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LAW & SOCIETY TRUST

Editor's note .....

In this issue we publish an article on the commercial sexual exploitation of children in Sri Lanka by Shanali Sivasupramaniam, who was an intern at the Trust last year. In this article, the writer looks at the international instruments that Sri Lanka has ratified and the local legislation in relation to children. She surveys the situation in Sri Lanka with regard to sexual exploitation of children and expresses concern about the non-implementation of laws and the negative impact such exploitation is having on children. The urgent need to take action to arrest the situation is highlighted. The writer raises particular concern with regard to the state of the juvenile justice system in the country as there is only one juvenile court for the whole country. She is dismayed at the way child victims of abuse are treated by the criminal justice system in the country.

We also publish three articles based on discussions held at the Trust under the Law and the Economy Programme of the Trust. These discussions were on Commercial law Reform, TRIPS agreement and copyrights law and globalisation and post-Seattle situation. The Law and the Economy Programme of the Trust was launched in 1990 as a result of the economic transition taking place in Sri Lanka as well as in the region and to see how the law should respond to this transition. After being dormant for a few months, the Law and Economy Programme was re-vitalised recently and several other programmes, including a training seminar on the World Trade Organisation, are on the pipeline.

LST Congratulates New Members of the Human Rights Commission

The new members of the Human Rights Commission were announced recently and the Trust would like to congratulate them on their appointment. The new members are: Mr. Faiz Mustapha (Chairman), Mr. Godfrey Goonetillake, Mrs. Manouri Muttettuwegama, Mr. N. Selvakumaran, and Mr. Sarath Cooray.

The Trust would like to extend its fullest co-operation to the new members, and looks forward to a long and fruitful working relationship with them.

THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN IN SRI LANKA

Shanali Sivasupramaniam*

INTRODUCTION

Sri Lanka has a long tradition of child protection. Yet, the urgent need to protect children in the modern context, as a result of child abuse (and in particular, the commercial sexual exploitation of children) that is rampant in society, is one of the gravest problems the country is facing at present. Universal recognition of the evolving concept of child's rights materialised in the adoption of the United Nations Convention on the Rights of the Child,[1] Article 1 of which defines the 'child' as: "every human being below the age of eighteen years, unless under the law applicable, majority is attained earlier." Thus, "the initial focus on the 'non-status' position of the child in the eyes of the law has gradually developed into a recognition of rights, based on a protectionist philosophy that saw children as the most vulnerable group in society,"[2] and as such, as a group dependent on society for its well-being. Despite extensive efforts made at the international level, ratification does not always amount to compliance with international standards at the national level. This is true of most countries in South Asia and unfortunately, this is the current position of Sri Lanka as well.

For the purposes of this discussion, an analysis of the topic "the commercial sexual exploitation of children in Sri Lanka" will be dealt with by paying special emphasis on the issue of child prostitution.

It is proposed to examine the types of child prostitution prevalent in Sri Lanka and the relevant domestic and international legislation applicable to the subject. In addition, it is proposed to highlight the drawbacks in the judicial and administrative systems in the country which have resulted in child prostitution being carried out with impunity. Having identified where Sri Lanka falls short of internationally accepted norms and expectations in this respect, attention will be paid to non-

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[1] 20 November 1989 UN Doc. A/ RES 44 / 25 (entered into force on 2 September 1990).

[2] S.W.E Goonesekere: "Children, Law and Justice - A South Asian Perspective" at page 77.

compliance with the provisions of the United Nations Convention on the Rights of the Child[3] and the problems faced in this regard.

Outline of the discussion:

Section I would survey the international law governing sexual exploitation of children. Section II will examine the present situation in Sri Lanka with respect to the said issue and survey the relevant domestic legislation. Section III will deal with the juvenile justice system of Sri Lanka. The case of the sexually exploited child and the legal process available in the country will be discussed here and this will bring into focus the extent of Sri Lanka's lack of compliance with international law. Section IV will examine the status of compliance with the CRC and section V will contain the conclusions.

SECTION I - THE INTERNATIONAL LAW GOVERNING SEXUAL EXPLOITATION OF CHILDREN:

The instruments on child labour and women's work adopted by the International Labour Organisation in the early part of the nineteenth century are indicative of the international concern with children's rights, initially linked children's rights with women's rights.[4] The focus on children as individuals entitled to rights in their own capacity emerged only in 1959, with the adoption of the Declaration of the Rights of the Child by the United Nations. However, it was the adoption of the Convention on the Elimination of Discrimination Against Women, two decades later, that set the stage for safeguarding children's rights at the international level. The year 1979 was declared the 'International Year of the Child' and this, in turn, prompted the drafting of an International convention on children's rights. The CRC was thus adopted by the General Assembly of the United Nations, thirty years after adoption of the Declaration on the Rights of the Child.

Embodying the principle of the best interest of the child,[5] the United Nations Convention on the Rights of the Child ratified by Sri Lanka on 12 July 1991, has set out universal standards on the level of protection to be accorded to the holders of rights under that convention: children.

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[3] Hereinafter referred to as the CRC.
[4] *Supra* 2 at p 23.
[5] Article 3.

Of specific relevance to the topic at hand is Article 34 of the Convention which deals specifically with the issue of sexual exploitation whilst the related issues of 'rehabilitative care' and 'the periodic review of placement' are dealt with in Articles 39 and 25 respectively. Together with the general standards set out by the CRC and other international instruments, the said provisions will be discussed in the ensuring part of this section.

In terms of Article 34 of the CRC, while state parties have obligated themselves to protect the child from all forms of sexual exploitation and sexual abuse, they are required to ensure that all pertinent national, bilateral and multilateral measures are adopted to prevent (a) a child being forcibly or unwittingly being made to engage in any unlawful sexual activity (b) children being exploited by being used for prostitution or other unlawful sexual practices and (c) children being exploited by being used for pornographic performances and materials.

In relation to the issue of 'rehabilitative care', Article 39 obliges States to: "take all appropriate measures to promote physical and psychological recovery" and bring about re-integration in an environment which fosters the health, self respect and dignity of the child.

With respect to the periodic review of placement, Article 25 of the Convention requires that: "State Parties recognise the right of a child who has been placed by competent authorities for the purposes of care, protection and treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his/her placement."

Article 19 of the Convention stipulates that State Parties shall take: "all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation including sexual abuse..." Subsection 2 of the same provision goes on to state that the measures should include: "effective procedures for the establishment of social programmes to provide necessary support for the child." The violation of a child's inherent dignity and worth and the resulting breaches of rights essential for the healthy development and survival of a child are dealt with under Articles 16, 24, and 31.

Also of relevance is the Forced Labour Convention No. 29 of 1930 of the ILO, ratified by Sri Lanka in 1950. Forced Labour is described 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." Thus, practices with regard to the commercial sexual exploitation of children may be examined within the meaning of this Convention which aims to suppress the use of forced labour in all its forms and declares it a punishable offence to illegally exact forced or compulsory labour.

Of similar significance is the International Convention on Slavery (1927), which defines 'Slavery' as: "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised."[6] Article 2 of the said Convention defines 'slave trade' as: "all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery: all acts involved in the acquisition of a slave with a view to selling or exchanging him...." The commercial sexual exploitation of children could, therefore, be examined within the meaning of the Convention, when such activities are considered as those involving a child to 'sell' his or her body and thereby be enslaved by the exploiters.

In addition, Article 24 of the International Covenant on Civil and Political Rights generally asserts that: "Every child shall have...the right to such measures of protection as are required by his status as a minor....."

Further, the United Nations Declaration on the Rights of the Child of 20 November 1959 imposes a duty on all States to safeguard children because "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection." This Declaration, though not a binding document, is of strong persuasive value emphasising the importance of safeguarding children through the various stages of their development.

Finally, it is appropriate to discuss briefly the provisions of the CRC that recognise the obligation of the international community to assist in a particular State's realisation of its goals concerning children. Article 4, in particular, obliges State Parties to: "undertake all appropriate legislative, administrative and other measures" to implement the CRC. It is stated further that "with regard to economic, social and cultural rights, State Parties shall undertake such measures to the maximum extent of

[6] Article 1

their available resources and where needed, within the framework of international co-operation" (emphasis added).

The recognition of this obligation of the international community is emphasised, once again, in Section 17 of the World Declaration on the Survival, Protection and Development of Children,[7] which requires "a continued and concerted effort by all nations, through national action and international co-operation."

Section 22 of the Plan of Action for Implementing the above World Declaration[8] reiterates this obligation by stating that children in difficult circumstances require protection from "national efforts and international co-operation." Clearly therefore, the above standards taken as a whole, enunciate the obligations of the international community in encouraging domestic compliance of these standards within individual states, thereby enabling them to realise their international obligations with respect to children.

A detailed analysis of the international instruments discussed above reveals that some of the standards set out by them are, in fact, higher than those declared by the CRC. However, the Convention makes express provision to prevent any interpretation of its text which could lower the standard of international protection afforded to children by stating in Article 41 that: "nothing in the present Convention shall affect any provisions which are more conducive to realisation of the rights of the child which may be contained in either (a) the law of the State Party or (b) the international law in force for the State."

