



The Rights and Obligations of Sri Lanka in Responding to Terrorism and Crimes Perpetrated by the LTTE

A. Introduction

1. This submission addresses the rights and obligations of the State of Sri Lanka in seeking to protect its population from terrorism and crimes perpetrated by the Liberation Tigers of Tamil Eelam (“LTTE”) during a thirty-year terrorist campaign and the non-international armed conflict of Eelam War IV (2006-2009).

B. Sri Lanka’s Right and Obligation to Act in Response to LTTE Terrorist Acts Over a Thirty-Year Period

2. The LTTE was an internationally proscribed terrorist organisation.¹ It carried out systematic terrorist attacks on Muslim,² Tamil and Sinhalese civilians,³ including politicians,⁴ police officers,⁵ academics,⁶ and diplomats over a thirty-year period in Sri Lanka.⁷ During this time, the LTTE exercised *de facto* control over substantial areas of the sovereign state.⁸ The LTTE targeted civilian infrastructure, concentrating its efforts on economically valuable targets, which had an adverse impact on the economy of Sri Lanka.⁹ The LTTE also operated outside Sri Lanka by raising funds through criminal activities,¹⁰ buying arms¹¹ and carrying out attacks, including the assassination of Indian Premier Rajiv

¹ The LTTE has been designated a proscribed terrorist organisation by 32 countries, including India (since 1994), the United States (since 1997), the United Kingdom (since 2001) and the European Union (since 2006).

² Between 1985 and 1991, the LTTE carried out a campaign targeting the Muslim population, largely located in the north eastern provinces of Sri Lanka. The LTTE carried out attacks on Muslim civilians and civilian targets, including villages and mosques: See Mohideen, *LTTE Human Right Violations and War Crimes gains North East Muslims* accessed at http://www.defence.lk/new.asp?fname=20111229_02.

³ See Attachment 1, Steven Kay QC, Liberation Tigers of Tamil Eelam, Annex E, List of LTTE Attacks on Civilian Targets. Source: Sri Lankan Ministry of Defence, *Humanitarian Operation Factual Analysis: July 2006 – May 2009* (July 2011) at pp. 96 - 105.

⁴ See Attachment 2, Steven Kay QC, Liberation Tigers of Tamil Eelam, Annex A, List of Tamil Politicians Assassinated by the LTTE. Source: Sri Lankan Ministry of Defence, *Humanitarian Operation Factual Analysis: July 2006 – May 2009* (July 2011) at pp. 88 - 92.

⁵ On 11 June 1990 the LTTE killed 600 police officers operating in the eastern provinces, after they were ordered to surrender by the Premadasa government within the scope of peace talks. See Daily News, *The Saddest Day in Police History* accessed at <http://archives.dailynews.lk/2011/06/11/fea01.asp>. In June 2014, retired police officers made a request to the Presidential Commission Investigating Cases of Missing Persons to investigate this incident. See Colombo Page, *Request to investigate the LTTE massacre of 600 Sri Lankan police officers in 1990* accessed at http://www.colombopage.com/archive_14A/Jun11_1402494333CH.php.

⁶ See Attachment 3, Steven Kay QC, Liberation Tigers of Tamil Eelam, Annex C, List of Tamil Academics Assassinated by the LTTE. Source: Sri Lankan Ministry of Defence, *Humanitarian Operation Factual Analysis: July 2006 – May 2009* (July 2011) at pp. 95.

⁷ The first terrorist attacks by the LTTE in Sri Lanka started in 1983. On 1 July 1983, the LTTE carried out a terrorist attack on the Yal Davi train at Kondavil; See Attachment 4, Steven Kay QC, Liberation Tigers of Tamil Eelam, Annex F, List of LTTE Attacks on Economic Targets. Source: Sri Lankan Ministry of Defence, *Humanitarian Operation Factual Analysis: July 2006 – May 2009* (July 2011) at pp. 114 - 116. See also Attachment 5, Steven Kay QC, Liberation Tigers of Tamil Eelam, Annex I, List of LTTE Suicide Attacks (Source: Ministry of Defence, Democratic Socialist Republic of Sri Lanka, ‘Humanitarian Factual Analysis July 2006 – May 2009’ at pp. 96-105, and South Asia Terrorism Portal accessed at http://www.satp.org/satporgtp/countries/shrilanka/database/data_suicide_killings.htm).

⁸ At one stage this was almost one quarter of the land mass. See map entitled “LTTE Dominated Area as at July 2006”, *Report of the Commission of Inquiry on Lessons Learnt and Reconciliation*, Annex at pp. 56.

⁹ Examples include the Central Bank, the Colombo International Airport and the Kolonnawa Oil Refinery; See Attachment 4, Steven Kay QC, Liberation Tigers of Tamil Eelam, Annex F, List of LTTE Attacks on Economic Targets. Source: Sri Lankan Ministry of Defence, *Humanitarian Operation Factual Analysis: July 2006 – May 2009* (July 2011) at pp. 114 - 116.

¹⁰ This included raising money by extorting the expatriate Tamil population; drug dealing, including smuggling heroin; and human trafficking. See, for example, Attachment 6, Mackenzie Briefing Notes, *Funding Terror: The Liberation Tigers of Tamil Eelam and their Criminal Activities in Canada and the Western World*, The Mackenzie Institute (December 1995) at pp. 3-6, 8.

