghetto or concentration camp, but is prevented from leaving the greater area where he is held.<sup>269</sup> Deprivation of liberty should not be viewed as severe in the sense of Article 7 (1) (e), if it occurs for a short period of time.<sup>270</sup>

The ICTY jurisprudence found that a deprivation of liberty amounts to imprisonment if it is 'arbitrary' and therefore illegal. The term 'arbitrary' is interpreted in the sense that the deprivation of

<sup>&</sup>lt;sup>265</sup> Ibid.

<sup>&</sup>lt;sup>266</sup> ICTY, *Stakić* Trial Judgement, para. 683.

<sup>&</sup>lt;sup>267</sup> See C.K. Hall, in O. Triffterer (ed), Commentary on the Rome Statute of the International Criminal court, 1999, Art. 7, marginal no. 38.

<sup>&</sup>lt;sup>268</sup> ICTY, *Krnojelac* Trial Judgment, paras. 111/112.

<sup>&</sup>lt;sup>269</sup> See 1996 Draft Code, commentary on Art.18, para. 14.

<sup>&</sup>lt;sup>270</sup> Werle supra note 223, at 243, para. 705.

liberty occurred without due process of law.<sup>271</sup> The ICTY held further that any deprivation of liberty is arbitrary if 'no legal basis can be called upon to justify the initial deprivation of liberty.'<sup>272</sup>

The right to physical liberty is not an absolute right and can be restricted under certain circumstances established by law. In the *Celebici* judgment the Tribunal held that while the confinement of civilians is permitted in certain limited situations, it is an exceptional measure of last resort that applies where the person is definitely suspected of or engaged in activities hostile to the security of a State.<sup>273</sup>

Imprisonment becomes an international crime only if it violates fundamental rules of international law. The term "rules of international law" is very broad and would include not only treaties and customary international law, but also general principles of law. 'Fundamental' rules are likely to include, at a minimum, all the guarantees of the right to be free from arbitrary detention and to fair trial, such as *inter alia* the right to prompt access to a judge, to have the lawfulness of the detention promptly determined by a court and to be released if the detention was unlawful.

The establishment of government/military controlled camps for the Tamil civilian population constitutes the framework under which this crime has been committed. As described above, persons detained in the camps were not allowed to leave them or partly move within the different sectors of the camp. The camps are surrounded by barbed wire, which prohibits persons to talk to someone on the other side of the wire. At some point the government issued permits which allowed persons to leave the camps for a certain time period. Around 80,000 persons are currently still interned in the camps and it is assumed that they are not permitted to decide on their own whether they want to leave or not. These measures therefore constitute arbitrary physical deprivation of liberty. Although the right to physical liberty can be restricted under certain circumstances, the screening of the civilian population for LTTE members does not represent a legitimate reason. Such a legitimate reason would exist, if a person is - based on some evidence - suspected of or engaged in activities hostile to the security of a State, which can clearly not be assumed here for a number of 300,000 people. The government instead put the whole Tamil population under a general suspicion of being involved in hostile activities. However, as the government does not classify the internment as such, no judicial review mechanisms are available. Moreover the persons held in the camps are not informed about the reason and duration of their detention. At present around 10.000 persons accused of being LTTE affiliated are held in high security detention facilities without access to lawyers or information on the duration of their detention.

## 5. Torture

Torture is prohibited in nearly all national legislation of states. Further customary international law and numerous human rights treaties and conventions outlaw torture,<sup>274</sup> whether in times of peace or in armed conflict. The prohibition against torture constitutes a norm of *jus cogens* allowing no derogations from the rule under any circumstances.<sup>275</sup> The prohibition against torture in international humanitarian law is expressly found in Common Article 3 of the Geneva Conventions.

<sup>&</sup>lt;sup>271</sup> ICTY, *Kordić* Trial Judgement, para. 302, as approved in the *Kordić* Appeals Judgement, para. 116; *Krnojelac* Trial Judgement, para. 113.

<sup>&</sup>lt;sup>272</sup> ICTY, *Krnojelac* Trial Judgment, para. 114 (noting further that national law itself must not be arbitrary and the enforcement of this law in a given case must not take place arbitrarily. It further observed: "In addition, the legal basis for the initial deprivation of liberty must apply throughout the period of imprisonment. If at any time the initial legal basis ceases to apply, the initially lawful deprivation of liberty may become unlawful at that time and be regarded as arbitrary imprisonment" (*Krnojelac* Trial Judgement, para. 114)).

<sup>&</sup>lt;sup>273</sup> ICTY, *Čelebići* Trial Judgment, paras. 569-572.

<sup>&</sup>lt;sup>274</sup> Article 7 ICCPR, Article 3 ECHR, Article 5(2) ACHR, Article 5 ACHPR.

<sup>&</sup>lt;sup>275</sup> See, *e.g.*, Article 2(2) Torture Convention; Article 15(2) European Convention; Article 4(2) ICCPR; Article 27(2) American Convention on Human Rights; Article 5 Inter-American Convention to Prevent and Punish Torture.

Moreover several international instruments are concerned specifically with the prohibition of torture.<sup>276</sup> As human rights instruments they can as a minimum provide guidance with regards to the analysis and interpretation of the elements of crimes in the Rome Statute.

The most widely accepted definition of torture can be found in Article 1 of the Convention against Torture. The CAT provides, so to speak, the customary law basis of the elements of torture.

Article 1 CAT states: The term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Article 7 (2) (e) of the ICC Statute defines the crimes of torture as 'the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.' The terminology can be derived from the definition in the Torture Convention, merely lacking the means-end relationship.<sup>277</sup> Hence, torture according to the International Criminal Court does not require any underlying particular purpose. Thus, Article 7(1) (f) ICC includes even random or purposeless infliction of severe pain or suffering, or even sadistic infliction of severe pain or suffering. Moreover the act can be committed by any person, not only someone acting in an official capacity.

The ad hoc criminal tribunals refer to the human rights definition of torture and use documents from human rights bodies such as the UN Human Rights Committee for interpretation.<sup>278</sup> Moreover, medical and psychological specialists, who deal with victims of torture, can help assessing what constitutes torture.

The crime requires that the perpetrator inflicted severe physical or mental pain or suffering upon one or more persons. Since the Akayesu Trial Judgment of the ICTR, the ICTY Trial and Appeals Chambers endorsed the definition of infliction of pain amounting to torture provided by the CAT as follows: 'the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person.' The infliction of severe pain or suffering may be mental or physical.<sup>279</sup> There is no exhaustive list of acts that amount to torture, as the infliction of pain or suffering can take various forms. However, any of the following acts do per se meet the threshold of suffering and amount to torture: beating, sexual violence, prolonged denial of sleep, food, hygiene and medical assistance, as well as threats to torture, rape, or kill relatives.<sup>280</sup> The UN Human Rights Committee considers all the circumstances of the individual case, especially the duration of the abuse and its physical and mental effects.<sup>281</sup>

Clearly the degree of severity is one of the key features distinguishing torture from cruel or inhuman treatment. In a separate opinion also the European Court of Human Rights affirmed that the defining element of torture is its severity.<sup>282</sup> However, it is very difficult to determine the degree of severity, as pain is a subjective perception. There is no absolute degree of pain. In order to distinguish the different levels of acts of violence, often medical and psychological expert knowledge is required.

<sup>&</sup>lt;sup>276</sup> E.g. the Inter-American Convention to Prevent and Punish Torture, the Declaration on the Protection of All Persons from being subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

<sup>&</sup>lt;sup>277</sup> Werle, supra note 223, at 244, para 771.

<sup>&</sup>lt;sup>278</sup> See e.g. ICTY, *Music* et al., Trial Chamber judgment, paras. 461; ICTY, *Kvocka* et al., Trial Chamber judgment, paras. 142 et seq. <sup>279</sup> ICTY, *Čelebići* Trial Judgement, paras. 461-469, especially para. 468. <sup>280</sup> See UN Special Rapporteur on Torture (UN Doc A/56/1596, 3 July 2001, para. 8 *et seq.*).

<sup>&</sup>lt;sup>281</sup> See Werle supra note 223, para 713.

<sup>&</sup>lt;sup>282</sup> ECtHR, *Ireland v UK*, Ser. A, o.25 (1976), separate opinion of Judge Fitzmaurice, 129 et seq.

Signs of severe distress on the part of a detainee during interrogation and detention do reveal the state of pain and suffering.<sup>283</sup>

As mentioned above, rape or sexual violence can constitute torture as crime against humanity, when the elements of torture are met. The jurisprudence of the ad hoc Tribunals and of the human rights bodies holds that rape necessarily implies pain and suffering as required for torture<sup>284</sup>, especially in detention.<sup>285</sup> Mental suffering can also be caused when a perpetrator forces people to watch a rape being committed.<sup>286</sup>

Another requirement established that such person or persons were in the custody or under the control of the perpetrator. The term "custody" refers to any form of detention or imprisonment, including arrest by security forces, as well as various restrictions on liberty that may include crowd control by security forces or enforced disappearances.<sup>287</sup> "Under the control of the perpetrator" has a broader meaning and includes any other form of restraint by another.<sup>288</sup>

Furthermore such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions. The test that applies here is whether the treatment was in conformity with international law. Legalization by the state authorities does not automatically make torture lawful; the decisive factor is the international law standard.<sup>289</sup>

Finally the act or omission must have been intentional. For the mental element Article 30 ICC Statute needs to be consulted. According to Article 30 ICC Statute a person has intent where:

(a) In relation to conduct, that person means to engage in the conduct;

(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

"Knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.

Reports about violence in the IDP camps as well as witness statements confirm beatings and sexual violence in these camps. Especially the way girls and women were treated in the camps or when captured as suspected LTTE members seems to amount to torture. While there is a special crime against humanity dealing with rape and sexual violence, these acts can also constitute torture. Further investigations are needed at this point, with a special focus on female IDPs. Female investigators and psychologists are necessary to approach persons affected by sexual violence with due care. Therefore, it is difficult to establish acts of torture at the moment, but many facts point at the commission of some acts that can amount to torture, especially those acts of sexual violence.