SECTION II - THE PRESENT SITUATION IN SRI LANKA

As a State Party to the Convention, Sri Lanka is under an obligation to abide by the standards and principles set out in the Convention. In reality, however, Sri Lanka is lagging far behind its commitments.

[7] 30 September 1990, New York.
[8] 18 October 1990, UNGA A / 45 / 625.

2.1 THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN

The sexual exploitation of children through prostitution and pornography is a global industry driven by greed and a callous demand for cheap sex.[9] In Sri Lanka too, commercial sexual exploitation of children is a flourishing business, which has reached alarming proportions. In the Sri Lankan context, exploitation in the form of child prostitution is twofold, namely, 'boy prostitution' and 'bonded children' - an overview of each of which follows.

2.1.1 BOY PROSTITUTION

In the Sri Lankan socio-culture, boys have greater freedom of movement than girls and hence are often free to operate as prostitutes if they so desire. Research work reveals a 70:30 ratio of boys to girls in prostitution under the age of sixteen.[10]

The problem of boy prostitution is evident on the beaches of the southern and western coasts of the island. The boys involved operate in two forms - either as 'beach boys' or as 'self-employed prostitutes.' The former category comprises male children drawn from the fishing hamlets, most of whom are amongst the extremely poor. They operate in gangs of their own groupings and are often found to be subject to the control of men acting as agents and who have been prostitutes themselves, when younger.[11] Another salient feature of this form of prostitution is that, although the children are from the poverty stricken families, it is not purely the financial element but also the promise of making their dream world become a reality, that enables agents to lure the boys to the beach. In almost all these cases, the 'dream world' comprises the prospects of travelling abroad and the assurance of a life overseas with a foreigner who would 'adopt' the child as his own.

The second category (the self-employed prostitutes), comprises mainly school drop-outs and rebels in the age category of eight to sixteen years and who have had homosexual alliances previously. These boys have become victims of abuse by local or foreign paedophiles. They usually operate in the beach resorts, particularly in Negombo, Hikkaduwa, Bentota and Galle - all of which are areas patronised heavily by tourists.

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[9] Maureen Seneviratne (ed), "The Sexual Exploitation of Children - Some Expert Analyses in Sri Lanka," UNICEF, p 7.
[10] Maureen Seneviratne, "Child Prostitution in Sri Lanka - A Brief Survey," p 15.
[11] *Ibid* at p 18.

In relation to boy prostitution in general, therefore, factors which lure the boys are the rewards they reap by way of easy money, liquor, drugs and the prospects of a trip abroad. The age group most in demand is that from ten to fifteen years and the tragic fact is that the out-going group is replaced at regular intervals by fresh batches of boys. These teenagers not only lose out on the opportunity of developing their skills in their formative years but also run the risk of acquiring incurable diseases such as HIV/AIDS and other Sexually Transmitted Diseases (STDs), as few precautions are taken by abusers and their innocent victims are unaware of the dangers involved.

2.1.2 BONDED CHILDREN

Certainly the more disturbing and indeed the more difficult problem to investigate is that of 'bonded children' used for the purposes of prostitution and pornography in or near the coastal regions of the country.[12] Such children are housed in so-called "safe houses" and lead lives of prisoners by being confined to such orphanages run by locals with contributions from abroad. The "safe houses" are blatantly set up and the existence of bonded children is a well-known fact in society. Yet, due to various extraneous factors it is an issue that is rarely discussed in Sri Lankan society.

Children from six to eight years upwards are made use of in this branch of this unsavoury trade, which is controlled by highly organised international and national networks. As is the fate of the beach boy, even the bonded child is discarded after he has been exploited to the maximum and as and when the "new" child is available. The discarded child is usually driven to a life of crime thereafter and his future is doomed. A certain percentage of bonded children are also subject to sadistic ill-treatment and they usually end up becoming addicted to drugs or alcohol. Research studies have revealed that unless removed from these corrupting influences at a very early date, children of such fate are virtually impossible to rehabilitate.[13]

2.2 RELEVANT DOMESTIC LEGISLATION

The 1978 Constitution of Sri Lanka contains in Chapter III, general provisions on fundamental rights which have a bearing on children. Article 12(1) in particular, recognises the right to equality by declaring that: "All persons are equal before the law and are entitled to the equal protection of the law." Article 12(4) provides for

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[12] *Ibid.*
[13] *Ibid.*

affirmative action on behalf of, inter alia, children by stating that nothing in the said Article shall prevent ".....special provision being made, by law, subordinate legislation or executive action, for the advancement of...children..."

Chapter VI of the Constitution sets out the duties of the State concerning the special care of children. Accordingly, Article 27 (13) declares that: "The State shall promote with special care, the interest of children and youth so as to ensure their full development – physical, mental, moral, religious and social – and to protect them from exploitation and discrimination."

Further, Article 27(13) of the 1978 Constitution found in the Chapter dealing with the Directive Principles of State Policy and Fundamental Duties urges the state "to promote with special care the interests of children and youth so as to ensure their full development ... and to protect them from exploitation." Unfortunately, since this Article is found in the above-mentioned chapter of the Constitution, it is only of persuasive value.

The October 1997 version of the Draft Constitution is a significant development since it embodies children's rights. Under the title of 'Special Rights of Children', every child[14] has the right to be protected from maltreatment, neglect, abuse or degradation.[15] Sub-section (2)(a) of the said Article goes on to provide for the right to "family care or parental care or to appropriate alternative care when removed from the family environment" and the basic rights to nutrition, shelter, basic health services and social services are provided for in sub-section (2)(b). Declaring it to be the responsibility of the State to take reasonable legislative or other measures with a view to achieving the progressive realisation of the above-mentioned rights,[16] the Draft Constitution also provides in Article 4 that: "in all matters concerning children..... the best interest of the child shall be of paramount importance." However, the status of the Draft Constitution remains uncertain.

"The laws as they stood in Sri Lanka could not be used to prevent child prostitution. At the time they were drafted prostitution was considered a female monopoly."[17] At present, however, the statutory framework for the protection of children in Sri Lanka consists of a vast number of Acts and Ordinances. The Children and Young Persons Ordinance No. 48 of 1939 (as amended), the Penal Code No. 2 of 1883 (as amended)

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[14] Article 22 (9) of Chapter VI defines 'child' as a person under the age of eighteen years.
[15] Article 22 (1) (b).
[16] Article 3.

and the Code of Criminal Procedure Act No. 15 of 1979 (as amended) are the most relevant pieces of legislation for the purposes of the present discussion. The most significant amendment was introduced by the Penal Code (Amendment) Act No. 22 of 1995, which illustrates Sri Lanka's increased legislative commitment towards safeguarding children from various forms of abuse. A study of these amendments also makes clear that the state has adopted a two pronged attack to protect children:

(a) by introducing amendments to the Penal Code to widen the definition of sexual exploitation, and

(b) by increasing the severity of the punishment meted out to the transgressors which, in turn, serves as a deterrent.

The effectiveness of this approach will be critically examined in the light of the provisions of the CRC.

Among the several new sections introduced by the amendments relating to offences committed upon children, Section 360B(I) (a) - (f) and Section 365B of the Penal Code which deal with the new offence of sexual exploitation are of greatest relevance for the purposes of this discussion.

Section 360 B (1) stipulates punishment of a person who:

(a) knowingly permits any child under the age of eighteen to remain in any premises for the purposes of sexual abuse, to participate in sexual activity, or participate in any indecent or obscene exhibition or show;

(b) acts as procurer of a child for sexual intercourse or sexual abuse of a child;

(c) procures a child for intercourse or abuse;

(d) gives monetary or other material consideration to procure a child.

Section 365B defines Grave Sexual Abuse as an offence committed by any person who:

[17] Ceylon Daily News 03/09/92 – Article written by Professor S.W.E. Goonesekere.

(1) .....for sexual gratification, does any act, by the use of his genitals or any part of the human body or any instrument or any orifice or part of the body of any other person, being an act which does not amount to rape under Section 363, in the following circumstances:

(a) without the consent of the other person;
(b) with the consent.....where the consent has been obtained by the use of force, threat or intimidation;
(c) with the consent....where such consent has been obtained at a time the other person was of unsound mind or was in a state of intoxication induced by alcohol or drugs.

In addition, the Code of Criminal Procedure Act 1979 was also amended in 1998 and Section 43A(2) of that Act is worthy of mention in this connection. In terms of that amendment, a person arrested for child abuse must be produced within 24 hours before a Magistrate who has the discretion to detain the accused for a further period of three days.

The adoption of the Children's Charter (1992) did indeed augur well for Sri Lanka. However, by virtue of the fact that it is not an Act of Parliament, this Charter does not have a legal status although it could come to have binding effect through judicial interpretation. The Charter provided for the establishment of a National Monitoring Committee[18] for the purposes of monitoring the implementation of the Charter. Although the intention was that the NMC was to be an independent body, the set back was rooted in the fact that it was to be chaired by the Secretary of the Minister of Social Services and hence the chances of obtaining an accurate and independent report was greatly diminished.