¹¹ See, for example, Phnom Penh Post, *Tamil Tigers Shopping for Arms in Cambodia* (September 1996), accessed at <http://www.phnompenhpost.com/national/tamil-tigers-shopping-arms-cambodia>; National Post, *Canadian Tamil Tigers ‘Operative’ Pleads Guilty in U.S After Working as Arms Supplier for Sri Lankan Rebels* (16 October 2013), accessed at http://news.nationalpost.com/2013/10/16/piratheepan-nadarajah-pleads-guilty/?__federated=1; News Trak India (sourced from Times Online), *British Tamils Held Regular Meetings with Special Branch While Supplying Terrorists* (18 April 2009), accessed at <http://www.newstrackindia.com/newsdetails/87313>.



Gandhi¹² and the attempted assassination of the then High Commissioner of Pakistan in Sri Lanka.¹³

3. The Geneva Conventions of 1949, their Additional Protocols of 1977, other international treaties and customary law prohibit terrorist acts committed in the course of an international or non-international armed conflict.¹⁴ Common Article 3 of the Geneva Conventions 1949 prohibits “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture”. Acts or threats of violence primarily intended to spread terror among the civilian population are also prohibited by customary international law as established by state practice.¹⁵ Terrorism can amount to a war crime¹⁶ and a crime against humanity.¹⁷ The terrorist acts of the LTTE were also in breach of Sri Lanka’s domestic law.¹⁸

C. Sri Lanka’s Right and Obligation to Act in Response to Crimes Committed by the LTTE between 2006 and 2009

4. Between 2006 and 2009, Sri Lanka had a duty under international humanitarian law to protect its citizens from criminal acts; this duty included the use of proportionate force against military targets.

¹² See Kaarthikeyan and Raju, *The Rajiv Gandhi Assassination: The Investigation*, Sterling Paperbacks (2004), in particular Chapter 11, ‘Clinching Evidence’.

¹³ See: Ministry of External Affairs Sri Lanka, *Government condemns LTTE targeting the Pakistan High Commissioner in Colombo*, accessed at <http://www.mea.gov.lk/index.php/en/media/news-archive/604-government-condemns-ltte-targeting-the-pakistan-high-commissioner-in-colombo>; and Asian Tribune, *Sri Lanka Government condemned LTTE’s assassination attempt of Pakistan High Commissioner*, 15 August 2006, accessed at <http://www.asiantribune.com/node/1554>.

¹⁴ Sri Lanka is party to the Four Geneva Conventions of 1949 but not to the Additional Protocols.

¹⁵ See Rule 2, *ICRC International Customary International Humanitarian Law Study*, accessed at http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule2. See also: Gasser, *Acts of Terror, “Terrorism” and International Humanitarian Law* (September 2002), *International Review of the Red Cross*, Vol. 84 No 847 at p. 560; UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, Oxford University Press (2005), para. 15.32.2.

¹⁶ Although Common Article 3 does not contain any provision on criminal responsibility, the ICTY Appeals Decision in *The Prosecutor v Tadic* has confirmed that “customary international law imposes criminal liability for serious violations of common Article 3”. Whether a violation of the prohibitions on terrorism in IHL amounts to a war crime will depend on the application of the four-part test set out in *Tadic* by the ICTY Appeals Chamber, namely: (1) the violation must amount to the infringement of a rule of international humanitarian law; (2) this rule must form part of customary law or applicable treaty law; (3) the violation must be “serious”, in other words, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim; (4) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule. See *The Prosecutor v Tadic*, Case No IT-84-1, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paras 94 and 134.

¹⁷ Whilst it is noted that the customary definition of crimes against humanity remains uncertain (with the most notable distinctions relating to the existence or otherwise of an armed conflict nexus requirement and the requirement for the acts to be perpetrated in pursuance of a State or organisational policy), it is submitted that, insofar as the conflict between the Sri Lankan government and the LTTE is concerned, the International Law Commission’s “Draft Code of Crimes against the Peace and Security of Mankind” (1996) provides a useful articulation of “crimes against humanity”. Article 18 of the Draft Code of Crimes against the Peace and Security of Mankind defines “crimes against humanity” as any of the following acts when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group: murder; extermination; torture; enslavement; persecution on political, racial, religious or ethnic grounds; institutionalized discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population; arbitrary deportation or forcible transfer of the population; arbitrary imprisonment; forced disappearance of a person; rape, enforced prostitution and other forms of sexual abuse; other inhumane acts which severely damage physical or mental integrity. Although terrorism was excluded from Article 7 of the ICC Statute, it is arguable that it is prosecutable as a crime against humanity under a sub-category crime, such as a murder, or as an inhumane act.

¹⁸ The Prevention of Terrorism (Temporary Provisions) Act, 1979 was made permanent in 1981. It was temporarily suspended during the operational period of the Ceasefire Agreement signed on 22 February 2002. See also the Public Security Ordinance No. 25 of 1947, s.5, which gave the President power to make Emergency Regulations as they appear to him to be necessary for the maintenance of supplies and services essential for the life of the community. On 6 December 2006, President Rajapaksa enacted the Emergency (Prevention and Prohibition of Terrorism and Specified Terrorist Activities) Regulations No. 07 of 2006 (“2006 Emergency Regulations”) whereby individuals and groups were prohibited from engaging in terrorism, any specified terrorist activity as defined in the Prevention of Terrorism (Temporary Provisions) Act, 1979, or any activity in furtherance of any act of terrorism or specified terrorist activity.



