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Freedom of Information

Seventy Ninth Session of the United Nations Human Rights Committee – Consideration of Sri Lanka's Fourth and Fifth Periodic Reports

LAW & SOCIETY TRUST

Editor's Note .....

The draft Freedom of Information (FOI) Act, approved by the Cabinet in mid December, 2003, could be fairly evaluated as the most liberal FOI draft yet to come out of any South Asian country.

It gives every citizen, the right of access to official information which is in the possession, custody or control of a public authority, (defined widely), and provides that the provisions of the law will prevail over any other existing law that is in conflict. In that sense, it affirms the principle of maximum disclosure.

The Draft Act, published in this double volume of the Review, attempts to balance the right to information with the reasonable need for secrecy, provided always that catchphrases such as national security and territorial integrity cannot be used indiscriminately by government officials to deny information.

Thus, for example, though information could be shut out on grounds of serious harm to the defence of the State, disclosure is permitted if it is vital in the public interest. A similar caveat applies to pending policy decisions by the government. All information (excepting trade, commercial or medical secrets or information protected by professional privilege) over ten years old, is available for scrutiny.

Then again, though once enacted, the FOI Act will prevail over the provisions of any other written law already in force, it will not apply where such pre-existing laws prescribe a secrecy oath with regard to members of bodies created under those laws. Accordingly, it will negate the obnoxious effect of archaic laws such as the Official Secrets Act No 32 of 1955 while providing for legitimate conditions of secrecy that are imposed by modern laws on officials of particular specialised bodies with regard to, for example, pending investigations.

The Bill imposes a duty on all Ministers, (including the President, when remaining in charge of any Ministries), to make public, records and other information specified in its provisions. A similar duty is imposed with regard to local and foreign funded projects within certain monetary limits.

All requests for information first goes to an information officer appointed to every public authority with an appeal lying therefrom to the Freedom of Information Commission that is appointed under the law. The Commission is comprised of three persons having security of tenure and appointed through a consultative process

between the President and the Constitutional Council. Time limits for supplying of information, rejection of the request and for appeal there from to the Commission are strictly provided for. An appeal is also provided to the Supreme Court against the decision of the Commission.

Notably, the Sri Lankan draft Act sets a new precedent for South Asia by expressly stipulating protection for whistleblowers. The Bill permits employees of public authorities to voluntarily release information permitted to be released under the law, (without fear of sanction), if such information disclosed evidence of any wrongdoing or a serious threat to the health or safety of any citizen or to the environment, provided that this was done in good faith and in the reasonable belief that the information was substantially true.

The Review, publishes as background to the draft Act, an analysis of legal developments relating to Freedom of Information in India and Pakistan, written for the *Law and Society Trust*, by **Deepika Mogilishetty-Farias**, from the Commonwealth Human Rights Initiative (CHRI), which spearheads one of the most activist right to information campaigns in South Asia.

This Issue of the Review also publishes the Concluding Observations of the Human Rights Committee as well as Responses of the Government of Sri Lanka to the List of Issues Raised by the Human Rights Committee in relation to the combined Fourth and Fifth Periodic State Reports submitted under the International Covenant on Civil and Political Rights (ICCPR).

The seriousness in which the Committee viewed outstanding human rights concerns, specially with regard to the life and liberty rights of Sri Lankan citizens is well seen in its resort to procedures under Rule 70, (paragraph 5 of the Committee's rules of procedure), which imposes a duty on the Government of Sri Lanka to provide information, within one year on its responses to particular observations of the Committee in this regard.

Extracts from the Alternate Report of the Asian Legal Resource Centre (ALRC) and the World Organisation Against Torture (OMCT), (which critiqued the combined Fourth and Fifth Periodic State Reports and was presented to members of the Committee prior to the presentation of the official report), are also published.

Kishali Pinto-Jayawardena

AN ACT TO PROVIDE FOR FREEDOM OF ACCESS TO OFFICIAL INFORMATION; SPECIFY GROUNDS ON WHICH ACCESS MAY BE DENIED: THE ESTABLISHMENT OF THE FREEDOM OF INFORMATION COMMISSION: THE APPOINTMENT OF INFORMATION OFFICERS; SETTING OUT THE PROCEDURE FOR MAKING REQUESTS FOR INFORMATION AND FOR MATTERS CONNECTED THEREWITH OR INCIDENTAL THERETO.

Preamble

WHEREAS there exists a need to foster a culture of transparency and accountability in public authorities by giving effect to the right of freedom of information and thereby actively promote a society in which the people of Sri Lanka have effective access to information to enable them to more fully exercise and protect all their rights:

BE it enacted by the Parliament of the Democratic Socialist Republic of Sri Lanka as follows:

Short title

1. This Act may be cited as the Freedom of Information Act, No. ..... of 2003 and shall come into operation the day immediately following the date of the expiration of a period of twelve months of the date of certification in terms of Article 80 of the Constitution. A Notification regarding the date on which this Act is due to come into operation shall be published, not less than three months prior to such date.

Right of access to information

Application of the Provisions of the Act

2. Subject to the provisions of subsection (2) of section 3 and section 4 of this Act, every citizen shall have a right of access to official information which is in the possession, custody or control of a public authority.

Provisions of this Act to prevail over other written law except in certain circumstances

3. (1) The provisions of this Act shall have affect notwithstanding anything to the contrary in any other written law, and accordingly in the event of any inconsistency or conflict between the provisions of this Act and such other written law, the provisions of this Act shall prevail.

(2) Notwithstanding the provisions of subsection (1), the provisions of this Act shall not apply in respect of any official information in the possession, custody or control of any public authority established by any written law where the members, officers or servants of such public authority are prohibited under such written law from disclosing or releasing any information received by them or which came to their knowledge in the performance and discharge of their duties and functions under such written law.

Denial of Access to Official Information

When right of access may be denied

4. (1) A request under this Act for access to official information shall be denied, where –

(a) the information relates to any matter in respect of which a decision by the Government is pending:

(b) the disclosure of such information would constitute an invasion of personal privacy of any person, unless –

(i) the person has consented in writing to such disclosure; or

(ii) the disclosure of such information is considered to be vital in the public interest;

(c) the disclosure of such information –

(i) would cause serious harm to the defence of the State or its territorial integrity or national security;

(ii) would cause danger to life or safety of any person; or

(iii) would be or is likely be seriously prejudicial to Sri Lanka's relations with any State or international organisation, where the information was given to or to or obtained from such State or international organisation in confidence.

unless the disclosure of such information is considered to be vital in the public interest;

(d) the information relates to the assessment or collection of revenue by the Inland Revenue Department;

(e) the disclosure of such information would reveal any trade secrets or harm the commercial interests of any person, unless –

(i) the person has consented in writing to such disclosure; or

(ii) the disclosure of such information is considered to be vital in the public interest;

(f) the information could lead to the disclosure of any medical secrets or medical records relating such person, unless that person has consented to such disclosure;

(g) the information is subject to professional privilege;

(h) the information is required to be kept confidential by reason of the existence of a fiduciary relationship;

(i) the disclosure of such information could cause grave prejudice to–

(i) the prevention or detection of any crime; or

(ii) the apprehension or prosecution of offenders; or

(j) the information relates to an examination conducted by the Department of Examination or a Higher Educational Institution which is required to be kept confidential, including any information relating to the results of any qualifying examination held by such Department or Institution.

(2) Notwithstanding the provisions of subsection (1), a request for information shall not be denied on any of the grounds referred to therein, other than the grounds specified in paragraphs (e), (f) and (g) of that subsection, if the information requested for is over ten years old.

(3) A disclosure by any public authority of any information which is prohibited from being disclosed under subsection (1) shall be an offence under this Act and the officer in such public authority who was responsible for such disclosure shall on conviction be liable to a fine not exceeding five thousand rupees and in addition to any disciplinary action that may be taken against such officer by such public authority.

Provided however, no action shall be instituted against such officer where the officer discloses such information in good faith.

Severability under certain circumstances

5. Where a request for information is denied on any of the grounds referred to in section 4 access may nevertheless be given to that part of any record or document which contains any information that is not prevented from being disclosed under that section and which can reasonably be severed from any part that contains information denied from being disclosed.

Duties of Ministers and public authorities

Public authorities to maintain and preserve its records

6. (1) It shall be the duty of every public authority to maintain all its records in such manner and in such form as is consistent with its operational requirements duly catalogued and indexed.

(2) All records being maintained by every public authority shall be preserved –

(a) in the case of new records which are opened after the coming into operation of this Act, for a period of not less than ten years from the date on which such record is opened; and

(b) in the case of those records already in existence on the date of the coming into operation of this Act, for a period of not less than ten years from the date of the coming into operation of this Act.

Ministers duty to publish a report

7. (1) It shall be the duty of –

(a) the President and of every Minister to whom any subject has been assigned under paragraph (1)(a) of Article 44 of the Constitutions and

(b) the President in respect of any subject or function of which the President remains in charge, under paragraph (2) of Article 44 of the Constitution.

to publish once in every two years and in such manner as may be determined by him, a report containing the following information –

(i) particulars relating to the organization, functions, activities and duties of the Ministry of such Minister, and of all the public authorities falling within the functions assigned to such Minister;

(ii) the powers, duties and functions of officers and employees of the Ministry and the public authorities referred to in paragraph (a), and the procedure followed by them in their decision making process;

(iii) the norms set for the Ministry and the public authorities referred to in paragraph (a), in the discharge of their functions, performance of their duties and exercise of their powers;

(iv) rules, regulations, instructions, manuals and any other categories of records under the control of the Ministry and of the public authorities referred to in paragraph (a), which are used by its officers and employees in the discharge of their functions, performance of their duties and exercise of their powers;

(v) the details of facilities available to citizens for obtaining official information from the Ministry and the public authorities referred to in paragraph (a); and

(vi) the name, designation and other particulars of the Information Officer or Officers appointed to the Ministry and to the public authorities referred to in paragraph (a).

(2) Notwithstanding the provisions of subsection (1), it shall be the duty of the President and of every Minister as the case may be, within six months of the coming into operation of this Act, to publish in such manner as may be determined by the President or such Minister, a report containing the information referred to in paragraph (a) to (f) of that subsection.

Duty of a Minister to inform public about the initiation of projects.

8. Prior to the commencement of any work or activity relating to the initiation of any project, it shall be the duty of the President or the Minister as the case may be, to whom the subject pertaining to such project has been assigned to communicate to the public generally and to any persons who are particularly likely to be affected by such project, in such manner as specified in guidelines issued for that purpose by the Commission, all such information relating to the project that are available as on the date of such communication.

For the purpose of this section, "project" means any project the value of the subject matter of which exceeds :-

(a) in the case of foreign funded projects, one million united states dollars; and

(b) in the case of locally funded projects, five million rupees.

Duty of public authorities to submit reports etc.

9. (1) It shall be the duty of every public authority to submit to the Commission annually, a report containing the following information.

(a) the number of requests for information received;

(b) the number of requests for information which were granted or refused in full or in part;

(c) the reasons for refusal in part or in full of requests received;

(d) the number of appeals submitted against refusals to grant in part or in full requests for information received; and

(e) the total amount received as fees for granting requests for information.

(2) A public authority shall be required on request to disclose the reasons for taking any decision, whether administrative or quasi-judicial to any person affected by any such decision.

Establishment of Freedom of Information Commission

Establishment of the Freedom of Information Commission

10. (1) There shall be established for the purposes of this Act, a body called the Freedom of Information Commission (in this Act referred to as the "Commission").

(2) The Commission shall by the name assigned to it by subsection (1), be a body corporate with perpetual and a common seal and may sure and be sued in its corporate name.

Constitution of the Commission

11. (1) The Commission shall consist of three persons of eminence and integrity, who have distinguished themselves in public life and who are not members of any political party and who, at the time of appointment and while functioning as a member of the Commission, do not hold any public or judicial office.

(2) The member of the Commissioner shall be appointed by the President on the recommendations of the Constitutional Council, and subject to the provisions of subsection (3) of this section, shall hold office for a period of five years. The President shall nominate one of the member of the Commission to be its Chairman.

(3) A member of the Commission shall cease to be a member, where–

(a) he earlier resigns his office by writing addressed to the President;

(b) he is removed from office by the President on the Constitutional

Council forming an opinion that such member is physically or mentally incapacitated and is unable to function further in office;

(c) he is convicted by a court of law for any offence involving moral turpitude; or

(d) he is deemed to have vacated office by absenting himself from three consecutive meetings of the Commission without obtaining prior leave of the Commission.

Appointment of officers and servants of the Commission

12. (1) The Commission may appoint such officers and servants as it considers necessary to assist the Commission in the discharge and performance of its duties and functions under this Act.

(2) The officers and servants appointed under subsection (1) shall be subject to such terms and conditions of service as determined by the Commission and be paid such remunerations as determined by the Commission in consultation with the Minister in charge of the subject of Finance.

Duties and functions of the Commission

13. The duties and functions of the Commission shall be, to:-

(a) monitor the performance and ensure the due compliance by public authorities of the duties cast on them under this Act;

(b) make recommendations for reform both of a general nature and directed at any specific public authority;

(c) hear and determine any appeals made to it by any aggrieved person under section 28 of this Act;

(d) lay down guidelines on which public authorities will be required to determine fees to be levied for the release of any official information by them under the provisions of this Act;

(e) co-operate with or undertake training activities for public officials on the affective implementation of this Act; and

(f) publicise the requirements of this Act and the rights of individuals under it.

Fund of the Commission

14. (1) The Commission shall have its own Fund to which shall be credited all sums of money as may be voted upon from time to time by Parliament for the use of the Commission and any money that may be received by the Commission by way of donations, gifts or grants from any source whatsoever, whether in or outside Sri Lanka.