The recently enacted National Child Protection Authority Act (1998) is a positive sign not only of Sri Lanka's commitment but also of the development with regard to the protection of child rights. As the first ever piece of domestic legislation exclusively on child rights, the National Child Protection Authority Act provides an "institutional focus for the prevention of child abuse and the protection of children who are the victims of such abuse."[19] This Act has vested in the new Authority, wide powers in the development of policies to protect children and also to oversee the enforcement of existing provisions.

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[18] Hereinafter referred to as the NMC.
[19] Speech made in the Parliament of Sri Lanka on 20/11/98 by the Late Dr Neelan Tiruchelvam, MP.

Under Section 31 of the Immigrants and Emigrants Act, the President has, inter alia, the power to deport from Sri Lanka, any person not being a citizen of Sri Lanka who is a commercial sex worker, procurer or a person living on the commercial sexual activities of others. As regards extra-territorial jurisdiction, the Sri Lankan courts are not empowered to try offences against children committed abroad by Sri Lankan nationals. However, several countries such as France, Germany, Switzerland and the United States of America, have introduced provisions in their national legislation to try their nationals for sexual offences committed against children abroad.[20]

Four recent case studies relevant to Sri Lanka are discussed below which establish the fact that the legal mechanism prevailing in the country is not yet geared to bring to book those who openly flout the law. Unfortunately, such a situation only encourages paedophiles from foreign countries to come to Sri Lanka and carry on their nefarious activities with impunity.

[20] ILO Country Report (Sri Lanka) 1998-1999.

Table 1

CASE STUDIES

1. In 1998, a Swiss national, Victor Baumann, was accused of molesting and raping more than one thousand minors during his ten-year stay in the island.[21] Baumann is at present, serving a jail sentence in Switzerland. It was in the aftermath of this case that the amendments to the Penal Code of 1883 were made and the Child Protection Bureau of the Police established.

2. Notwithstanding the amendments made to the Penal Code in 1995, the situation in Sri Lanka in relation to the commercial sexual exploitation of children, remains unchanged. In January 1999, Armyn Pfaffhauser - a convicted paedophile – escaped from a detention centre outside Colombo while awaiting deportation. To date, there has been no inquiry launched into the circumstances and the manner in which his escape from detention became possible.[22] After his escape, he had been re-arrested when he was found molesting the same two minors whom he had previously abused in the same manner. After having been found guilty and sentenced to a term of imprisonment by the courts, subsequently his sentence was reduced by the then government, which granted an amnesty to certain prisoners. Armyn escaped from detention a second time and had even managed to leave Sri Lanka. When the Sri Lankan Authority realised that Armyn had escaped to South India, they contacted the relevant authorities there who liaised with the South Indian Police to trace and arrest him in Madras, India. Although the provisions of Extradition Law No: 8 of 1977 could have been invoked by the Government of Sri Lanka, it is regrettable that to date, no meaningful steps have been taken by the authorities to have Armyn extradited to Sri Lanka.

3. In April 1999, Erik Ove Lenart - a seventy year old Swedish national - was arrested by the police in a north-western coastal region, when they found him to be in the company of a sixteen year old boy. A frequent visitor to the island, this paedophile while out on bail was re-arrested by the police when they found him to be in possession of a new passport and airline ticket to a European nation. When his case was heard, Erik pleaded guilty and only a fine of Rs.100,000 was imposed on him.

4. Immediately prior to Lenart's arrest the Sri Lanka Tourist Police arrested Jan Nilson, a paedophile. He was found to be in the company of a child in a location notorious for its paedophilic activity. In a statement to the police he had admitted to indulging in non-penetrative sex with the child. Nilsons's case is still pending.

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[21] *Ibid.*

[22] The Sunday Leader – September 1999.

SECTION III - THE ABUSED CHILD AND THE JUVENILE JUSTICE SYSTEM OF SRI LANKA

'Child abuse' is a developing concept, which has both a physical and psychological dimension to it. All physical abuse (sex-related and non sex-related) involves psychological abuse while the converse is not always true. Although the Sri Lankan law applicable to the child provides no direct definition for the term 'abuse', it defines the term by reference to other laws.[23] Further, it distinguishes various categories of children based on age but has, in accordance with the CRC, generally accepted eighteen as the age of majority. The most recent development of this concept of 'child abuse' in Sri Lanka has been to refer to it as 'offences against children' or in other words, all acts which cause harm to a child. For the purposes of this discussion, however, the term 'abused child' will be read in the light of the sexually exploited child, where such exploitation has taken place on a commercial scale.

3.1 THE JUVENILE JUSTICE SYSTEM

3.1.1 PROCEDURE[24]

A high proportion of reported cases of child abuse is initially brought to the notice of the police. In the event of severe injury, however, the child is usually taken to hospital initially and the authorities there would subsequently refer the child to the police.

At the police station, the relevant authorities are required to fill in the 'Medico-Legal Form', which would give them the basic information they require as regards the abused child and which would enable them to decide what steps to take next. In the meantime, however, statements would be recorded from the witnesses and if the accused is found, he is arrested by the police and a statement would be recorded from him. The information so gathered is then recorded in the Information Book (IB), where 99% of the reports are hand written, unless the investigation has been carried out by a special branch of the police such as the Criminal Investigations Department (CID).

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[23] See the Child Protection Authority Act.

[24] Interview conducted with official at the Attorney General's Department, Sri Lanka.

Prior to the Amendments made to the Criminal Procedure Code in 1998, section 37 provided that the accused may be kept in custody for a maximum duration of twenty-four hours. In accordance with the 1998 amendments, however, in relation to child abuse cases alone, any officer above the rank of Superintendent of Police (SP) may request the Magistrate to allow him to keep the accused in custody for a period of seventy two hours. If the Officer-In Charge (OIC) at the police concludes that the case involves rape, the accused is arrested and the facts of the case are reported to the Magistrate. In court, the police would ask for an order to remand the accused and this order is initially given for a period of fourteen days.

In most cases, the abused child is produced in court by the police in the absence of parents/guardians whom the police claim cannot be traced. It is common knowledge that the police do not always inform the parents/guardians of court hearings. Invariably, the absence of parents/guardians is explained by a host of other social factors such as overseas employment, the need to look after other children in the family, employment restrictions or even the lack of interest or concern for the child. In such circumstances, the Magistrate by issuing a 'Warrant of Detention', would usually direct the child to be sent to an appropriate state institution.

3.1.2 THE INSTITUTIONS

A number of state institutions play a pivotal role in the working of the juvenile justice system of the Sri Lanka: the courts, the Department of Probation and Child Care Services (and their provincial departments), the Police Department and the Judicial Medical Service.

Part 1 of the Children and Young Person's Ordinance (1939) (CYPO) requires the establishment of juvenile courts exclusively for the purpose of dealing with children in the judicial process. However, only one such court functions in Sri Lanka. Elsewhere in the country, Magistrate's Courts sitting as Juvenile Courts perform the function of the type of court envisaged in the CYPO.

As regards the institutions into which child victims of abuse (and juvenile offenders) are directed to, there are four categories: remand homes, detention centres, state receiving homes and certified schools. In addition, there are the State approved children's homes and the 'borstal' or training schools which are not directly under the state but require state sanction for their operation. With the enactment of the Provincial Councils Act in 1987, the Provincial Councils, through their respective

departments of Probation and Child Care Services, oversee the maintenance of these institutions. However, overall responsibility for these institutions is borne by the Department of Probation and Child Care Services which is, in effect, the lead agency for the protection, care and rehabilitation of children 'in need of care and protection' (and of children who come into conflict with the law).

3.2 AN EVALUATION OF THE JUVENILE JUSTICE SYSTEM IN THE LIGHT OF INTERNATIONAL LAW

The UN Minimum Rules for the Administration of Juvenile Justice[25].and the International Covenant on Civil and Political Rights 1966 [Article 10(2)(b))], together with the CRC (Articles 25 and 39) set out the basic international standards against which a juvenile justice system of a country may be evaluated.

In general, the treatment of the child in the juvenile justice system of Sri Lanka falls far short of the internationally accepted norms. This is particularly so in relation to victims of sexual abuse and exploitation. In the ensuing part of this section, the juvenile justice system as it exists in Sri Lanka will be evaluated in the light of international law.

The very centralised nature of the juvenile justice system is illustrated by the establishment of only one juvenile court and that too, in the country's capital. Although in its physical arrangements the court room projects informality, in the conduct of its proceedings, the court takes on a different character.[26] Thus, the child-friendly atmosphere that is considered to be an essential element of a juvenile justice system is made to disappear in its entirety, from the very core of this system: the courts. In addition, Probation Officers who are attached to the juvenile court (or to the appropriate Magistrate's Court) are not always trained or equipped to function effectively as social welfare workers. This, in turn, contributes to laws delays. Further, the CYPO requires the juvenile courts as well as other courts handling cases of children under fourteen years, to give priority to the best interest of the child in their decision making.[27] Yet, "due to lack of adequate support services from professionals or welfare workers, or guidelines on how to apply this concept,"[28] decisions continue to be made subjectively.