(i) Arbitrary Detention and Hostage-Taking

5. After losses in the conflict with the Sri Lankan Armed Forces (“SLAF”) from 2006-2008, the LTTE withdrew to the northeastern section of Sri Lanka taking a large part of the civilian population, amongst which it placed its forces.¹⁹ Throughout this period, the LTTE operated a “pass” system to control civilians leaving the area, and would require civilians to leave family members behind to guarantee their return.²⁰ The LTTE continued hostile actions from this position, having effectively embedded itself amongst the Tamil civilian population.²¹ From January 2009, the LTTE actively prevented the civilian population from leaving the LTTE-controlled area in order to create a human shield behind which it continued its combat operations.²² In the last phase of the conflict, the geographical location of the areas held under LTTE control, and the fact that the LTTE fired at individuals who tried to escape, made it difficult to create and maintain safe passages for the civilians to cross over to the liberated areas.²³
6. By taking Sri Lankan civilians hostage and restricting their free movement by forcible acts, including killing, the LTTE breached domestic law²⁴ and international humanitarian law.²⁵ The taking of hostages can also constitute a war crime.²⁶
7. In 2006, the UN General Assembly urged all States “to take all necessary measures, in accordance with relevant provisions of international humanitarian law and international human rights standards, to prevent, combat and punish acts of hostage-taking, including by strengthening international cooperation in this field.”²⁷ As a sovereign state, Sri Lanka was entitled to act to prevent citizens being taken or held in captivity as hostages by the LTTE hostile forces. Sri Lanka was entitled to use necessary and reasonable force to free those hostages including the use of lethal force to effect their release and to resist the armed forces of the LTTE who were intent on killing those civilians who attempted to escape.²⁸

¹⁹ Attachment 7, Sri Lankan Ministry of Defence, *Humanitarian Operation Factual Analysis: July 2006 – May 2009* (July 2011), paras 166, 167, and 173-209.

²⁰ Human Rights Watch, *Trapped and Mistreated: LTTE Abuses against Civilians in the Vanni*, (December 2008), p. 11, accessed at <http://www.hrw.org/reports/2008/12/15/trapped-and-mistreated-0>.

²¹ Attachment 7, Sri Lankan Ministry of Defence, *Humanitarian Operation Factual Analysis: July 2006 – May 2009* (July 2011), paras 173-209.

²² Attachment 7, Sri Lankan Ministry of Defence, *Humanitarian Operation Factual Analysis: July 2006 – May 2009* (July 2011), paras 173, 177, and 182. See also Ministry of Defence and Urban Development, *LTTE More Actively Prevented People Leaving During Pause - John Holmes...Forced Recruitment of Civilians, Including Children, to Fight or Work for the LTTE Continues* (30 December 2010), accessed at http://www.defence.lk/new.asp?fname=20090416_06.

²³ Attachment 7, Sri Lankan Ministry of Defence, *Humanitarian Operation Factual Analysis: July 2006 – May 2009* (July 2011), para. 184.

²⁴ The Prevention of Hostage Taking Act, 2000.

²⁵ Hostage-taking during non-international armed conflicts is prohibited by Common Article 3(1)(b), Geneva Conventions 1949. This practice is also prohibited by customary international law, as articulated in Rule 96, *ICRC International Customary International Humanitarian Law Study*, accessed at http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter32_rule96?OpenDocument&highlight=hostage.

²⁶ Hostage-taking is listed as a war crime under, *inter alia*, the Statutes of the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, and the ICC.

²⁷ UN General Assembly, Res. 61/72, 19 December 2006.

²⁸ Attachment 7, Sri Lankan Ministry of Defence, *Humanitarian Operation Factual Analysis: July 2006 – May 2009* (2011), paras 177 and 191.



(ii) The Use of Civilians as Human shields

8. As a deliberate military strategy, the LTTE ensured that members of its forces operated from within the cordon of a civilian population. From 2006 to 2009, the LTTE continued to employ a tactic of deliberately mounting hostile activities from areas within which the civilian population was located.²⁹ In the final phase of the conflict, the LTTE retreated to the Mullivaikkal peninsula to stage their final stand.³⁰ This peninsula is bordered by the sea on the northern side, and the Nanthi Kadal on the southern side, and covers an area of approximately 14 square kilometres.³¹ The LTTE forced the civilian population to intermingle with the LTTE cadres in camps.³² It erected earth bunds and placed mine fields around the camps to prevent escape.³³ Civilians attempting to flee were shot by the LTTE.³⁴ As such, the LTTE used the civilian population as part of its military strategy to shield LTTE cadres and prevent attacks by the SLAF.
9. The use of human shields in non-international armed conflict is prohibited under customary international law.³⁵ The ICTY has treated human shielding as a variant of recognised war crimes such as inhuman treatment, a breach of Common Article 3(1)(a),³⁶ or an outrage on personal dignity, contrary to Common Article 3(1)(c).³⁷
10. The location of military forces in populated areas is also prohibited by customary international law.³⁸ As a sovereign state, Sri Lanka had an obligation to protect its citizens from the illegal actions of the LTTE. The SLAF was entitled to treat civilians who voluntarily acted as human shields as direct participants in the hostilities.³⁹

²⁹ Attachment 7, Sri Lankan Ministry of Defence, *Humanitarian Operation Factual Analysis: July 2006 – May 2009* (2011), paras 10 and 173.

³⁰ Attachment 7, Sri Lankan Ministry of Defence, *Humanitarian Operation Factual Analysis: July 2006 – May 2009* (2011), para. 184.

³¹ Attachment 7, Sri Lankan Ministry of Defence, *Humanitarian Operation Factual Analysis: July 2006 – May 2009* (2011), p. 60.