(2) There shall be paid out of the Fund all such sums of money required to defray the expenditure incurred by the Commission in the discharge and performance of its duties and functions.

Financial year and audit of accounts

15. (1) The financial year of the Commission shall be the calendar year.

(2) The Commission shall cause proper books of accounts to be maintained of the income and expenditure and all other transactions of the Commission.

(3) The provisions of Article 154 of the Constitution relating to the audit of the accounts of public corporations shall apply to the audit of the accounts of the Commission.

Part II of Finance Act, 38 of 1971 to apply

16. The provisions of Part II of the Finance Act. No. 38 of 1971 shall mutatis mutandis apply to the financial control and accounts of the Commission.

Exemption from prosecution

17. No criminal or civil proceedings shall lie against or any member of the Commission or any officer or servant appointed to assist the Commission, for any act which, in good faith, is done or omitted to be done in the course of the discharge and performance of their duties and functions under this Act.

Procedural requirements to be published

18. The Commission shall within six months of its establishment formulate and give adequate publicity to the procedural requirements for the submission of appeals to the Commission under section 28 of this Act.

Appointment of Information Officers and Procedure for gaining Access

Appointment of an Information Officers and their duties

19. (1) Every public authority shall, for the purpose of giving effect to the provisions this Act, appoint one or more officer as an Information Officer of such public authority.

(2) It shall be the duty of an Information Officer to deal with requests for information made to the public authority of which he has been appointed its Information Officer and render all necessary assistance to any citizen making such request to obtain the information being request for.

(3) The Information Officer may seek the assistance of any other officer as he may consider necessary for the officer as he may consider

necessary for the proper discharge of the duty imposed on him under subsection (2) and where assistance is sought form any such officer it shall be the duty of such officer to render the assistance requested for by the Information Officer.

Procedure for obtaining official information

20. (1) A citizen desirous of obtaining any official information under this Act, shall make a request in writing to the appropriate Information Officer specifying the particulars of the information requested for:

Provided that where any citizen making a request under this subsection is unable due to any reason to make such request in writing he shall be entitled to make the request orally and it shall be the duty of the appropriate. Information Officer to reduce it to writing on behalf of the person making the request.

(2) For the purpose of this section –

"writing" includes writing done through electronic means; and

"appropriate Information Officer" means the Information Officer appointed to the public authority from which the information is being requested for

Decision on requests submitted under section 20

21. (1) An Information Officer shall as expeditiously as possible and in any case within fourteen working days of the receipt of a request under section 20, make a decision either to provide the information requested for on the payment of a fee, or to reject the request on any one or more grounds as specified in section 4 of this Act and shall forthwith communicate such decision to the person who made the request. Where the decision has been taken to provide the information requested for, access to such information shall be granted as soon as practicable.

(2) Where providing the information requested for, requires the payment of any fee in addition to the fee referred to in subsection (1), the Information Officer shall request for the payment of such additional fee giving details of such fee and specifying the date before which such additional payment should be made by the person concerned.

(3) Notwithstanding the requirement made for the payment of a fee under subsections (1) and subsection (2) of this section, the Commission may determine circumstances in which information may be provided by an Information Officer without the payment of a fee.

Public authority to display fees to be charged

22. A public authority shall be required to display in a conspicuous place within its official premises, a notice specifying the fees being charged for obtaining any official information from such public authority. The fees so specified shall be determined by the public authority on the guidelines issued by the Commission for the purpose.

Manner in which official information is to be provided

23. (1) Where a decision has been made to grant a request for information, such information shall be provided in the form in which it is requested for unless the Information Officer is of view that providing the information in the form requested for would be detrimental to the safety or preservation of the relevant document or record in respect of which the request was made.

(2) Where an Information Officer is unable to provide the information in the manner requested for, it shall be the duty of such officer to render all possible assistance to the person who made the request, to facilitate compliance with such request.

Rejection of a request to be communicated

24. Where a request for information is rejected by an Information Officer it shall be the duty of such Officer to specify the following information in the Communication sent to the person who made the request under subsection (1) of section 21.

(a) the ground or grounds on which such request is being rejected; and

(b) the period within which and the person to whom an appeal against such rejection may be preferred.

Where information requested for was supplied by a third party

25. (1) Where a request made to an Information Officer by any citizen to disclose official information relates to or has been supplied by a third party and such information has been treated as confidential at the time the information was supplied, the Information Officer shall, before arriving at a decision regarding its disclosure, invite such third party by notice issued in writing to make his or her representation for or against such disclosure within seven days of the receipt of such notice.

(2) The Information Officer shall be required in making his decision on any request made for the disclosure of official information which relates to or has been supplied by a third party, to take into consideration the representations made by the third party under subsection (1) and shall, where any objections are raised by such third party, deny access to the information requested for:

Provided however, where the disclosure of the information in question is vital in the public interest, the Information Officer shall disclose the same notwithstanding any objection raised by such third party against its disclosure.

Protection against Actions

26. Where access to any information has been granted by an Information Officer under this Act, no action shall lie against such Officer or the public authority concerned by reason of granting access to such information.

Granting access not to constitute an authorization for publication

27. The granting of access to any information in consequence of a request made under this Act, shall not be taken to constitute an authorization or approval of the publication of such information by the citizen to whom such access was granted.

Appeals Against Rejections

Appeals against a rejection of a request

28. (1) Any citizen whose request for official information is rejected by an Information Officer may within thirty days of receipt of the decision relating to such rejection prefer an appeal to the person referred to in the communication issued under subsection (2) of section 24, being the person designated to hear any such appeal.

(2) The decision on any appeal preferred under subsection (1) shall be made within one month of preferring the same.

Appeals to the Commission

29. A person aggrieved by the decision made in appeal under subsection (2) of section 27 may, within two weeks of the communication of such decision, appeal against that decision to the Commission and the Commission may affirm vary or reverse the decision appealed against and remit the request back to the Information Officer concerned for necessary action.

Appeals to the Supreme Court

30. (1) A person aggrieved by the decision of the Commission made under section 28 shall have a right of appeal to the Supreme Court against the decision of the Commission. Every such appeal shall be forwarded in the manner prescribed by the relevant rules of the Supreme Court.

(2) Where any appeal is preferred to the Supreme Court under subsection (1), such Court may affirm vary or reverse the decision appealed against, and shall have the power to make any other order that it may consider necessary to give effect to its decision on appeal.

Appeal may be made on behalf of an aggrieved party

31. An appeal under section 27, section 28 or section 29 of this Act, may, where the aggrieved party concerned is unable due to some reason to prefer such appeal on his own, be made by any other person on his behalf who is duly authorized in writing by such aggrieved party, to prefer the same.

General Commission to prepare a report of its activities

32. (1) The Commission shall cause to be prepared a report of its activities as often as it may consider necessary so however that is shall prepare at least one report in each calendar year. The Commission shall also cause every report prepared by it to be placed before Parliament.

(2) A copy of the report prepared under subsection (1) shall, within two weeks of it being placed before Parliament, be made available for public inspection at the office of the Commission.

Offences

33. (1) Any Information Officer who –

(a) rejects a request made for information without giving reasons for such rejection;

(b) rejects a request made or any ground other than a ground specified in section 4 of this Act; or

(c) fails without any reasonable cause to make a decision on a request made within the time specified under this Act for making such decision.

shall be guilty of an offence and shall, on conviction be liable to a fine not less than five thousand rupees.

(2) Any officer whose assistance was sought for by and Information officer under subsection (3) of section 19 fails without reasonable cause to provide such assistance, shall be guilty of an offence and shall on conviction be liable to a fine not exceeding five thousand rupees.

(3) A fine imposed for the commissions of an offence referred to in subsection (1) or (2) of this section shall be in addition and not in derogation of any disciplinary action that may be taken against such officer by the relevant authority empowered to do so for the failure to carry out a duty imposed under this Act.

Release or disclosure of official information by an

34. Notwithstanding any legal or other obligation to which a person may be subject to by virtue of being an employee of any public authority, no employee of a public authority shall, be subjected to any

employee of a public authority

punishment disciplinary or otherwise for releasing or disclosing any official information which is permitted to be released or disclosed on a request submitted under this Act so long and so long only as such employee acted in good faith and in the reasonable belief that the information was substantially true and such information disclosed evidence of any wrong doing or a serious threat to the health or safety of any citizen or to the environment.

Regulations

35. (1) The Minister may make regulations in respect of all matters required by this Act to be prescribed.

(2) Every regulation made under subsection (1) shall be published in the Gazette and shall come into operation on the date of such publication or on such later date as may be specified in the regulation.

(3) Every regulation made under subsection (1) shall, forthwith after its publication in the Gazette be brought before Parliament for approval and any regulation which is not so approved shall be deemed to be rescinded as from the date of such disapproval but without prejudice to anything previously done thereunder.

(4) The date on which any regulation is deemed to be so rescinded shall be published in the Gazette.

Interpretation

36. In this Act unless the context otherwise requires –

"citizen" includes any body of persons, whether corporate or unincorporate;

"Information Officer" means an Information officer appointed under section 19 of this Act;

"Official information" includes any

correspondence, memorandum, draft legislation, book, plan, map, drawing, diagram, pictorial or graphic work, photograph, film, microfilm, sound, recording, video tape, machine readable record, computer records and other documentary material, regardless of its physical form or character and any copy thereof;

"public authority" means –

(a) a Ministry of the Government;

(b) any body or Office established by or under the Constitution other than the Parliament and the Cabinet of Ministers;

(c) a Government Department;

(d) a public corporation;

(e) a company incorporated under the Companies Act, No. 17 of 1982, in which the State is a shareholder;

(f) a local authority; and

(g) any department or other authority or institution established or created by a Provincial Council.

Sinhala text to prevail in case of inconsistency

37. In the event of any inconsistency between the Sinhala and Tamil texts of this Act the Sinhala text shall prevail.

Access to Information – A Comparative Overview of Laws in India and Pakistan

*Deepika Mogilishetty –Faria*s*

Introduction

'Information has always been a basis for knowledge. Lack of information contributes to knowledge deficiency, leading to powerlessness. Freedom of Information, in that sense, implies a form of empowerment or, better still, it signifies freedom from ignorance, from servitude and ultimately the freedom to choose. An informed person is an empowered person.'[1]

The foundation of a democratic state is based on the informed choice of its people. Modern day democracy has moved from being merely representative to a participatory process. Meaningful participation and engagement in the democratic process is not possible without information. Informed citizens are in a position to make choices regarding their development and governance which would not be possible without a guaranteed right to information. Citizens like to be involved in decisions that affect their day today lives, like the development projects that need to be undertaken in their community, input into policies affecting their lives, they like to know how public money is being spent and like to see statements of accounts and expenditure and would like to be involved in developing budgets and prioritizing development projects in their environment.

Information is a relative term and cannot be defined specifically and uniformly for all persons. A mother of a school going child would be interested in knowing the criterion for admission to a school and the process of decision making. Building developers would be interested in copies of title documents to land they are developing and citizens in urban areas would be interested in knowing the effect of privatization of power on their monthly electricity bills.

Whatever the need, it is every person's basic right to have access to information so that they can engage more effectively in the world around them. Ultimately, access to information promotes good governance and brings accountability and transparency to the working of public bodies; the every fact that their murky dealings could be exposed will discourage corruption in public office. The power of information is immense; it is the duty of every government to guarantee effective access in order to promote people centered development and give true meaning to democracy.

Access to information is a human right

The right to access information has, for long, been a universally recognized human right. As far back as 1946, in its very first session, the United Nations General Assembly adopted a resolution, which recognised freedom of information to be a fundamental human right and "... the touchstone of all the

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[1] Seyoum Hameso, writing in Focus on International and Comparative Librarianship, Vol. 26 No. 3 of 1995,

freedoms to which the United Nations is consecrated."[2] The International Covenant for Civil and Political Rights as well as the Universal Declaration of Human Rights, recognizes the right seek, impart and receive information as a part of the fundamental right to freedom of speech and expression.[3] However, access to information as a human right has gained most visibility in the context of environment and sustainable development, Principle 10 of the 1992 Rio Declaration on Environment and Development recognized that –

> *"environmental issues were best handled with participation of citizens and that each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available..."*

Over the years, recognition that access to information is central to the realization of all other human rights has grown and various international bodies such as the Commonwealth, the United National Commission on Human Right (UCHR) and the African Union have independently endorsed certain principle that are now seen as international standards on access to information laws. The Commonwealth principles[4] on Freedom of Information were endorsed by the Commonwealth law ministers in 1999 and were subsequently recognized by the Commonwealth heads of government meeting in the same year. In addition to developing the principles, the Commonwealth secretariat in 2002, created a model law[5] in order to help member states that require assistance in creating legislation.

The United Nations Special Rapporteur for Speech and Expression has stressed the importance of freedom of information in many reports. In 1999, the Special Rapporteur stated "[I]mplicit in freedom of expression is the public's right to open access to information and to know what governments are doing on their behalf, without which truth would languish and people's participation in government would remain fragmented"[6] In 2000 the Special Rapporteur endorsed a set of principles which were promoted by the free speech advocacy group, ARTICLE 19 based in the United Kingdom, which have been thereafter accepted as the classic standard on access to information legislation.