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[25] These Rules are not binding under international law but they do provide useful standards for the Administration of Juvenile Justice.
[26] Vijaya Samaraweera "the Abused Child and the Legal Process of Sri Lanka" at page 35.
[27] *Supra* n 2 at p 283.
[28] *Ibid.*

In terms of the placement of children in the legal process, the CYPO declares that any child 'in need of care or protection' can be ordered by a court to be: (a) sent to a certified school provided he/she is over the age of twelve years; (b) committed to the care of any fit person; (c) released to his/her parents who are, in turn, ordered to exercise proper guardianship; or (d) placed under the supervision of a probation officer.[29] This is what the domestic legislation requires but what exists in reality is only evidence of blatant non-compliance with the law. Despite these four-fold alternatives in section 35 of the CYPO, option (c) is most often ruled out from the very commencement, since it is the parents/guardians who are often responsible for the situation of the child. Alternative (d) is not a practical option either, given the scarcity of resources and personnel. Thus, the final outcome is almost always institutionalisation in a certified school or approved home.

The resultant over-reliance in this branch of the legal process is itself in contravention of universal standards set out in the Beijing Rules. In particular, Rule 19.1 of these standards states that "the placement of a juvenile in an institution shall always be a disposition of last resort and for the minimum necessary period" because of the detrimental effects of such a placement on a child. Identifying detention as being contrary to the principle of the best interest of the child, Rule 13.1 states: "detention pending trial shall be used only as a measure of last resort and for the shortest possible period of time." As a set of standards which focus primarily on the justice administered to juvenile offenders (and to all children involved in the legal process, generally), if "last resort" and "for the minimum duration" are the key determinants of its necessity, it is clear that juvenile victims of abuse should, under no circumstances, be put through detention or institutionalisation. Clearly, therefore, the universal standards do recognise the detrimental effects on a child of putting him/her through these branches of the legal process and Sri Lanka, acting oblivious to this recognition, is falling short of the required standards.

Furthermore, with regard to the obligations under the CRC, Sri Lanka's approach to institutionalisation is in complete conflict with the philosophy of the Convention that: "...in all actions concerning children...(the) courts of law, administrative authorities or legislative bodies...." the best interest of the child should be given primary consideration.

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[29] Section 35.

A critical point to note as regards the initial documentation that must be filled out by the relevant authority in relation to a child victim, is that it treats every child as either a 'suspect' or 'prisoner'. Thus, when the stage of making arrangements for the placement of children in the legal process is reached, the courts as well as the probation officers perceive institutionalisation as a 'detention' or the 'remanding of' the child.[30] This is due to the fact that there is no legal term equivalent to 'victim'. Thus, a child produced in court for the purpose of enabling the police to convey any information in his/her regard to the Magistrate is referred to as a 'suspect' regardless of the real reason for the appearance. In a recent high-profile case involving the sexual exploitation of a child by a foreign paedophile, it was reported that the child victim was brought into court hand-cuffed and along with the accused![31] A more common occurrence is for the juvenile victims of exploitation to be transported in prison vehicles when being brought to court for the purposes of making orders on their custody and care.[32] Appalling consequences such as these which are brought about by the above-mentioned lapses in the law, also illustrate how far the juvenile justice system falls below the Riyadh Guidelines[33] which require the State to adopt measures which are aimed at protecting juveniles who are deemed to be at 'social risk'. In general, therefore, victims of sexual exploitation in the country are treated like all other children (including juvenile offenders and real suspects) throughout the legal process, with the obvious result of them not receiving the level of care a child in his/her position deserves, and has the legal right to receive.

Section 13 of the CYPO mandates that all children under the age of sixteen must be separated from adults at all times in the legal process, for his/her own protection. Non-compliance with this section results in the child not being held separately from adults whilst in the custody of the police or in the court premises. Under the guise of safeguarding the interests of the child and as a means of ensuring the custody of the child, juveniles are, on many occasions, kept in the company of adults in police cells. Regardless of what the duration might be, allowing child victims to be in the company of adult offenders is certainly an unhealthy practice, for it paves way for further abuse/exploitation of the child. In addition to being in contravention with the domestic legislation, this practice also violates Rule 13.4 of the Beijing Rules which states: "Juveniles under detention pending trial shall be kept separate from adults and shall be detained in a separate institution or in a separate part of an institution also

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[30] *Supra* n 2 at page 283.
[31] *Supra* n 23.
[32] *Supra* n. 29
[33] Preamble to the Guidelines (Adopted in 1990, the Riyadh Guidelines are otherwise known as the United Nations Guidelines for the Prevention of Juvenile Delinquency).

holding adults." It is also in contravention of Article 10(2)(b) of the ICCPR which provides for the separation of accused juveniles from adults and for their speedy adjudication.[34] Furthermore, it is in violation of Article 37(c) of the CRC which declares that: "...every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so."

The contrast that exists between assertion and reality as regards the justice system of Sri Lanka as it affects children, borders on the unthinkable. On the one hand, there is an obvious inadequacy of juvenile courts in the country, which epitomises the lack of infrastructure to support child victims of exploitation. Further, the shortage of trained Probation Officers and other personnel in general, illustrates the difficulty Sri Lanka experiences in co-ordinating the judicial and administrative initiatives in child exploitation. On the other hand, in relation to the process of institutionalisation, all institutions without exception house both child victims of abuse and children who are in conflict with the law. In addition to be being numerically insufficient, the facilities in the institutions themselves are plagued with inadequacies. The cumulative effect of all the above is to make it virtually impossible for the institutions to operate at optimum if not acceptable standards in relation to their stated purpose. The insignificant degree of importance attached to the child's best interest is illustrated very clearly by these factors which, in turn, constitute a violation of the CRC – Article 3(1) in particular. Further, much in contrast to the "physical and psychological recovery and social re-integration of a child victim (of abuse)" which Article 39 of the CRC requires the State to promote, the institutions hardly make it possible to promote a child's esteem, which would no doubt render it extremely difficult for him/her to reintegrate into society as a useful citizen.

SECTION IV - THE STATUS OF COMPLIANCE WITH THE CRC

Ratification of the CRC by Sri Lanka in July 1991 paved the way for several policy initiatives to be set in motion. The National Plan of Action was adopted by the Ministry of Policy Planning and Implementation within a year of ratification and the Children's Charter was formulated a year later. The Government's positive response was further illustrated by the setting up of the National Child Protection Authority in 1988 and the Women's and Children's Desks at police stations throughout the island. Concerted efforts in this regard by the Non-Governmental Organisations (NGOs) resulted in the formation of a NGO Alliance against child abuse and the staging of a

[34] Geraldine Van Bueren; *The International Law on the Rights of the Child* at p 70.

forum on the Rights of the Child. But it is regrettable that in practice, the effectiveness of these initiatives has not measured up to the standards expected of them. This is perhaps partly due to the fact that States, having ratified the Convention, sometimes endeavour to introduce national standards which, in fact, tend to dilute international standards.[35] The negative impact of this tendency is to encourage governments and policy makers to ignore or lose sight of the international value base that they must work towards in realising child rights.[36] More importantly, however, in Sri Lanka the low level of priority attached to children's rights at the national level may well be the cause for the lack of incentives to comply with the Convention. The consequences of a situation of this nature will be examined in the ensuing part of this section.

At the very outset of this discussion, it was noted that historically, Sri Lanka has a very long tradition of child protection. This is borne out by the fact that "the customary laws recognised the concept of child protection through institutions like guardianship, adoption and the obligation of support."[37] However, the term "children's rights" is relatively new to Sri Lanka and the lack of priority attached to it, coupled with the apathetic enforcement of the present laws governing sexual exploitation, leaves juvenile victims at the receiving end of abominable treatment from a justice system supposedly designed to protect children. Be it the rather unfriendly juvenile court or the State or State-run institutions which are in an appalling condition, the legal process available to children in Sri Lanka certainly compromises its ability to rehabilitate a child. This lack of commitment towards the protection of children's rights poses a serious problem when it comes to the question of compliance with the CRC.

Sexual exploitation is caused by "a combination of economic, social, financial and cultural factors, which are overwhelming in developing countries"[38] and this is particularly true in the Sri Lankan context. Although locals are responsible for a high proportion of the paedophilic activity in the island, the country cannot afford to discount the rising number of foreign paedophiles who seem to filter into the country at regular intervals. Often governments in developing countries which depend heavily on tourism as a lucrative foreign exchange earner, have no choice but to turn a blind eye on issues such as sexual exploitation by foreigners through fear of

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[35] *Supra* n 2 at p 60.
[36] *Ibid.*
[37] Sharya de Soysa *Children's Rights in Sri Lanka,* (unpublished).
[38] Jean Ferrand Laurent, ICCB / Geneva Statement to the UN.

otherwise having to pay a high price by way of revenue loss. Unfortunately, Sri Lanka too finds itself trapped in such a situation.

