
Can Human Rights Monitoring Halt Abuses in Sri Lanka?

PHILIP ALSTON AND WILLIAM ABRESCH

INTRODUCTION

Since Norway stepped forward to play the thankless role of peace-maker between the government of Sri Lanka and the Liberation Tigers of Tamil Eelam (LTTE) some five years ago, the international community has generally dealt with Sri Lanka within a conflict resolution framework. As the prospects for peaceful settlement have faded, disengagement has become an increasingly tempting option. The human rights framework, however, grows only more relevant as war returns and more and more people are being disappeared or killed. The government and the LTTE each has a strong interest in avoiding international condemnation for human rights abuses. Both parties continue to commit such violations, however, counting on the fog of war—and the absence of human rights monitors—to avoid public accountability. Under these circumstances, international human rights monitoring would make a major contribution in exposing and halting the abuses committed on all sides. This would both provide some immediate protection to the population and help establish the conditions for a sustainable peace.

Philip Alston is John Norton Pomeroy Professor of Law at New York University School of Law and United Nations Special Rapporteur on extrajudicial, summary, or arbitrary executions. He visited Sri Lanka as Special Rapporteur in November and December 2005 and reported his findings to the Commission on Human Rights and the General Assembly. William Abresch is Director of the Project on Extrajudicial Executions at the Center for Human Rights and Global Justice of New York University School of Law. This article is written in their personal capacities.

The conflict in Sri Lanka is complex, but its outline may be briefly summarized. The LTTE began fighting the government in the late 1970s with the aim of establishing a state of Tamil Eelam in the north and east of the island. In February 2002, the government and the LTTE signed the Ceasefire Agreement (CFA) brokered by the government of Norway. The next few years saw few military confrontations between the parties, but numerous attacks on the civilian population repeatedly demonstrated the absence of peace. Matters became still more complicated when the LTTE's Eastern Province commander, Colonel Karuna, split with the LTTE leadership in March 2004, drawing perhaps one fourth of the LTTE's cadres into what is called the "Karuna group" and engaging in a low-intensity conflict with the LTTE.¹ The return to a broader war was more firmly marked by the major attacks on government forces that took place in late 2005, placing the CFA under unprecedented stress. No one took credit for most of these attacks, but they were generally presumed to be the work of the LTTE, the only group with the motive and means.

The war that is now in progress represents a startling escalation from the low-intensity conflict of the recent past, and historical and current indicators suggest the distinct possibility of further escalation. Until February 2002, the conflict-related death toll in Sri Lanka was roughly 100,000.² Before the ceasefire, governmental commissions of inquiry had documented over 16,000 forced disappearances. Leaving aside the conflict with the LTTE, there had been conflicts with and between other Tamil nationalist groups, two insurgencies by the Janathi Vimukthi Peramuna (JVP) had been suppressed with great violence, and the Indian Peace Keeping Force (IPKF) had come and gone. In many respects, the ceasefire represented substantial progress. From 2002 to 2005, when compliance with the CFA was fairly strong, killings powerfully intimidated political dissenters, but they were relatively few in number. But the rate of killings increased dramatically over 2006 and early 2007, resulting in several thousand deaths.³ In this context, it is important for the international community to look for new measures to halt this trend toward greater violence rather than opting for disengagement while hoping against hope for renewed compliance with the CFA.

In this article, we focus on one especially promising measure, the establishment of an international human rights monitoring mission in Sri Lanka led by the United Nations. The reader will surely note that this is an unexceptional recommendation coming as it does from human rights lawyers. Over the past decade, international monitoring has become almost a standard recommendation made by human rights groups. Establishing

a mission invariably requires a large expenditure of limited resources and political capital, however, and monitoring cannot always be the answer in complex situations. The question that arises is whether monitoring can work in a Sri Lanka at war. Our answer is that a large part of the conflict to date has played out in the form of human rights violations and that such abuses are susceptible to being deterred by international pressure. A successful mission would not only limit to some extent the human suffering caused by war, it could also make an important contribution to laying the groundwork for a sustainable peace.

.....
... a large part of the conflict to date has played out in the form of human rights violations and that such abuses are susceptible to being deterred by international pressure.

HUMAN RIGHTS AND INTERNATIONAL LEGITIMACY

If the role of human rights accountability in Sri Lanka is to be taken seriously, it is important to acknowledge that there is no necessary connection between such accountability—at least in the limited sense of publicly exposing violations and their perpetrators—and respect for human rights. Those who are shameless or thuggish may be undeterred by public exposure, and material rewards or physical coercion may be necessary to stop them. In such cases, human rights monitoring, however effective, would accomplish nothing but the documentation of unabated depravity. Some might argue that this is the case in Sri Lanka. When we visited Sri Lanka and asked what was needed to end the killings, an especially common response was that UN human rights monitoring was needed. But upon further pressing as to whether public knowledge that, for instance, the LTTE had killed a particular political opponent would prevent them from killing others, a common response was that it would not. Such respondents indicated that the perpetrators were thugs who enjoyed their reputations for violence and that, furthermore, large numbers of people already knew the facts of such killings. Initially, these two widespread strands of thought appeared to testify at once to the inadequacy of existing monitoring efforts and the futility of improving them. The truth, however, appears to lie somewhere in between. The government and the LTTE both care about their reputations for respecting human rights; however, human rights are not their only concern and are often subordinate to other priorities.⁴ The dynamics of the conflict in Sri Lanka push the parties in contradictory

directions—toward committing particular tactically or politically advantageous human rights violations, and toward developing a global reputation for showing respect for human rights. In what follows, we briefly sketch some reasons why the government and the LTTE are deterred, to some extent, by the exposure of their abuses.⁵