#### 5. Sexual and gender violence

### 5.1 General remarks

When the ICTY and ICTR began their work, they encountered a lack of definition of sexual violence under international treaty and customary law. Although the ad hoc tribunals did not

<sup>&</sup>lt;sup>283</sup> See for a detailed analysis Philippe Sands, Torture Team Rumsfeld's memo and the Betrayal of American Values, 2008, Palgrave Macmillan, p. 170.

<sup>&</sup>lt;sup>284</sup> ICTY, *Kvocka Trial Chamber*, para. 145; ICTY, *Kunarac* Appeals Judgement, para. 150, *Fernando and Raquel Mejia v. Peru* (1996), Inter-Am. Comm. H.R. No. 5/96; *Aydin c. Turquía* (57/1996/676/866) European Court of Human Rights.

<sup>&</sup>lt;sup>285</sup> United Special Rapporteur on Torture in its oral introduction to his 1992 Report on Human Rights, E/CN.4/1992/SR.21, para. 35, *Aydin c. Turquía* (57/1996/676/866) European Court of Human Rights, para. 83 and 86.

<sup>&</sup>lt;sup>286</sup> See for a detailed analysis, Women's Initiatives for Gender Justice, Sexual Violence and International Criminal Law, 2005, p. 20.

<sup>&</sup>lt;sup>287</sup> See *Hall*, in: Triffterer (ed.), article 7, margin 105.

<sup>&</sup>lt;sup>288</sup> See also *Hall*, in: Triffterer (ed.), article 7, margin 105.

<sup>&</sup>lt;sup>289</sup> See Report of the Special Rapporteur to the Commission on Human Rights Peter Kooijmans, UN Doc. E/CN.4/1988/17 (1988), para. 42; also *Hall*, in: Triffterer (ed.), article 7, para. 106.

enumerate them specifically in their statutes, they have not ignored the specific forms of sexual violence. Accordingly they made great efforts to build a definition in accordance with international standards defining these crimes in such a way that they cover acts which were previously considered lesser offences, sexual assaults or indecent actions under national laws.<sup>290</sup> Finally, the elements of crimes in the ICC Statute were formulated reflecting the case law of the ICTR and ICTY.

Art. 7 (1) (g) ICC Statute enumerates sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and any other form of sexual violence of comparable gravity as within its jurisdiction as crimes against humanity. The latter element assures the punishment of sexual offences that are not covered by the enumeration, as sexual offences are a form of aggression that is often difficult to capture in a mechanical description.<sup>291</sup>

### 5.2 Rape

In international law, no common definition of sexual violence, inter alia rape, had been developed at the beginning of the negotiations on the ICC Statute. But as mentioned above the case law of the ad hoc tribunals has influenced the drafting of the now existing definition of rape in the ICC Statute. Mostly the tribunals had to discuss whether to follow a broad "conceptual" approach towards the crime or to apply a "mechanical" definition, which requires the penetration of certain parts of the victim's body by certain means. Additionally, the discussion always involves the issue of consent.

This element requires that the perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim with any object or any other part of the body. Unlike the ICTY jurisprudence, the mentioned element uses a more mechanical definition, and refers to the concept of invasion. Therefore it covers a wide range of ways, and does not only include forced sex. It also includes sexual conduct connected with the insertion of the perpetrator's sexual organ into other body cavities (oral and anal penetration) and the insertion of other parts of the perpetrator's body or of objects into the vagina or other parts of the body.<sup>292</sup>

The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of coercive environment, or the invasion was committed against as person incapable of giving genuine consent. Regarding the consent, it is considered that a person cannot give genuine consent if affected by natural, induced or age-related incapacity. Regarding this, the article 70 of the Report of Evidence of Prosecution of the Preparatory Commission for the ICC is sufficiently broad to encompass a situation where a woman has seemingly consented to sex, but is actually doing so because the alternative—for example a different form of violence—is less desirable.<sup>293</sup>

Consequently, it is important to note that the definitions given by the ICC are a mix of the *Akayesu* and *Furundzija* definitions, including alongside this domestic legal perspectives, focused on the circumstances of the coercion rather than the lack of consent. Unlike in *Kunarac*, the consent of the

<sup>&</sup>lt;sup>290</sup> ICTY, Furundzija Trial Judgment, para. 179.

<sup>&</sup>lt;sup>291</sup> ICTR, Akayesu Trial Judgment, para. 596.

<sup>&</sup>lt;sup>292</sup> Werle supra note 223, at 248, para. 724.

<sup>&</sup>lt;sup>293</sup> United Nations Preparatory Commission for the International Criminal Court, *Report of the Preparatory Commission for the International Criminal Court*, U.N. Doc, Article 70, PCNICC/2000/1/Add.1 (2000).

Article 70, Principles of evidence in cases of sexual violenceIn cases of sexual violence, the Court shall be guided by and, where appropriate, apply the following principles:

<sup>(</sup>a) Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent;

<sup>(</sup>b) Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent;

<sup>(</sup>c) Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence;

<sup>(</sup>d) Credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim or witness.

victim is not included as an element of the crime in the light of the context in which sexual violence is committed during international crimes such as genocide, war crimes and crimes against humanity, where the lack of consent can be easily presumed.<sup>294</sup>

Therefore coercion should be interpreted broadly, and not only in regard to physical strength, as there may be coercive circumstances in situations of abuse of power or psychological oppression, or other situations in which it is not necessary to mediate physical strength. This coercion presumes a lack of consent on the part of the victim, thereby rendering the conduct illegal.

For all material elements of crimes, Art. 30 ICC Statute applies. As the absence of consent is somehow now part of the material element of the crimes, the mental element requests at least the knowledge of the elements. But this is fulfilled by the knowledge that the victim did not freely consent, for instance if the victim is in captivity and fear for her life.<sup>295</sup>

## 5.3. Sexual slavery

The element of crime for Article 7 (1) (g)-3 ICC Statute provide: "The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as purchasing, selling, lending or bartering such a person or persons, or by imposing on them in a similar deprivation of liberty."

Sexual slavery is a specific manifestation of enslavement. Incorporating an illustrative list, the definition of slavery in the elements was partly taken from the definition in Article 7 (2) (c) ICC Statute. Sexual slavery may be understood as a continuing offence, which ends when the perpetrator ceases to exercise powers attaching to the right of the ownership, which he or she has been exercising to cause the victim to engage in one or more acts of sexual nature. The offence covers all form of enslavements including sexual violence, like "forced (temporary) marriage", the detention in "rape camps" or "comfort stations".<sup>296</sup>

#### 5.4 Enforced prostitution

In Article 7 (1) (g)-3 ICC Statute enforced prostitution is recognized for the first time as a self-standing crime against humanity.<sup>297</sup>

The first element of crimes for Article 7 (1) (g)-3 ICC Statute provides: "1. The perpetrator caused one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage or a coercive environment or such persons' incapacity to give genuine consent."

Although there is a considerable overlap with the crime of sexual slavery, the first element of enforced prostitution is considerably broader. It suffices according to this element the sexual act by force or coercion instead of the exercising of any or all powers attaching the right of ownership over one or more persons and causing such person to engage in acts of sexual nature.

Moreover the sexual act carried out in a context of prostitution will comply with the requirement of the broad conception of the coercive element within the crime of sexual violence. The "forcible" requirement does not have to be present for each individual sexual act.

The second element of crimes for Article 7 (1) (g)-3 ICC Statute provides: "2. The perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature." On the other hand the definition limits the concept of enforced prostitution and distinguishes it from sexual slavery because the perpetrator or any other

<sup>&</sup>lt;sup>294</sup> L.M. de Brouwer, "Supranational Criminal Prosecution of Sexual Violence. The ICC and the Practice of the ICTY and the ICTR". 2005.

<sup>&</sup>lt;sup>295</sup> ICTY, *Kunarak* Trial Judgement, para. 647.

<sup>&</sup>lt;sup>296</sup> Werle supra note 223, at 250, para. 728.

<sup>&</sup>lt;sup>297</sup> Werle supra note 223, at 251, para. 729.

person obtained or expected to obtain pecuniary or any other advantage. Provided this element is satisfied, forced prosecution should also apply where the elements of crimes for rape, such as force, threat or coercion, are missing. As the pecuniary advantage is also to be seen in respect of another person, it distinguishes such incidents from rape cases where the victim himself or herself hopes to ensure his or her survival or to avoid further harm.

### 5.5. Sexual violence

The elements of crimes provide for Article 7 (1) (g)-6 ICC Statute: "1. The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of coercive environment or such person's or person's incapacity to give genuine consent (...) 2. such conduct was of a gravity comparable to the other offences in Article 7, paragraph 1 (g) of the Statute."

Based on the jurisprudence of the ad hoc Tribunals the adopted definition in Article 7 (1) (g)-6 ICC Statute is very neutral and extensive. The required sexual act includes acts that do not involve penetration or even physical contact. Forcing a person to strip naked in public should also be considered sexual violence.<sup>298</sup>

After controversial negotiations on this element this formulation now does not establish a specific threshold and clearly refers to all gender crimes and not exclusively to the crime of rape.

This element now clarifies that the ICC Statute only requires the knowledge of the factual circumstances and the perpetrator's wrongful perception of the gravity of his or her acts is irrelevant.

## 5.6 Assessment of facts

From the reports and statements collected by human rights organizations as well as from the media it can be inferred that sexual and gender violence took place in a widespread and systematic manner. As with all crimes mentioned in this report, there have not been any substantial investigations so far. For several reasons the number of victims of gender and sexual violence and the concrete facts of the crimes are more difficult to ascertain. In addition to the threat and fear victims in general have to face, victims of gender and sexual violence, male and female, are stigmatized by their own group. Rape is still often accepted as an inevitable consequence of the war and therefore hardly reported as a crime.

Despite these difficulties, some facts and testimonies have already been provided by witnesses to the sexual abuses that took place in the camps. Some of these reports concern sexual abuse by the guards and officers, who traded sex for food, or rape by Sri Lanka Army officers. Girls and women in the camps were often forced to walk around naked or to bath in front of the guards. Although the women did not talk about sexual abuse, it has been observed that military officers were touching women. One organization reported prostitution networks in the camps.