³² Attachment 7, Sri Lankan Ministry of Defence, *Humanitarian Operation Factual Analysis: July 2006 – May 2009* (July 2011), para 179.

³³ Attachment 7, Ministry of Defence, *Humanitarian Operation Factual Analysis: July 2006 – May 2009* (July 2011), para. 187.

³⁴ Amnesty International, *Sri Lanka Report 2010*, accessed at <http://www.amnesty.org/en/region/sri-lanka/report-2010>.

³⁵ See Rule 97, *ICRC International Customary International Humanitarian Law Study*: “[t]he use of human shields is prohibited...[s]tate practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts”, accessed at http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule97. See also the San Remo *Manual on the Law of Non-International Armed Conflict* at para. 2.3.8: “The use of civilians (as well as captured enemy personnel) to shield a military objective or operation is forbidden. It is also forbidden to use them to obstruct an adversary’s operations [...] This Rule is drawn from Additional Protocol I, Article 51.7, and is undoubtedly reflective of customary international law in both international and non-international armed conflict.” Civilians who are coerced into acting as human shields must be afforded the protection extended to all “persons taking no active part in hostilities” by Common Article 3, Geneva Conventions 1949.

³⁶ *The Prosecutor v Blaskic*, IT-95-14-T, Trial Chamber, Judgement, 3 March 2000, paras 186 and 710.

³⁷ *The Prosecutor v Aleksovski*, IT-95-14/1-T, Judgement, 25 June 1999, paras 48 and 57.

³⁸ Parties to a non-international armed conflict must avoid locating military targets within or near densely populated areas and take feasible precautions to protect civilians and civilian objects under their control, see Rules 22-23, *ICRC International Customary International Humanitarian Law Study*, accessed at http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule22 and http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule23. Parties are also arguably required, to the extent reasonable possible, to remove civilian persons and objects under their control from the vicinity of military objectives, see Rule 24, *ICRC International Customary International Humanitarian Law Study*, accessed at http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule24.

³⁹ Civilians who voluntarily participate in military operations take an active part in hostilities. See International Institute of Humanitarian Law, *The Manual on the Law of Non-International Armed Conflict with Commentary* (2006), Commentary, para. 2.3.8. See also: Schmitt, *Human Shields in International Humanitarian Law – Israel Yearbook on Human Rights*, Vol. 38 (2008), pp. 42, 43, 58; ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, adopted by the Assembly of the ICRC on 26 February 2009, *International Review of the Red Cross*, Vol. 90, No. 872 (2008), pp. 991-1047, p. 1024: “Where civilians voluntarily and deliberately position themselves to create a physical obstacle to military operations of a party to the conflict, they could directly cause the threshold of harm required for a qualification as direct participation in hostilities”; and Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, p. 22, accessed at <http://www.icrc.org/eng/assets/files/other/2004-06-expert-paper-dph-icrc.pdf>: “Voluntary shielding is unquestionably direct participation.”



11. The use of involuntary human shields by the LTTE did not bar the SLAF from launching proportionate attacks on lawful targets.⁴⁰ In such attacks, the protected civilians involuntarily shielding lawful targets may be considered as collateral damage, provided that the SLAF observed the principle of proportionality and ensured that the level of collateral damage did not exceed the concrete and direct military advantage anticipated by the attack.⁴¹ The SLAF was entitled to adjust its proportionality assessment to reflect the position that the LTTE's unlawful and persistent use of human shields would result in a higher number of collateral civilian casualties.⁴² Failure to adjust the proportionality assessment would have legitimized and encouraged the LTTE's policy of using human shields to gain an unlawful military advantage and ultimately lead to greater civilian casualties.⁴³

(iii) Forced Labour

12. Humanitarian officials and confidential witnesses have provided evidence that the LTTE forced civilians, including IDPs, to work on projects involving hazardous tasks, such as the building of bunkers close to areas of military activity.⁴⁴ The LTTE's forced labour requirements intensified towards the end of 2008.⁴⁵ In addition to violent coercion tactics employed by the LTTE to ensure compliance with its policy of civilian forced labour,⁴⁶ it also used the practice as a form of punishment.⁴⁷
13. State practice establishes, as a norm of customary international law applicable in non-international armed conflicts, the prohibition of uncompensated or abusive forced labour.⁴⁸ The use of forced labour also contravenes Sri Lanka's domestic law.⁴⁹ Sri Lanka was under an obligation to act to suppress the use of forced or

⁴⁰ See Schmitt, *Human Shields in International Humanitarian Law –Israel Yearbook on Human Rights*, Vol. 38 (2008), p. 47. This view was adopted by the United States in their joint targeting doctrine, see Joint Chiefs of Staff, *Joint Targeting* (Joint Publication 30-30) (13 April 2007), E-2 to E-3. See also UK Ministry of Defence, *The Joint Service Manual of the Law of Armed Conflict*, Joint Service Publication 383 (2004), para. 2.7.2: "if the defenders put civilians or civilian objects at risk by placing military objectives in their midst or by placing civilians in or near military objectives, this is a factor to be taken into account in favour of the attackers in considering the legality of attacks on those objectives."

⁴¹ Joint Chiefs of Staff, *Joint Targeting* (Joint Publication 3-60) (31 January 2013, Appendix A, 4.a(1)).

⁴² See UK Ministry of Defence, *The Joint Service Manual of the Law of Armed Conflict*, Joint Service Publication 383 (2004) at 5.22.1 "the enemy's activity may be taken into account in considering whether the incidental loss or damage was proportionate to the military advantage expected". See also Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Second Edition (Cambridge University Press, 2010): "whether civilian casualties are expected to be 'excessive' in relation to the military advantage anticipated must make allowances for the fact that – by dint of the presence (albeit involuntary) of civilians at the site of the military objective – the number of civilians can be foreseen to be higher than usual".