PRINCIPLES ON FREEDOM OF INFORMATION[7]

- ***Maximum Disclosure***: Public bodies have an obligation to disclose information and every member of the public has a corresponding right to receive information. "Information" includes all records held by a public body, regardless of the form in which they are stored;

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[2] UNGA Resolution 59(I)
[3] Article 19 of ICCPR and Article 19 of UDHR.
[4] The Durban Communiqué, Commonwealth Heads of Government Meeting, Durban, 15 Nov. 1999, para 57.
[5] Freedom of Information Act [...] Commonwealth model Freedom of Information bill.
[6] Joint Declaration by the UN Special Rapporteur, the Organisation of Security and Co-operation in Europe representative on Freedom of Media, and the Organisation of American States Special Rapporteur on Freedom of Expression, issued under the auspices of Article 19, London, 26 November 1999.
[7] The Public's Right to Know: Principles on Freedom of Information Legislation, Article 19, 1999 available at www.article19.org

- ***Obligation to publish:*** Public bodies should publish and widely disseminate documents of significant public interest, for example, on how such bodies function and the content of any decision or policy affecting the public;
- ***Promotion of Open Government:*** At a minimum, the law should make provision for public education and the dissemination of information regarding the right, and include mechanisms to address the problem of a culture of secrecy within government;
- ***Limited Scope of Exceptions:*** A complete list of the legitimate aims that may justify non-disclosure should be provided in the law and exceptions should be narrowly drawn so as to avoid including material that does not harm the legitimate interest. A refusal to disclose information may not be based on trying to protect Government from embarrassment or the exposure of wrongdoing;

- ***Processes to facilitate access:*** All public bodies should be required to establish open, accessible internal systems for ensuring the public's right to receive information. The law should provide strict time limits for processing requests and require that any refusals be accompanied by substantive written reasons;
- ***Costs:*** Fees should not be so high as to deter potential applicants and negate the intent of the law itself;
- ***Open Meetings:*** The law should establish a presumption that all meetings of governing bodies are open to the public;
- ***Disclosure takes precedence:*** The law should require that other legislation be interpreted, as far as possible, in a manner consistent with its provisions. The exemptions included in the law should be comprehensive and other laws should not be permitted to extend them;
- ***Protection for Whistleblowers:*** Individuals should be protected from any legal, administrative or employment-related sanctions for releasing information on wrongdoing.

Guaranteeing right to access information

The right to access information can be guaranteed in many various ways, either constitutionally or, through legislation/ through executive action. In South Asia, all three models exists. Of these, access to information through executive action is least preferred because executive action in the form of Ordinance lapse without legislative support. Additionally, open government codes and other such directives can be overturned as easily as they have been brought into force. The best model to follow would be a specific constitutionally guaranteed right to information law that operationalises the right.

Constitutional recognition as a fundamental right

Constitutional recognition of the right to access information can be a part of the fundamental right to freedom of speech and expression or a specific fundamental right as in South Africa, Ghana, Malawi, etc. In the South Asian region, the Constitution of Nepal specifically recognizes the citizen's right to demand and receive information on any matter of public importance.[8] Others such as India, guarantee the right to seek and receive information as a part of the fundamental right to freedom of speech and expression. Sri Lanka has recognized this right through judicial interpretation of the right to freedom

[8] Article 16 Constitution of the Kingdom of Nepal 2047 (1990)

of speech. The Supreme Court of India has not only recognized the right to know as a part of freedom of speech and expression but recognized the link between the right to know and the right to life and liberty. Thus, it stated in 1989 that people at large have the right to know in order to take part in industrial development and democracy and "... the right to know is a basic right that citizens of a country aspire under Article 21 of our Constitution."[9]

The Constitution of Pakistan does not guarantee the right to seek and receive information as a part of the right to freedom of speech and expression but the Supreme Court of Pakistan has recognized that the citizen's right to receive information can be spelt out from the right to freedom of speech.[10]

Legislation on Right to Information

Despite such constitutional guarantees, the right to information has no meaning unless there are systems in place, which help give effect to the fundamental right. It is for this reason that there is demand for legislation on access to information. A law on access to information will not only help put in place systems through which citizens can access information, it will also clearly set out duties of public officials to provide information and provide clear guidelines on the basis of which information can be denied.

In addition, a law would create mechanisms for redressal of disputes in case information is wrongfully denied. After more than a decade of struggle and advocacy, the central government in India passed the Freedom of Information Act (Indian Law) in December 2002. However, this law is yet to come into force since the central government has to draft the rules and notify the same in order to effectuate the working of the law.

Interestingly, since 1997 several state governments in India have taken the initiative and enacted laws on right to information even before the central law was passed in Parliament. As of date, right to information laws are being implemented in seven states in the Indian Union namely Tamilnadu, Karnataka, Goa, Maharashtra, Madhya Pradesh, Rajasthan and the National Capital Territory of New Delhi. The net effect of this piece meal and fragmented approach is that some citizens of India have laws that enable them to access information while others are still awaiting some positive action on the part of the central government.

Executive Action

Access to information can also be guaranteed through executive action through codes like the Open Government code in the United Kingdom, executive orders and in some cases, like in Pakistan, through the promulgation of an Ordinance. The Pakistan Freedom of Information Ordinance (Pakistan Ordinance) was promulgated in October 2002. While creation of the Ordinance is a positive act which has been welcomed by access to information advocates, the lack of political will and seriousness on the part of the government is exposed when nearly a year after coming into existence, the Ordinance is

[9] Reliance Petrochemicals Ltd v Proprietors of Indian Express Newspapers Bombay Pvt. Limited AIR 1989 SC 190

[10] ***Navaz Sharif*** v. ***President of Pakistan*** PLD 1993 SC 473

not in operation since the rules of business to effectuate the implementation of the Ordinance have not been created by the government.

The situation in India and Pakistan is merely a manifestation of the culture of secrecy prevalent in governments. A law on access cuts at the very root of government functioning; it opens government to scrutiny and forces transparency and accountability in their working tilting the balance of power in favour of the citizens. At the very fundamental level, an access to information law affects every single department and every action of government bodies. Hence the resistance to openness. While slow implementation or lack of implementation is a cause for concern, the content of the law and the manner in which laws are drafted without any public participation is a bigger cause for concern where it concerns legislation on as the right to information that is supposed to empower citizens and enable greater democratic participation.

Comparative overview of India and Pakistan law

At the very outset, it needs to be recognized that the Indian law and Pakistan Ordinance do not meet the international standards of access to information legislation. They fail on various counts. The analysis of the Indian law and Pakistan Ordinance in this paper will be in the light of the international standards so as to identify problem areas and issues that need to be addressed in the future. For the purpose of this paper, discussion on Indian law is limited to the central law and will not include state legislation.

Objects of the law

The objects clause of any legislation is crucial as it states the basic objective of the law and is very useful in guiding the interpretation of the legislation. A clear opening statement that establishes the rule of maximum disclosure and a presumption in favour of disclosure goes a long way in sending a message down the ranks of the intent of the government and its expectation from public officials. The Indian law has a fairly wide objects clause that recognizes that the legislation has been enacted to provide for freedom to every citizen to secure access to information in order to promote openness, transparency and accountability in administration.[11] The Pakistan Ordinance fails to recognize the citizens right to information. Instead the preamble talks of the improving citizens access to records and to make the government more accountable to citizens.[12]

By not recognizing the citizens right and limiting access to information to only records, the Pakistan Ordinance is at the very outset narrowing the scope of access to information in Pakistan. However, the Ordinance states very clearly that the law is to be interpreted so as to facilitate and encourage promptly and at the lowest reasonable cost, the disclosure of information.[13] This statement on interpretation really sets the tone for the working of the legislation. Even though limiting in scope, the law does create a presumption in favour of disclosure.

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[11] Preamble to the Indian Freedom of Information Act 2002 (hereinafter referred to as the Indian Act)
[12] Preamble of Pakistan Freedom of Information Ordinance 2002 (hereinafter referred to as the Pakistan Ordinance).
[13] Pakistan Ordinance, s 3 (2)(ii)

Scope of the Legislation

The scope of the law is addressed by answering two questions; firstly, who is covered by the law and secondly, what information is available to citizens.

Who is covered?

Traditionally, access to information laws have been applicable only to public bodies. However, in light of globalisation and increased privatization across the world and keeping in mind the high influence that corporations have on lives of people, there is a growing demand for making access legislation applicable to private bodies also.

The South African law passed in 2000 is unique in this respect in that it is applicable to private bodies as much as public bodies. Neither the Indian law nor the Pakistan Ordinance cover private bodies and they are applicable to public bodies only. The Indian law covers all bodies created by the Constitution or any law of the state and includes any body owned, controlled or substantially financed directly or indirectly by the government.[14] By this wide definition, the executive, legislature and judicial wings of government are covered. Any body created by law (for instance), Universities are covered. In addition, all public sector undertakings and other bodies that are funded by government are also required to comply with the freedom of information legislation.

In contrast, the Pakistan Ordinance defined "public body" rather narrowly. The President is excluded from the scope of the law. Only ministries and departments of federal government, the Parliament, Courts and Tribunals and bodies established by Federal law are covered.

While the Indian law has stopped short of including private bodies and has left out contractors engaged by government and various other organizations that perform functions that are of a public nature, the Pakistan Ordinance is extremely narrow in scope and application and leaves the important office of the President outside the reach of citizen scrutiny.

What information is available?

The question as to what information is available is highly contentious; many laws allow access to information while others limit access to records. The Indian law uses the wider terminology of "information" which is defined as material in any form relating to administration, operations or decisions of a public authority.[15]

The Pakistan Ordinance limits access to "public records" and even goes to the extent of defining exactly what is a public record[16] and includes a very small list of documents like policies, guidelines, transactions involving acquiring of property, information on grant of licenses, allotments and benefits and final orders on decisions relating to members of the public. Information that citizens need are not

[14] Indian Law s. 2 (f)
[15] Indian Law s. 2 (d)
[16] Pakistan Ordinance, s. 7

always limited to the records mentioned above. Instead, they may want copies of surveys, findings investigation reports and other information which may not be easy to define.

Citizens should be provided access to all records subject to exceptions clearly defined under the law; the exemptions should not be based on the nature of the record but rather the content. The Pakistan Ordinance defeats the fundamental purpose of the law by defining public records and restricting access to only such information.

Duty to provide information - *suo moto disclosure*

The right to information includes a duty on government to proactively disclose information of general relevance to citizens. Access to information legislation should not only deal with providing information on request. It should also include a duty on public bodies to actively disclose, publish and disseminate, as widely as possible, documents and information of general public interest. Proactive disclosures help inform citizens of government actions and enables better participation in governance.

The Indian law contains a provision for proactive disclosure while the Pakistan Ordinance merely casts a duty on public bodies to publish rules, regulations, laws, by-laws, manuals and order and makes these available at a price. The basic premise behind proactive and *suo moto* disclosures are to make certain kinds of information available that will be of general interest to the public. The Indian law, for instance, makes it mandatory for all public bodies to make available information to the public including, information regarding public authorities such as their duties, functions, particulars of the organizations, powers and duties of the employees, norms for discharge of functions by the authorities etc.[17]

In addition public authorities are required to make public all facts concerning important decisions while announcing decisions, give reasons for decisions administrative or quasi – judicial and most importantly, from a citizen's perspective before initiating any project public authorities are required to communicate to the public all facts concerning the project which should be known.[18]

Suo moto disclosures can be an effective method to ensure that citizens are informed of developments in government. It is not enough to provide information on rules and regulations or even about projects being undertaken by government. If public bodies identify information that citizens have an interest in and generally seek and if this information put out in the public domain, they would be in a position to cut down their dealing with multiple requests for information and limit resources and investment in setting up systems to deal with individual requests.

Exemptions from disclosure

The right to information is not an absolute right. Hence, much like the fundamental right to freedom of speech and expression, it is subject to restrictions. The most contentious provisions in any access to information legislation are exemption clauses. The general rule that to be followed while defining

[17] Indian Law s. 4 (b)
[18] Indian Law s. 4 (c), (d) and (e)

exemptions is that they should be narrowly defined and denial of information should be in the overall public interest.

A three part test has been evolved in order to determine the legitimate denial of information namely, a) the information must relate to a legitimate aim listed in the law, b) Disclosure must threaten substantial harm to that aim and c) the harm must be greater than the public interest in disclosure.[19] Disclosure of information should not be based on the kind of document or the nature of the organization that holds the information; it should be based on the content and its capacity to legitimately harm public interest.

The Pakistan Ordinance, for instance, clearly excludes certain kinds of records from the purview of the law, such as notings on files, minutes of meetings, records of documents furnished to public bodies on the condition of confidentiality.[20] There is no justifiable reason to exclude notings and minutes of meetings from public scrutiny. The Ordinance defeats its stated purpose of bringing in transparency in government through the inclusion of such provisions.

Similarly, the Indian law excludes certain intelligence and security organizations from the purview of the law. At the time of passing of the law in December, the number of exempted organizations stood at 19. The government has the power to add to this list from time to time.[21] The reasoning that the information possessed by these organizations is sensitive in nature does not really hold water especially when the law contains class exemptions and legitimately denies information on grounds of national security, law and order and investigation of crimes. Further, not all information possessed by these organizations is sensitive in nature. Information for instance, relating to recruitment policy and certain administrative decisions should be open to the public.

The common grounds on which information is denied is that disclosure would "prejudicially affect"[22] or "cause grave and significant damage"[23] to international relations, national security, the economy, public safety and order, detection and investigation of a crime or affect legitimate commercial interests. If the information is a protected trade and a commercial secret it can be denied.[24] The significance of language like "prejudicially affect" and "cause significant damage" as a prefix to the category of information ensures that there is no blanket refusal of information. A public official cannot deny information just because it concerns international relations; he/ she needs to show that the specific information that has been requested if disclosed would prejudicially affect international relations. These harm tests do bring in some subjectivity in decision-making, but they require public officials to justify and give reasons for denying information.