The lack of tangible action and the continued inconsistency in the application of the law over time, is made evident by reports similar to those mentioned in section II, which also shed light on the fact that paedophiles like Nilson and Erik[39] roam about without any effective action being taken against them. This is clearly an unsatisfactory state of affairs. By allowing paedophiles to move freely in society, the authorities are unwittingly exposing children to great danger, contrary to the level of protection they are required to afford to children by the CRC. Not only do paedophiles get a second and perhaps even a third and fourth chance to further exploit the already exploited child, but they are virtually given a chance to make numerous other children victims of their repulsive behaviour. The failure on the part of the State to see the degree of risk involved in permitting such activity is inexplicable, but the fact that the prevalent situation is in violation of Articles 3(3) and 34 of the CRC remains a reality. Moreover, it makes a mockery of Sri Lanka's ratification of the CRC – especially Article 3(I) of which requires the legislature, the executive, the major agencies of government and private social welfare institutions within the country, to make the 'best interest of the child' a primary consideration in their actions and decisions.

It is indeed regrettable that some of the law enforcement authorities themselves condone sexual exploitation of children for pecuniary gain, despite it being no secret that sexual exploitation of children takes place at an alarming scale in Sri Lanka and that child prostitution continues to escalate rapidly. In addition, the protection afforded to those in breach of the law from persons placed at very high levels of authority who appear to be part of an organised mafia, prevents law enforcement agencies from raiding the notorious locations and arresting the abusers.

An examination of Sri Lanka's administrative capacity to implement the CRC also highlights the lack of priority in this regard. The Child Protection Authority Act came into force in early January 1999 the government is yet to make its presence felt. Although it is meant to be a body set up to oversee the enforcement of existing legislation and development of new policies to protect children, the Chairman's main concern at present - out of no choice - is to sort out the application forms sent in by persons applying for the various posts of the Authority. Some may argue that one

[39] See Table 1 – Case study Nos. 3 and 4.

year is an unreasonable time frame within which positive results are to be expected. Yet, it is only reasonable to argue, on the other hand, that a statutory authority set up to address such an important social issue should have at least had its Committee appointed within one year, let alone been effective in fulfilling its mandate. In keeping with the CRC the Government is indeed taking steps to set up this authority. It is, however, a matter of great concern that the red tape involved has delayed the setting up of this authority by nearly one year - whereas the Government should have gone ahead in a very expeditious manner, in view of the importance of the subject and the irreparable damage which could result consequent to such delay.

Worthy of mention in this regard, however, are the proposals put forward in Parliament prior to the enactment of the Bill. Taking into account the failure on the part of the NMC to function effectively, it was proposed that the NMC and the new Child Protection Authority be merged to create a single authority with the overall responsibility of child protection.[40] It was also recognised that the new authority would have to have its mandate broadened to cover all the rights accorded to children under the Convention of the Rights of the Child since it was limited to child abuse.[41] Recommended accordingly, was that clauses 14 (a) - (r) of the Bill should be amended to include: "the realisation of the rights of the child recognised by the Convention on the Rights of the Child."[42] Such an expansion would have given the new authority the capacity to adopt a suitable approach to this question in an effective manner, in order to symbolise an "unequivocal commitment to the realisation of its objectives.[43]

In general, however, the existence of numerous agencies with overlapping mandates reveal the mismanagement as well as the wastage of resources which, in turn, compromises the effectiveness of the main goal. Had these resources been concentrated in a fewer agencies with set goals and targets, they would have proved to be much more result oriented. Needless to say, the lack of commitment on the part of agency officials to co-operate with each other and the tendency to work in water-tight compartments, only further jeopardises the situation.

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[40] *Supra* n 19.

[41] Child abuse is defined rather restrictively under the domestic law. It includes the contravention of the relevant provisions of the Penal Code and the Employment of Young Persons and Children Act and the Children and Young Persons Ordinance. It was also suggested that this definition should be broadened to include the impact of the armed conflict on children.

[42] The inter-related rights under the Convention have been categorised as survival rights, child development rights, protection rights and participation rights.

[43] Supra n 39.

Ineffective implementation of existing laws as opposed to the lack of laws in relation to sexual exploitation of children is what is proving to be the problem as far as Sri Lanka is concerned. A weak administrative infrastructure with respect to children's rights would, therefore, only further hinder the effectiveness of the existing laws and compromise the implementation of future laws.[44] Thus, though on the one hand the amendments made to the Penal Code and the Child Protection Authority Act deserve recognition as renewed efforts taken by the State to prioritise children's rights, they must, on the other hand, be met with scepticism as to their effectiveness in the light of these shortcomings in the administrative infrastructure.

Recently a disturbing trend has been noticed as regards the prioritisation of children's rights. In the past there were certain high profile NGOs which effectively lobbied to prioritise the protection of children from sexual and physical abuse. These NGOs were instrumental in past amendments being effected to the Penal Code. However, an amendment made to the Voluntary Social Services Organisation (Registration & Supervision) Act, which was passed on 3rd March 1998, tends to compromise the future effectiveness of NGOs. In terms of this amendment, provision is made where a Board of Inquiry appointed by the Minister reports that there is evidence of fraud or misrepresentation of funds in a voluntary organisation, then the government is given the authority to appoint an 'Interim Board of Management' to administer the affairs of that voluntary organisation.[45] Thus, the government is virtually empowered to take over an NGO and this power, unless exercised bona fide, will no doubt hamper the work of such organisations in Sri Lanka and undermine their overall effectiveness.[46] As a consequence of the above, the NGOs will cease to perform one of the vital functions they have been performing up to now, namely, to act as an effective check on the activities of the government and this would, in turn, compromise their ability to effectively lobby the government to prioritise children's rights in future.

Clearly, therefore, domestic priority is central to the establishment of a community of interests based on children's rights to promote adherence to the CRC. In recognition of the potential for the lack of such priority to hamper the development of community interests, several initiatives have been taken at the regional level, particularly by the South Asian Association for Regional Co-operation (SAARC). In 1986, at the Bangalore Summit (India), the potential for a community of interests

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[44] Pam Singh, "An Evaluation of the Laws on Children's Rights in Sri Lanka." *LST Review*, November 1998, Volume 9, Issue 133, p 1-36.
[45] *Ibid.*

among the SAARC countries[47] surrounding children's rights was discussed at length and this Association has, since this summit, called for concerted efforts to create an environment favourable to the realisation of children's rights.[48] By incorporating the subject of children's rights into several of its summit declarations and calling for the exchange of experiences, SAARC did, in that sense, set a precedent for the concept of an international coalition on children's rights.[49] Subsequently, the year 1990 was designated the Year of the Girl Child and 1991-2000 was designated the Decade of the Girl Child.[50] But it is regrettable that no follow up action has been taken to implement these Declarations.

Also of significant importance is that the international community does not attach sufficient priority to the realisation of children's rights under international law. That the international community affords protection to children at international law is certainly not in doubt. Indeed, the development of an entire Convention based on the said issue, as well as its near universal ratification are in themselves indicative of the international community's interest in this regard. Yet, it fails to realise that ratification alone is not sufficient to induce compliance amongst individual states and that countries like Sri Lanka need international assistance, if domestic priority is to be encouraged. In accordance with the CRC, monitoring an individual state's performance at periodic intervals (every five years) as far as implementation is concerned, does take place at present but it is far from adequate to ensure compliance with the international norms, since there is no lasting sense of accountability to encourage increased efforts at implementation beyond cosmetic adherence.[51]

SECTION V - CONCLUSION

The commercial sexual exploitation of children is indeed a phenomenon that stems from economic factors but it is submitted, in agreement with Vitit Muntarbhorn,[52] that "poverty cannot be accepted as a pretext and justification for the exploitation of children." Children need help and protection from an adult world that perpetrates such abuse and it is precisely with that objective in mind that legislation has been drawn up nationally and internationally.

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[46] *Ibid.*
[47] Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka.
[48] *Supra* n 2 at p 47.
[49] *Ibid.*
[50] See http//:www.saarc.com
[51] Supra n 43.
[52] UN Special Rapporteur (until 1995) on the Sale of Children, Child Prostitution and Child Pornography.

As noted earlier on in this discussion, the adequacy of the law in Sri Lanka governing the sexual exploitation of children is not in doubt. The CYPO (as amended), functions as the basic law dealing with children – their placement along the institutionalisation branch of the juvenile justice system and the establishment of juvenile courts, in particular. Equal or even greater importance is attached to the country's Penal Code, its amendments of 1995 and the Criminal Procedure Code (as amended) which, together with the CYPO, constitute the very foundation of the justice system as it impacts upon children. Yet, the availability of substantive law almost seems of no avail, since improper implementation has truly undermined the effectiveness of such law. Thus, the failure on the part of the government to establish a firm linkage between enforcement and implementation, has resulted in the existing law being ineffective in curbing the incidence of exploitation and affording real protection to children exposed to such dangers.