⁴³ Rubinsten and Roznai, *Human Shields in Modern Armed Conflicts: The Need for a Proportionate Proportionality* 22 Stan. L. & Pol'y Rev. 93, pp. 121-122: "Ongoing and systematic use of civilians as human shields would justify the adjusted assessment, since it would also create an incentive to lessen the use of the human shields tactic, ultimately enhancing civilian protection during armed conflicts."

⁴⁴ Human Rights Watch, *Trapped and Mistreated: LTTE Abuses against Civilians in the Vanni* (December 2008), p. 11; Ministry of Defence and Urban Development, *Seized Camera Reveals Dark Secrets of LTTE*, accessed at http://www.defence.lk/new.asp?fname=20090505_13.

⁴⁵ Human Rights Watch, *Trapped and Mistreated: LTTE Abuses against Civilians in the Vanni* (December 2008), p.11.

⁴⁶ Attachment 7, Sri Lankan Ministry of Defence, *Humanitarian Operation Factual Analysis: July 2006 – May 2009* (July 2011) at para. 187: "The LTTE countered by constructing earth-bunds and multiple layers of obstacles creating twin complications to delay entry and hinder entrapped civilians' access to freedom. During this period, there was a considerable increase in the atrocities committed by the LTTE against the incarcerated civilian population, i.e., shooting those attempting to leave the control of the LTTE, permanent deployment of civilians as human shields, forced labour, forced recruitment of children, and forced construction of large earth bunds by civilians coerced by armed guards. The civilians who crossed over to the liberated areas confirmed that the civilian population was subject to severe violence by the LTTE".

⁴⁷ Human Rights Watch, *Trapped and Mistreated: LTTE Abuses Against Civilians in the Vanni* (December 2008) at p.11: "...when the LTTE was still providing passes to civilians to leave the Vanni, persons who obtained passes often had to leave other family members behind as "guarantors" to ensure they would return. If the person with the pass did not return as agreed, the "guarantor" would often be detained until the person who had left the Vanni returned, and in some cases would be required to engage in dangerous forced labor, such as digging military trenches, for months."

⁴⁸ See Rule 95, *ICRC International Customary International Humanitarian Law Study*, accessed at http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule95. Common Article 3 requires humane treatment to those who do not take part in hostilities.

⁴⁹ Section 358A(1)(b) of the Sri Lankan Penal Code, 2006 states that "[a]ny person who...subjects or causes any person to be subjected



compulsory labour of the kind enforced by the LTTE, and to take effective measures to secure its immediate and complete abolition.⁵⁰

14. The LTTE operated a policy of conscription throughout the conflict.⁵¹ This included the “one person per family” programme, which required families to provide one person between the ages of 18 and 35 to fight in the LTTE forces.⁵² Although ostensibly voluntary, families were often threatened with physical violence and the confiscation of property if they did not comply. During the latter stages of the conflict, this policy escalated into one of forced conscription.⁵³ The LTTE punished those who resisted⁵⁴ and detained them in recruitment centres.⁵⁵

(iv) Forced Recruitment of Children

15. The LTTE developed and trained armed forces that included children under the age of eighteen.⁵⁶ It recruited its personnel principally from the Tamil population, over which it had *de facto* control, achieved in great part by the destruction of political rivals.⁵⁷ The LTTE was organised primarily along military lines and imposed a culture of militarism over the people it controlled so that its orders and culture were accepted without question.⁵⁸ The recruitment strategy of the LTTE was able to thrive under these conditions. The recruitment of children constituted a clear breach of Sri Lankan law⁵⁹ as well as customary international law.⁶⁰

to forced or compulsory labour [...] shall be guilty of an offence.” Section 358A(3) of the 2006 code defines, with limited exceptions which do not apply to the acts of LTTE, “forced or compulsory labour” as “all work or service which is exacted from a person under the threat of any penalty and for which such person has not offered himself voluntarily...”

⁵⁰ Articles 1 and 2 of the Convention Concerning Forced or Compulsory Labour, 1930 (ratified by Sri Lanka on 5 April 1950); Article 2 defines “forced or compulsory labour” as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily”. See also Articles 1 and 2 of the Convention Concerning the Abolition of Forced Labour, 1957 (ratified by Sri Lanka on 7 January 2003) and Article 8(3)(a) of the ICCPR (to which Sri Lanka acceded on 11 June 1980).

⁵¹ Attachment 7, Sri Lankan Ministry of Defence, *Humanitarian Operation Factual Analysis: July 2006 – May 2009* (July 2011), para. 44.

⁵² This policy is referred to in a leaked cable from American Ambassador Robert Blake, *Sri Lanka: Tamil Tigers Siphon Off Part of International Relief Funds*, accessed at <http://www.theguardian.com/world/us-embassy-cables-documents/111710>. See also Human Rights Watch, *Trapped and Mistreated: LTTE Abuses against Civilians in the Vanni* (December 2008), p. 3.