In addition to harm tests it is not uncommon to specify "public interest override" provisions. Even if information falls within the legitimate exemption category, if the public interest in disclosure is greater than the interest in keeping the information undisclosed, then the information is to be

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[19] *Global Trends on Right to Information – a survey of South Asia* (2001), ARTICLE 19, CHRI, CPA, HRCP, p 39.
[20] Pakistan Ordinance, s. 8.
[21] Indian law s. 16 read with the Schedule.
[22] Indian law s. 8.
[23] Pakistan Ordinance, s. 15 and 18.
[24] Indian law s. 8 (f).

disclosed. For example, information can be a trade secret protected under law but if the disclosure of the information can save lives that are in danger, then the public interest override clause would come into play and information would have to be disclosed. Though many access laws like New Zealand, South Africa and other contain public interest override provisions, sadly, neither the Indian Law not the Pakistan Ordinance contains such a provision. This is one of the major failings of these legislation.

Applications Procedure and Disposal of Requests

As a general rule, the procedure for application and disposal of requests should be simple and non-complicated so as not to deter citizens from seeking information. The application forms must be simple and citizen should not be required to justify their reasons for seeking information. In addition, the fees charged should be nominal in nature and should not be so high as to keep citizens from using the law.

Application

The Indian law states that the application should be made in writing, but in cases where a written request cannot be made, it would be the duty of the public information officer to render all assistance to reduce an oral request into writing.[25] In a country where a majority of the population is illiterate this provision is particularly useful. The Pakistan Ordinance does not cast any duty on the designated officials to accept oral requests or to help reduce them in writing. In fact, if the application furnished is not in the prescribed from, the official is required to record this decision in writing and inform the citizen of the same.[26]

Fees

Neither the Indian Law nor the Pakistan Ordinance prescribe fees for providing information. The issue will be dealt with in the rules that are yet to be formulated. Fees are now said to be an important element in deterring frivolous requests. Governments sometimes argue that it costs money to have an information regime and that the public must bear some of this cost. While there is no objection to charging a nominal fee for copies of records, the fees charged should not try to recover the cost of the entire information regime.

Time Limits

Under the Pakistan Ordinance the time limit within which information is to be provided is 21 days from the date of application[27], under Indian law the time limit is 30 days.[28] However the Indian law creates an exception, if the information being sought concerns the life and liberty of a person this information is to be provided within 48 hours of the request.[29] While both the Indian law and Pakistan Ordinance prescribe time limits, they do not provide for an effective enforcement mechanism to deal with delays.

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[25] Indian law s.6
[26] Pakistan Ordinance, s. 13 (2)(a).
[27] Pakistan Ordinance, s. 13.
[28] Indian law s. 7.
[29] Indian law s. 7 proviso.

Disposal of Requests

Under Indian Law, reasons for rejection of a request is required to be communicated in writing. The requestor should also be informed of the option to appeal and the time period within which the appeal can be made and details of the appellate authority.[30]

The Pakistan Ordinance on the other hand does not require reasons for rejection to be stated. It merely requires the concerned official to record the decision in writing and inform the applicant.[31] This provision in the Ordinance is flawed and is disadvantageous to the citizen. At the very least, the rejection should be in writing so as to enable the applicant to understand why information is being denied and also to legitimately challenge the denial of information.

Appeals

The most common complaint of citizens against their governments is that they are non responsive; one can make any number of applications but rarely receive a response. Any regime on access to information depends entirely on the dispute redressal mechanism it provides. Simply put, what recourse does a citizen have if information is denied, if there are delays in receiving a response or if the information provided is incomplete or wrong? Governments have a tendency to confuse their own interests with the public interest. Therefore there is need for a powerful independent body that is mandated to deal with refusals to provide information and compel public authorities to disclose where information is wrongfully denied.

One option available could be to seek redressal in courts of law. In most countries and particularly in India, court based remedies are slow and costly and out of reach of most ordinary citizens. The presence of an independent body would be a cheaper, more efficient alternative and would provide a level of public confidence that comes with assured independence.

The Indian law has failed in providing an effective redressal mechanism. The law provides for two levels of appeals both of which are within the government.[32] The net effect is an appeal to Caesar from Caesar. The Indian law goes as far as banning the jurisdiction of courts in dealing with matters under the legislation without providing an alternative independent redressal mechanism. The only positive feature of the appeals mechanism under Indian law is that the appeals are time bound and have to be disposed of within 30 days from the date of filing. The lack of an independent appeals body is a serious failure in the Indian law

The most positive feature of the Pakistan Ordinance is the independent appeals mechanism. An applicant who has been denied information is first required to file a complaint to the head of the public body. This compels the concerned authority to engage in an internal review and rectify a wrong decision. A second appeal lies to the Mohtasib (Ombudsman) and in cases relating to revenue division, to the Federal Tax Ombudsman.[33] However, the Ordinance does not set any time limits for

[30] Indian law s. 7 (3).
[31] Pakistan Ordinance, s.13 (2).
[32] Indian law s. 12
[33] Pakistan Ordinance, s.19

disposal of appeals by the Ombudsman. Clear time limits would ensure quick redressal of disputes and favour citizens.

Penalties

Most access laws fail at the stage of enforcement. Without effective appeal and penalty mechanisms access to information laws have little or no meaning. The Indian law fails on this count since it lacks any penalty clauses. Interestingly, it is only the central legislation in India that has not provided any penalties provisions. Many state laws in India have included penalties for delay, wrongful denial and deliberately providing wrong or misleading information. Internationally, penalty provisions have been included for destruction, falsification and concealment of records. Pakistan follows this trend and the Ordinance makes it an offence to destroy records punishable with imprisonment not exceeding two years or fine or both.[34]

Annual reports of information commissioners in Canada, the Privacy Commissioner in New Zealand have, year after year, identified delays in providing information and constant extensions sought by officials as the singularly most frustrating factor for citizens. Lack of penalty provisions for not following time limits to deliver information make it difficult to fix accountability and leave the citizen helpless. The Canadian and South African Acts try to force timely compliance by providing that if a decision on a request is not communicated to the requestor within the stipulated time limits, it will be construed as a deemed refusal, thereby allowing appeals mechanisms to come into play.[35] The innovative system followed by some of the state right to information laws in India could ensure effective compliance of the access to information legislation. Public officials are required to pay a fine for every single day of delay and the amount of the fine is deducted by the concerned government from the salary of the concerned official.[36]

Ironically, the Pakistan Ordinance contains a provision that imposes a fine of up to Rs 10,000 on complainants who make malicious, frivolous or vexations complaints[37], while officials who frustrate citizens by consistent delays are not held accountable.

Independent Monitoring Bodies

Implementation of an access to information legislation is not easy, given the inherent penchant of all governments for secrecy. In all fairness, the task is not an easy one; an access to information law affects every single department and authority within the government machinery. It is therefore necessary to have an independent body which oversees the working of the law and can focus on issues of training government officials and recommend systems to ensure compliance with the law.

In South Africa, the South African Human Rights Commission performs this task, while in Canada the Information Commissioner is required to do the same. In countries such as Jamaica and Trinidad and Tobago, a special freedom of information unit attached to the office of the Prime Minister focuses

[34] Pakistan Ordinance, s.21
[35] Canadian Act s. 10(3); South African Act s.27
[36] Karnataka Right to Information Act 2000 and Maharashtra Right to Information Act 2003 can be accessed at www.humanrightsinitiative.org
[37] Pakistan Ordinance, s. 20

on publicizing the law, training of officials and monitors implementation of the law. India and Pakistan have remained silent on this issue and have avoided any scope for ensuring accountability in implementing the law

Conclusion – where do we go from here?

A law by itself will not bring about change in the working of governments. Unlike any other regulatory legislation, an access to information law will only be effective if citizens consistently use the law. Neither the Indian law nor the Pakistan Ordinance are examples of good practice as far as access to information laws go. But, it is definitely a start and can be used by citizens to consistently put pressure on government to expand the scope and boundary of the law.

An access to information regime is part of larger systemic reform to bring in open government; mere enactment of a right to information law will not do away with the culture of secrecy prevalent in government.

In India, Pakistan, Sri Lanka and other countries in the South Asian region that are part of the Commonwealth, archaic Official Secrets legislation, oaths of secrecy and other restrictive legislation that are antithetical to the concept of open government, continue to exist on the books.

Unless governments have the political will to engage in systemic reform and do away with restrictive laws and encourage a culture of openness by undertaking strong administrative reform by training public officials and reorienting them into a culture of service delivery, access legislation will be meaningless. As far as India and Pakistan are concerned formulation of rules for the Indian law and the Pakistan Ordinance would be a welcome first step that is long overdue. We welcome initial steps taken by the Sri Lankan government in this regard, as well.

CCPR/CO/79/LKA (future)
HUMAN RIGHTS COMMITTEE
Seventy-ninth session

CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 40 OF THE COVENANT

Concluding Observations of the Human Rights Committee

SRI LANKA

1. The Human Rights Committee considered the combined fourth and fifth reports of Sri Lanka (CCPR/C/LKA/2002/4) during its 2156th, and 2157th meetings, held on 31 October and 3 November 2003 (see CCPR/C/SR.2156 and 2157). It adopted the present concluding observations during its 2164th meeting (CCPR/C/SR. 2164), held on .6 November 2003.*

Introduction

2. The Committee notes that the report was submitted after considerable delay and combines the fourth and fifth periodic reports of Sri Lanka. It notes that the report contains detailed information on domestic legislation and relevant national case law in the field of civil and political rights, but regrets that it does not provide full information on the follow-up of the Committee's concluding observations on Sri Lanka's previous report. The Committee expresses its appreciation for the discussion with the delegation, and notes the answers, both oral and written, that were provided to its questions.

B. Positive aspects

3. The Committee welcomes the conclusion, on 24 February 2002, of a cease-fire agreement between the Government of Sri Lanka and the LTTE, and expresses the hope that the implementation and monitoring of the agreement will help to achieve a peaceful and lasting solution to a conflict which has given rise to serious violations of human rights on both sides.

4. The Committee welcomes the establishment of the National Human Rights Commission in March 1997. It notes that the Commission has begun to play an active role in the area of promotion and protection of human rights in the peace process. It expresses the hope that the Commission's monitoring and educational activities, including those projected under the Strategic Plan for 2003-2006, will receive appropriate resources.

5. The Committee notes the measures taken by the State party to improve awareness of human rights standards among public officials and members of the armed forces, and to facilitate the investigation of human rights violations. These measures include improved human rights

* These Concluding Observations do not address events in Sri Lanka that occurred after the examination of the report.

education for all law enforcement officers, members of the armed forces and prison officers, the establishment of a central register of detainees in all parts of the country and the creation of the National Police Commission.

6. The Committee welcomes the State party's ratification of the Optional Protocol to the Covenant in October 1997, and the training workshop on the procedure under the Optional Protocol to the Covenant co-organized by the National Human Rights Commission and the UN Development Programme in December 2002.

C. Principal subjects of concern and recommendations

7. While taking note of the proposed constitutional reform and the legislative review project currently being undertaken by the National Human Rights Commission, the Committee remains concerned that Sri Lanka's legal system still does not contain provisions which cover all of the substantive rights set forth in the Covenant, or all the necessary safeguards required to prevent the restriction of Covenant rights beyond the limits permissible under the Covenant. It regrets in particular that the right to life is not expressly mentioned as a fundamental right in Chapter III of the Constitution even though the Supreme Court has, through judicial interpretation, derived protection of the right to life from other provisions of the Constitution. It is also concerned that contrary to the principles enshrined in the Covenant (e.g. the principle of non-discrimination), some Covenant rights are denied to non-citizens without any justification. It remains concerned about the provisions of article 16(1) of the Constitution, which permits existing laws to remain valid and operative notwithstanding their incompatibility with the Constitution's provisions relating to fundamental rights. There is no mechanism to challenge legislation incompatible with the provisions of the Covenant (articles 2 and 26). It considers that a limitation of one month to any challenges to the validity or legality of any "administrative or executive action" jeopardizes the enforcement of human rights, even though the Supreme Court has found that the one-month rule does not apply if sufficiently compelling circumstances exist.

The State party should ensure that its legislation gives full effect to the rights recognized in the Covenant and that domestic law is harmonized with the obligations undertaken under the Covenant.

8. The Committee is concerned that article 15 of the Constitution permits restrictions on the exercise of the fundamental rights set out in Chapter III (other than those set out in articles 10, 11, 13.3 and 13.4) which go beyond what is permissible under the provisions of the Covenant, and in particular under article 4(1) of the Covenant. It is further concerned that article 15 of the Constitution permits derogation from article15 of the Covenant, which is non-derogable, by making it possible to impose restrictions on the freedom from retroactive punishment (article 13(6) of the Constitution).

The State party should bring the provisions of Chapter III of the Constitution into conformity with articles 4 and 15 of the Covenant.

9. The Committee remains concerned about persistent reports of torture and cruel, inhuman or degrading treatment or punishment of detainees by law enforcement officials and members of the

armed forces, and that the restrictive definition of torture in the 1994 Convention against Torture Act continues to raise problems in the light of article 7 of the Covenant. It regrets that the majority of prosecutions initiated against police officers or members of the armed forces on charges of abduction and unlawful confinement, as well as on charges of torture, have been inconclusive due to lack of satisfactory evidence and unavailability of witnesses, despite a number of acknowledged instances of abduction and/or unlawful confinement and/or torture, and only very few police or army officers have been found guilty and punished. The Committee also notes with concern reports that victims of human rights violations feel intimidated from bringing complaints or have been subjected to intimidation and/or threats, thereby discouraging them from pursuing appropriate avenues to obtain an effective remedy (article 2 of the Covenant).