As mentioned above further gender-specific investigations are needed, as there are many facts that can amount to gender and sexual violence. The use of specialized female interrogators is needed to respect the traumatic situation of some of the victims.

### 6. Persecution

Article 7 (1) (h) ICC Statute deals with the crime of persecution against any identifiable group or collectively on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3,

<sup>&</sup>lt;sup>298</sup> ICTR, *Akayesu* Trial, para. 688; UN Special Rapporteur on the Situatuion of Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conclicts definition of sexual violence.

or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.

The crime of persecution is not known in the world's major criminal justice systems and has never been comprehensively defined.<sup>299</sup> However it has been included in all relevant international criminal law instruments since Nuremberg.<sup>300</sup>

Article 7 (2) (g) ICC Statute defines the crime of persecution as 'the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.'

According to the ICC the crime of persecution is used to describe large-scale and discriminatory offences in situations involving large-scale criminality, but that may not entail the necessary physical destruction or exterminatory *animus* required for genocide.

The material elements require the persecution of an identifiable group or community, whereas the group as such can be the object of the persecution.<sup>301</sup> The definition equally encompasses acts aimed at individuals as representatives of a group.

The first material element requires that the perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights. Fundamental rights include all those inalienable and universal rights referred to in international customary law and treaty law.<sup>302</sup> Acts that could constitute persecution include non-physical acts of an economic or judicial nature (such as promulgating discriminatory laws, restricting family life and rights of citizenship, creation of ghettos, plunder, and imposition of a collective fine)<sup>303</sup> as well as physical acts (such as extermination, killings, beatings, torture, enslavement, imprisonment, and deportation).<sup>304</sup> Omissions can equally constitute persecution.

According to the *Blaskic* judgment "persecution encompasses not only bodily and mental harm and infringements upon individual freedom, but also acts which appear less serious, such as those targeting property, so long as the victimized persons were especially selected on grounds linked to their belonging to a particular community."<sup>305</sup>

Moreover the denial of the fundamental rights needs to be severe, meaning flagrant and intense in nature. The severity or gravity refers to the way the person is deprived of his/her right, not the right as such.

The perpetrator must have targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such. There is a discriminatory intent required for the crime of persecution, meaning that the perpetrator specifically intended to deny a fundamental right to a person, because that person belonged to a particular group. In this regard the crime of persecution differs from all other Crimes against Humanity. The discriminatory intent can be divided into two parts, one regarding the degree or quality of the requisite mental state, the other one regarding the scope. With regards to the scope, the requisite mental state must encompass one or more of the

<sup>&</sup>lt;sup>299</sup> See ICTY, Kordić Trial Judgement, para. 192; also *citing inter alia* ICTY, *Tadić* Trial Judgement, para. 694.

<sup>694.</sup> <sup>300</sup> See Article 6(c) Nuremberg Charter, Article II (1) (c) Control Council Law No. 10, Article 5 Tokyo Charter, Article 5 (h) ICTY Statute and Article 3 (h) ICTR Statute.

<sup>&</sup>lt;sup>301</sup> See Werle supra note 223, at 254, para. 738.

<sup>&</sup>lt;sup>302</sup> See ICTY, *Kupreškić* Trial Judgement, para. 621. The *Krstić* Trial Judgement refers to this passage in the *Kupreškić* Trial Judgement as a definition, and seems to accept it (*see* ICTY, *Krstić* Trial Judgement, para. 534).

<sup>&</sup>lt;sup>303</sup> ICTY, *Tadić* Trial Judgement, paras. 704-710 (discussing acts found to constitute persecution by the International Military Tribunal at Nuremberg); *see also* ICTY, *Kupreškić* Trial Judgement, paras. 610-613.

<sup>&</sup>lt;sup>304</sup> ICTY, *Kupreškić* Trial Judgement, para. 594 (discussing acts found to constitute persecution by the International Military Tribunal at Nuremberg and the subsequent trials under Control Council Law No. 10); *See* also *ibid*, at para. 601 (German prison warden convicted by Netherlands Special Court of persecution for holding Jews in "illegal detention, beating and kicking them, and mistreating and humiliating them in other ways").

<sup>&</sup>lt;sup>305</sup> ICTY, *Blaškić* Trial Judgement, para. 233.

discriminatory grounds listed in Article 7(1)(h) ICC Statute. The degree of mental state on the other hand requires that the accused must consciously intend to discriminate.<sup>306</sup>

The crime requires that the targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law. Relevant to the present case are discrimination on the grounds of ethnic identity, race, culture, gender<sup>307</sup> and religion.

Moreover the conduct must have been committed in connection with any act referred to in Article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court. Persecution counts usually encapsulate many other discrete offences charged elsewhere under the ICC Statute. The ICTY noted in the *Kvočka* Trial Judgment that if "based on the same acts against the same victims, the Trial Chamber considers that the crime of persecution subsumes other alleged acts separately constituting crimes against humanity, as long as the additional element of discrimination on specified grounds is present."<sup>308</sup>

From the information gathered by NGOs as well as governments and media it can be established that hundreds of thousands of people were confined in detention camps against their will. Moreover discriminatory laws, expropriation, as well as physical acts such as extermination, killings, beatings, torture, rape, imprisonment and deportation are at stake here. The Tamil population constitutes an ethnic group, with a distinct language, culture and tradition. Moreover they differ from the majority inhabited Sri Lankan population through their Hindu religion. Moreover the relocation of Sinhalese persons to the naturally inhabited areas of the north raises questions as to the motives of these measures. On this basis the attempt to persecute can at least be assumed.

## 7. Enforced disappearances of persons

According to Article 7 (2)(i) ICC Statute "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time. The definition is based on the definition in the Preamble of the Declaration on the Protection of All Persons from Enforced Disappearance.<sup>309</sup>

The word detained includes a perpetrator who maintained an existing detention. Moreover the arrest or detention as such may have been lawful. The main issue surrounding the crime of enforced disappearance, which usually goes alongside many of the other crimes listed in Article 7 ICC Statute, such as severe deprivation of liberty, torture and extra-judicial execution, is that it is committed in absolute secrecy and thus nearly impossible to prove. A forced disappearance is often aimed at hiding the perpetration of other human rights violations. Whereas it is relatively easy to prove the arrest, detention or abduction of a person, it is more difficult to prove the human rights abuse during the enforced disappearance. However the crime of forced disappearance does not require proof of the acts that were committed during the forced disappearance, such as torture or execution. Hence, where crimes such as torture, rape or murder cannot be established because of the secrecy in which they were committed, a charge of forced disappearance may be appropriate.

<sup>&</sup>lt;sup>306</sup> See ICTY, *Krnojelac* Trial Judgement; The *Krnojelac* Trial Judgement further provides that discriminatory intent "need not be the primary intent with respect to the act, it must be a significant one" (Krnojelac Trial Judgement, para. 435). The *Krnojelac* Trial Chamber's general elucidation of the elements of persecution (as set forth in para. 431 of the Judgement) was recently confirmed on appeal (*see* ICTY, *Krnojelac* Appeal Judgement, para. 185).

<sup>&</sup>lt;sup>307</sup> It is confirmed by several ICTY cases that persecution can also be based on rape and sexual violence, see e.g. ICTY, *Statkic* Trial Judgement, para 818; ICTY, *Kvočka* Trial Judgement, para. 186.

<sup>&</sup>lt;sup>308</sup> ICTY, *Kvočka* Trial Judgement, para. 187.

<sup>&</sup>lt;sup>309</sup> Adopted by the General Assembly, 18 December 1992, UN Doc. A/47/49.

It is necessary that the perpetrator arrested, detained or abducted one or more persons; or refused to acknowledge the deprivation of freedom, or to give information on the fate or whereabouts of such person or persons.

Prior to the definition in the Rome Statute, many Latin American countries required for the offence of an enforced disappearance that the perpetrator committed both stages of the crime, namely the abduction, detention or arrest, and the refusal to provide information. Under the Rome Statute the conduct is disjunctive, meaning that either the deprivation of liberty or the refusal to provide information is sufficient to fulfill the offence of a forced disappearance.<sup>310</sup> This is because within this collective crime, it is very unlikely that one person commits both acts himself. However, it is possible that the perpetrator fulfils both stages of the enforced disappearance. Besides, according to the wording of the first material element, the conduct can involve only one victim. The collective nature of the crime is taken into account by the requirement that the perpetrator has to act in a context involving other persons.

The second element describes an objective condition. The conduct must be committed within the scope of an enforced disappearance of a person as defined in article 7 (2) (i) of the Statute. Either the first stage conduct (arrest, detention, abduction) is followed by a second stage act (refusal to acknowledge or inform), or the second stage conduct is preceded by a first stage act. It is possible that the two stages take place at different places and different times.

With regards to the degree of the intent Article 30 ICC Statute applies. Intent must extend to the failure to provide the information in question. In case of the second alternative the perpetrator must be aware that the victim was first abducted, arrested or detained prior to its disappearance.<sup>311</sup> The deprivation of liberty must occur on behalf of or with the approval of a state or political organization.<sup>312</sup> The perpetrator must further intend to remove the person from the protection of the law. This element requires such an intention at the moment of the refusal to provide information.

From the facts above it can be inferred that persons, being affiliated with the LTTE, were arrested, abducted and detained by Sri Lankan government forces. The well known 'White-Van-Syndrome' stands for kidnapping of people at various places throughout the country by forcing them into a white van. Many of these people have not been seen since. Family members, as well as national and international organizations, inquiring about the fate of the disappeared, either do not receive adequate information or are not given any information at all. The high number of cases of civilians being taken from the IDP camps as well as from hospitals and their homes is alarming and calls for independent investigations.

### **C.** Conclusions

It can be observed that the acts in question were committed as part of a widespread and systematic attack directed mainly against the Tamil civilian population. The Sri Lanka Army as well as the LTTE targeted the civilian population. Women, children and elderly people as well as men, who were not taking active part in any fighting, were victims of heavy shelling and bombardment in government declared safety zones as well as in the conflict zones itself. The amount of displaced persons as well as the scale and intensity of the attacks leave no doubt as to the collective nature of the acts that were committed. The acts were related to armed attacks which were in turn an integral part of the armed conflict between the fighting factions. Undoubtedly the threshold of what constitutes widespread attacks was reached.