⁵³ See Human Rights Watch, *Trapped and Mistreated: LTTE Abuses against Civilians in the Vanni* (December 2008), p. 7. See also Independent, ‘Tamil Rebels Recruited Children for Last Stand Against Sri Lankan Army’ (12 December 2011): “An official, who held a non-military position with the Liberation Tigers of Tamil Eelam (LTTE), said that in the spring of 2009, the rebels found themselves in an ever-worsening situation that led them to step up their forced recruitment of civilians between the age of 14 and 55. He said more than 300,000 civilians had intentionally been held to provide cover for the LTTE fighters”, accessed at <http://www.independent.co.uk/news/world/asia/tamil-rebels-recruited-children-for-last-stand-against-sri-lankan-army-6275874.html>.

⁵⁴ Amnesty International, *Annual Report 2010, Human Rights in Democratic Socialist Republic of Sri Lanka*, accessed at <http://www.amnesty.org/en/region/sri-lanka/report-2010>.

⁵⁵ Amnesty International, *Annual Report 2009, Human Rights in Democratic Socialist Republic of Sri Lanka*, accessed at <http://www.amnesty.org/en/region/sri-lanka/report-2009>.

⁵⁶ Attachment 7, Sri Lankan Ministry of Defence, *Humanitarian Operation Factual Analysis: July 2006 – May 2009* (July 2011), para. 118. See also: Human Rights Watch, *Trapped and Mistreated: LTTE Abuses against Civilians in the Vanni* (December 2008), p. 5; UNICEF News note, *Children Being Caught up in Recruitment Drive in North East* (26 June 2004): “After promising signs in April that the LTTE was taking seriously its pledge to release the children in its ranks, recruitment has been accelerated in recent weeks, including of children under the age of 18,” accessed at http://www.unicef.org/media/media_21990.html.

⁵⁷ Attachment 2, Liberation Steven Kay QC, *Tigers of Tamil Eelam, Annex A, List of Tamil Politicians Assassinated by the LTTE*. Source: Sri Lankan Ministry of Defence, *Humanitarian Operation Factual Analysis: July 2006 – May 2009* (July 2011), pp. 88-92. Also see Attachment 8, Steven Kay QC, *Liberation Tigers of Tamil Eelam, Annex B, List of Sri Lankan Government Officials Assassinated by the LTTE*. Source: Sri Lankan Ministry of Defence, *Humanitarian Operation Factual Analysis: July 2006 – May 2009* (July 2011), pp. 92-94.

⁵⁸ This included training in suicide killings and suicide by the administration of cyanide capsules. See Attachment 7, Sri Lankan Ministry of Defence, *Humanitarian Operation Factual Analysis: July 2006 – May 2009* (July 2011), paras 67 and 93. See also Asia Times Online, Sudha Ramachandran, *Suicide, the Ultimate Tiger Weapon* (10 July 2002), accessed at http://atimes.com/atimes/South_Asia/DG10Df04.html.

⁵⁹ See section 358A Penal Code of the Parliament of the Democratic Socialist Republic of Sri Lanka: “Debt bondage, serfdom, forced or compulsory labour, slavery and recruitment of children for use in armed conflict”; and Penal Code (Amendment) Act, No 16 of 2006.

⁶⁰ Rule 136, *ICRC International Customary International Humanitarian Law Study*, accessed at <https://www.icrc.org/customary-ihl/eng/docs/v1>.



16. The LTTE's use of child soldiers extended to forced recruitment,⁶¹ abduction⁶² and the use of children in combat.⁶³ The forced recruitment of child soldiers intensified in 2009. In March 2009, between 250 and 400 youths were taken from Valaiganar Catholic Church to training camps.⁶⁴ In another incident, a recruitment unit shot dead a child and his parents after they attempted to prevent the child from being abducted.⁶⁵ In April 2009, the LTTE forcibly recruited 600 teenagers who sought refuge in the Valaignarmadam church near Mullivaikkal in northern Sri Lanka.⁶⁶ From April 2009, children were employed as frontline soldiers or used to protect senior LTTE leadership as human shields.⁶⁷

(v) Torture, Cruel and Inhuman Treatment of Civilians by the LTTE

17. The LTTE used detention facilities to torture prisoners of war, dissenting LTTE cadres and the civilian population.⁶⁸ The LTTE operated large detention centres in Thunnukai Mullaivaikkal, Devipuram and Vallipunam Udyarkattu (Victor Base 1)⁶⁹ and smaller LTTE camps, such as the Elaivan⁷⁰ and Thoppigala.⁷¹
18. Common torture methods included beating with rods, cutting prisoners with sharp razors, applying chilli powder to prisoners' eyes, cavities and foreskins, and using electric shocks.⁷² The use of torture and cruel, inhuman or degrading treatment is prohibited in non-international armed conflicts⁷³ and is punishable as a war crime or crime against humanity.⁷⁴

⁶¹ Attachment 7, Sri Lankan Ministry of Defence, *Humanitarian Operation Factual Analysis: July 2006 – May 2009* (July 2011), para. 187.

Amnesty International, *Annual Report 2010, Human Rights in Democratic Socialist Republic of Sri Lanka*, accessed at <http://www.amnesty.org/en/region/sri-lanka/report-2010>.

⁶² Child Soldiers International, *Child Soldiers Global Report 2004*, p. 208, accessed at http://www.child-soldiers.org/global_report_reader.php?id=281.

⁶³ Amnesty International, *Annual Report 2010, Human Rights in Democratic Socialist Republic of Sri Lanka*, accessed at <http://www.amnesty.org/en/region/sri-lanka/report-2010>.

⁶⁴ US Department of State, *Report to Congress on Incidents During the Recent Conflict in Sri Lanka* (2009), p. 12, accessed at <http://www.state.gov/documents/organization/131025.pdf>.