The State party should adopt legislative and other measures to prevent such violations, in keeping with articles 2, 7 and 9 of the Covenant, and ensure effective enforcement of the legislation. It should ensure in particular that allegations of crimes committed by state security forces, especially allegations of torture, abduction and illegal confinement, are investigated promptly and effectively with a view to prosecuting perpetrators. The National Police Commission complaints procedure should be implemented as soon as possible. The authorities should diligently enquire into all cases of suspected intimidation of witnesses and establish a witness protection program in order to put an end to the climate of fear that plagues the investigation and prosecution of such cases. The capacity of the National Human Rights Commission to investigate and prosecute alleged human rights violations should be strengthened.

10. The Committee is concerned about the large number of enforced or involuntary disappearances of persons during the time of the armed conflict, and particularly about the State party's inability to identify, or inaction in identifying those responsible and to bring them to justice. This situation, taken together with the reluctance of victims to file or pursue complaints (see paragraph 9 above), creates an environment that is conducive to a culture of impunity.

The State party is urged to implement fully the right to life and physical integrity of all persons (Art 6, 7, 9 and 10, in particular) and give effect to the relevant recommendations made by the UN Working Group on Enforced or Involuntary Disappearances and the Presidential Commissions for Investigation into Enforced or Involuntary Disappearances. The National Human Rights Commission should be allocated sufficient resources to monitor the investigation and prosecution of all cases of disappearances.

11. While noting that corporal punishment has not been imposed as a sanction by the courts for about 20 years, the Committee expresses concern that it is still statutorily permitted, and that it is still used as a prison disciplinary punishment. Moreover, despite directives issued by the Ministry of Education in 2001, corporal punishment still takes place in schools (article 7).

The State party is urged to abolish all forms of corporal punishment as a matter of law and effectively to enforce these measures in primary and secondary schools, and in prisons.

12. The Committee is concerned that abortion remains a criminal offence under Sri Lankan law, except where it is performed to save the life of the mother. The Committee is also concerned by

the high number of abortions in unsafe conditions, imperiling the life and health of the women concerned, in violation of articles 6 and 7 of the Covenant.

The State party should ensure that women are not compelled to continue with pregnancies, where this would be incompatible with obligations arising under the Covenant (article 7 and General Comment 28), and repeal the provisions criminalizing abortion.

13. The Committee is concerned that the Prevention of Terrorism Act (PTA) remains in force and that several of its provisions are incompatible with the Covenant (articles 4, 9 and 14). The Committee welcomes the decision of the Government, consistent with the Ceasefire Agreement of February 2002, not to apply the provisions of the PTA and to ensure that normal procedures for arrest, detention and investigation prescribed by the Criminal Procedure Code are followed. The Committee is also concerned that the continued existence of the PTA allows arrest without a warrant and permits detention for an initial period of 72 hours without the person being produced before the court (sec. 7), and thereafter for up to 18 months on the basis of an administrative order issued by the Minister of Defence (sec.9). There is no legal obligation on the State to inform the detainee of the reasons for the arrest; moreover, the lawfulness of a detention order issued by the Minister of Defense cannot be challenged in court. The PTA also eliminates the power of the judge to order bail or impose a suspended sentence, and places the burden of proof on the accused that a confession was obtained under duress. The Committee is concerned that such provisions, incompatible with the Covenant, still remain legally enforceable, and that it is envisaged that they might also be incorporated into the Prevention of Organized Crimes Bill 2003.

The State party is urged to ensure that all legislation and other measure enacted taken to fight terrorism are compatible with the provisions of the Covenant. The provisions of the PTA designed to fight terrorism should not be incorporated into the draft Prevention of Organized Crime Bill to the extent that they are incompatible with the Covenant.

14. The Committee is concerned about recurrent allegations of trafficking in the State party, especially of children (article 8).

The State party should vigorously pursue its public policy to combat trafficking in children for exploitative employment and sexual exploitation, in particular through the effective implementation of all the components of the National Plan of Action adopted to give effect to this policy.

15. The Committee notes with concern that overcrowding remains a serious problem in many penitentiary institutions, with the inevitable adverse impact on conditions of detention in these facilities (article 10).

The State party should pursue appropriate steps to reduce overcrowding in prisons, including through resorting to alternative forms of punishment. The National Human Rights Commission should be granted sufficient resources to allow it to monitor prison conditions effectively.

16. The Committee expresses concern that the procedure for the removal of judges of the Supreme Court and the Courts of Appeal set out in article 107 of the Constitution, read together with

Standing Orders of Parliament, is incompatible with article 14 of the Covenant, in that it allows Parliament to exercise considerable control over the procedure for removal of judges.

The State party should strengthen the independence of the judiciary by providing for judicial, rather than parliamentary, supervision and discipline of judicial conduct,

17. While appreciating the repeal of the statutory provisions relating to criminal defamation, the Committee notes with concern that State radio and television programs still enjoy broader dissemination than privately owned stations, even though the Government has taken media-related initiatives, by repealing the laws that provide for state control of the media, by amending the National Security Act and by creating a Press Complaints Commission (article 19).

The State party is urged to protect media pluralism and avoid state monopolization of media, which would undermine the principle of freedom of expression enshrined in article 19 of the Covenant. The State party should take measures to ensure the impartiality of the Press Complaints Commission.

18. The Committee is concerned about persistent reports that media personnel and journalists face harassment, and that the majority of allegations of violations of freedom of expression have been ignored or rejected by the competent authorities. The Committee observes that the police and other government agencies frequently do not appear to take the required measures of protection to combat such practices (articles 7, 14 and 19).

The State party should take appropriate steps to prevent all cases of harassment of media personnel and journalists, and ensure that such cases are investigated promptly, thoroughly and impartially, and that those found responsible are prosecuted.

19. While commending the introduction since 1995 of legislation designed to improve the condition of women, the Committee remains concerned about the contradiction between constitutional guarantees of fundamental rights and the continuing existence of certain aspects of personal laws discriminating against women, in regard to marriage, notable the age of marriage, divorce and devolution of property (articles 3, 23, 24, and 26).

The State party should complete the ongoing process of legislative review and reform of all discriminatory laws, so as to bring them into conformity with articles 3, 23, 24 and 26 of the Covenant.

20. The Committee deplores the high incidence of violence against women, including domestic violence. It regrets that specific legislation to combat domestic violence still awaits adoption and notes with concern that marital rape is criminalized only in the case of judicial separation (article 7).

The State party is urged to enact the appropriate legislation in conformity with the Covenant without delay. It should criminalize marital rape in all circumstances. The State party is also urged to initiate awareness-raising campaigns about violence against women.

D. Dissemination of information about the Covenant (article 2)

21. The fifth periodic report should be prepared in accordance with the Committee's reporting guidelines (CCPR/C/66/GUI/Rev.1) and be submitted by 1 November 2007. The State party should pay particular attention to indicating the measures taken to give effect to these concluding observations. The Committee requests that the text of the State party's fourth periodic report and the present concluding observations be published and widely disseminated throughout the country.

22. In accordance with rule 70, paragraph 5, of the Committee's rules of procedure, the State party should provide information, within one year, on its response to the Committee's recommendations contained in paragraphs 8, 9, 10 and 18. The Committee requests the State party to provide information in its next report on the other recommendations made and on the implementation of the Covenant as a whole.

Responses of the Government of Sri Lanka to the List of Issues raised by the Human Rights Committee in relation to Sri Lanka's 4th & 5th Periodic Report under the ICCPR

31st October – 3rd November, 2003

Constitutional and Legal Framework within which the Covenant is Implemented (Art. 2)

1. **What progress has been made in the constitutional reform process and what steps have been taken to ensure compatibility of the draft Constitution with the Covenant? What steps have been taken to abolish the time limit of two years, proposed in the draft Constitution, for challenging the constitutional validity of enacted legislation?**

Sri Lanka is currently engaged in a political process to achieve lasting peace through devolution of power. This process would necessitate substantial constitutional reforms. The obligations devolving on Sri Lanka in terms of the International Covenant on Civil and Political Rights as well as other applicable international human rights instruments will be taken into consideration in the constitutional reform process. A special task force consisting of academics, public servants, professionals and students has been established by the Ministry of Constitutional Affairs and an extensive study has been carried out taking into consideration the 1948, 1972 and 1978 Constitutions and the proposals made in relation to constitutional reforms in 2000.

In the context of the overall constitutional reform process, the Ministry of Constitutional Affairs will address, *inter-alia*, the issue of the right to challenge the constitutional validity of enacted legislation. The Ministry of Constitutional Affairs is currently engaged in a custody of the comparable provisions in other jurisdictions. The concerns expressed by the Human Rights Committee in respect of the 3rd Country Report presented by Sri Lanka is being given due consideration in the formulation of the proposals.

2. **What measures have been taken to ensure compatibility of the state party's laws with the Constitution in the light of article 16, paragraph 1, which stipulates that all existing laws remain valid and operative, notwithstanding any inconsistency with the Constitution's provisions relating to fundamental rights?**

The issue of validity of existing laws notwithstanding constitutional inconsistency will also be addressed as a part of the constitutional reform process. However, several legislative interventions have been made in several sectors such as Citizenship, Civil Procedure Code, Criminal Procedure Code and the Maintenance Act to ensure compatibility with fundamental rights enshrined in the Constitution. In addition, the National Human Rights Commission has embarked on a legislative review project to review all existing legislation for consistency with fundamental rights in the Constitution and international human rights standards.

3. **What specific measures have been taken to fight impunity for violations of the Covenant committed by State agents? What steps have been taken to ensure that State agents guilty of human rights violations are brought to justice? To what extent have offences been investigated and guilty parties prosecuted and punished under the Prevention of Organized Crime Act of 2003?**

The Supreme Court exercises fundamental rights jurisdiction and provides relief where violations of fundamental rights committed by State agents are established. The Attorney-General who

ordinarily represents the State and its officers in proceedings relating to fundamental rights applications, does not, as a matter of policy, appear to defend a State officer where there are personal allegations of torture. The Attorney General has forwarded indictments in 40 cases against 50 public officials under the Convention Against Torture and Other Cruel, Inhuman Degrading Treatment or Punishment Act No. 22 of 1994. In addition, over 300 public officers have been charged for offences of abduction and wrongful confinement. In this regard, 12 public officers have been convicted and sentenced.

A Bill for the Prevention of Organized Crime has been presented to Parliament and is currently being examined by the Parliamentary Consultative Committee of the Ministry of Justice. The Bill is being revised taking into account the recommendations of the Consultative Committee and will be presented to Parliament thereafter.

4. How are human rights being protected in the context of the implementation of the Peace Agreement reached on 24 February 2002? To what extent has the protection of human rights been a part of the negotiations between the Liberation Tigers of Tamil Eelam (LTTE) and the Government of Sri Lanka?

Article 2.1 of the Ceasefire Agreement between the Government of Sri Lanka and the LTTE signed in February 2002, refers to international human rights norms to which the parties must adhere. Furthermore, the Nordic Monitoring Mission has been mandated with the responsibility of ensuring compliance with the undertakings of the Ceasefire Agreement. The Monitoring Mission provides regular reports of violations requiring remedial measures by the parties concerned.

During the 4th round of peace talks in Nakhon Pathom, Thailand, the parties decided to commence a process of discussion on human rights issues. The parties agreed to request the services of Mr. Ian Martin, the former Secretary General of Amnesty International as an advisor on the submit of human rights. At the 5th round of peace talks in Berlin, Mr. Martin was invited to attend the peace talks. The parties requested him to develop a road map to address human rights issues at the talks.

At the 6th round of peace talks in Hakone, Japan, the draft road map provided by Mr. Ian Martin was discussed in detail and it was decided by the parties to adopt a declaration of principles on human rights and humanitarian issues. Mr. Martin was required to provide a draft of a declaration. This draft would be an item for discussion on resumption of the peace process.

Furthermore, it was decided that the Human Rights Commission of Sri Lanka be strengthened as the national body for the protection and promotion of human rights International organizations such as UNICEF, UN High Commissioner for Human Rights and UNHCR were requested to assist the National Human Rights Commission in monitoring human rights activities in Sri Lanka. Assisting the Sri Lanka peace process as set out in the agreement reached at the Hakone round is among the priorities identified by the National Human Rights Commission in its strategic plan for 2003-06. The National Human Rights Commission envisages making representations and suggestions to all parties engaged in the peace process. In order to effectively perform a proactive role in the peace process, enhancement of capacity by way of recruitment of personnel, infrastructure improvement as well as substantial improvement of the Commission's management

structure, particularly in regard to the regional offices, becomes crucial. While the National Human Rights Commission has approached the donor community for such assistance, greater cooperation with the relevant United Nations bodies would also be appreciated in this regard.

The Office of the High Commissioner for Human Rights has appointed a Senior Human Rights Advisor. This is with a view to assisting and advising the authorities in Sri Lanka for capacity building in the protection and promotion of human rights in Sri Lanka in general and more specifically in the North and East.

5. What measures has the State party taken to implement the views of the Human Rights Committee with regard to case 916/2000 (*Jayawardena* v. *Sri Lanka*), adopted on 26 July 2002?

Dr. Jayalath Jayawardena, representing the United National Front was elected to Parliament at the elections held in December, 2001. In the present Cabinet of Ministers, he holds the portfolio of Minister of Rehabilitation, Resettlement and Refugees. The complaint in question was made prior to his appointment to the Cabinet of Ministers.