Moreover the Sri Lankan military is a professional, highly organized and well trained army whose explicit goal was to defeat the LTTE and regain control of the groups held territory in the north and

<sup>&</sup>lt;sup>310</sup> See Werle supra note 223, at 260/70, para 754.

<sup>&</sup>lt;sup>311</sup> Ibid., at 261, para. 756.

<sup>&</sup>lt;sup>312</sup> Ibid., at 261, para. 755.

east of Sri Lanka. The military operations were well planned and aimed at 'liberating the country from LTTE terrorism.'<sup>313</sup> The LTTE likewise conducted military operations against the Sri Lanka Army on a regular basis, turning a blind eye to rules on the protection of civilians. Hence the acts in question were also committed as part of systematic attacks.

The civilian population, in particular the Tamil ethnic civilian population, can be seen as the targeted group of people in this conflict. The conflict can be described as a fight between two ethnic groups or a majority governing group against a minority ethnic group within one nation state concerning the dominance of one group over the other. As the fighting took place in the northern part of the country which is the habitual residence of the Tamil people, the victims were clearly Tamil civilians who were living in the conflict zone. As can be seen from the enlisted military operations on the website of the Sri Lanka Army, the attacks were intended to clear certain areas of LTTE members in order to regain control over the territory. This resulted in the displacement of hundreds of thousands of Tamil civilians. The attacks forced the inhabitants of these areas to flee to government protected zones which were in turn attacked by both parties to the conflict. The murders, exterminations, deportations, imprisonment in the camps, torture, rape, persecution and enforced disappearances were clearly related to the conflict and part of the widespread attacks against the LTTE and subsequently the Tamil civilian population.

It can be concluded that from the evidence which has been evaluated further investigations into the following crimes should be initiated: Murder, Extermination, Deportation, Imprisonment, Torture, Rape and other forms of Sexual Violence, Persecution and Enforced Disappearance of Persons. It is very likely that these crimes have been committed and therefore it is necessary to initiate further investigations.

### II. Article 8 of the ICC Statute: War Crimes

### A. General remarks

Article 8 (1) ICC Statute, named War Crimes, reads as follows:

"The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes."

### 1. Jurisdiction

Article 8 (1) ICC Statute grants the International Criminal Court jurisdiction in respect of war crimes 'in particular when committed as part of a plan or policy'. This term should be understood as a jurisdictional threshold rather than an additional requirement or elements of war crimes. Thereby the provision "in particular" does not rule out the ICC exercising jurisdiction over war crimes "not committed as part of a plan or policy or part of a large-scale commission of such crimes". This view is encouraged by the objection to the United States proposal to include the wording "only" instead of "in particular" into the paragraph. The policy element is therefore an additional threshold in order to narrow the scope of application of Article 8, but it is not an absolute or excluding criterion.

Article 8 Nr. 2 (c) ICC Statute is formulated along the wording of Article 3 common to the four Geneva Conventions. It grants the Court jurisdiction over serious violations of Article 3 during internal armed conflict. It has recently been referred to by the *Čelebići* Appeals Chamber as the "quintessence of the humanitarian rules found in the Geneva Conventions as a whole".<sup>314</sup>

 $<sup>^{313}</sup>$  See the Guardian, www.guardian.co.uk/world/2009/may/18/tamil-tigers-killed-sri-lanka; see also for an overview of the military operations between January and May 2009 at www.army.lk/operations.php.  $^{314}$  LCTV.  $\check{C}$  L Life and L

<sup>&</sup>lt;sup>314</sup> ICTY, *Čelebići* Appeals Judgement, para. 143.

### 2. The concept of humane treatment enshrined in common Article 3 of the Geneva Conventions

Respect for humane treatment under the Geneva Conventions entails three components. The first concerns the axiomatic interdiction of inhumane acts. Acts such as murder, torture, or mutilation are incompatible with the principle of humane treatment and are thus prohibited.

The second component is that humane treatment cannot be withheld based on adverse distinction. The list of prohibited grounds of discrimination in Common Article 3 is non-exhaustive. Although Common Article 3 envisions that discrimination could stem from race, color, religion, sex, birth or wealth, it simultaneously proscribes discrimination on the basis of "any similar criteria."

The third component is that Common Article 3 obligations are absolute and inexcusable. The acts incompatible with the principle of humane treatment are prohibited *at anytime and in any place whatsoever*. Thus, there can never be a temporal setting nor mitigating circumstances to exclude the liability of a party committing acts incompatible with humane treatment. Furthermore, Common Article 3 obligations are neither conditioned on reciprocity of conduct nor excused by any inter-state agreements. Hence, no State, nor *a fortiori* a non-state entity, can claim any overriding legal entitlement to murder, torture or inflict any inhumane act proscribed under Common Article 3.

## **B.** General elements of crimes

### 1. Existence of an armed conflict (not of an international character)

In order to assess whether war crimes have been committed by either of the parties to the conflict, the existence of an armed conflict within the meaning of the four Geneva Conventions will need to be established. Article 8 Nr. 2 (f) quasi defines an internal armed conflict as taking place in the territory of a state when there is protracted armed violence between governmental authorities and organized armed groups. The wording is similar to a passage in the *Tadic* decision of the International Criminal Tribunal for the Former Yugoslavia according to which an armed conflict exists whenever there is "a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."<sup>315</sup> As the fighting took place solely on the territory of Sri Lanka, the conflict can be classified as a non-international conflict.

From January to May 2009 Sri Lankan government military forces fought on one side against the separatist freedom movement 'the Liberation Tigers of Tamil Eelam' on the other. Also break-away factions of the LTTE such as the so called 'Karuna Group', set up in March 2004 and lead by Vinayagamoorthy Muralitharan (alias 'Colonel' Karuna)<sup>316</sup> were involved in the conflict and subsequently supported the government forces against the LTTE.<sup>317</sup> Although in the late 1970s the existence of 37 militant groups was recorded, only five were of significance in the ensuing conflict.<sup>318</sup> Notwithstanding their common stated goal to achieve an independent state, confrontations with the LTTE led to the collapse of the other major groups and their switching allegiances to the state armed

www.iiss.org/publications/armed-conflict-database/.

 <sup>&</sup>lt;sup>315</sup> ICTY, *Dusko Tadic*, Decision on the Defence Motion for interlocutory appeal on jurisdiction, para. 70.
 <sup>316</sup> See IISS Armed Conflict Database, Sri Lanka (LTEE), Annual Update 2004,

<sup>&</sup>lt;sup>317</sup> See for example, Human Rights Watch, www.hrw.org/en/news/2007/05/10/sri-lanka-un-security-councildirects-tamil-tigers-karuna-end-use-child-soldiers; also UNICEF reports of child abductions and recruitment of children by the Karuna Group, www.unicef.org/media/media\_34677.html.

<sup>&</sup>lt;sup>318</sup> The LTTE, PLOTE (People's Liberation Organisation of Tamil Eelam), TELO (Tamil Eelam Liberation Organisation), EPRLF (Eelam People's Revolutionary Liberation Front) and EROS (Eelam Revolutionary Organisation of Students).

forces, leaving the LTTE as the dominant Tamil liberation movement.<sup>319</sup> Hence a two-protagonist view of the conflict can be justified on the basis that the state and the LTTE are the two primary actors through which strategically organized violence in Sri Lanka manifested itself.<sup>320</sup>

## 2. Nexus between the armed conflict and the criminal acts or omissions

Common Article 3 requires the proof of a nexus between the armed conflict and the conduct of the accused, as not every crime committed in wartime necessarily breaches international law. This becomes clearer when taking a closer look at the purpose of common Article 3. Article 3 protects the victims of internal armed conflicts. However the case law of the ICTY and the ICTR did not come to the conclusion that an official link between the perpetrator and a party to the conflict is required.

### 3. Protected persons

Article 8 ICC Statute protects persons who were not actively taking part in hostilities, including members of the armed forces who had laid down their arms and those placed hors de combat

According to the *Tadić* Trial Judgment, "the protection embraces, at the least, all of those protected persons covered by the grave breaches regime applicable to conflicts of an international character: civilians, prisoners of war, wounded and sick members of the armed forces in the field and wounded, sick and shipwrecked members of the armed forces at sea."<sup>321</sup> Although the Rome Statute repeats the language of Common Article 3, referring to "persons taking no active part in hostilities, including...", the elements of crimes text differs slightly, specifying "civilians, medical personnel, or religious personnel taking no active part in hostilities."<sup>322</sup>

In Sri Lanka, in general only members of Sri Lankan armed forces on the one side and members of the organized armed group of the LTTE and similar armed groups on the other side were lawful targets in the armed conflict. Any other person was protected under international humanitarian law. Attacks against these persons can constitute war crimes.

## C. Specific elements of Article 8

Of relevance to the situation in Sri Lanka are the crimes of Article 8 (2) (c) (e) ICC Statute.

### 1. Article 8 Nr. 2 (c) ICC Statute

For the purpose of this Statute, "war crimes" means:

(c) In the case of an armed conflict not of an international character, serious violations of Article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces

<sup>&</sup>lt;sup>319</sup> See Suthaharan Nadarajah, Luxshi Vimalarajah, ' The Politics of Transformation: The LTTE and the 2002- 2006 peace process in Sri Lanka', Berghof Transitions Series No. 4, Berghof Research Center for Constructive Conflict Management, 2008, p. 21, footnote 20 of the text.

<sup>&</sup>lt;sup>320</sup> See Suthaharan Nadarajah, Luxshi Vimalarajah, ' The Politics of Transformation: The LTTE and the 2002- 2006 peace process in Sri Lanka, Berghof Transitions Series No. 4, Berghof Research Center for Constructive Conflict Management, 2008, p. 21.

<sup>&</sup>lt;sup>321</sup> See e.g. ICTY, *Tadić* Trial Judgement, para. 615.