⁶⁵ US Department of State, *Report to Congress on Incidents During the Recent Conflict in Sri Lanka* (2009), p. 12, accessed at <http://www.state.gov/documents/organization/131025.pdf>.

⁶⁶ Coalition to Stop the Use of Child Soldiers, Sri Lanka: Report to the Committee on the Rights of the Child on the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (April 2010) at pp. 5-6, accessed at http://www.child-soldiers.org/research_report_reader.php?id=311.

⁶⁷ Coalition to Stop the Use of Child Soldiers, Sri Lanka: Report to the Committee on the Rights of the Child on the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (April 2010), p. 6, accessed at http://www.child-soldiers.org/research_report_reader.php?id=311. Independent, Tamil Rebels Recruited Children for Last Stand Against Sri Lankan Army (12 December 2011), accessed at <http://www.independent.co.uk/news/world/asia/tamil-rebels-recruited-children-for-last-stand-against-sri-lankan-army-6275874.html>.

⁶⁸ Ministry of Defence and Urban Development, Sri Lanka, "Victor Base 1, Vallupunam – LTTE's secret prison and torture chamber for POWs and Tamils" by Shenali Waduge accessed at http://www.defence.lk/new.asp?fname=20111228_02. See also Taipei Times, *Sri Lanka Claims to Find Tamil Tiger Torture Chambers*, accessed at <http://www.taipaitimes.com/News/front/archives/2007/01/17/2003345097>.

⁶⁹ The Vallipunam Udyarkattu (Victor Base 1) detention centre was built in 1997 and had 24 cells. See Shenali Waduge, *Victor Base 1, Vallipunam – LTTE's Secret Prison & Torture Chamber for POWs & Tamils* (12 March 2012), accessed at http://www.defence.lk/new.asp?fname=20111228_02; Colombo Telegraph, *The POWs of the Eelam War* (22 June 2014), accessed at <https://www.colombotelegraph.com/index.php/the-pows-of-the-eelam-war/>.

⁷⁰ Ministry of Defence and Urban Development Sri Lanka, *Credible Evidence Found: "LTTE Tortured us in cells for three months" – surrendered cadres* (30 December 2010), accessed at http://www.defence.lk/new.asp?fname=20070119_02.

⁷¹ Ministry of Defence and Urban Development Sri Lanka, *LTTE 'Torture Chambers' Located – Thoppigala* (30 December 2010), accessed at http://www.defence.lk/new.asp?fname=20070629_04.

⁷² Colombo Telegraph, *The POWs of the Eelam War* (22 June 2014), accessed at <https://www.colombotelegraph.com/index.php/the-pows-of-the-eelam-war/>.

⁷³ Common Article 3, Geneva Conventions 1949 prohibits the use of "mutilation, cruel treatment and torture...outrages upon personal dignity, in particular humiliating and degrading treatment" against persons *hors de combat*. This prohibition is also a norm of customary international law, as articulated at Rule 90, *ICRC International Customary International Humanitarian Law Study*, accessed at http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule90. The International Institute of Humanitarian Law, *The Manual on the Law of Non-International Armed Conflict With Commentary* (2006) states that customary international law prohibits causing "unnecessary suffering" to combatants (para. 1.2.3) and the use of "torture and degrading or inhuman treatment" against persons *hors de combat* (para 1.2.4), accessed at <http://www.iihl.org/iihl/Documents/The%20Manual%20on%20the%20Law%20of%20NIAC.pdf>.

⁷⁴ Torture constitutes a serious breach of Common Article 3, Geneva Conventions 1949. Customary international law imposes criminal liability for serious violations of Common Article 3. See UK Ministry of Defence, *The Manual of the Law of Armed Conflict*,



(vi) Murder of Civilians by the LTTE

19. The LTTE systematically attacked civilian targets outside the LTTE controlled area⁷⁵ and murdered civilians inside the *de facto* LTTE controlled region.⁷⁶
20. International humanitarian law prohibits “violence to life and person, in particular murder of all kinds” of both civilians and persons *hors de combat* in non-international armed conflicts.⁷⁷ Outside the context of armed conflict, murder is a criminal offence pursuant to section 294 of the Sri Lankan Penal Code.⁷⁸
21. As a sovereign state, Sri Lanka had an obligation to protect civilians and persons *hors de combat* from being murdered during a non-international armed conflict within its borders. Furthermore, Sri Lanka, as a party to the ICCPR, had an obligation to protect the lives of its citizens at all times.

D. Sri Lanka’s Rights and Responsibilities During an Internal Armed Conflict in Respect of Civilian Objects Used for Military Purposes or Action

22. The LTTE used civilian objects, such as hospitals, as bases from which to store military assets and fire at SLAF troops.⁷⁹ Under international humanitarian law, a civilian object loses its protected status when used as part of a military objective to carry out attacks “harmful to the enemy”.⁸⁰
23. In exercising its right to self defence, the SLAF were entitled to use reasonable force to respond to ongoing armed attacks by the LTTE from civilian objects which were being used for military purposes.⁸¹ As a sovereign state, Sri Lanka had the right to reassert control over its territory.⁸² It also had the responsibility to ensure the safety and welfare of its citizens and protect their fundamental human

Oxford University Press (2005) at 15.32.2. Torture can also constitute a crime against humanity: See Article 7(1)(f) of the Rome Statute, Article 5 of the ICTY Statute, Article 3 of the ICTR Statute, Article 2 of the SCSL Statute, Article 5 of the Law on the Establishment of the ECCC; Article 18 of the International Law Commission’s Draft Code of Crimes against the Peace and Security of Mankind.