Pursuant to the decision of the Human Rights Committee in its case 916/2000 the Government caused further investigation through the Criminal Investigation Department (CID) in the course of which a further statement was recorded from Dr. Jayalath Jayawardena. Dr. Jayawardena took up the position that he was unable to identify the persons who had threatened him. In view of the position taken by Dr. Jayawardena, there was no material to identify the persons who were responsible for the alleged threats. However, the Government has assured that it was willing to provide additional security if requested, apart from the security already provided to Dr. Jayawardena as a Cabinet Minister.

GENDER EQUALITY AND THE RIGHT OF CHILDREN TO BE PROTECTED

6. What steps have been taken to ensure that there are no discriminatory provisions in the laws governing marriage, inheritance and succession?

Legal reforms initiated during the period under review have placed special emphasis on non-discrimination, both in terms of gender inequality and inequality in the rights of children due to status of birth, race etc.

In 1995, the general law and the Kandyan law, (a personal law), on marriage was amended to prescribe a uniform minimum age of marriage i.e 18 years, for both boys and girls, (hitherto the minimum ages were different). Although at that time it was not possible to extend these reforms to those governed by the Muslim Law, a consultative process initiated by the Ministry of Justice and the National Child Protection Authority is now underway with members of the Muslim community with a view to obtaining a consensus for this purpose. The Government is committed to making progress on this complex issue within the sensitive environment of a multi-ethnic, multi-religious and democratic society.

A new Maintenance Act enacted in 1999 to replace the Maintenance Ordinance of 1889 removed a discriminatory provision which required a mother to apply for maintenance in respect of a non-material child within a period of one year of the birth of such child, a time limit which was not applicable to children born in wedlock.

An amendment to the Citizenship Act of 1948 passed by Parliament on 10th January 2003 recognizes the right of a Sri Lankan mother to pass her citizenship to her children where the father is a foreign national. Prior to the amendment, Sri Lankan citizenship was only through the paternal line.

A prohibition imposed on married women from being appointed as guardians-ad-litem in civil actions was removed with an amendment to the Civil Procedure Code enacted by the Parliament in 2002.

A proposed amendment to the Land Development Ordinance seeks to remove discriminatory provision according to which males have priority to succeed to state land alienated under that Ordinance.

While the current Program of Work of the Law Commission includes the examination of laws relating to children to improve the rights of the child as one item of its work, a specific request has been made for its early recommendations to overcome discrimination against non-marital children.

A legislative process aimed at removing various discriminatory provisions is continuing.

7. What steps have been taken by the State party to ensure that violence against women is adequately dealt with by the authorities and with what results?

A draft Prevention of Domestic Violence Act which seeks to enable victims of such violence to obtain protection orders from court, has been prepared. It is presently undergoing a consultative process prior to submission to the Cabinet for approval.

Any person against whom an act of domestic violence has been committed or is likely to be committed, may make an application to court for a protection order. The Act also enables other persons such a police officer or in the case of a child, a parent, guardian or a person authorized by the National Child Protection Authority to make an application on behalf of the victim of violence.

The Act does not create new criminal offences, but recognizes all Penal Code offences affecting the human body and also emotional abuse for purposes of domestic violence.

The Act sets out the procedure to obtain a protection order. Breach of a protection order is a punishable offence.

DEROGATION IN TIME OF PUBLIC EMERGENCY

8. Please provide information regarding the current applicability of Emergency Regulations and the Prevention of Terrorism Act (paras. 136 and 137). Please provide detailed information on declarations of a state of emergency and the rights that were limited in each case during the reporting period.

The Emergency Regulations were allowed to lapse from 7 July 2001 and have not been renewed or reinforced.

Consequent to the Ceasefire Agreement which came into force in February 2002, (Article 2.12), no arrests or detentions are carried out under the provisions of the Prevention of Terrorism Act. No. Investigations are carried out under the Prevention of Terrorism Act. All criminal investigations or arrests are carried out under the normal law of the land, namely the Criminal Procedure Code. Consequent to the Ceasefire Agreement approximately 1000 indictments have been withdrawn. In addition, 338 persons who were in detention pending charges, were discharged. It must be noted that, at present, there is not a single person who is being detained pending charges. With regard to pending PTA cases, i.e. those filed before the Ceasefire Agreement and not withdrawn by the Attorney General in view of the seriousness of the offence, a special High Court has been established with a view to expediting trials.

During the time that the Emergency was in force, the following rights were restricted:-

a) Freedom of Association;
b) Liberty of Movement;
c) Freedom of Expression in so far as it affects the security of the State;
d) Freedom of Assembly having a bearing on national security and public safety;

RIGHT TO LIFE; PROHIBITION OF CRUEL, INHUMAN OR DEGRADING TREATMENT; AND RIGHT TO BE FREE ARBITRARY ARREST AND DETENTION

9. What steps have been taken towards conducting an inquiry into human rights violations and summary executions that occurred between 1984 and 1988?

The period in question involves a time of considerable complexity, both politically and militarily. Problems posed by the conduct of intense military activities were compounded by the involvement of unauthorized military groups, as well as other forces. Attempts by the law enforcement authorities to secure evidence of human rights violations and summary executions in this period have not been met with success due to non-availability of witnesses as well as the reluctance of persons to come forward to give information. In the circumstances, conducting of a meaningful inquiry is not feasible.

10. What measures have been taken to investigate extra-judicial killings such as those of Neelan Tiruchelvam in July 1999 and G.G. Ponnambalam in January 2000?

Immediately after the assassination of Mr. Kumar Ponnambalam, (also known as G.G. Ponnambalam), the Government of Sri Lanka had directed the Crime Detection Bureau of the Police Department to inquire into the assassination. According to the investigations the Wellawatte police visited the scene of the crime immediately on receipt of a telephone call and commenced investigations. The Magistrate of the Mount Lavinia Court held an inquest into the death of Mr. Ponnambalam. The post mortem examination was conducted by the Judicial Medical Officer (JMO), Colombo South on 05 January 2000 and the JMO observed 05 gun shot injuries on the corpse. On 21 January 2000, the Magistrate returned a verdict of homicide based on the report of the JMO. Empty ammunition casings of calibre 03x9 mm were recovered from the scene of the crime. However, no bullets were found in the dead body. The Cellular phone used by Mr. Ponnambalam bearing No. 077-311922 was recovered in a canal in the Colombo 7 area.

On a directive by the Inspector General of Police, the Criminal Investigation Department (CID) of the Police took over the inquiry on 28 February 2001 and conducted further investigations into the murder.

Subsequent to the investigation conducted in respect of the cellular phone and the other materials, the Attorney General directed the CID to institute criminal proceedings against the following suspects in the Magistrate Court, Mt. Lavinia under Case No. 46943

i. Nanayakkara Palliyage Sugath Ranasinghe (Former Reserve Police Constable)
ii. Madurapperuma Appuhamilage Kamalsiri Kalingawansah alias Moratu Saman
iii. Uduwara Rathnaweera Sudath Rohana alias U.R.S. Rohan

Whilst the committal proceedings were in progress, two of the main suspects; Nanayakkara Palliyage Sugath Ranasinghe and Madurapperuma Appuhamilage Kamalsiri Kalingawansah alias Moratu Saman have been killed. Amended plaint will be filed against the remaining suspect. Meanwhile, the investigations are in progress to ascertain the killers of the main suspects pertaining to the case.

Dr. Neelan Thiruchelvam has been killed, allegedly, by a LTTE suicide bomber. Investigations by the Criminal Investigation Department (CID) are pending.

11. Please provide details on criminal proceedings resulting from investigations conducted by the Disappearances Investigations Unit established in November 1997 (para. 157).

	High Court	Magistrate Court	Total
Cases filed	376	56	432
Cases Concluded	135	43	178
Pending cases	241	06	247
Accused discharged	123	07	130
Convicted	12	-	12

12. Please indicate the results of the work of the Board of Investigation (para. 166). Have steps been taken to punish those found responsible for disappearances on the basis of the Board's investigations and to compensate the families of the disappeared victims?

On a directive issued by the President in October 1996, Secretary to the Ministry of Defence appointed a Board of Investigations on 05 November 1996 to inquire into complaints of disappearances in the Jaffna Peninsula. This Board was constituted with the objective of maintaining impartiality in the investigations into complaints which were made against military and police personnel. This course of action was also intended to act as a deterrent to prevent escalation of unlawful arrests which could lead to disappearances.

The Board had a series of sittings. As an initial step the Board decided to collect statistics of persons arrested and detained on the detention orders given by respective Area Commanders and Deputy Inspector General of Police (Northern Range) and who were transferred from Jaffna to Remand Prisons outside Jaffna and those who were released after initial investigations.

The total number of complaints received by the Board was 2,621, consequent to media publicity. Of these, 539 complaints were from aggrieved parties which were received by the Board after publicity was given in the Press. Upon examination of the complaints, it became evident that there were repetitions of names. Therefore, the Board processed all complaints by comparing names and addresses. After completion of this task, the Board came out with the actual number of alleged disappearances as 765. After the investigations the Board directed the investigations to be continued by the Disappearances Investigation Unit (DIU), a unit established to investigate disappearance cases. Current position of investigations is indicated in the statistics indicated below.

The Ministry of Foreign Affairs forwarded 651 fact sheets prepared by the UN Working Group on Enforced and Involuntary Disappearances which it received through Sri Lanka's Permanent Mission to the United Nations in Geneva, to the Board in October 1997. After comparing the names contained in the communications, it was revealed that 301 cases have been investigated by the Board.

- Progress made with regard to the conduct of criminal Investigations relating to disappearances in Jaffna in 1996:

Total number of complaints referred to DIU	765
Investigations pending	102
Inquiries yet to be commenced	101
Files sent to AG after completion of investigations	338
AG had advised to close the cases due to lack of evidence	209
Complainants not traced	15

- Investigations into alleged disappearances brought to the attention of the Government by the UN Working Group on Enforced or Involuntary Disappearances:

Total number of cases	12	
Number of cases to which responses have been sent	05	12
Number of cases to which responses are being prepared	04	
Remaining cases to be attended to	03	

The Attorney General has indicated 27 accused on charges of murder in relation to disappearance cases, after the completion of investigations.

According to Rehabilitation of Properties, Persons and Industries Authority (REPPIA), an amount of Rs. 610,192,700 has been paid to dependents of missing persons as compensation between 1995 and August 2003 in twenty Districts under its purview. There are 960 balance cases and an amount of Rs. 39,047,000 is required to pay them, their compensation. Payment of compensation in the other five Districts (Jaffna, Kilinochchi, Mannar, Mulaitivu, and Vavuniya) is under the purview of the Ministry of Rehabilitation, Resettlement & Refugees.

13. Two what extent has the establishment of a hotline and Central Police Registry assisted family members of detainees in obtaining information on the detention (para. 185)?

A twenty-four hour telephone hotline has been established at the Police Headquarters to assist relatives of the detainees in obtaining accurate information pertaining to the detention such as their whereabouts, the nature and circumstances of the detention etc, expeditiously. Police personnel fluent in all three languages – Sinhala, Tamil and English – staff this facility. The telephone number of this hotline is 001-2696545, 2692012, 2699439. This facility now enables family members of persons believed to be arrested to ascertain (a) whether in fact such a person has been arrested and if so (b) identity of the arresting authority and (c) place of detention.

In order to enhance the efficacy of this telephone hotline, a computerized Central Police Registry (CPR) under the purview of a Senior Deputy Inspector General of Police has been established. This registry originally contained information pertaining to all arrests and detentions of suspects under the Emergency Regulations and the Prevention of Terrorism Act (PTA). It is located at the Police Headquarters.

Police internal departmental regulations now require all arresting officers to notify the personnel operating the CPR of arrest or suspects within six hours of such arrest.

14. What steps have been taken or are being envisaged to bring the State party's anti-torture legislation in conformity with the Covenant?

The Convention Against Torture and Other Cruel, Inhuman or Degrading Punishment Act No. 22 of 1994 is in substantial conformity with the UN Convention Against Torture. Sri Lanka has taken note of the point made that the word "suffering" does not appear in the definition of the term "torture" in section 12 of the Act. It is of the view however that the expression "causes severe pain whether physical or mental" would necessarily include any suffering that is caused to any person." It is also submitted that judicial interpretation of the term "torture" would take into account any suffering, (physical or mental), that any person would be subject to. Furthermore, the Sri Lanka courts have increasingly maintained that in the interpretation of any domestic law

giving effect to Sri Lanka's international obligations, the Court would necessarily give expression to the provisions of the relevant international legal instrument.

Some of the other provisions in the Convention Against Torture Act such as article 3 of the Convention, (i.e. not to expel, return or extradite a person to another State where there is substantial grounds for believing that he would be in danger of being subjected to torture), could be given effect to under other laws such as the extradition law, immigration law, as well as through administrative measures.

15. What steps have been taken with regard to prevention, investigation, prosecution and punishment in response to allegations of torture, extra judicial executions, disappearances and other violations of human rights?

The Human Rights Commission of Sri Lanka functions as a national body with a multi-functional role combined with investigative, advisory and awareness promotion tasks.

An Inter-Ministerial Working Group has been established to give effect to the implementation of the decisions taken by the Standing Committee and to monitor the implementation process. Through the Inter Ministerial Working Group on Human Issues, investigations on torture allegations are being accelerated and co-ordinated between the law enforcement authorities.

The Inter-Ministerial Working Group closely monitors cases where police forwards notes of investigation (IBE) to the Attorney General's Department, in order to bring about an expeditious conclusion of the cases. The Inter-Ministerial Working Group also works closely with all investigative mechanisms such as the Disappearance Investigation Unit (DIU), Criminal Investigation Department (CID) and the Special Investigation Unit (SIU).

Attorney General's Department has indicated 27 accused in disappearance cases during the period of 2001-2003 after the completion of investigations.