<sup>&</sup>lt;sup>322</sup> Preparatory Commission for the ICC, Finalized draft text of the Elements of Crimes, Article 8(2)(c). See also footnote 56: "The term "religious personnel" includes those non-confessional non-combatant military personnel carrying out a similar function." This clarification was necessary as several States took the view that the wording of Common Article 3 was 'ambiguous', whereas others felt that this would leave some protected persons out of the scope of protection; cf. *Dörmann*, p. 389.

who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause:

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

(ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(iii) Taking of hostages;

(iv) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

## 1.1 Violence to life and person

The perpetrator must have committed violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture. The evidence collected by human rights organizations as well as the media reveals reasonable grounds to believe that top government officials ordered members of the Sri Lankan military forces to kill persons, captured by them during the fighting. Moreover it is believed that the execution of several LTTE leaders, wanting to surrender, was ordered and conducted by Sri Lankan military forces. There is further evidence mounting to suggest that civilians were victims of murder, such as footage showing the execution of several naked and handcuffed men. Further investigations are necessary to reveal the circumstances of the deaths of several LTTE leaders, who were allegedly shot when they surrendered. Investigations would also be able to collect more of the footage and pictures taken by many soldiers on the battlefield.

### 1.2 Outrages upon personal dignity

The perpetrator committed outrages upon personal dignity, in particular humiliating and degrading treatment.

This requires that the perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons. Person thereby includes also dead persons. This element takes into account relevant aspects of the cultural background of the victim. Further, the severity of the humiliation, degradation or other violation must have been of such a degree as to be generally recognized as an outrage upon personal dignity.

Finally, the perpetrator was aware of the factual circumstances that established this status. Positive knowledge or the obligation to have known<sup>323</sup> of the underlying facts is required to establish this mental element. There is no requirement of a specific discriminatory intent.

In the camps the inmates had to stand for hours in line for water and food distribution, insufficient medical treatment was provided. Female inmates or captured LTTE suspects had to undress and to walk naked before male guards. Girls and women were also forced to wash themselves in public places where they were exposed to soldiers. This treatment amounts to outrages upon personal dignity.

### 1.3 Taking of hostages

The requirements are, that the perpetrator seized, detained, or otherwise held hostage one or more persons and threatened to kill, injure or continue to detain such person or persons. Further, the perpetrator intended to compel a State, an international organization, a natural or legal person or a group of persons to act or refrain from acting as an explicit or implicit condition for the safety or the release of such person or persons. Such person or persons were either hors de combat, or were civilians, medical personnel or religious personnel taking no active part in the hostilities. The perpetrator was aware of the factual circumstances that established this status.

<sup>&</sup>lt;sup>323</sup> Cf. ICTR, *Akayesu* Trial Judgement, paras. 12, 179, 182.

The LTTE, in particular, is alleged to have committed the war crime of taking hostages. The LTTE forced civilians to stay close to the battlefield and not to flee in order to shield behind them. People who tried to flee were shot by LTTE members. Young men and children under the age of 18 were abducted and forced to fight for the LTTE. The pressure and threat the LTTE exercised during the conflict on the Tamil population and especially those who wanted to leave the conflict zone constitute a constant behavioral pattern. Investigations would be able to collect much more evidence on the use of child soldiers. Since most of the LTTE leaders were killed in the last days of the conflict, investigations would also have to focus on who can still be held accountable on LTTE side.

#### 1.4 Executions

This crime requires the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

The extrajudicial killings of surrendered LTTE leaders, which are already addressed under the war crime violence to life, also apply here. The killing of surrendered and captured people constitutes a war crime. Only a competent tribunal can judge on allegations made against captured persons such as LTTE fighters or leaders. Also the incarceration of civilians in the detention camps can be seen as a form of pre-trial punishment, as allegedly all inmates are under general suspicion of being related to the LTTE. Even one year after the end of the conflict, some 80,000 remain in the camps. Some camps seem to be built for a longer internment than just several months, although it is contrary to international law to detain people without a legal review of their case.

### 2. Article 8 (2) (e) ICC Statute

Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in Article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;

(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;

(viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;

### 2.1 Directing attacks against the civilian population

The violation of certain rules relating to the protection of the civilian population is defined as a war crime. This crime requires that the perpetrator intentionally directed attacks against the civilian population as such or against individual civilians not taking direct part in hostilities.

Article 8(2)(e)(i) ICC Statute is largely based on Article 13(2) of Additional Protocol II that prohibits attacks against a civilian population as such or individual civilians in non-international conflicts.

International Humanitarian Law requires that combat operations be conducted in accordance with the principles of distinction and proportionality.<sup>324</sup> It is generally recognized that most of the rules laid down in Additional Protocol I to the Geneva Conventions constitute customary international law. The humanitarian law principle of distinction requires parties to the conflict to distinguish between military and civilian objects.

Material Element 2 requires that the object of the attack was a civilian population as such or individual civilians, not taking direct part in hostilities. Civilians taking direct part in hostilities lose their immunity from attack. According to Additional Protocol I Article 50, civilians and civilian population is defined as:

(1) A civilian is any person who does not belong to one of the categories of persons referred to in Article 4(1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.

(2) The civilian population comprises all persons who are civilians.

(3) The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.

In relation to the presence of combatants in a civilian population, the Appeals Chamber of the ICTY in the Galic case held that this did not necessarily change the fact that the ultimate character of the population remains, for legal purposes, a civilian one. If the population is indeed a "civilian population"<sup>325</sup>, then the presence of combatants within that population does not change that characterization.<sup>326</sup>

The Mental Element requires that the perpetrator targeted the civilian population as such or individual civilians who were not taking direct part in the hostilities. Article 30 ICC Statute applies here. The crime thus demands that the perpetrator intended to direct an attack (Article 30 (2)(a)) and that he intended the civilian population to be the object of the attack. The latter intent requirement also appears to be an application of the default rule contained in Article 30. In this particular case the standard of sub-paragraph (2)(b) applies, i.e. the perpetrator means to cause the consequence or is

<sup>&</sup>lt;sup>324</sup> Additional Protocol I Article 51(2) and Additional Protocol II Article 13(2) both state in part: "The civilian population as such, as well as individual civilians, shall not be the object of attack." Moreover Additional Protocol I refers in Article 51 to indiscriminate attacks and to five forms of such attack, all of which are prohibited:

<sup>(1)</sup> those which are not directed at a specific military objective (51(d)(a));

<sup>(2)</sup> those which employ a method or means of combat which cannot be directed at a specific military objective (51(d)(b));

<sup>(3)</sup> those which employ a method or means of combat the effects of which cannot be limited (51(4)(c));

<sup>(4)</sup> an area attack treating separate and distinct military objectives in an area containing a concentration of civilians as a single military objective (51(5)(a)); and

<sup>(5)</sup> an attack which may be expected to cause incidental civilian casualties or civilian property damage disproportionate to the expected military advantage.

In addition Additional Protocol I contains several grave breach provisions related to unlawful attacks, including: Making civilians the object of attack (85(3)(a)) and, launching an indiscriminate attack in the knowledge it will cause disproportionate civilian casualties or civilian property damage (85(3)(b)). By contrast, Additional Protocol II has no provisions related to unlawful attacks beyond the phrase in Article 13(2) quoted above. <sup>325</sup> See ICTY, *Galic* case, para 56, 60.

<sup>&</sup>lt;sup>326</sup> See also ICTY, D. Milosevic Trial Chamber and Appeals Chamber judgments.

aware that it will occur in the ordinary course of events. On the basis of these sources, one might argue that the willfulness of the conduct may be inferred from the fact that the necessary precautions (i.e. the use of available intelligence) were not taken before and during an attack.

The Sri Lanka Army conducted military operations in densely populated areas. Although it established so called safe areas, it bombarded these areas. Whether some of the shelling attacks were conducted by the LTTE would be a task for an investigation into these incidents. Whether it was the army's intention to attack the civilians is questionable, as it is argued they were only targeting LTTE fighters, who were hiding in these areas. However the attacker must have been at least aware that civilians might get injured as a consequence of the act. The majority of the civilians was not actively taking part in hostilities and therefore constituted a civilian population. Moreover it can be manifested that cluster munitions was used by the Sri Lanka Army. The use of cluster bombs is indiscriminate in densely populated areas. Whereas they can be used in order to target a bigger area such as a military base, they are not appropriate when targeting individuals or smaller objects. The shelling of the safe zones, especially with cluster bombs, constitutes therefore a clear breach of the principle of distinction.

### 2.2 Attacks on buildings and personnel using the distinctive emblems of the Geneva Conventions

The first material element requires that the perpetrator attacked one or more persons, buildings, medical units or transports or other objects using, in conformity with international law, a distinctive emblem or other method of identification indicating protection under the Geneva Conventions. The term 'attack' is defined in Article 49(1) of Additional Protocol I and means acts of violence against the adversary, whether in offence or in defense. There are no indications that the notion of attack has a divergent meaning in non-international armed conflict from its meaning in international armed conflicts. <sup>327</sup> The Conventions and their Additional Protocols authorize the use of three emblems: the red cross, the red cressent, and the red lion and sun on a white background. <sup>328</sup> They shall be respected in all circumstances.

The second material element requires that the perpetrator intended such persons, buildings, units or transports or other objects so using such identification to be the object of the attack.

Video footage and pictures as well as witness accounts prove that attacks on persons, buildings, medical units and transports, using the red cross did occur. Hospitals, which had painted huge red cross signs in the roofs, were bombarded. Up to now, the origin of the attacks cannot be identified with certainty. Witness accounts maintain that the shelling came from government troops as well as LTTE forces. Though the government accused the LTTE of also hiding in hospitals, the hospitals would not lose their civilian character, as there were always civilians in the hospitals that were bombarded. Investigations are therefore essential to determine where the attacks were launched from and by whom.

### 2.3 Attacks on humanitarian aid workers and humanitarian operations

This crime requires that the perpetrator intentionally directed attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission

<sup>&</sup>lt;sup>327</sup> Regarding the notion of 'attack', the ICRC Commentary states: 'Protocol I defines attacks. This term has the same meaning in Protocol II'. *S. Junod*, in: Sandoz, Swinarski and Zimmerman, in: *Dörmann*, p.448. See also *Solf*, in: Bothe, Partsch and Solf, in: Dörmann, p. 448. The concept of 'attack' as defined in Additional Protocol I refers to the use of armed force to carry out a military operation during the course of an armed conflict. The terms 'offence' and 'defence' must therefore be understood independently from the meaning attributed to them by the law regulating the use of force under the UN Charter (i.e. *jus in bello and jus ad bellum*). *Dörmann*, pp. 350-351.