The state's positive response to protecting children's rights was demonstrated at an early stage through the adoption of the National Plan of Action and the formulation of the Children's Charter. Renewed efforts by the State towards child welfare were made evident by the adoption of the National Child Protection Authority Act (leading to the establishment of the National Child Protection Authority) and the setting up of several Women's and Children's Desks at police stations island-wide. However, such commitment has been constrained by the practical difficulties brought about by the inefficient allocation of existing resources, on the one hand, resulting in a high degree of wastage, and a general lack of resources, on the other. Sri Lanka's reliance on a weak administrative infrastructure must, therefore, come as no surprise in the light of the above mentioned factors. In addition, the lack of commitment on the part of law enforcement authorities, some of whom are even prepared to condone sexual exploitation for pecuniary gain, is despicable to say the least. It is strongly recommended that the Government takes positive steps to bring about a solution to this problem in an efficient manner taking into consideration the gravity of the situation and emphasising at all levels, that there is no room for complacency and compromise when protecting such vulnerable children.

The lack of infrastructure discussed above is made apparent by the highly centralised nature of the juvenile justice system of the country as well. The legal process as it functions at present, epitomises resource mismanagement and clearly violates the standards set by the CRC and the Beijing Rules. The obvious inadequacy of juvenile courts is illustrated by the inability of the existing juvenile court to handle the cases of child abuse that take place in the country's capital alone. Additionally, the absence of any legal distinction made between juveniles who are victims of exploitation and those who

are in conflict with the law has resulted in persons belonging to both these categories being placed in the same institutional setting. Further, the institutions themselves are locked facilities, characterised by the absence of systematic educational and rehabilitation programmes and run by individuals who, in some cases, have no formal educational qualifications, let alone counselling credentials.

The efforts made by the SAARC countries to make co-operation within the South Asian region a reality, particularly as regards child protection, have been discussed previously. The potential that exists in relation to the building of a strong community of interests is clear, but it is regrettable that no follow up action has been taken. With every member of SAARC having ratified the CRC, the foundation seems to be suitably laid for positive regional co-operation. It is hoped that these countries recognise the urgent need to take the official rhetoric a step further and encourage a positive response in relation to children in this region, who so clearly require protection.

In terms of the protection afforded to children at the international level, the variety of instruments in existence have been examined during the course of this discussion. However, the mere ratification of an international convention would not, in itself, afford protection to children since the worth of any international convention or law would be felt in its entirety, only upon the incorporation of such an instrument locally. In relation to Sri Lanka, the Government's commitment towards such initiatives is apparent but the non-implementation of existing laws and the non-availability of adequate resources, have hampered the Government in achieving its goals. Developing countries like Sri Lanka require assistance in this respect and certainly a concerted effort is required on the part of the Government, NGOs, Interpol, other foreign governments and the international organisations if this problem is to be eradicated. It is hoped that the international community would, in recognition of its obligation to assist in a particular State's realisation of its goals concerning children, set about its task in an effective manner, giving these countries the much needed impetus to enable them to use the CRC "creatively, with optimism and commitment."[53]

[53] Supra n 2 at p 379.

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LIST OF INTERVIEWEES

De Silva, Prof. Harendra	Chairman, National Child Protection Authority, Sri Lanka
Karunaratne, Nihal	Senior Superintendent of Police and Head of the Police Child Protection Bureau.

Saluwadane, Kanthi	Superintendent of Police, Women's and Children's Desk, Borella, Colombo
Tillekawardene, Hon. Justice Shirani	Judge of the Court of Appeal, Sri Lanka
Thurairajah, S	State Counsel, Attorney General's Department, Sri Lanka
Yasaratne	Warden, Remand Home for Boys, Pannipitiya, Sri Lanka

THE LAW & ECONOMY PROGRAMME OF THE TRUST REVITALISED*

Harsha Samaraweera**

1. RECENT DEVELOPMENTS IN COMMERCIAL LAW

The Law and Economy Programme of the Trust was revitalised recently. A series of discussions was held under this programme. The inaugural lecture under the programme for this year was delivered by Mr. Kang-Iswaran, President's Counsel. The discussion was chaired by Mr. S. S. Wijeratne, consultant to the Trust.

Mr. Kang-Iswaran gave a broad overview of the work undertaken by the Commercial Law Reform Project of the Ministry of Justice funded by the World Bank. The proposed reforms had the twin aims of promoting business efficacy and making the Sri Lankan legal structure compatible with the legal structure of the Dispute Settlement Mechanism of the WTO. Commercial law can no longer be considered a national law, as the majority of the players are international. Today, commercial law has become internationalised and Sri Lanka lags far behind countries like Hong Kong and Singapore where standards are set by international law.

Legal reforms on intellectual property law, sale of goods, enforcement of foreign judgments, partnership law, financial instruments and services, product liability, information technology and consumer protection were some of the subjects studied under the project.

Many foreign investors were dissatisfied with the existing legal system. In addition to being less time consuming, decisions made by the courts should also be commercially viable. Some of the more important areas studied by the project were the New Companies Act, the Arbitration Act, reforms to copyright laws to conform with the TRIPS Agreement adopted under the WTO.

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* The Trust would like to thank Ms. Malathy Knight-John, Co-ordinator, Law and Economy Programme, Ms. Pubudini Wickremeratne, Intern LST and Mr. Harsha Samaraweera, Intern LST, for organising these events.

** Intern, Law & Society Trust.

1.1 The Arbitration Act

Lengthy legal disputes consume time and money, resources that companies are hard pressed to conserve. The Arbitration Act was introduced in 1995 as a viable alternative to the courts system. One problem with the old Arbitration Ordinance was that the decision of the arbitrator could be challenged in the courts. As this is precisely what arbitration seeks to avoid, section 26 of the new Arbitration Act nullifies the right to challenge the arbitrator's decision and sets strict limits on the grounds on which one can challenge or set aside an award. The Act also contains an exclusion clause that allows the participants to agree before hand to exclude certain areas from scrutiny by the courts.

Provisions for mutual assistance on civil and commercial matters between Sri Lanka and other countries on the recording abroad of judicial and extra-judicial documents and enforcement of awards made in Sri Lanka and abroad was another area studied under the project. The project committee has recommended that the New York Convention on Enforcement of Foreign Arbitral Awards be incorporated in Sri Lanka as well. Under the current law, an award granted in Sri Lanka can be enforced in the United Kingdom or Singapore, but not vice versa. This is because the legal codes of these countries read "within the commonwealth" whereas the Sri Lankan code still reads "within Her Majesty's realm," despite the fact that Sri Lanka itself is no longer part of "Her Majesty's realm! Similarly an award granted in Sri Lanka cannot be enforced in India for the same reason. Once legislation internalising the New York Convention is adopted, arbitratal awards will be enforceable in all countries that are signatories to the Convention.

Another proposal put forward by the project committee to facilitate the collection of evidence abroad was the establishment of a central authority to whom the request could be made. This authority will ensure that evidence is properly recorded, authenticated and sent back to the requesting state.

The new Arbitration Act strives to minimise the lawyer's role, as the Act can be "hijacked" by various parties. In Sri Lanka, unlike in the west, many of the cases that appear before arbitration boards are collection cases as a result of unilateral contracts. In such cases the enforcement must be in a consumer friendly manner. One of the questions considered by the reform committee was whether courts should be allowed to intervene in cases involving unilateral contracts.

1.2 The New Companies Act (Draft)

The New Companies Act aims to give companies in Sri Lanka the flexibility to compete in the rapidly changing global market. It gives companies the choice of either a memorandum of association or articles of association and frees them from the doctrine of ultra vires; it allows one man companies if the single shareholder is a body corporate; it has replaced the concept of par value; and has laid down a catalogue of director's obligations vis-à-vis a number of matters. This last provision was included to eliminate the need for expensive legal advice on the interpretation of the articles of association every time a dispute arose between the directors and shareholders. The wording of the Act too was kept simple for the same reason.

As the New Companies Act frees companies from the doctrine of ultra-vires, it also contains a provision to safeguard a good faith investment/minority shareholder(s) when a company changes its goals. According to the Act, ¾ of the shareholders must be in agreement before a company can change direction. Once the ¾ majority has been obtained the minority shareholders (those opposed to the change) can demand that they be bought out.

Due to currency fluctuations and inflation, par value is largely historical. Some companies even have a negative par value. The Act does away with the concept of par value and allows directors to assess the value of shares based on market value and includes safeguards to prevent companies from undervaluing shares in order to buy them back.

The Act also has an in-built governance system to ensure that the company stays solvent. It introduces the concept of a "solvency test" that is defined in the Act. Under this test the onus is on the company directors to inform creditors and shareholders of the state of the company's finances.

1.3 Intellectual Property Law

As a member of the WTO, Sri Lanka is obliged to adhere to the provisions in the Trade Related Aspects of Intellectual Property Rights (TRIPS). Sri Lanka followed British intellectual property law until 1979 (Copyright Act of 1911 of the United Kingdom) when Mr. Lalith Athulathmudali, the then Minister of Trade and Shipping, introduced the Code of Intellectual Property Act No. 52 of 1979. Part II of the Code is based on the model drafted by WIPO for developing nations. The WIPO Code held that developing countries

were not competent to conduct substantive examination of patents. Examinations were restricted to form only and the Registrar of Patents did not have the power to reject a design. This meant that the Registrar of Patents could not refuse to give someone a patent even if a patent for an identical design already existed. As a result, there have been cases of more than one person having a patent or copyright on the same design. The new law gives the Registrar of Patents the power to reject an application for a patent or copyright, and also differentiates between a patent and a copyright - patent must be obtained for any design that can be used in a production process, whereas a copyright is granted for a geometric design of specific proportions.