The National Human Rights Commission, as part of its Strategic Plan for 2003-2006, will give priority to dealing with cases of torture. The Strategic Plan envisages the development of specific programmes to combat torture through effective monitoring and follow up. The Plan envisages, a special programme of the Commission which will be formulated in consultation with the relevant government authorises as well as NGOs.

The following steps have been taken by the Police for the capacity building and creating awareness among the Police officers with a view to prevent instances of torture and developing investigative techniques which are in conformity with International norms:

a) Human rights is now included as a compulsory subject in the training curricula for recruits to all ranks at the Police College and for aspirants for promotion to higher ranks. Education on respecting, protecting, safeguarding and advancing human rights is a topic given importance and prominence at 'In Service' lectures and seminars arranged for all ranks. Diploma Courses on human rights are conducted where successful participants are given due weightage at promotion interviews in order to motivate participants towards attaining high standards.

Since most cases of torture are perpetrated in the course of criminal investigations, human rights awareness lectures are coupled with investigational skills development. The resource personnel include experienced criminal investigators, Commissioners of the National Human Rights Commission, officers of the Attorney General's Department and foreign experts.

b) Posters in Sinhala, Tamil and English languages are exhibited in all Police stations setting out the right of detainees. Lawyers are granted access to suspects for the purpose of safeguarding human rights of detainees as well as ensuring transparency.

c) The Police headquarters has circulated instructions to all Police stations which set forth the Principle of Command Responsibility, under which the Supervisory Officers such as the officers in charge of Stations, the Asst. Superintendents, Superintendents and the Deputy Inspectors General will be held responsible for torture by their subordinates if it had been facilitated due to lack of supervision or negligence on the part of such superior officer.

d) The Deputy Inspector General in charge of the Police Legal Range is charged with the responsibility of taking cognisance of complaints of torture, made by individuals or reported in the media, whereupon he should activate the mechanism to have such complaints investigated. He also monitors the investigations to their conclusion. The Deputy Inspector General of Legal Range is responsible for instituting Departmental disciplinary proceedings and for the co-ordination with the Attorney-General's Department for the prosecution under Torture Act.

e) Officers against whom indictments are served under the Torture Act or where a prima facie case is made out are interdicted forthwith.

f) While 43 police officers/armed forces personnel have been indicted in the High Court on charges of torture, internal disciplinary proceedings have been instituted against 12 officers on their failure to take proper steps to prevent instances of torture.

Among other action taken by the authorities, the following action has been taken with respect to two communications received from the UN Special Rapporteur on Torture in 1999 and 2002.

Total number of cases referred for investigations	110
<u>Breakdown</u>	
Investigations completed and criminal proceedings not instituted on AG's advice	25
Disciplinary action instituted	04
Proceedings instituted in Courts	09
Number of cases under investigation	17
Complaints withdrawn by the victim	06
Victims living abroad	07
Victims unable to be traced	17
Investigations completed	17
Case in which information is not sufficient to proceed with investigation	03
Number of case where instructions are awaited from the AG's Department	05

16. Is it envisaged to repeal legislation which allows for the imposition of corporal punishment?

As regards children in conflict with the law, proposed juvenile justice reforms seek to prohibit the imposition of corporal punishment as a sentencing alternative for juvenile offenders.

Corporal punishment in schools continues to be a matter of much debate. Despite circular directives issued by the Ministry of Education 2001 prohibiting such punishment and awareness on alternative methods of discipline, many are the instances of corporal punishment brought to the notice of authorities. Some of these instances have been challenged as a violation of the fundamental right to freedom from torture, inhuman and degrading punishment, while others have been prosecuted under the offence of cruelty to children under the Penal Code. The greatest drawback in eliminating corporal punishment is the difficulty in achieving attitudinal changes. While the National Child Protection Authority has launched a major campaign against this form of punishment, the National Monitoring Committee appointed under the Sri Lanka Children's Charter has also taken up the issue with the education authorities.

Although statutory provisions exist for the imposition by courts of corporal punishment on adult offenders, as a matter of policy, corporal punishment has not been carried out for over 20 years. It has also been proposed to amend the Prison Ordinance to abolish corporal punishment in conformity with international legal obligations.

17. What additional measures have been taken to protect the rights of detainees held by order of the Secretary of Defence under the Prevention of Terrorism Act? What progress has been made towards the release of detainees held for prolonged periods of time without trial under the Act?

At present no investigations are carried out under Prevention of Terrorism Act (PTA) and persons are not held in detention under the provisions of this Act. In respect of the cases which were pending at the time of the Ceasefire Agreement was signed the Attorney General has taken steps to review all such cases filed under the PTA. He has withdrawn over thousand (1000) indictments in respect of such cases and there are only 65 cases filed under the PTA pending in the courts.

RIGHT OF PERSONS DEPRIVED OF LIBERTY TO BE TREATED WITH HUMANITY AND RIGHT OF JUVENILES TO BE AFFORDED TREATMENT APPROPRIATE FOR THEIR AGE

18. Please describe the results of the application of the Prisons Ordinance and the findings of the Board of Prison Visitors (paras 234 and 246)

The Prison Department has taken a series of steps to safeguard the welfare of the prisoners taking into account, *inter alia*, the recommendations of the Board of Prison Visitors made form time to time. These include;

- Delivery of lectures by the Human Rights Commission to prison guards focusing on minimum standards for effective discharge of their duties.
- Providing facilities to Prisoners to read books, magazines and newspapers.
- Providing home leave in respect of prisoners who are nearing completion of their sentence.
- Providing technical skill training/ development for prisoners.
- Meditation training by a local NGO.

19. Please describe the results of the monitoring activities of the Sri Lanka Human Rights Commission in relation to prison conditions. Have any penal sanctions been applied with regard to conditions of detention under the Act establishing the Human Rights Commission. (Para 82)

Due to the current financial and resource constraints, it has not been possible for the Commission to undertake monitoring activities on a regular basis. There have been no cases where penal sanctions have been imposed for failure by the police to inform the National Human Rights Commission of arrests or detentions.

The Strategic Plan of the National Human Rights Commission for 2003 2006 recognised the need for surprise visits as an effective check against human rights abuses by custodial institutions. Accordingly, the Commission intends to accord priority to the development of a sustainable system of regular monitoring by the Monitoring and complaints team in all places where people are detained, including juvenile homes, psychiatric institutions, police stations and prisons. According to the Plan, such visits will be undertaken with the objective of examining the procedures and conditions in these institutions for consistency with national laws and international standards. The National Human Rights Commission will thereafter prepare reports which would include suggestions for remedial action.

20. What measures have been taken to abolish unofficial places of detention?

There are no "unofficial places of detention". A person could be detained only pursuant to an order of court in a place of detention established under the law of the land.

21. Please explain the results of the Law Commission's review of laws relating to juvenile justice (Para 475) What steps are being taken to raise the age of criminal responsibility from its current minimum, i.e. eight years?

The Children and Young Persons Ordinance of 1939 which governs the administration of justice to children in conflict with the law, despite its salutary provisions has not contributed to the promotion of the best interest concept. The law is at present under review by the Legal Sub-Committee of the National Child Protection Authority with the aim of introducing a new Juvenile Justice Law which can be better implemented within the framework of the limited resources available. It will as far as possible attempt to realize the guidelines set out in the Beijing Rules dealing with Standard Minimum Rules for the Administration of Juvenile Justice. The proposals for reform envisage a diversion from the formal criminal justice system, a child friendly court procedure. Wider use of community base

correctional schemes, better institutional care, legal aid services and promotion of professionalism among law enforcement personnel.

The Law Commission recommendations on juvenile justice have been incorporated in the draft juvenile justice law which is presently being finalised by the aforementioned Legal Sub-Committee for submission the ministry of justice.

RIGHT TO FAIR TRIAL

22. What measures have been taken towards ensuring the independence of the judiciary in the light of article 107 of the Constitution, read together with the Standing Orders issued by Parliament? Is the dismissal of a member of the judiciary subject to judicial scrutiny (para 302, 303)? Please give concrete examples, if available.

The judges of the Supreme Court or Court of Appeal could be removed by the President only upon an address of the majority of members of Parliament on the ground of proved misbehaviour or incapacity. There appears to be a conflict of legal opinion as to who could decide the question of proven misbehaviour or incapacity. Certain legal experts believe that misbehaviour or incapacity requires a judicial determination while certain others take the view that it could be done by a Parliamentary Committee appointed by the Parliament in terms of its Standing Orders. This is a matter that has to be addressed in the context of the constitutional reform process, taking into account, *inter-alia*, the contending principles involved. Due consideration would be given to the recommendations of the Human Rights Committee made during the examination of Sri Lanka's 3rd Periodic Report.

RIGHT TO FREEDOM OF EXPRESSION

23. What progress has been made with regard to amending the Parliamentary (Powers and Privileges) Act to ensure freedom of expression (para 358-359)? What is the status of the proposed amendment to the Constitution that restricts the right to freedom of expression "in the interest of the authority of Parliament"?

The Supreme Court in the case of ***Attorney-General*** v. ***Nadesan*** has held that the Parliamentary (Powers and Privileges) Act cannot in any way be utilised to stifle objective criticism on the conduct of parliamentarians and parliamentary proceedings. There is no reason to doubt that the Supreme Court would depart from this trend on questions affecting the freedom of expression in matters concerning parliamentary powers and privileges arising in the future. However, this is a fundamental issue which has to be addressed in the context of the constitutional reform process.

24. In the light of reports that State radio and television programmes enjoy broader dissemination than privately owned stations, what steps have been taken to ensure freedom of the press? What has been done, or is envisaged to be done, to repeal Section

27 of the Sri Lanka Broadcasting Corporation Act of 1966 and the Sri Lanka Rupavahini Corporation Act of 1982?

A multitude of private radio and television channels continue to broadcast a variety of programmes including news. These programmes also include Talk Shows with live audience participation on current political and economic issues. The Panels include Cabinet Ministers, Senior Government Officials and persons in authority. Although currently no action is envisaged to repeal Provisions of the Sri Lanka Broadcasting Corporation Act 1996, it is the intention of the Government to vest the licensing power and allocation of frequencies with an independent Commission. This matter is now under discussion.

25. What measures have been taken to sanction individuals who harass media personnel and journalists?

The Police have entertained a series of complaints regarding harassment of journalist by police officers and other members of the public. However due to variety of reasons such as:

- The inability of the victims to identify the perpetrator of the offence.
- Victim not interested in pursuing their complaints
- Total lack of evidence to support the complaint.

The police were unable to institute legal proceedings.

However, in one case filed in the MC of Attanagalle (Case No. 2701), a person found in possession of a cellular telephone belonging to a journalist who had been relieved of the same while covering a political demonetisation in Colombo, was charged and convicted for the possession of stolen property. In another case the defence correspondent in a leading English weekly, was threatened and intimidated by a group of person who were later identified to be members of the Sri Lanka air Force. In this case the Attorney – General forwarded indictments and perpetrators of the offence were convicted and sentenced to two years rigorous imprisonment.

26. The Committee has been informed that government officials do not consistently implement judicial orders relating to violations of the right to freedom of expression. Please comment.

The Government request specific instances where the public officials alleged to have failed to implement judicial orders relating to violations of the right of freedom of expression. Necessary investigations could be caused if such information is made available. However, the government has initiated a series of measures to strengthen and promote the freedom of expression.

After the establishment of the a Inter-Ministerial Working Group on Human Rights Issues, 29 allegations pertaining to the violation of Freedom of Expression has been investigated. Due to various reasons such as the complainant withdrawing the allegations, most of the investigations have been terminated. Furthermore, following mechanisms are in place to ensure that freedom of expression is maintained and respected in the country.

- Decriminalising the offence of criminal defamation

The offence of criminal defamation, which was part of the body of the substantive criminal law of Sri Lanka for the past 120 years was decriminalized on 24th April, 2002. Amendments were also introduced to the Sri Lanka Press Council Act for the same purpose. These legislative changes seek to develop a conducive environment in which a fully liberalized media could perform its functions without any fear of adverse repercussions. A civil remedy continues to be available to a person subject to defamation.

- Freedom of Information Bill

Manifesting its commitment towards fostering a culture of transparency and accountability in public bodies, the Government has agreed to a proposal put forward by the Editors Guild for legislation on Freedom of Information. Towards this end, the Prime Minister appointed a high level committee to study the draft legislation presented by the Editor's Guild.

This Bill is intended to further strengthen people's right to information. It aims at minimizing administrative restrictions and bureaucratic procedures relating to public access to Government held information. While making Public Officials more accountable, unhindered access to information through this bill will enable the Public to make their representations. It also aims at further strengthening the right of journalists from being forced to divulge their sources of information. Restrictions on the freedom of information envisaged in the proposed bill will be strictly limited.

- Establishment of Training Institute for journalists

A training institute for journalists with an emphasis on imparting of professional skills has been a long felt need. The government recognizing this need has undertaken to provide the necessary infrastructure for the establishment of this institution a priority basis. The proposed institution would have an autonomous governing body comprising professional journalists without any Government control.

- Establishment of a Press Complaints Commission

A Press Complaints Commission seeking to replace the Press Council has been established with the support of the Government. This proposal was originally made by the Editor's Guild and Newspaper Society of Sri Lanka. The proposed institution would be a self-regulatory mechanism run and financed by the various organizations and professional bodies of the News Paper Industry. The principal objective of this institution would be to ensure that the media in Sri Lanka is free and responsible, that is to meet the needs and expectations of the public whilst maintaining the highest journalistic standards without prejudice to the national security and social harmony. Arbitration and mediation would be the methods of resolving disputes referred to the Commission. A voluntary code of conduct subscribed to by editors and publishers of newspapers would be the benchmark used by this institution in resolving disputes. The membership of the Commission would include the nominees of organizations representing the interests of the publishers of Newspapers, Editors and Journalists.