<sup>351.
&</sup>lt;sup>328</sup> Article 38 of Geneva Convention I, Article 41 of Geneva Convention II, Article 8(1) of Additional
Protocol I, and Article 12 of Additional Protocol II. Under current rules, only one of the distinctive emblems can
be used by a State and its National Society. The *red lion and sun* emblem has not been in use since 1980,
according to a diplomatic note to the ICRC from the Islamic Republic of Iran, dated 4 September 1980.

in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict.

The object of the attack must have been personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations. There is no specific definition of a humanitarian assistance mission in international humanitarian law, nor is it clear what standards apply to this generic category which covers diverse phenomena. It is submitted that humanitarian assistance refers primarily to relief assistance (i.e. assistance to prevent or alleviate human suffering of victims of armed conflict).

The perpetrator intended such personnel, installations, material, units or vehicles so involved to be the object of attack. The wording of this mental element is a close reproduction of the Statute. It is an *additional* mental element to the general mental element provided in article 30 of the Statute.

The attacks on the UN convoy and food distribution center on 24 January 2009 in PTK constitute attacks on a humanitarian operation. Several witness accounts maintain that the attacks came from government troops. In particular, the report by the International Crisis Group "War Crimes in Sri Lanka" contains some good evidence to prove the attack.<sup>329</sup> Attacks like these might be easier to investigate since international staff was involved. Such people would be able to testify under less threat than witnesses from the region and are more accessible to those outside Sri Lanka. As the ICG report shows, focus should be put on single incidents, for which good and reliable evidence exists. These single cases could then frame the ground for prosecutions and stand as representative examples for the events that occurred in this conflict.

### 2.4. Attacks on hospitals and churches

This crime does not require any specific damage to protected buildings. It includes intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives

The object of the attack must have been one or more buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals or places where the sick and wounded are collected, which were not being used to fulfill military objectives. Article 16 AP II of the GC prohibits the commission of hostile acts against places of worship.<sup>330</sup> Religious objects such as churches do therefore fall under this Article. There is only one specific rule in International Humanitarian Law according protection for hospitals and places where the sick and wounded are collected, which is applicable to internal armed conflicts. According to Article 11 AP II medical units and transports shall be respected and protected at all times and shall not be the object of attack.<sup>331</sup>

While certain objects such as schools, hospitals or places of worship are in principle civilian objects, they are not immune from direct attack if they are being used to commit hostile acts. According to Article 11 (2) AP II GC the protection to which medical units and transports are entitled shall not cease unless they are used to commit hostile acts, outside their humanitarian function. Protection may however cease only after a warning has been given, setting, whenever appropriate, a reasonable time-limit, and after such warning has remained unheeded. The objects listed in Article

<sup>&</sup>lt;sup>329</sup> See in detail International Crisis Group, supra note 190, at 10 et seq.

<sup>&</sup>lt;sup>330</sup> Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, it is prohibited to commits any acts of hostility directed against historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples, and to use them in support of the military effort.

Art 11. Protection of medical units and transports

<sup>1.</sup> Medical units and transports shall be respected and protected at all times and shall not be the object of attack.

<sup>2.</sup> The protection to which medical units and transports are entitled shall not cease unless they are used to commit hostile acts, outside their humanitarian function. Protection may, however, cease only after a warning has been given, setting, whenever appropriate, a reasonable time-limit, and after such warning has remained unheeded.

8(2)(e)(iv) are hence only protected provided they are not military objectives.<sup>332</sup> Article 52(2) AP I applies in this case too.<sup>333</sup>

The perpetrator intended such building or buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals or places where the sick and wounded are collected, which were not being used to fulfill military objectives, as the object of the attack.

From the evidence collected about the repeated attacks on hospitals, it can reasonably be argued that also this specific war crime was committed. As in other shelling incidents, it has to be established who is responsible for each single shelling incident. Therefore, further investigations are needed.

#### 2.5 Gender crimes

According to Article 7 (2) (e) (vi) acts of war crimes include committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in Article 7, paragraph 2 (f)  $\dots$  and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions.

Article 7 (1) (g) and Article 8 (2) (e) (vi) ICC Statute contain almost the same material and mental elements for gender crimes. Except for the context of the act, the elements of crimes are completely identical. For the act of sexual violence it is necessary to constitute a serious violation of Article 3 common to the four Geneva Conventions.

As these crime are already discussed in the section on crimes against humanity, (especially Article 7 (2) (f) ICC Statute), a detailed analysis will be omitted here.

# 2.6 Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities

Although it was often linked to the LTTE, there is currently not enough evidence on the commission of this crime on the side of the LTTE in the last months of the conflict. Thus a detailed analysis will be omitted here. However, various reports point to a pattern by the LTTE of enlisting children during the conflict within the last decades.<sup>334</sup>

## 2.7 Displacement of the civilian population

This crime requires ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand. The perpetrator must have actually ordered the displacement. Only acts that are directly aimed at removing the respective civilian population from a given area are prohibited.

<sup>&</sup>lt;sup>332</sup> Art 52. General Protection of civilian objects

<sup>1.</sup> Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.

<sup>2.</sup> Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

<sup>3.</sup> In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.

<sup>&</sup>lt;sup>333</sup> It was used in Article 2(6) of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II to the 1980 Convention as amended on 3 May 1996) and more recently in Article 1(16) of the Second Protocol to the Hague Conventions.

<sup>&</sup>lt;sup>334</sup> See e.g. the latest considerations of the Committee on the Rights of the Child, CRC/C/OPAC/LKA/1, 15 February 2010.

For a transfer of civilians to be lawful, it is necessary to show either that the transfer was voluntary or that the evacuation was ordered in response to two circumstances; namely when the safety of the population or imperative military reasons so demand. Circumstances falling under those exceptions include situations where an area is endangered as a result of military operations or is liable to be subjected to intense bombardment, or where the presence of civilians hampers military operations.

Military necessity requires the most meticulous assessment of the circumstances. In this case, military necessity is qualified by referring to 'imperative military reasons'. The situation should be scrutinized most carefully, as the adjective 'imperative' reduces to a minimum of cases in which displacement may be ordered. Imperative military reasons cannot be justified by political motives. It would be prohibited to, for example, move a population in order to exercise more effective control over a dissident ethnic group.<sup>335</sup>

The perpetrator must have been in a position to effect such displacement by giving such order. This element requires the authority or power of the perpetrator to order the displacement.

It might have been necessary to move the civilian population into security zones in order to protect them from attacks, but it is questionable whether it was the intent of the army to protect the civilians as they subsequently attacked the security zones. Moreover it is questionable whether the mass internment of Tamil civilians in detention camps was a military necessity and to the benefit of the security of the people. As it was shown under the crimes against humanity, there was no military necessity to move the population to such an extent in no fire zones and camps.

### **D.** Conclusions

It can be maintained that most likely the following war crimes have been committed: violence to life and person, committing outrages upon personal dignity, taking of hostages, intentionally directing attacks against civilians, humanitarian operations, schools and hospitals.

It can further be established that the alleged crimes were committed in the context of an armed conflict. The perpetrators were most likely aware of the armed conflict and of the nexus between the crimes they committed and the conflict.

Further investigations are essential to establish evidence regarding single incidents. Exact times and places of attacks must be examined as well as individuals responsible for the commission of single crimes. Only then, single war crimes can be embedded in a broader framework which might lead to further higher-ranking person responsible for the commission of these crimes.

## III. Article 6 of the ICC Statute: Genocide

### A. General requirements of the crime

Article 6 ICC Statute, the crime of genocide, reads as follows:

For the purpose of this Statute, 'genocide' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

<sup>&</sup>lt;sup>335</sup> S Junod, in: Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), in: Dörmann, p. 474.

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

Common elements of Article 6 ICC Statute hence include that the acts in question must be committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such.

## 1. Victims belonged to a particular national, ethnical, racial or religious group

The crime of genocide requires a group classification of the victims of the crime. Such a group can be national, ethnical, racial or religious, but not political. There are two approaches acknowledged in international jurisprudence to classify a group: First by an objective nature, second by a group's self-perception or its perception by others.<sup>336</sup>

The Tamil population in northern Sri Lanka does form such a group. Their ethnical composition distinguishes them from other groups living in the region and the country.

# 2. The perpetrator intended to destroy, in whole or in part, that national, ethnical or religious group as such.

The most important requirement of the crimes of genocide is the *special intent to destroy*. Often, a conviction for the commission of the crime of genocide fails because a special intent to destroy cannot be proven without any reasonable doubt. The destruction of the group must be the perpetrators (preliminary) goal. The intent must be directed to achieve this goal. Genocide cannot be committed by an individual perpetrator as accompanying crime to other crimes such as persecution or the forced displacement of groups.

Without intense and highly professional investigations it is not possible to establish such a special intent. Documents, speeches, internal memoranda as well as witness statements about internal meetings and talks are necessary to prove such intent. Often suspected persons did not make public statements or signed documents, which would prove their special intent to destroy a certain group of people within an armed conflict.

# 3. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.

The conduct took place in the context of a manifest pattern of similar conduct. Also the crime of genocide requires a certain pattern. As war crimes and crimes against humanity are often committed by a state policy or in a systematic manner, the crime of genocide requires a certain pattern. Single acts by individuals with the aim to destroy a group a not sufficient. Thus, other crimes such as persecution or forced displacement of groups can be part of the crime of genocide. The conduct must be of a nature that would allow for the destruction of an entire group of people. This requirement sets another high standard on the commission of the crime of genocide.

## **B.** Specific elements of crimes of Article 6 (Genocide)

The material elements of the crime of genocide will not be analyzed here in detail, as currently not enough evidence can be provided to corroborate these acts.

<sup>&</sup>lt;sup>336</sup> Werle, supra note 223, Rn. 573.