While the question of folklore and patents on medicinal plants was not considered by the project, the existing Intellectual Property Act states that the Ministry of Culture has the responsibility of protecting folklore. However, legislation with regard to biodiversity, and the role of the government in protecting community property (i.e. homeopathic and medicinal plants) did not come under the project's purview.

The many changes resulting from increased globalisation have necessitated drastic changes to Sri Lankan Copyright Law. As a member of the WTO Sri Lanka is obliged to comply with the TRIPS Agreement. Having efficient Intellectual Property Laws that balance fairness with a decent return on investment will also send the right signal to the foreign investors Sri Lanka is trying so hard to attract.

The new intellectual property law offers several new remedies for dealing with counterfeit goods. Section 174 of the existing Act allows one to sue for damages after the counterfeit goods have entered the market. There are no provisions to deal with counterfeit goods prior to entry or at the point of entry. Under the new law customs authorities can be requested to delay entry of the goods into the country.

Re-broadcasting of satellite transmissions is still a grey area. At present local broadcasters contend that they are free to re-broadcast satellite transmissions once they have entered the sovereign airspace of Sri Lanka. However, this may be a contravention of Article 14 of the TRIPS Agreement, which gives "neighbouring rights" to broadcasters.[1]

[1] See Article on Sri Lankan Copyright Law and the TRIPS Agreement in this issue.

1.4 Other Areas of Legal Reform

There are a number of other areas that still require reform. For example, the current Sale of Goods Ordinance was passed in 1874, and requires considerable review and reform. The union of regions too, needs further study. For example, under the current devolution proposals, goods that are unloaded at the Galle port and shipped overland to Colombo will pass through several regions, each with its own financial regime. As the goods move from one region to another they may be in violation of laws that did not exist prior to transfer.

Information Technology and Computer Crimes was another area studied by the reform project. Computer hackers have cost many companies several billion dollars worth of losses without actually stealing or embezzling. Among the questions raised were, what constitutes a computer crime? When does an attempt begin? For example, if someone has legitimate access to a computer, but commits an unauthorised act is it a crime? Is it still a crime if the attempt does not succeed? If a person using a computer in Germany hacks into the Sri Lanka branch of an American company where is the crime committed and who has the responsibility to persecute the offender?

There are many more areas that require extensive study and reform. For example, Sri Lanka has no legal regime in place to deal with BOO/BOT projects. India and Pakistan are way ahead of Sri Lanka in this regard and there is a lot we can learn from them. However, the most pressing need is for more study on Commercial Law reform and the speedy implementation of proposed reforms.

2. THE "SEATTLE DEBACLE" AND ITS IMPACT ON SOUTH ASIA*

Liberalisation, globalisation and international trade were the catchwords of the 90s. The WTO Ministerial Conference in Seattle was to be the culmination of a decade of unprecedented growth in international trade. However, Seattle turned out to be anything but a celebration of globalisation. The WTO Ministerial Conference held in Seattle, WA in November-December 1999, turned out to be one of the most embarrassing setbacks suffered by proponents of free trade and globalisation in recent times. The Seattle Ministerial Conference of 1999, is better known today as the "Seattle Debacle."

* Article based on a presentation made at the Trust by Dr Saman Kelegama, Executive Director of the Institute of Policy Studies entitled "The Seattle Round of WTO Talks: its impact on South Asia."

CNN, BBC and sundry other news organisations broadcast images of the anti-WTO demonstrators to all corners of the globe. Many of the demonstrators were from farm, labour and environmental organisations within the US, who wanted to see the inclusion of environmental and labour standards brought within the jurisdiction of the WTO - a position diametrically opposed to that of developing countries who wanted environmental and labour issues left out of the ambit of the WTO.

It has now been acknowledged that one of the main reasons for the apparent failure[2] of the Seattle Summit was the unified stance taken by many developing nations. While the disagreements between the US and Europe over agricultural policies, the US and Japan over anti-dumping duties and the US and Cairns group all contributed to the failure of the summit, the unified stance taken by developing nations and the reasons for consensus are of more importance to Sri Lanka than the divisions between the US and its traditional allies.

The single most important factor in the new found unity of the developing nations was undoubtedly the lack of tangible gains from liberalisation and globalisation. Proponents of globalisation (and just about every economics textbook) promised increased trade, increased growth and higher incomes as trade barriers were dismantled. The reality however, was that despite of considerable liberalisation, developing countries did not see any significant growth in their GDP, export earnings from international trade, or even increased foreign direct investment (FDI). Most developing countries found their share of world trade either remained stagnant or declined, that export growth declined sharply,[3] and for the most part they were denied the "special and differential treatment" promised under the Uruguay round of the WTO Agreement.

During the period leading up to the Seattle conference, many economists and civil society groups in developing nations warned of the dangers of unbridled liberalisation, and expressed their dissatisfaction with the existing structure of the WTO which was inherently biased towards developed nations. This period was also notable for the growth in strength of civil society groups which were able to successfully oppose the OECD's Multilateral Agreement on Investment (MAI)[4] . Attempts by the US to table a number of new issues, most notably on environmental and labour standards, increasing use of the

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[2] I use the word "apparent" failure because there are many who view the absence of new issues arising from the Seattle round and the failure of the US to push through its linkages agenda a success.

[3] Growth of Asian service sector exports declined from 18% in 1995 to 9% in 1996 to 5% in 1997. Growth in merchandise exports too fell from 18% in 1995 to 5% in 1997.

[4] OECD Chief, Donald Johnson admitted that the reason for the failure of the MAI was the massive public outcry organised by civil society groups.

use of the Dispute Settlement Body (DSB) to further its domestic agenda, and the Special 301 clause[5] were also viewed with concern. Many developing countries were having trouble complying with the agreements they have entered into under the Uruguay Round, and viewed the Seattle conference as an "implementation" round, where they would be able to express their concern about the non-implementation of the special and differential treatment (SDF) promised under the Uruguay Round, their exclusion from the green room process[6] and the increasing use of anti-dumping measures by the US and EU.

2.1 Special and Differential Treatment

The special and differential treatment provisions under the WTO agreement can be divided into two main categories:

1. longer transition periods, greater threshold limits and increased flexibility relating to obligations;
2. "best endeavour" clauses enjoining developed countries to be specially cognizant of the needs and concerns of developing countries.

The original GATT had provided for developing countries to be comparatively free from basic GATT obligations relating to reciprocity, non-discrimination, bound duties, etc. The WTO provisions on special and differential treatment encompassed all previous GATT agreements as well as a whole range of new agreements. However, very few developing countries had been able to derive any benefit from the SDT clause, as in many cases it was totally disregarded. For example, Article 15 of the WTO Agreement asks developed countries to give special regard to developing countries before implementing anti-dumping measures. Yet the EU, US, Australia and Canada are responsible for almost 70% of the anti-dumping measures initiated since 1994[7] , and the number of anti-

[5] The special 301 clause allows the US to take unilateral action against any nation the US considers to be acting in a manner inconsistent with "fair trading standards." For example, the US in 1996 instituted a ban on wild shrimp imports caught without the use of Turtle Exclusion Devices (based ostensibly on the US Endangered Species Act) despite the fact the cost of installing such devises was prohibitively high and beyond the reach of many fishermen in Asia. The DSB of the WTO later condemned the US embargo on shrimp and shrimp products from countries that did not require their shrimp trawlers to use such devises.

[6] The Green Room is a place where the delegates from a limited number of countries having substantial negotiating interest on a particular issue can meet for discussions/negotiations. As a rule this room cannot exclude any countries (even those without any negotiating interest), but there is no requirement that all countries be invited, or even informed of the various green room discussions. Many delegates from developing nations were offended by the fact that they were not informed of the green room meetings and the hostile treatment they received when they did enter a green room where discussions were taking place.

[7] 113 of the 240 anti-dumping measures initiated in 1997 were by the EU, US, Australia and Canada, and 2/3 of the measures in force by 1997 were initiated by the EU, US, Australia and Canada

dumping measures initiated against developing nations during the same period had also increased.

Under the WTO Agreement on Textiles and Clothing (ATC), all quantitative restrictions were to be phased out in ten years starting 1st January 1995. However, the phase out was structured in such a way that almost half the restrictions would remain in force until the very end of the phase out period[8] . Even though the agreement on textiles and clothing stipulates that tops, yarns, fabrics and finished clothing all be included in integration, finished clothing has remained relatively untouched. New rules of origin[9] and frequent recourse to anti-dumping measures, even to products already under quantitative restrictions, have also nullified the SDT provisions.

Many developing countries have opened their capital markets to developed countries, yet the labour markets in industrialised countries remain under protectionist barriers. The UNCTAD Trade and Development Report 1999 has linked capital account liberalisation in developing countries with serious shortcomings in the size, stability and sustainability of capital flows to developing countries. The report goes on to state that an increasing proportion of capital in flows has been offset by capital outflows, notably short term outflows, and costly reserve accumulation to guard against the instability of capital flows.