The dynamics of the conflict are driven by each party's interlocking concerns with the control of territory and the allegiance of people. Compared to most other non-state armed groups, the LTTE has proven remarkably effective at controlling territory. At various times, the LTTE has controlled most of the Jaffna peninsula, the remaining area of the north, and significant areas of the east. However, the east has higher economic value than the north, as it holds more fertile land and encompasses Trincomalee, one of the Indian Ocean's premier ports. The relative poverty of the north may be illustrated by noting that while remittances from abroad account for 18 percent of incomes nationwide and 24 percent of incomes in the east, they account for a much higher 37 percent of incomes in the north.⁶ A Tamil Eelam without the east, were it even viable, would be a deeply disappointing prize for Tamil nationalists. However, the LTTE is not as strong in the east as in the north, and it has been especially weak since the defection of Colonel Karuna. The LTTE is quite far from being able to control the cities of the east, much less from protecting its proposed borders, and it stands virtually no chance of seizing the Trincomalee harbor by military means.

Since the LTTE cannot conquer and hold all of what it considers Tamil Eelam, its hopes for autonomy or independence rest on persuading the domestic and international communities that its preferred outcome should be promoted on more idealistic grounds. The LTTE's principal argument is that the human rights of Tamils cannot be ensured under Colombo's rule. However, the LTTE itself has a problematic human rights record, which includes the use of killings to deter civilians from exercising freedoms of expression, movement, association, and participation in public affairs. The LTTE has long defended its role as the "sole representative" of the Tamil people by discouraging—on penalty of death—political activity by Tamils opposed to or even unaligned with the LTTE. High profile instances have included the assassinations of Neelan Thiruchelvam (a parliamentarian involved in constitutional reform), Lakshman Kadirgamar (then foreign minister), and Ketheshwaran Loganathan (deputy head of Sri Lanka's Peace Secretariat). While the LTTE has never claimed responsibility for these killings, unrefuted circumstantial evidence pointed to its responsibility in each case. Lower profile groups of civilians have also been targeted. Some are

regular people who have refused to give money to the LTTE, have tried to block the recruitment of their children, have been too outspoken, or have simply been in the wrong place at the wrong time. Civilians have also been targeted for supporting political parties opposed by the LTTE. In particular, members of certain Tamil groups—including Eelam People's Democratic Party (EPDP), Eelam People's Revolutionary Liberation Front (EPRLF), and People's Liberation Organisation of Tamil Eelam (PLOTE)—have been routinely targeted. These groups originated as militant groups fighting alongside the LTTE and, in some cases, subsequently sided with the IPKF, which was present from 1987 to 1990, or the government in fighting the LTTE. These rival Tamil groups have since entered into normal politics. The CFA required the government to disarm them completely. While compliance has not been perfect and some killings may have been motivated by the quest for military advantage, many killings appear to have been aimed only at preventing political activity by Tamils not affiliated with the LTTE. These killings have weakened international perceptions of the extent to which the LTTE represents all Tamils. As it stands, no outside observer could wish LTTE's rule on the entire Tamil community, much less on the Sinhalese and the Muslim populations in the east.

The government also faces obstacles to achieving a purely military victory and would most likely continue to face serious difficulties in monopolizing violence, even if it were given extensive military assistance and managed to retake the large areas of the north and east currently controlled by the LTTE. The government has few Tamil soldiers or police officers, limiting its ability to gather the intelligence necessary to stamp out what would be, at a minimum, continuous low-intensity conflict. Reliance on the Karuna group and its cadres' linguistic ability and local knowledge could compensate for this intelligence deficit to some extent, but relying on a group without any historical loyalty to the government would pose its own obvious risks. As it stands, the more fundamental problem for the government is that even if it were to retake the east or north, the Tamil population's faith in its good intentions would remain low, at least initially, setting the stage for renewed insurrection. With the military's record of human rights violations, it is unlikely that a large military presence could avoid provoking anger and violence. Many Tamils do not—and would not—believe that the government would protect their rights.

The widespread doubt among Tamils that the government is committed to protecting their rights is partly due to the nearly complete absence of convictions of government officials for killing Tamils. The last successful prosecution of which we are aware was that for the rape and

murder of Krishanthi Kumaraswamy, which resulted in the conviction of five soldiers and one policeman in 1998. Even in most of those cases that have been investigated and prosecuted, justice has seldom been achieved. The failure to convict anyone for the Bindunuwewa massacre is an example of this impunity.⁷ On October 25, 2000, 27 Tamil men were beaten, cut, and trampled to death by a mob while they were in the custody of approximately 60 police officers. That there was both state and individual criminal responsibility is undeniable and supported by multiple government reports.⁸ However, not a single person has been convicted of any crime related to the events at Bindunuwewa. Various explanations for this failure of justice have been offered: an inadequate police investigation led to insufficient evidence for conviction, judicial bias or corruption produced acquittals, or the complexity of the case forced the prosecution to rely on novel legal theories. Whatever the reason, the bottom line remains that this kind of outcome is all too consistent with fears that there is impunity for those who kill Tamils. Until the problem of impunity for violations of the rights of Tamils is overcome, any military victory will likely be short-lived and a lasting peace difficult, if not impossible, to negotiate.

The Sri Lankan government and the LTTE both recognize that achieving and maintaining international legitimacy grounded in respect for human rights is strategically important. Indeed, the human rights discourse is central to the parties' own understandings of the conflict's origins and conduct.