Professor Boyle, University of Illinois College of Law, views the Sri Lankan government's crimes of murder, torture, the attempt of extermination and persecution to have been motivated by the doctrine of Lebensraum. He believes that the future survival of the Tamil culture in Sri Lanka is in peril.<sup>337</sup> Martin Shaw also questions whether the Sri Lankan government was on the verge of attempting genocide. He contrasts the idea of "rolling" genocide, applied by Madeleine Albright to describe the Sudanese campaign in Darfur with the "volcanic" genocide in Rwanda.<sup>338</sup> He continues, however, by contemplating that in many cases there may be genocidal "moments" (as the genocide historian, Dirk Moses, has suggested of colonialism) in stories of oppression - decades or even centuries long - which do not, taken as a whole, constitute processes of genocide.<sup>339</sup>

At the moment, some facts point to the fulfillment of acts constituting the material element of genocide. However, one of the most decisive elements regarding the crime of genocide is the special intent with which the material element must be fulfilled. Without investigations by a competent authority and focusing especially on this mental element, a determination about the commission of the crime of genocide is not possible. It is decisive whether the commission of the crimes was driven by the overall aim to destroy the Tamil population in northern Sri Lanka in total. As said regarding the commission of the other crimes, a thorough investigation is essential to confirm suspicions.

<sup>&</sup>lt;sup>337</sup> Tamil Net, www.tamilnet.com/art.html?catid=13&artid=29515.

<sup>&</sup>lt;sup>338</sup> Open Democracy, www.opendemocracy.net/article/sri-lanka-camps-media-genocide.

<sup>&</sup>lt;sup>339</sup> See A Dirk Moses ed., *Empire, Colony, Genocide: Conquest, Occupation, and Subaltern Resistance in World History*, Berghahn, 2008.

### IV. Individual criminal responsibility

Each act committed must be attributable to a person beyond any reasonable doubt to reach a conviction. There are different forms of perpetration of a crime and of participation in the commission of a crime possible, generally depending on the extent to which the individual was involved in the planning, the ordering and the commission of the act itself. In regard to higher ranking persons within an army or administration, special forms of attribution of a criminal act to the individual are possible under international criminal law. The so-called command responsibility focuses on the conduct of the persons in charge, not the individual which exercise the act on the ground. The following section deals with the requirements for individual criminal responsibility. However, it is too early to establish individual accountability. Investigations under international standards are essential to gather evidence especially on the mental element of each individual involved in the commission of crimes.

### A. Individual criminal responsibility

Article 25 of the Rome Statute on individual criminal responsibility reads as follows:

"The Court shall have jurisdiction over natural persons pursuant to this Statute.

A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.

In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

(ii) Be made in the knowledge of the intention of the group to commit the crime;

(e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;

(f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law."

There are different forms possible regarding the commission of and participation in a crime. In situation of systematic crimes committed by police or military, the form of committing a crime through another person often occurs. It is acknowledged in international law that this form of commission can be based on the mere organizational power within the system. Individuals, who exercise the power to organize the pattern of crimes that were later committed, can be held criminally liable as perpetrators. These perpetrators can usually be found in the civil administration, in certain ministries such as the ministry of defense or the office of the president. Regarding the situation in Sri Lanka, investigations are essential to reveal organizational structures and especially the process and competence of certain offices within different ministries. The testimony of witnesses, which worked in some of these offices or were close to them, would be one key element to attribute governmental decisions to individual persons. A special focus on Provincial Councils and Districts in or around the conflict zone is needed. Further, a link from the provinces to the capital with the central government should be examined and investigated too.

#### **B.** Command responsibility

Article 28, headlined responsibility of commanders and other superiors, reads as follows:

"In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution."

Command responsibility addresses military commanders as well as civilian superiors. In contrast to individual criminal responsibility as described above, command responsibility takes the role of persons in the background, which are not present on the battlefield or even the conflict zone, into account. These persons, which have the power to stop the commission of crimes or at least to bring those perpetrators to justice, must do so to avoid their own criminal responsibility. Excesses by

troops on the ground must thus be addressed by their superiors as soon as they know about the commission.

Regarding the situation in Sri Lanka, investigations are essential to determine which person knew about the crimes committed and was in power to stop them but failed to do so. Again, the testimony of witnesses, which worked in some of the governmental or regional offices or were close to them, would be one key element to establish the willful omission of individuals to stop the commission of crimes. In situation, where a direct order by a military commander is difficult to prove, the failure of the commander to prevent or repress the commission of crimes by his unit could be investigated. Hence, a special focus could be put on military commanders of the different divisions of the Sri Lanka army. In the first position investigations should address the role of the four Major Generals in the conflict zone, followed by the conduct of the thirteen battle field commanders. Other higher or lower positions within the Sri Lanka Army might have been involved as well as. Once a certain level within a military hierarchy is investigated, evidence on the role and conduct of other levels is often revealed.

The publicly available information at this stage does not allow for attribution of single incidents to individuals in the hierarchy of military or civilians structures in Sri Lanka. However, there are numerous facts calling for a genuine investigation of these structures to provide for more information about the role of single persons and offices within this structure.

### PART THREE: PROSPECTS OF ACCOUNTABILITY

### **I. Domestic accountability**

There is a long-lasting culture of impunity in Sri Lanka. Several national commissions were established during the conflict, but none of them produced valuable results.<sup>340</sup> Human Rights Watch summarized this as follows:

"These include, among others, eight separate presidential commissions of inquiry established between 1991 and 1998 specifically devoted to investigating enforced disappearances; a commission of inquiry into the alleged establishment and maintenance of an unlawful detention and torture facility in 1995; a commission of inquiry into the killing of 27 Tamil inmates of the Bindunuwewa Rehabilitation Centre on in October 2000; and in 2001, the Presidential Truth Commission on Ethnic Violence covering events of 1981-1984. The Sri Lankan Human Rights Commission also appointed a special committee to investigate reported enforced disappearances in Jaffna between 1990 and 1998. These Commissions investigated tens of thousands of complaints. The "disappearance" commissions alone received nearly 30,000 complaints (including some duplicates) and recorded evidence in over 20,000 of these cases; another 16,305 cases remain uninvestigated. They identified thousands of alleged perpetrators and recommended legal action, along with reparations to victims and legal reforms to prevent future violations.

Reports of most of these commissions were published, and although some families received monetary compensation, most recommendations made by these commissions were never implemented. There were few prosecutions of those named in the reports, and even fewer convictions. Hundreds of security personnel indicted as result of commission findings were returned to active duty by the Inspector General of Police in 2001.

During the administration of current President Mahinda Rajapaksa there has been a surge in abuses by both government security forces and the LTTE, including laws of war violations such as the murder of 17 aid workers in August 2006. This has created pressure for new investigatory bodies. Set up with much fanfare in November 2006 to examine 16 high-profile cases, the Presidential Commission of Inquiry with international participation has held public hearing in only four cases, and none of the commission's findings have been released to the public. Other special bodies set up in recent years have likewise brought few results and no prosecutions.<sup>341</sup>

The 2006 Commission of Inquiry was accompanied by the so called International Independent Group of eminent Persons. The group was invited by President Rajapaksa to react to growing pressure especially from the UN High Commissioner for Human Rights. However, the IIGEP finished its work without any results, since it was not able to perform its mandate to observe the national commission due to a lack of cooperation by the Sri Lankan Government.<sup>342</sup>

In 2010, the Sri Lankan Government announced the appointment of another commission. The so called Commission on Lessons Learnt and Reconciliation is meant to – according to the government – investigate the allegations of abuse of international norms of conduct in the end of the conflict. The commission was welcomed by the US State Department, regardless of all the efforts and results commissions in Sri Lanka produced before. Human Rights Groups criticized this renewed attempt by the Sri Lankan Government to overcome international pressure by establishing another commission

<sup>&</sup>lt;sup>340</sup> Amnesty International, Twenty Years of Make-Believe, June 2009; International Crisis Group, SRI LANKA'S JUDICIARY: POLITICISED COURTS, COMPROMISED RIGHTS, Asia Report N°172 – 30 June 2009; International Bar Association Human Rights Institute Report: Justice in retreat – A report on the independence of the legal profession and the rule of law in Sri Lanka, May 2009; International Commission of Jurists, Post-War Justice in Sri Lanka, January 2010.

<sup>&</sup>lt;sup>341</sup> Human Rights Watch, www.hrw.org/en/news/2009/04/27/q-accountability-violations-internationalhumanitarian-law-sri-lanka, April 27, 2009.

<sup>&</sup>lt;sup>342</sup> IIGEP Final Report, 15 April 2008.

with little or no value.<sup>343</sup> However, having in mind the experience of the last decades, there is no expectation or realistic chance for any slight progress in this commission.

It is not a problem in legislation and the laws of Sri Lanka. The problem lies in the access to justice and the general approach of the Sri Lankan judiciary to investigate war crimes and human rights violations.

# <u>II. International accountability: relevant international human rights treaties and conventions and their enforcement mechanisms</u>

Compared to other situations, where allegation of war crimes and grave human rights violations were made, an independent international commission of inquiry or a fact-finding mission would be a first step that could be taken by the international community. In the past, it was the UNSC, which mandated the Commission of Inquiry on Darfur, and the UNHRC, which mandated an independent international fact-finding mission on Gaza. Since April 2009, groups have been continuously calling for an independent international investigation.<sup>344</sup>

## A. UN Human Rights Council

The UN High Commissioner for Human Rights called for a commission of inquiry in May 2009. However, the first resolution by the UNHRC after the end of the conflict did not follow this suggestion, but instead reaffirmed the principle of non-interference in the domestic jurisdiction of states.<sup>345</sup>

Regarding Gaza, the UNHRC established an independent international fact-finding mission to investigate all violations of international human rights law and international humanitarian law.<sup>346</sup>

The fact-finding mission led by Richard Goldstone reported back and recommended inter alia the UNHRC should request the UN SecGen to bring its report to attention of the UNSC. Further it, recommended:

" (...) that the Security Council should require the Government of Israel, under Article 40 of the Charter of the United Nations:

(i) To take all appropriate steps, within a period of three months, to launch appropriate investigations that are independent and in conformity with international standards, into the serious violations of international humanitarian and international human rights law reported by the Mission and any other serious allegations that might come to its attention;

(ii) To inform the Security Council, within a further period of three months, of actions taken, or in process of being taken, by the Government of Israel to inquire into, investigate and prosecute such serious violations;

(b) The Mission further recommends that the Security Council should at the same time establish an independent committee of experts in international humanitarian and human rights law

<sup>&</sup>lt;sup>343</sup> BBC, Commission on Lessons Learnt and Reconciliation,

www.bbc.co.uk/sinhala/news/story/2010/05/100517\_humanrights.shtml.