2.2 The Linkages Issue

The insistance of certain developing countries, particularly the US, for the inclusion of non-trade issues also helped unify developing nations. The one advantage almost all developing nations enjoy over developed nations is their relatively cheap labour markets. As a result, any attempt to link trade and labour standards was guaranteed to antagonise almost all developing countries.

The Singapore Ministerial Declaration categorically rejected "the use of labour standards for protectionist purposes." It went on to state that "the comparative advantage of countries, particularly low wage developing countries, must in no way be put into the

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[8] 16% of listed products 1995-1997, 17% of listed products 1998-2001, 18% of listed products 2002-2004, **49% of listed products 1 January 2005** – the last day for integration.

[9] Rules of Origin(ROO) attempt to prevent a product manufactured primarily in one country being exported under the quota of another country. For example, a Sri Lankan textile manufacturer can buy clothing that is manufactured almost entirely in China, sew on the buttons in Sri Lanka and export it to the US as "made in Sri Lanka" and profit from the pdifference in labour costs. The purpose of the ROO specify the percentage of the final product that must me manufactured in the exporting country. However, given the complexity of today's manufacturing process (a product may be assembled in one country using goods manufactured in several other countries. For example, finished clothing exported from Sri Lanka may include textiles manufactured in China, yarn from Australia, buttons from Indonesia and so forth) complex ROO are often used by developed nations as a barrier to trade.

question." Despite this, President Clinton threatened unilateral action if a labour agenda was not included in the WTO, and the argumment used by the US and other developed nations to justify the inclusion of labour-trade linkage was that sub-standard labour conditions gave developing countries an unfair advantage!

Labour standards in the formal sector in Sri Lanka remain relatively high, and the labour-trade linkage is of concern to us insofar as Sri Lanka has adopted a unified stance with a number of other countries with substantially lower labour standards.

Other issues of contention included the attempt at environment-trade linkages, the TRIPS agreement, and the lack of transparency in WTO negotiations – this at a time when developed nations, led by the US were demanding more transparency in government procurement by member nations (i.e. developing nations) of the WTO. Many delegates from developing nations were also offended by the manner in which they were excluded from the green room process, and the assumption by the industrialised nations that the developing nations would blindly acquiesce as they had during the Uruguay Round.

2.3 Conclusion

In the aftermath of the Seattle Debacle, analysts were quick to blame President Clinton for his insistance on including non-trade related issues, Charlene Barshefsky, for her abrasive personality and WTO Director Genera, Mike Moore, for the "failure". The underlying causes for the Seattle Debacle, however, run much deeper than a momentary pique against Barshefsky's belligerence or Moore's mumblings. The liberalisation and globalisation process is not something that can be halted or reversed. Indeed, globalisation and liberalisation definitely offer many benefits. However, unfettered liberalisation is neither desirable nor feasible, and the developing countries need to find a middle path between demands from developed nations for extreme liberalisation and the need to protect domestic industries.

The structure and decision making process of the WTO also needs review. Developed nations need to band together to exploit the newly emerging divisions amongst developed nations. They should also strive to change the decision making system of the WTO from the current consensus system to one of a simple majority (this move will be vehemently opposed by developed nations as developing nations comprise almost 2/3 of the WTO membership). Developing nations must also learn to make better use of the WTOs Dispute Settlement Board to challenge the use of anti-dumping measures and the special 301 clause of the US.

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3. SRI LANKAN COPYRIGHT LAW AND THE TRIPS AGREEMENT

A discussion was held recently at the Trust on the Sri Lankan Copyright Law and the TRIPS Agreement under its Law and Economy Programme. A presentation was made by Dr. Indunil Abeyesekera, Senior Lecturer, Faculty of Law, University of Colombo.

Intellectual Property rights, or the lack thereof, became a contentious issue in Sri Lanka when ETV began re-broadcasting the BBC World News. When the BBC objected to the re-broadcasting of their news transmission ETV replied that satellite transmission was not covered under the Sri Lankan Intellectual Property Code and they had a legitimate right to re-broadcast satellite signals that entered the sovereign airspace of Sri Lanka. Article 14 of the Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement, to which Sri Lanka is a signatory, specifically prohibits the unauthorised re-broadcast of satellite transmissions. This is just one of the many changes that will have to be made to the Sri Lankan Intellectual Property Code in order to comply with the TRIPS Agreement.

The rapid development of information technology and global communications has made intellectual property a much disputed topic in recent years. Prior to the TRIPS Agreement Intellectual Property rights were governed by a series of conventions, most notably the Paris Convention and Berne Convention, administered by the World Intellectual Property Organisation (WIPO). In the 1980s, developed countries led by the U.S. began pushing to integrate intellectual property rights with free trade, culminating in the adoption of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS).

The TRIPS Agreement concentrates on 3 areas; Substantive, Remedial and Dispute Settlement. The most important aspects of the substantive section deals with rental rights, neighbouring rights, computer programmes and databases.

3.1 Rental Rights

The Sri Lankan Intellectual Property Code does not contain a provision for rental rights. However, as a member of the WTO and a signatory to the TRIPS Agreement Sri Lanka is obliged to introduce this right. The TRIPS Agreement does not define the word "rental" nor does it offer guidelines for the implementation and/or enforcement of rental rights. As a result it is necessary to look at other laws for models. Of particular interest is the European Community Directive on rental rights. The EC Directive states that "rental" must be for a "limited period of time," i.e. on-the-spot use does not constitute rental and it also helps distinguish rental from a sale or gift. The TRIPS Agreement qualifies the word "rental" by preceding it with the word "commercial." Therefore the intent of making a profit or financial gain is inherent in the TRIPS definition. As a result, making a backup copy of a computer programme, private recording of TV programmes for later viewing etc., are not considered a violation of copyright.

Articles 11 and 14(4) of the TRIPS Agreement state that authors of computer programmes and cinematographic works, and producers and any other lawful rights holders of phonograms will have the right to authorise or prohibit commercial rental. The creator of a computer programme will have the same rights as an author of a literary work. However, computer programmes are generally written by employees in the course of employment, and as a result the rightsholder will be the employer.

The Sri Lankan Intellectual Property Code needs to be amended by adding a provision to grant rental rights to authors in order to be in compliance with the TRIPS Agreement. There is no immediate need to make a provision granting rental rights to authors/producers of cinematographic works as rental has not led to widespread copying.[10]

Section 14(4) gives producers and "any other rightholders ... as determined by domestic law" the right to authorise or prohibit domestic rental. The term "any other rightholders" is used because there could be two kinds of rightsholders in addition to the producer - the performer(s) and author(s) of the work(s) performed in the phonogram. Accordingly, section 10 of the Sri Lankan Intellectual Property Code and the section pertaining to performers and producers must be amended to grant rental rights to authors, performers and producers.

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[10] At present rental of cinematographic work is confined to a small number of people living in major cities like Colombo and Kandy. In addition, few individuals possess the equipment required for copying (at least two video

Article 10 of the TRIPS Agreement provides for the protecting of computer programmes as literary works whether in source or object code. While the Sri Lankan Intellectual Property Code does not specifically cover computer programmes, it does provide protection to literary, artistic and scientific works. However, it is probably advisable to explicitly include computer programmes in the works protected by the Sri Lankan Intellectual Property Code in order to prevent complications in future.

3.2 Neighbouring Rights

The rights given to performers, producers of phonograms, and broadcasting companies is called "Neighbouring Rights," or "related rights," as they are not author's rights. Sri Lankan law does not explicitly differentiate between copyrights and neighbouring rights. Section 20 of the Sri Lankan Code states that "the lawful maker of any sound recording will have exclusive rights." While the term "lawful maker" is not defined in the Sri Lankan Code, the Sri Lankan Judiciary has hitherto followed English Law, which states "the person by whom the arrangements necessary for the making of the recording or the film are undertaken." This could be interpreted to mean the producer, but the Sri Lankan Code should be modified to grant neighbouring rights to performers, producers, and broadcasting companies in the interest of business efficacy.

Of special interest to Sri Lanka are the terms "performer" and "folklore." The term "performer" is new to Sri Lankan Copyright Law and is not defined in the TRIPS Agreement. However, the WIPO Performances and Phonograms Treaty states "actors, singers, musicians, dancers and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works, or expressions of folklore." Sri Lanka is rich in folklore which plays an important part in the preservation of our culture and traditions, and adequate protection should be given to creators and practitioners of such art forms. Section 12 of the Sri Lankan Intellectual Property Code calls for the Minister of Cultural Affairs to protect expressions of Sri Lankan folklore, but if these art forms are to be kept alive provisions must also be made to provide adequate remuneration to performers and practitioners by granting them neighbouring rights.

Article 14 of the TRIPS Agreement also covers satellite broadcasts. Satellite broadcasting exists in the form of Direct Broadcasting by Satellite and Fixed Service Satellites (A satellite signal being re-broadcast by a ground station, as in the case of ET is

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decks). As rental is not so extensive as to affect the sale of videos Sri Lanka is not compelled to introduce rental rights to the authors of cinematographic works.

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