The Sri Lankan government and the LTTE both recognize that achieving and maintaining international legitimacy grounded in respect for human rights is strategically important.

..... Many Tamils, whether or not they support the LTTE, view the massacres of July 1983 ("Black July") as a legitimate cause for the militarization of Tamil nationalism. The government, in turn, has called attention to particular human rights abuses by the LTTE, including its use of child soldiers. On these and similar issues there is a constant competition between the government and the LTTE for the moral high ground. Although the parties' commitment to human rights is often mixed with strategic interests, the results for individuals can, nonetheless, be quite positive. For example, in the view of many proponents of the LTTE, its use of child soldiers has unfairly distracted the international community's attention from earlier and current violence and discrimination against Tamils. The function of this issue in compromising the LTTE's international image cannot be overlooked in tracing the LTTE's response. The LTTE has adopted a number of measures

to dispel the opprobrium. Some of these measures were superficial reforms and implausible denials, but its recognition of the effect these abuses had on the group's international reputation also led to meaningful reforms, including the release of over one thousand children in cooperation with UNICEF (although other children continue to be recruited).⁹

Since Allan Rock, of the United Nations Office of the Special Representative to the Secretary-General for Children in Armed Conflict, and Human Rights Watch found the government complicit in the recruitment and use of child soldiers by the Karuna group in late 2006, some of the same dynamics have been visible with respect to the government.¹⁰ The government has thus far denied all responsibility for such recruitment, but its response is likely to evolve.¹¹ The dynamics at play were clearly laid out in a letter to President Mahinda Rajapakse from his then-foreign minister, Mangala Samaraweera:

The issue of child soldiers is one of the main planks on which the government has maintained the high moral ground against the LTTE . . . One of the main reasons for the EU ban on the LTTE, was this abhorrent practice of forced child recruitment. . . . We hope that in the very near future, the UN Secretariat will recommend sanctions on the LTTE under Security Council Resolution 1612. However, as the Allan Rock episode indicated, allegations about recruitment of child soldiers by Karuna and the government's inability to act against this practice has eroded the government's high moral ground and helped the LTTE deflect criticism on this issue. . . . What is more disturbing is that the government is being dragged into a confrontation with international entities on an issue where the government had maintained the high moral ground. There is the danger of Sri Lanka being brought before the Security Council regarding this issue. This needs to be avoided and we must provide maximum cooperation to the UN to investigate and bring sanctions on the LTTE on this issue.¹²

The extensive instrumentalization of human rights law and discourse in Sri Lanka is sometimes demoralizing, but it is also illustrative of the interest both parties have in achieving, retaining, and increasing their international legitimacy through actual or apparent respect for human rights.

THE STRATEGY OF DENIABILITY

The caveat that apparent, as well as actual, respect for human rights can serve each party's strategic interests is critical to understanding the role the international community can play. When seeking international legitimacy, parties to a conflict can either respect human rights and humanitarian

law, or cover up their abuses. The conflict in Sri Lanka exhibits aspects of both strategies. Both main parties have shown some restraint, committing human rights abuses that are less pervasive and barbaric than those seen in other contemporary conflicts. On the other hand, both parties also violate human rights and humanitarian law while attempting to avoid the loss of legitimacy by committing abuses in a manner that permits them maximum deniability. In Sri Lanka no one claims responsibility for any violence short of a pitched battle. Indeed, proxies and disinformation are used to impede efforts by objective observers to reach compelling conclusions about responsibility for human rights abuses.

Proxy forces have been employed by both the government and the LTTE, although much more substantially by the former. When Colonel Karuna split from the LTTE, it was not immediately clear whether his faction would disintegrate, become a truly independent third party to the conflict, or move into a close relationship with the government. Human Rights Watch has carefully documented the ways in which the third possibility has now been realized, with the Karuna group's work being facilitated by the army and the police throughout the east.¹³ The primary reason for this cooperation is presumably for the government to avail itself of forces that are more capable of gathering intelligence and competing for the allegiance of the local population than the predominantly Sinhalese military and security forces. However, this relationship has also facilitated human rights violations, because the government's responsibility is obscured and the Karuna group is less susceptible to international pressure.¹⁴ The LTTE's use of proxies is far more superficial. Indeed, it seems unlikely that it maintains any true proxies, but the concept and the possibility of proxies have proven helpful. In a number of attacks believed to have been committed by the LTTE, responsibility has been "claimed" by an assortment of ephemeral groups.

In Sri Lanka, for every incident there are at least two accounts, usually more. Each account is typically refined, internally consistent, and difficult to confirm or disprove, yet completely inconsistent with other accounts. One example confronted us when we visited Sri Lanka. Shortly before our visit, two people rolled grenades to the front of a mosque in Akkairapattu during morning prayers.¹⁵ The grenades exploded, killing six persons and seriously wounding 29 others. The conflict between the LTTE and the Karuna group figured in almost all accounts that we received from victims, community representatives, government officials, and LTTE representatives, but the details differed widely. One explanation was that the Karuna group perpetrated the attack as part of an effort to create dissension between the Tamil and Muslim communities. Another explanation

suggested that the attack was part of a cycle of retaliation. Two days earlier, the bodies of two LTTE members had been found on a road marking the unofficial boundary between the predominantly Tamil and predominantly Muslim areas of the town. Muslim community members suggested that the two LTTE cadres may have been killed by Muslim individuals cooperating with the Karuna group. Although the Muslim community as a whole had avoided alignment with either group, many speculated that the LTTE attacked the mosque in retaliation and to deter further instances of cooperation. Without an effective investigation, it remains impossible to definitively assign responsibility for the attack. The same proliferation of accounts and counter-accounts is seen after every incident. Even when the identities of those involved are known, the debate over what actually happened remains. Savvy observers and local residents usually have strong views as to which story is correct, but these are more often based on an intimate understanding of the local logic of violence than on concrete evidence. For those in Sri Lanka who are less engaged, for the diaspora, and for the international community, the truth too often remains a menu of stories to be chosen from according to political disposition.¹⁶