<sup>&</sup>lt;sup>344</sup> Human Rights Watch, www.hrw.org/en/news/2009/04/20/sri-lanka-protect-civilians-final-attack;

www.timesonline.co.uk/tol/news/world/asia/article6329717.ece, May 21, 2009, Battle begins to establish UN Sri Lankan war crimes investigation.

<sup>&</sup>lt;sup>345</sup> www.hrw.org/en/news/2009/05/27/sri-lanka-un-rights-council-fails-victims, Member States Ignore Need for Inquiry Into Wartime Violations, May 27, 2009.

<sup>&</sup>lt;sup>346</sup> A/HRC/S-9/2, para. 14.

to monitor and report on any domestic legal or other proceedings undertaken by the Government of Israel in relation to the aforesaid investigations. Such committee of experts should report at the end of the six-month period to the Security Council on its assessment of relevant domestic proceedings initiated by the Government of Israel, including their progress, effectiveness and genuineness, so that the Security Council may assess whether appropriate action to ensure justice for victims and accountability for perpetrators has been or is being taken at the domestic level. The Security Council should request the committee to report to it at determined intervals, as may be necessary. The committee should be appropriately supported by the Office of the United Nations High Commissioner for Human Rights;

(c) The Mission recommends that, upon receipt of the committee's report, the Security Council should consider the situation and, in the absence of good-faith investigations that are independent and in conformity with international standards having been undertaken or being under way within six months of the date of its resolution under Article 40 by the appropriate authorities of the State of Israel, again acting under Chapter VII of the Charter of the United Nations, refer the situation in Gaza to the Prosecutor of the International Criminal Court pursuant to article 13 (b) of the Rome Statute;

(d) The Mission recommends that the Security Council should require the independent committee of experts referred to in subparagraph (b) to monitor and report on any domestic legal or other proceedings undertaken by the relevant authorities in the Gaza Strip in relation to the aforesaid investigations. The committee should report at the end of the six-month period to the Security Council on its assessment of relevant domestic

proceedings initiated by the relevant authorities in Gaza, including their progress, effectiveness and genuineness, so that the Security Council may assess whether appropriate action to ensure justice for victims and accountability for perpetrators has been taken or is being taken at the domestic level. The Security Council should request the committee to report to it at determined intervals, as may be necessary;

(e) The Mission recommends that, upon receipt of the committee's report, the Security Council should consider the situation and, in the absence of good-faith investigations that are independent and in conformity with international standards having been undertaken or being under way within six months of the date of its resolution under Article 40 by the appropriate authorities in Gaza, acting under Chapter VII of the Charter of the United Nations, refer the situation in Gaza to the Prosecutor of the International Criminal Court pursuant to article 13 (b) of the Rome Statute;"<sup>347</sup>

## (...)

"To the international community,

(a) The Mission recommends that the States parties to the Geneva Conventions of 1949 should start criminal investigations in national courts, using universal jurisdiction, where there is sufficient evidence of the commission of grave breaches of the Geneva Conventions of 1949. Where so warranted following investigation, alleged perpetrators should be arrested and prosecuted in accordance with internationally recognized standards of justice;<sup>3348</sup>

Similar recommendations could be an aim regarding Sri Lanka. However, to reach these conclusions and to bring the situation to the UNSC, the UNHRC must establish such a fact-finding mission.

It remains to be discussed whether states - regardless whether European or from the non-aligned movement - are approachable and open to support the adoption of a resolution establishing a fact-

<sup>&</sup>lt;sup>347</sup> A-HRC-12-48, para. 1969.

<sup>&</sup>lt;sup>348</sup> A-HRC-12-48, para. 1975.

finding mission in the UNHRC. Some states support the warfare of the Sri Lanka Army and are even asking for trainings to apply the same methods in their country.<sup>349</sup>

### **B. UN Security Council**

The UN Security Council is another option, although the armed conflict ceased more than one year ago and the UNSC deals according to the UN Charter only with threats and breaches of peace and security. Nevertheless, a conflict is still on-going, and especially accountability and reconciliation issues are of utmost importance for future peace and security. Previous inquiry commissions have already been established during an armed conflict. The establishment of the Darfur Commission of Inquiry as well as later the referral of the Darfur situation to the International Criminal Court happened during the on-going conflict in Darfur. Also the establishment of the ICTY in 1993 arose during the conflict in former Yugoslavia.

Slightly different is the situation regarding the establishment of the ICTR. While the genocidal acts happened within less than four months, in the last weeks of the commission of these crimes the UNSC set up an impartial commission of experts.<sup>350</sup> Their report led to the establishment of the ICTR in November 1994, at the time, the conflict ceased. It has to be noted, that first steps were undertaken in the course of the events. This point in time was missed in the conflict in Sri Lanka. Further, an ad hoc tribunal is quite expensive and states do not seem willing to invest anymore in these types of tribunals, since the permanent International Criminal Court was established. This is the reason why one could argue, instead of creating an ad hoc tribunal as in the case of Rwanda, a referral to the ICC would be the preferable option. The SC could with this step also give the burden of investigating the situation in Sri Lanka to the Office of the Prosecutor of the ICC instead of dealing with the matter itself by establishing its own international investigation commission.

China and Russia would be the two key states involved in adopting a resolution referring the situation to the ICC, but the USA would also be crucial regarding their hesitance towards the Court. Looking back at the resolution referring the Darfur situation to the ICC in 2005, two of the permanent Five abstained in voting (China and USA).<sup>351</sup> To reach a similar vote on Sri Lanka, international pressure on SC members must be so strong that they abstain from voting against a referral resolution.<sup>352</sup>

## C. UN Secretary General (UNSecGen)

Finally, UNSecGen Ban Ki-Moon established a panel of experts to advise him on accountability issues.<sup>353</sup> Compared to other situation, such a panel is insufficient to conduct fact-finding. Nevertheless, it might open the door for further steps. At the moment it appears as the only open door within the UN system to continue the demands for investigations in Sri Lanka. The UNSecGen must then take up the opportunity once the expert panel reports to him to set up a fact-finding mission. Such

<sup>&</sup>lt;sup>349</sup> Telegraph, Sri Lanka to train Pakistani army to fight Taliban, 21 August 2009, www.telegraph.co.uk/news/worldnews/asia/srilanka/6069018/Sri-Lanka-to-train-Pakistani-army-to-fight-Taliban.html.

<sup>&</sup>lt;sup>350</sup> Res. 935 (1994), 1 July 1994, para. 1.

<sup>&</sup>lt;sup>351</sup> UN press release, 31.3.2005, www.un.org/News/Press/docs/2005/sc8351.doc.htm.

<sup>&</sup>lt;sup>352</sup> Non-permanent Security Council members are at the moment: Austria, Bosnia and Herzegovina, Brazil, Gabon, Japan, Lebanon, Mexico, Nigeria, Turkey and Uganda.

<sup>&</sup>lt;sup>353</sup> Reuters, Rights experts to advise UN's Ban on Sri Lanka, 6 March 2010, www.alertnet.org/thenews/newsdesk/N0546358.htm.

a mission would strongly support him to bring the atrocities of the Sri Lankan conflict to the attention of the right bodies.

### **D. Judicial proceedings in third states**

Judicial proceedings in third states are not completely excluded. Some jurisdictions allow for prosecutions in third states. A couple of international treaties provide for jurisdiction over crimes in every state party to the treaty. For example the genocide convention enables all states to investigate and prosecute genocide, regardless of the state in which the acts were committed and regardless of the nationality of the perpetrator and victim. Furthermore, the duty to investigate is included in these treaties. Some states have introduced the principle of universal jurisdiction in their laws, e.g. many European states. This principle means that a state can investigate and prosecute any person responsible for certain crimes, such as war crimes, crimes against humanity, enforced disappearance or torture. Usually, these laws are accompanied by legislation requiring the presence of the alleged perpetrator on the territory of the state or similar issues. Further, the question of immunities plays a role regarding diplomatic personnel in Sri Lankan embassy around the globe as well as invited guests of a state. Nevertheless, persons going abroad e.g. for medical treatment or as asylum seekers do not enjoy immunity and could be a target. Further, in the long term there is no statute of limitations regarding the type of crimes described above.

It has to be noted that some perpetrators have double nationality. Therefore investigations in the countries of their citizenship are also an opportunity to initiate some form of investigations.

Finally, if some of the victims possessed the nationality of another state at the time the crime was committed, also this state could open investigations.

### **CONCLUSIONS**

The current situation regarding accountability in Sri Lanka is a well-known type of dilemma faced over the last two decades: There is information available on what happened in a country, but the government and other state authorities are trying to avoid by any means the revelation of this information before the international public. There is also sufficient evidence available that severe crimes were committed, not to mention the consensus that accountability is necessary for the transitional process to peace and rehabilitation in Sri Lanka. However, there is a lack of enforcement mechanisms to hold the responsible persons accountable. On the national level the government constantly refuses to take action or if it takes some kind of actions, it shields the perpetrators. On the international level, the International Criminal Court has no jurisdiction. Consequently, the UN is vital to initiate proceedings which could end impunity.

Every single state has a duty to investigate allegations of war crimes, crimes against humanity and genocide. The type of investigations needed is one which ensures compliance with international standards to secure evidence admissible for criminal prosecution. The focus must be on individual acts and attribution of acts to individuals. If single states do not or are not able to open investigations themselves, they must at least actively support and call for the initiation of investigations in international organs and fora.

Given the situations in other countries, the prosecution of severe crimes takes years or decades. However, trials on-going in Argentina 30 years after their commission or in Rwanda 15 years after the conflict strongly rely evidence obtained by investigations initiated much earlier. The initiation of investigations is important as soon as possible after the commission of a crime, even if the prospect of prosecution cannot yet be determined.