⁷⁵ See Attachment 1, Steven Kay QC, Liberation Tigers of Tamil Eelam, Annex E, List of LTTE Attacks on Civilian Targets. Source: Sri Lankan Ministry of Defence, *Humanitarian Operation Factual Analysis: July 2006 – May 2009* (July 2011), pp. 96-105. Also see Attachment 9, Steven Kay QC, Liberation Tigers of Tamil Eelam, Annex D, List of LTTE Attacks on Vulnerable Villages. Source: Sri Lankan Ministry of Defence, *Humanitarian Operation Factual Analysis: July 2006 – May 2009* (July 2011), pp. 106-113.

⁷⁶ See Attachment 2, Steven Kay QC, Liberation Tigers of Tamil Eelam, Annex A, List of Tamil Politicians Assassinated by the LTTE. Source: Sri Lankan Ministry of Defence, *Humanitarian Operation Factual Analysis: July 2006 – May 2009* (July 2011) at pp. 88-92. See also Attachment 8, Steven Kay QC, Liberation Tigers of Tamil Eelam, Annex B, List of Sri Lankan Government Officials Assassinated by the LTTE. Source: Sri Lankan Ministry of Defence, *Humanitarian Operation Factual Analysis: July 2006 – May 2009* (July 2011) at pp. 92 - 94. See also Al Jazeera news report, ‘LTTE defector accuses group of civilian murder’, 30 April 2009, reporting that Tamil fighters killed hundreds of civilians as they tried to flee the northeastern war zone, accessed at http://www.dailymotion.com/video/xqp9li_ltte-defector-accuses-group-of-civilian-murder-30-apr-09_news.

⁷⁷ Common Article 3, Geneva Conventions 1949 prohibits “violence to life and person, in particular murder of all kinds”. This is also a prohibition under customary international law established by state practice, as articulated at Rule 89, *ICRC International Customary International Humanitarian Law Study*, accessed at http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule89.

⁷⁸ Section 294, Chapter 19, Penal Code.

⁷⁹ See Attachment 7, Sri Lankan Ministry of Defence, *Humanitarian Operation Factual Analysis: July 2006 – May 2009* (July 2011), para. 179.

⁸⁰ The exception to the protected status of hospitals is found in Article 19 of Geneva Convention IV 1949, which states that hospitals shall not lose their protections under international humanitarian law “unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy.” See Rule 10, *ICRC International Customary International Humanitarian Law Study*, accessed at https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule10.

⁸¹ The doctrine of self-defence was established in the *Caroline* case as “instant, overwhelming, leaving no choice of means, and no moment of deliberation”. See letter from Mr Webster to Lord Ashburton, originally addressed to Mr Fox, British Minister at Washington, dated 24 April 1841 cited in R Y Jennings, ‘The Caroline and McLeod Cases’, *The American Journal of International Law*, Vol. 32, No. 1 (January 1938), pp. 82-99, p. 89. A state has a right of self-defence against non-state actors, see Bethlehem, ‘Principles Relevant to the Scope of a State’s Right of Self-Defence Against an Imminent or Actual Armed Attack by Non state Actors’, *American Journal of International Law*, Vol. 106 (2012), pp. 5-7. Also see ICJ, *Case Concerning Military and Paramilitary Activities In And Against Nicaragua*, Judgment of 27 June 1986 (Merits), paras 194-195.

⁸² This is a principle of Westphalian state sovereignty.



rights.⁸³ The extent and enormity of the crimes committed by the LTTE over such an extensive period of time entitled Sri Lanka to pursue a strategy by which it defeated the hostile forces it faced in a decisive outcome that did not constitute an attack upon the civilian population.

E. Crimes Against Humanity

24. The LTTE committed crimes against humanity in Sri Lanka as part of a widespread and systematic attack directed against the civilian population, pursuant to an organisational policy to commit such an attack, with knowledge of the attack.⁸⁴ These crimes included: murder; extermination; enslavement; forcible transfer; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture; persecution; and other inhumane acts. As a sovereign state, Sri Lanka had a duty to prevent crimes against humanity being perpetrated against its populace.

⁸³ See Deng, *Protecting the Dispossessed: A Challenge for the International Community*, Brookings Institution Press (1993). See also Etzioni, *Sovereignty as Responsibility*, Foreign Policy Research Institute (2006), accessed at <http://www2.gwu.edu/~ccps/etzioni/documents/A347a-SoverigntyasResponsibility-orbis.pdf>. The concept of ‘sovereignty as responsibility’ was subsequently adopted in the responsibility to protect doctrine as set out in International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, Report of the International Commission on Intervention and State Sovereignty, December 2001, accessed at <http://responsibilitytoprotect.org/ICISS%20Report.pdf>. This was later developed by the UNGA in UNGA Resolution, *2005 World Summit Outcome*, A/RES/60/1, 24 October 2005. See Ramesh Thakur, *Outlook: Intervention, Sovereignty the Responsibility to Protect: Experiences from the ICISS*, Security Dialogue 2002 33:323, p. 328: “Crucially the responsibility to protect acknowledges that responsibility rests primarily with the state concerned; only if the state is unable or unwilling to fulfill this responsibility, or is itself the perpetrator, does it become the responsibility of others to act in its place.” Furthermore, Article 4(d) of the 1978 Constitution of the Republic of Sri Lanka states: “the fundamental rights which are by the Constitution declared and recognized shall be respected, secured and advanced by all the organs of the government, and shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided.”

⁸⁴ *Supra*, fn 16.