These mechanisms of proxies and disinformation have allowed the parties to the conflict in Sri Lanka to employ a strategy of deniability in order to simulate respect for human rights. To be sure, neither party invariably opts for this strategy over that of actually respecting rights, but its availability encourages its use. It is the strategic option of deniability presented by these mechanisms that must be foreclosed in order to pressure the government and the LTTE to seek legitimacy through actual respect for human rights. The dynamics of human rights abuses over the past several years have taught us several lessons about what will be needed to overcome these mechanisms of deniability. One such lesson is that clarifying the facts of particular incidents will require an unusual level of investigative capacity. Another is that for the results of investigations not to be perceived merely as additional possible truths, inquiries must be conducted by a body independent of either party to the conflict. Lessons like these must shape our assessment of existing accountability mechanisms and the design of new ones.

DESIGNING EFFECTIVE HUMAN RIGHTS ACCOUNTABILITY MECHANISMS

This analysis of human rights abuses in Sri Lanka has a variety of implications for the role that the international community might play in ameliorating and resolving the conflict. The concern each party has with

achieving and maintaining a high level of international legitimacy suggests that the international community should send unambiguous signals aligning legitimacy with respect for human rights. Similarly, the factors fa-

The concern each party has with achieving and maintaining a high level of international legitimacy suggests that the international community should send unambiguous signals aligning legitimacy with respect for human rights.

..... facilitating deniable human rights abuses necessitate the development of accountability mechanisms capable of countering disinformation as well as the means to correctly attribute responsibility for the actions of proxies.¹⁷

The relationship between a party's human rights record and its international legitimacy is not a simple fact. It is the international community that determines the criteria for international legitimacy. Thus, one of us reported to the General Assembly that "[t]he conflict between the Government and the LTTE is ultimately a struggle for

legitimacy, not territory. The conflict has no military solution, and mere adjustment of the facts on the ground will not fundamentally change either party's position in future negotiations. . . . A resolution of this conflict that would merit the international community's endorsement will require the government, LTTE, or both, to demonstrate genuine respect for human rights."¹⁸ This perspective resonates with many in Sri Lankan civil society but has also been rejected by others. The government has stated that it "does not need to struggle for legitimacy, because it is the legitimately constituted government through democratic participation of [the] people."¹⁹ One proponent of armed struggle by Tamils has suggested that territory matters more than human rights and that "Nobody involved in this war, in fighting it or in trying to stop it, was born yesterday."²⁰ Who is right and who is wrong about the relevance of human rights to this conflict cannot truly be decided by any single observer or participant. Whether respect for human rights proves critical or utterly irrelevant will ultimately be determined by the parties to the conflict, by civil society, and, in significant measure, by the states comprising the international community. To put it another way, some civil wars—Sri Lanka's among them—will come to involve competition for the moral high ground, but where that moral high ground is located is a question decided by the rest of the world.

States can take a variety of measures to help align legitimacy, or the moral high ground, with human rights. In addition to the many material

incentives and disincentives available, many of the most valuable measures take the form of consistent verbal signals. States can emphasize the impossibility of a purely military solution and argue that war is not always the proper response to acts of terror.²¹ States can also discourage the parties from pursuing the creation of “facts on the ground” by consistently indicating that they are of the view that a sustainable peace—one that does not encourage spoilers or insurgents—will be possible only if human rights receive sufficient respect during the peace process and under any final settlement.²² States should also recognize the political and financial power of the Tamil diaspora, and engage with its members concerning the evidence of the LTTE’s human rights abuses and the consequences of those abuses for people living in Sri Lanka, including Tamils. Insofar as members of the Tamil diaspora receive reliable information about events occurring in Sri Lanka and fully comprehend the extent of their power and responsibility, they can be a powerful force for human rights protection.

Finally, both as a signal of the importance the international community places on respect for human rights and as a means to ensuring that actual respect fully displaces simulated respect, states can promote the effectiveness of existing accountability mechanisms and the development of new and complementary approaches. Given the role of deniability mechanisms in the dynamics of human rights abuse, the international community should assess the extent to which these are countered by existing accountability mechanisms, and it should consider whether a complementary role could be played by a UN-led international human rights monitoring mission. The existing accountability mechanisms may be loosely grouped into two categories. First, there are official, national mechanisms that are constitutionally independent of the three traditional branches of government. Second, there is the Sri Lanka Monitoring Mission (SLMM), the ceasefire monitoring mechanism that was established by the government and the LTTE, which is staffed by Scandinavians, and reports to the Norwegian government.

National Accountability Mechanisms

Sri Lanka has a number of permanent oversight bodies, the most relevant of which for present purposes is the National Human Rights Commission (HRC).²³ The HRC was established to oversee the government’s compliance with its human rights obligations. While the system was never perfect, and the HRC has faced obstacles in securing full cooperation from the police and military, it has held great promise for investigating

human rights violations committed by government officials. However, for reasons both avoidable and unavoidable, it is insufficiently independent from the government to play a major role in providing accountability for conflict-related human rights abuses.

First, the HRC's independence from the executive has been compromised. The independence of this body was formally guaranteed by the Seventeenth Amendment to the Constitution in 2001, which established the mechanism for appointments to the HRC. Under its provisions, there are two stages of appointments. Various political actors, including parties in opposition, are permitted to select members of the Constitutional Council. The Constitutional Council in turn selects the members of the HRC. However, the Constitutional Council has not operated since a controversy over who has the authority to select one of its members erupted in March 2005. When the terms of the commissioners of the HRC ended in April 2006, the body became defunct. The President has subsequently selected and appointed individuals to the HRC, circumventing the procedure specified by the Seventeenth Amendment. There is, of course, no worse means by which to ensure an oversight body's independence from the executive than for the executive to directly appoint its members. And the independence of the HRC was a far from incidental attribute: the very concept of a body designed to oversee the conduct of the executive branch of Government is that it be independent of that branch.

Second, even when the HRC was a fully independent body, its status as an organ of the Sri Lankan state prevented it from effectively monitoring abuses in conflict zones. Even if it could credibly hold government officials to account, it remained—properly and unavoidably—too closely associated with the state to conduct investigations in LTTE-controlled areas or to hold LTTE cadres accountable. This reality was demonstrated when, following the 2003 peace talks in Hakone, it was decided that the HRC would play the lead role, with international support, in monitoring conflict-related human rights abuses. After attempting to carry out fact-finding missions in the east, the HRC itself concluded that “no national or regional human rights entity will be able to effectively monitor and implement human rights standards in the north and the east. No organization or individual enjoys that kind of universal authority and legitimacy.”²⁴

Another approach that holds promise for handling violations committed by government officials is that of establishing temporary, ad hoc, independent commissions of inquiry. In late 2006, President Mahinda Rajapakse announced that a commission of inquiry would be established to investigate fifteen particular incidents and to report on, *inter alia*, the

“identities, descriptions and backgrounds of persons and groups of persons, who are responsible under the applicable laws and legal principles of Sri Lanka” for the deaths and injuries involved.²⁵ The hybrid national–international model that was adopted is innovative, and its full potential remains to be seen, as the commission first convened in February 2007. The national component consists of a commission of inquiry of eight Sri Lankans appointed by the President. The international component consists of an International Independent Group of Eminent Persons (IIGEP) of eleven foreigners nominated by various governments to observe the investigations and inquiries of the commission with a view to “maintaining the transparency of such investigations and inquiries, and for the purpose of satisfying interested parties that such investigations and inquiries have been conducted comprehensively and in conformity with relevant basic international norms and standards.”²⁶

Skepticism regarding this initiative has been widespread, based partly on its mandate, but primarily on past experience. As Vasuki Nesiiah wrote in another context, “There is a tried and true recipe—when pesky questions are raised, promise an investigation, appoint a commission, cramp the mandate, lean on commissioners,
 massage the inquiry, delay the report—
 by the time the findings are released,
 the issue has faded from public atten-
 tion and critical political energies have
 moved on to other issues.”²⁷ However,
 the caliber of persons appointed to
 the commission and to the IIGEP has
 been impressive. The former is chaired
 by Supreme Court Justice Nissanka
 Udalgama and includes a number of
 prominent members of civil society.
 The IIGEP includes such respected per-
 sons as Justice P. N. Bhagwati, Bernard
 Kouchner, and Nigel Rodley. These are
 individuals with sufficient internation-
 al standing to be able to profoundly shape the international community’s
 reception of the commission’s work. Ultimately, if the commission takes its
 task seriously and interprets its mandate broadly, if the government accords
 it full cooperation, and if the members of the IIGEP use their standing to
 insist on a serious effort, the initiative could prove to be a significant step
 against impunity.

... *if the commission
 takes its task seriously and
 interprets its mandate
 broadly, if the government
 accords it full cooperation,
 and if the members of the
 IIGEP use their standing
 to insist on a serious effort,
 the initiative could prove to
 be a significant step against
 impunity.*

However, both the HRC and the hybrid commission of inquiry have inherent limitations that must be candidly acknowledged in order to avoid unrealistic expectations. First, there is little public confidence in investigations conducted by some government officials into the conduct of other government officials. This is a ubiquitous problem inherent in the idea of an accountable sovereign, but it is aggravated in the case of Sri Lanka by the distrust engendered by civil war. The words of Rohini Hensman reflect the views of many in the areas of conflict:

Supposing a man has killed his neighbor, and his family members say, "Let's not go to the police, we will investigate this murder ourselves." Will the family of the murdered man, and the other neighbors, trust them to carry out an honest investigation and make an honest report of the results? Aren't they more likely to say, "You know he's guilty but don't want him to be punished, that's why you don't want us to go to the police"?

This is exactly how family members of the victims in the north and east, as well as many others in Sri Lanka and abroad, feel about the government's investigations of human rights violations in the North and East. Members of one arm of the state are guilty of war crimes, and members of that same arm or other arms, all of whom are like family members to the criminals, are supposed to investigate.²⁸

Second, the government has failed to rebut this kind of doubt. The issue of distrust could be addressed if the government were to routinely prosecute and punish its own agents for violations of the human rights of Tamils. But the truth is that the government has scarcely ever held its own to account. Finally, the government does not control some parts of the island, so any government body will face serious difficulties in investigating some crimes and apprehending some perpetrators. It is improbable that any body established by the government will be able to operate effectively in LTTE-controlled areas or be able to secure the cooperation of LTTE cadres in carrying out its inquiries. Given the role of the LTTE in human rights violations, this is no minor limitation.

Sri Lanka Monitoring Mission

The Sri Lanka Monitoring Mission (SLMM) was created to monitor the compliance of the government and the LTTE with the CFA. Like any ceasefire agreement, the provisions of the CFA regulate the relationship between the parties. However, the CFA also includes provisions regulating the relationship of each party to the civilian population, most importantly

that “[t]he Parties shall in accordance with international law abstain from hostile acts against the civilian population, including such acts as torture, intimidation, abduction, extortion and harassment.”²⁹ For its first several years of operation, the SLMM interpreted this provision quite narrowly. When called upon to respond to the wave of political killings, the former head of the mission said simply, “We are not here to police the country.”³⁰ This blunt refusal to address political killings led many to lose faith in the SLMM’s potential to protect human rights.³¹

When we visited Sri Lanka in December 2005, criticism of the SLMM was widespread, and three issues stood out. First, the SLMM made a strong distinction between monitoring and investigation, practicing only the former. It would forward complaints to the parties, elicit their responses, and attempt to determine whether a violation of the CFA had occurred. Second, it did not provide public accountability. Complaints were treated as confidential, and the SLMM communicated to the public only aggregate statistical data. Third, there was a popular perception that the work of the monitoring mission was influenced by its relationship to the peace process’s facilitator, Norway. Whether or not this was true in practice, the arrangement did contain an inherent conflict of interest that limited the SLMM’s perceived integrity. Under the CFA, the government of Norway appoints the head of the SLMM, who in turn reports to that government. Thus, in its relationship with the SLMM, Norway is charged with ensuring the disinterested verification of violations. As the facilitator of the peace process, however, it has an interest in preventing ceasefire implementation issues from disturbing the broader peace process. This conflict would be especially acute when the violation in question was of interest primarily to an individual civilian rather than to either of the parties.

In response to these concerns, a number of observers noted that the SLMM could and should give the CFA a less restrictive interpretation and more effectively address human rights and humanitarian law violations against the civilian population.³² In early 2006, the government of Norway and the SLMM took various actions that represented a serious attempt to play a more effective role in responding to human rights violations. Indeed, the ensuing transformation provides an exemplary case study in the possibilities for institutional reform within a fairly limited and narrowly defined mandate. The SLMM has acted much differently from 2006 to 2007 than it had from 2002 to 2005. In March 2006, Major General Ulf Henricsson of Sweden was appointed Head of Mission of the SLMM, replacing a Norwegian and reducing Norway’s conflict of interest between providing accountability for violations and advancing the peace process. In

April 2006, the SLMM began to exhibit greater concern for violence directed against civilians, referring for the first time to the “extrajudicial killings of civilians.”³³ In investigating these cases, the SLMM also provided a much larger amount of information to the public, supplementing statistics with more substantive statements and occasional narrative reports.

The SLMM’s less constricted interpretation of its mandate has provided a measure of accountability for the kinds of abuses that had previously been lost to disinformation and denials. In August 2006, the SLMM responded to the deaths of 17 employees of Action Contre la Faim in the town of Muttur by launching a major investigation and issuing a public ruling that the “SLMM is, with the obtained findings, convinced that there cannot be any other armed groups than the Security Forces who could actually have been behind [this] act.” After another investigation, the SLMM publicly ruled that the LTTE was behind a claymore mine attack on a bus that killed 67 civilians. In these and other cases, the SLMM made explicit and detailed reference to international human rights and humanitarian law. Both the decision to make the results of investigations public—as opposed to making rulings based on admissions of the parties public—and the decision to refer to human rights and humanitarian law in addition to the CFA were major developments. These actions by the SLMM have had additional concrete consequences. International outrage following the SLMM’s ruling on the government’s responsibility for the killings of the Action Contre la Faim workers apparently contributed to the government’s decision to establish the commission of inquiry and the IIGEP. In addition, it might be observed—although the evidence is much more circumstantial—that the SLMM’s public rulings have deterred many direct attacks on civilians, even as attacks on military targets have increased.

Both in what its transformation has accomplished and in those aspects that have been resistant to change, the SLMM provides a number of lessons that should be taken into account when considering the establishment of a full-fledged international human rights monitoring mission in Sri Lanka. First, the monitoring mission should not have any structural connection to the peace process. Second, it should command a high level of investigative capacity and expertise. Third, it should be authorized to disseminate information publicly.³⁴ Fourth, while the mandate for any such mission would necessarily be revocable by the government, arbitrary dependencies of the sort built into the SLMM’s mandate should be avoided. The government or the LTTE could decide to unilaterally terminate the CFA at any time, thus withdrawing the mandate of the SLMM.³⁵ Even without such a direct move, the LTTE demonstrated its ability to weaken the SLMM when it

insisted on the withdrawal of monitors who are nationals of EU member states, thereby cutting the SLMM's strength by two-thirds. The SLMM exists at the mercy of the parties, to an extent that would be unnecessary for a monitoring mission that did not receive its mandate from a ceasefire agreement.

International Human Rights Monitoring

There are strong, context-specific reasons to think that a human rights monitoring mission and a broader focus on human rights by the international community would be major positive steps. First, human rights is the appropriate language: the discourse of human rights is central to the parties' own understanding of the conflict's origins and conduct, and much of the human toll is the product of quintessential human rights violations—the targeting of civilians and the execution of individuals for the exercise of their civil and political rights. Second, the international community has a recognized and powerful role: the conflict is ultimately a struggle for legitimacy, not territory, and the government and the LTTE recognize the strategic importance of achieving and maintaining international legitimacy. Third, monitoring would affect conduct: the parties feel that they are able to violate human rights and humanitarian law without losing international legitimacy so long as they commit abuses in a manner that permits them maximum deniability; monitoring could foreclose the strategy of deniability and force the parties to show actual respect rather than simulated respect for human rights.

.....
There are strong, context-specific reasons to think that a human rights monitoring mission and a broader focus on human rights by the international community would be major positive steps.

The discussions of national mechanisms and of the SLMM might suggest, however, that the need for monitoring has already been adequately met. Indeed, these mechanisms have made important strides against impunity and deniability. However, it cannot be denied that there are a number of critical gaps that an international human rights monitoring mission would be well-suited to fill—and some that only such a mission could fill. If the failings of current mechanisms are taken into account when designing such a mission's mandate, there is every reason to believe that the mission could meaningfully—though by no means completely—reduce conflict-

related human rights abuses and help lay the groundwork for a sustainable peace. The requirements for effective monitoring in Sri Lanka include the following points.³⁶

- The mandate of the monitoring mission should not be geographically limited, because both the government and the LTTE—along with others—are responsible for human rights abuses, and such acts occur throughout the country.
- The monitoring mission should command a high level of investigative and forensic capacity, for a key purpose of monitoring is to limit the possibility of conducting deniable human rights abuses. This capacity requires, *inter alia*, persons with police training, persons with medical training, and Sinhala and Tamil interpreters.
- The monitoring mission should be independent of any peace process, to avoid the appearance of partiality and to ensure independence from the parties.³⁷
- The details of alleged incidents, the results of investigation, and the basis for the monitoring mission's determination of responsibility should be made public—even if information is redacted to protect individuals.
- The investigative process should be designed to prioritize the protection of witnesses against intimidation and violence.

This list is not, of course, even remotely comprehensive. The design of any monitoring mission must draw upon lessons learned from past initiatives.³⁸ The intention of this list is simply to highlight certain largely unmet requirements for effective monitoring that are specific to Sri Lanka in light of the dynamics and logic of human rights abuses in that country. It is worth observing that, with its monitoring experience and its relative lack of involvement in Sri Lanka's peace process, the United Nations would be well situated to establish a mission that fulfills these requirements.

LAYING THE GROUNDWORK FOR A SUSTAINABLE PEACE

Measures that will better ensure respect for human rights are inherently important, given the human toll of the conflict in Sri Lanka. The potential for the conflict to worsen sharply is too great to be indifferent to how it is fought, whatever the prospects for its peaceful resolution. However, it is important to emphasize that taking a step forward in promoting human rights accountability would in no way mean taking a step backward in promoting the peace process. To the contrary, steps taken to align international

legitimacy with genuine respect for human rights could also be expected to increase the trust of the people in the parties. Without such trust, any peace agreement faces the constant threat of disintegrating in the face of those who might be referred to as spoilers. Recent experience suggests that it is this kind of trust that will facilitate not only agreements between the parties but also a sustainable peace among the people of Sri Lanka. ■

ENDNOTES

- 1 Colonel Karuna (the *nom de guerre* of Vinayagamoorthi Muralitharan) established a political party, Tamil Makkal Viduthalai Pulikal (TMVP), in 2004. However, in keeping with general usage, we refer to the armed group that he commands as the “Karuna group.”
- 2 Estimates vary widely, partly due to varying coverage of the range of conflicts that Sri Lanka has experienced. International Crisis Group estimates that the total is “at least 100,000 violent deaths in conflicts in both the north and south,” with 70,000 for those in the north (and east) and 30,000 for those in the south. *Sri Lanka: The Failure of the Peace Process*, International Crisis Group Asia Report N°124, November 28, 2006, 1.
- 3 According to the International Crisis Group, “more than 2,500 people have been killed, many of them civilians” from January through November 2006. Indications are that the rate of killing has increased during the first months of 2007. *Ibid.*
- 4 This kind of ambiguity and uncertainty often persists even once international human rights monitoring has been established. See Liam Mahony, *Proactive Presence: Field strategies for Civilian Protection* (Centre for Humanitarian Dialogue, 2006), 29.
- 5 There is no implication that either the government or the LTTE respects human rights only when deterred. Indeed, both parties would appear to avoid some kinds of abuse nearly entirely on principle, markedly distinguishing the Sri Lankan conflict from some others. This is most welcome, of course, but we necessarily focus on the problems that remain.
- 6 *Sri Lanka Development Forum: The Economy, Regional Disparities, and Global Opportunities*, World Bank, January 12, 2007, 15.
- 7 Philip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Mission to Sri Lanka*, UN doc. E/CN.4/2006/53/Add.5, March 27, 2006, paras. 60–61.
- 8 See especially *Interim Report on the Incident at the Bindunuwewa Rehabilitation Centre, Bandarawela - 24 & 25 October 2000*, Human Rights Commission of Sri Lanka, November 1, 2000.
- 9 For current information on the recruitment of children by all parties, see the *Report of the Secretary-General on children and armed conflict in Sri Lanka*, UN Doc. No. S/2006/1006, December 20, 2006.
- 10 Allan Rock and Human Rights Watch made preliminary remarks in November 2006. For full reports, see: *Complicit in Crime: State Collusion in Abductions and Child Recruitment by the Karuna Group*, Human Rights Watch, January 2007; *Report of the Secretary-General on Children and Armed Conflict in Sri Lanka*, S/2006/1006, December 20, 2006.

- 11 *Human Rights Watch Report on Sri Lanka Government complicity in Child Abductions: unfounded and baseless: Govt. has consistently opposed conscription of children*, Government of Sri Lanka, Secretariat for the Coordination of the Peace Process, January 25, 2007.
- 12 *Letter from Mangala Samaraweera to H.E. President Mahinda Rajapakse*, December 13, 2006, printed in *The Sunday Leader*, Colombo, February 25, 2007.
- 13 *Complicit in Crime: State Collusion in Abductions and Child Recruitment by the Karuna Group*, Human Rights Watch, January 2007.
- 14 *Ibid.*
- 15 Alston, paras. 17–19.
- 16 It should be noted that the various accounts tend to be relatively detailed, going far beyond mere finger pointing. With respect to the Akkairapattu attack, for example, two detailed accounts are available on the Internet. According to one, Karuna group members operating out of the Special Task Force (STF) camp in Pannalagama in Amparai district and under the command of Iniyabarathy committed the attack. According to another, the attack was committed by Rajah, an LTTE intelligence operative, accompanied by Valluvan, the LTTE's deputy intelligence chief for Ampara.
- 17 We will not extensively address the question of how to provide better accountability for the actions of proxies, but this will be a key issue moving forward.
- 18 *Extrajudicial, Summary or Arbitrary Executions*, UN Doc. A/61/311, September 5, 2006, paras. 12, 14.
- 19 Statement by Ambassador Prasad Kariyawasam, Permanent Representative of Sri Lanka to the United Nations, on Agenda Item: 67 (C), Human Rights Situations & Reports Of Special Rapporteurs & Representatives, at the United Nations General Assembly, 61st Session, Social, Humanitarian & Cultural Committee, October 27, 2006.
- 20 See the views expressed on *TamilNation*, a web site administered by Nadesan Satyendra, at <www.tamilnation.org/unitednations/unhrc06a.htm>.
- 21 A number of international observers have made this point—including the Special Rapporteur Philip Alston, the U.S. Ambassador Robert Blake, and the outgoing head of the SLMM Ulf Henricsson—but its truth remains by no means universally accepted.
- 22 The extent to which the peace process has suffered for paying too little attention to human rights has been a matter of some debate. For one perspective on how the peace process has overlooked human rights concerns, see Ahilan Kadirgamar, “The Violence of Peace,” *lines*, May 2003 and Ahilan Kadirgamar, “Defining Political Killings,” *lines*, November 2004, <www.lines-magazine.org>. For an analysis of human rights issues, the exclusion of some groups from negotiations, and some problems confronted by the peace process, see *Sri Lanka: The Failure of the Peace Process*, International Crisis Group Asia Report N°124, November 28, 2006, 13–16.
- 23 Also note, however, the National Police Commission (NPC), which was established in part to oversee the handling of abuses by the police. Alston, paras. 64–65.
- 24 *The Human Rights Situation in the Eastern Province*, Human Rights Commission of Sri Lanka December 2003, 33.
- 25 P.O. No.: CSA/10/3/8, November 3, 2006. This is the Presidential Warrant establishing the commission and the IIGEP.
- 26 *Ibid.*

- 27 Vasuki Nesiah, "Commissioning Accountability? Political Assassinations and the Politics of Fear," *lines* May 2005. For discussion of particular strengths and weaknesses of the commission of inquiry and IIGEP, see Press release of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, "UN Expert Welcomes Proposed Sri Lanka Commission," September 5, 2006; *Sri Lanka: Observations on a Proposed Commission of Inquiry and International Independent Group of Eminent Persons*, Amnesty International, ASA 37/030/2006, November 17, 2006; and the three part column by Kishali Pinto Jayawardena, *Sunday Times* (Colombo), January, 14, 2007, January, 28, 2007, February 4, 2007.
- 28 Rohini Hensman, "No Peace Without Human Rights!" *The Island* (Colombo), November 8, 2006.
- 29 CFA, Art. 2.1.
- 30 "SLMM rejects Ratnasiri's charges as baseless," *Daily Mirror*, August 25, 2004; and SLMM, Press Release, March 8, 2005.
- 31 "Over the three and a half year tenure of the SLMM, perceptions on the ground have hardened and the local population sees the SLMM mainly as a force that mediates conflicts between the two parties to the CFA, rather than as an entity that stands for the rights of civilians." Wasana Punyasena, Alan Keenan, and Ashwini Vasanthakumar, "Independent International Human Rights Monitoring in Sri Lanka" (unpublished working paper), October 6, 2005, 5.
- 32 Among others, one of us recommended a number of particular reforms, E/CN.4/2006/53/Add.5, para. 72.
- 33 SLMM, "Airstrikes Violate the Ceasefire Agreement," Press Release, April 29, 2006.
- 34 There is a need both for any monitoring mission to report to the public at large and for it to "have the necessary linkages" to the key actors that can exert high-level pressure to end violations. Wasana Punyasena, Alan Keenan, and Ashwini Vasanthakumar, "Independent International Human Rights Monitoring in Sri Lanka" (unpublished working paper), October 6, 2005, 9.
- 35 CFA, Art. 4.4.
- 36 *Extrajudicial, Summary or Arbitrary executions*, UN Doc. A/61/311, September 5, 2006, paras. 22–23.
- 37 For a number of precise recommendations on what is needed in terms of "composition and structure," see Wasana Punyasena, Alan Keenan, and Ashwini Vasanthakumar, "Independent International Human Rights Monitoring in Sri Lanka" (unpublished working paper), October 6, 2005, 9–10.
- 38 For an explanation of the particular relevance of the highly successful UN monitoring mission in Nepal, see *Improving Civilian Protection in Sri Lanka: Recommendations for the Government and the LTTE*, Human Rights Watch, September 2006, 45–46.