The establishment of the Press Complaints Commission has been welcomed nationally and internationally as a major step in ensuring media freedom.

RIGHT OF CHILDREN TO BE PROTECTED

27. What progress has been made to ensure that legal procedures adequately protect children against economic and sexual exploitation?

Sexual exploitation:

Since 1995 the Ministry of Justice has initiated several legislative interventions to deal with the scourge of child abuse. The reform process began in the early 1990's and was intensified with the appointment of a Presidential Task Force in 1996 to recommend measures to prevent child abuse.

Significant amendments, both substantive and procedural have been introduced to several Acts since 1995. Amendments to the Penal Code introduced in 1995 and 1998 recognized a series of new offences to combat forms of criminality hitherto not recognized and prescribed stringent penalties, including mandatory minimum jail terms and fines and the requirement of awarding compensation to victims of abuse and exploitation mandatorily. The new offences included sexual harassment, grave sexual abuse, incest, use of children for obscene publications, begging, drug trafficking and procuration for sexual intercourse and trafficking in persons. These amendments also raised the age of statutory rape to 16 years (from 12 years).

The Criminal Procedure Code was amended in 1995, 1997 and 1998 to enable child abuse suspects to be kept in police custody on a court order for up to 72 hours the period for other cases being 24 hours to vest the High Court with jurisdiction to hear all cases attracting mandatory sentences and to require the giving of priority to child abuse cases.

An amendment to the Judicature Act in 1998 dispensed with the requirement of a non summary inquiry (often taking the form of a protracted trial) in statutory rape cases.

In 1999, the Evidence Laws were amended to enable court to admit video taped evidence of child victims of abuse to reduce the trauma to be faced in the trial itself.

In each Province, a High Court and a Magistrate's Court have been nominated to deal with child abuse cases. The objective of this nomination is to enable the relevant judges to acquire sensitivity regarding child rights issues, including child abuse and a degree of specialization to deal with such cases.

An examination of the implementation of some of these reforms has revealed that it is time to make further legal interventions to address certain gaps in the law. As such, under consideration for future enactment are more reforms to deal with those who solicit children for sexual abuse, prevent the exposure of children to pornography and sexual abuse of children via the internet, protection from domestic violence and the conferring of extra-territorial jurisdiction on Sri Lankan courts which will enable the law enforcement authorities to deal with paedophiles and traffickers.

To support the implementation of the laws, the National Child Protection Authority has undertaken many activities. The foremost among them are the setting up of a cyber watch unit, providing training for video recording of child testimony, professional development of law enforcement personnel, intensive awareness campaigns for the prevention of child abuse, supporting rehabilitation initiatives and surveys to identify areas requiring further reform, legislative or otherwise.

The Ministry of Justice has sought funding to set up its own cyber watch unit, which will be a pre-requisite for the effective implementation of the proposed Prevention of Computer Crimes Law, which *inter alia*, contains provisions to combat child abuse via the internet.

Economic exploitation:

Steps to eliminate child labour has gathered momentum over the last few years with Sri Lanka ratifying the ILO Convention on Minimum Age for admission of Children to Employment (ILO 138) in 2000 and the ILO Convention on the Elimination of Worst Forms of Child Labour (ILO 182) in 2001.

In August 2000, Sri Lanka signed the Optional Protocol to the Convention on the Rights of the Child (CRC) prohibiting recruitment of children under 18 years into the armed forces, whether by State or non-state actors.

Several legislative interventions have been made to strengthen the laws regulating child labour. With the enactment of amendments to the Employment of Children Regulations in 1999 and the Estate Labour (Minimum Wages) Ordinance in 2002, the minimum ages in relation to all sectors were brought into conformity with ILO 138. In relation to ILO 182, amendments to the Penal Code are under preparation to criminalize the worst forms of child labour. Definition of forms of hazardous labour has been prepared but is yet to be finalized for presentation in Parliament.

Amendments to the Employment of Women, Young Persons and Children Act passed by Parliament in January 2003 has enhanced the penalties for the violation of child labour laws while requiring the courts to mandatorily award compensation to victims of child labour and increasing the minimum age for dangerous performances up to 18 years.

District level committees led by Assistant Commissioners of Labour have been appointed to facilitate and co-ordinate the implementation of the law and to streamline administrative practices for better law enforcement.

A Child Labour Documentation Center has been established in the Ministry of Labour.

The Ministry of Labour, through a tri-partite approach supported by ILO-IPEC since 1997, has been able to conduct several programmes in an attempt to reduce child labour. The IPEC has sponsored in particular, support for data collection, training, awareness and rehabilitation programmes and continues its technical assistance.

28. What measures are being taken to climinate the trafficking of children in the State party?

Sri Lanka is a signatory to the Palermo Protocol on Human Trafficking, Especially Women and Children. In addition, at the regional level, it is a signatory to the SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution.

The SAARC Convention on Trafficking imposes obligations on Member States, *inter-alia*, to:

1) Criminalize the offences under the Convention and to impose appropriate penalties, which take into account the grave nature of the offences;
2) Confer appropriate jurisdiction on domestic Courts over trafficking offences where extradition is not granted;
3) Provide for aggravating circumstances to be taken into account by Court;
4) Provide for extradition in respect of offences covered under the Convention;
5) Provide for rendering of mutual legal assistance.

The criminalisation of offences is being addressed through proposed amendments to the Penal Code as well as the Immigration Law.

Sri Lanka is also a State Party to the SAARC Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia. This Convention is of an enabling nature and contain, *inter-alia*, guiding principles and a set of regional priorities to facilitate the protection of the rights of the child in the South Asian region. The guiding principles, *inter alia*, require State Parties to uphold the best interest of the child as a principle of paramount importance and to adhere to this principle in all activities concerning children.

The Government in June 2003 endorsed a public policy to combat trafficking in children for exploitative employment. The National Plan of Action to give effect to this policy is now before the relevant agencies for implementation. The Plan consists of four components, viz., Legal Reform and Law Enforcement, Institutional Strengthening and Research, Rescue, Rehabilitation and Re-integration and Prevention.

29. What steps have been taken to establish juvenile courts, for the purpose of trying juveniles (para 474)?

The Children and Young Persons Ordinance provides for the establishment of Juvenile Courts. However, currently there is only one separate Juvenile Court. In all other instances, the Magistrate's Courts function as Juvenile Courts when dealing with juvenile offenders. There are 80 Magistrate's Courts set up in each Judicial Division. The possibility of establishing a Juvenile Court at least in each of the nine Provinces has been recommended for inclusion in the National Plan of Action for Children now under preparation. Resource constraints have been a negative factor in the establishment of juvenile courts.

DISSEMINATION OF THE COVENANT AND OPTIONAL PROTOCOL

30. Describe the measures taken to disseminate information on the submission of reports and on their consideration by the Committee, particularly on the Committee's concluding observation.

The Sri Lanka Foundation Institute maintains a library consisting all the national and international documents pertaining to Human Rights situation of the country. Through the training programmes that they conduct for more than 2000 participants from different sectors, the information on Human Rights are being disseminated widely.

The Human Rights Commission also through campaigns of posters, journals and newsletters, makes the public aware of the various national and international human rights mechanisms.

STATE-SPONSORED VIOLENCE IN SRI LANKA - AN ALTERNATIVE REPORT TO THE HUMAN RIGHTS COMMITTEE

PRESENTED BY THE ASIAN LEGAL RESOURCE CENTER (ALRC)[1] AND THE WORLD ORGANIZATION AGAINST TORTURE (OMCT)[2] DURING THE SEVENTY NINTH SESSION OF THE HUMAN RIGHTS COMMITTEE, GENEVA, OCTOBER-NOVEMBER, 2003.[3]

EXTRACTS FROM THE ALTERNATIVE REPORT – PART I: STATE-SPONSORED VIOLENCE IN SRI LANKA

Introduction

This document focuses on some basic issues relating to the implementation of the International Covenant on Civil and Political Rights ('ICCPR') in the Democratic Socialist Republic of Sri Lanka ('Sri Lanka').

Sri Lanka acceded to the ICCPR in 1980. It presented periodic reports to the Human Rights Committee ('HRC') in 1983, 1990, 1994 and the latest on 18 September 2002. Although Sri Lanka has been a party to the ICCPR for over 22 years, Sri Lanka has failed to effectively implement some of the principle provisions of the ICCPR. In fact, the shortcomings mentioned in this report are of such a fundamental nature that they have affected the rule of law and the basic democratic framework of Sri Lanka.

Often, analysis of human rights in Sri Lanka is premised on the assumption that violations of rights is mostly due to the civil strife in the North and the East and that consequently, the resolution of this problem is the most important aspect of improving this situation. Close observation of the sequence of events that has led to the breakdown of law and order in Sri Lanka, demonstrates that such an assumption is not only simplistic but also fatally flawed.

It can even be argued that without a serious attempt to improve the institutional framework of the rule of law and democracy in the country as a whole, no lasting solution can be found to the conflict in the North and the East of the country.

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[1] The Hong Kong based Asian Legal Resource Centre ('ALRC') is a regional, independent non-governmental organization ('NGO') with General Consultative Status with the Economic and Social Council of the United Nations. Its mission is to promote and protect human rights through strengthening the rule of law and administration of justice at national and local levels and effective implementation of international human rights treaties at the national and local levels.

[2] The Geneva based World Organisation Against Torture ('OMCT') is the largest international coalition of non-governmental organizations fighting against torture, summary executions, forced disappearances and all other forms of cruel, inhuman or degrading treatment.

[3] The Report was based on the work and research of the Asian Human Rights Commission (AHRC) – Hong Kong, People Against Torture, Janasansadaya – Panadura, SETIK – Kandy, Citizens Committee for Human Rights – Kandy, Citizens Committee for Human Rights – Panadura and Kalapaye Api – Katunayake and was presented to the members of the Committee by attorney-at-law Kishali Pinto-Jayawardena, Sanjeewa Liyanage (AHRC) and Reid Shelton Fernando, (People Against Torture).

In fact, the cease-fire agreement that had existed in recent months shows that in order to make further progress, it is essential to deal with the country's longstanding problems relating to the rule of law. Delay in dealing with the denial of basic rights due to institutional failures has caused tremendous insecurity.

The following comments are directed towards scrutiny of basic institutional failures that need to be addressed if Sri Lanka's obligations under the ICCPR are to be complied with.

I. ICCPR article 2 – Effective Implementation

Under Article 2 of the ICCPR, state parties are under an obligation to put into effect legislative, judicial and administrative measures that ensure the implementation of the ICCPR. This obligation is very much of a practical nature. It means that institutions are created and provided with resources for the implementation of the rights as enshrined in the ICCPR.

Policing system

One of the basic institutions necessary for carrying out the obligations under the ICCPR by the state party is a proper policing system. Where the policing system is fundamentally flawed, none of the rights in the ICCPR can be realized. In Sri Lanka, the policing system is seriously flawed.

This has been acknowledged by government appointed commissions themselves, such as the Justice Soertzs Commission of 1946, Basnayaka Commission of 1970, Jayalath Committee of 1995, Commissions of Inquiry into Involuntary Removal as well as the Disappearance of (Certain) Persons (Commissions on Disappearances), which were appointed in 1994 and made their final reports in 2001.

The creation of the National Police Commission (NPC) under the 17th Amendment to the Constitution of Democratic Socialist Republic of Sri Lanka, (the Constitution), was meant to bring about the depoliticization of the police force. The newly appointed NPC has, on several occasions, pointed to problems besetting the police force.

The defects of the system, identified by the previously detailed commissions and committees, are as follows:

Militarization of the Police System

Since the early 1970's, Sri Lanka has witnessed cumulative violence that has transformed the Sri Lankan police force from a crime detection and law enforcement agency to an insurgency suppression mechanism.

As detailed in the reports published by the Commissions on Disappearances, police stations functioned as detention centres, torture chambers, and places where thousands of persons disappeared. Police stations throughout the country were used for these purposes. A profound transformation of the system took place as a result of this phenomenon.

Extreme forms of torture, which were used against the suspected insurgents, became a usual habit within police stations.

Some examples may illustrate the existing situation. In one case, the Supreme Court found the police officers of the Wattala Police Station responsible for the torture of a person named Waragodamudalige Gerald Mervyn Perera[4] who was arrested on mistaken identity, and within a few hours, was assaulted to the extent that he suffered renal failure and had to be put on a life support system for two weeks.

In another case, a 17-year-old boy named B. G. Chamila Bandara Jayaratne[5] was tortured between 20 – 28 July 2003 by officers attached to the Ankumbura police. Doctors later declared that he had lost the use of his left arm.

The method of torture was described in an affidavit signed by the young victim thus:

> *"Then my hands were swung behind my back and my thumbs tied together with a string, and then they put a fiber string between my thumbs and hung (me) from a beam on the ceiling. One officer pulled the fiber string so that I was lifted from the ground. When I was lifted, my hands were twisted at the elbow and they became numb. Then the OIC kept hitting me on my legs and soles with the wicket stumps used for cricket."*[6]

Similar forms of torture were also practiced in the case of 32-year-old Galappathy Guruge Gresha De Silva (32)[7] who also lost the use of both his arms due to torture.

Reports are received from all over the country with regard to similar types of torture used at the police stations, which clearly show that habits formed in the past in dealing with insurgents are now being commonly and routinely used at police stations.

Thus, a central issue in relation to the implementation of article 2 of the ICCPR concerns the prevention of such methods of torture by the police and the creation of a police force that is committed to the rule of law. When the police force itself is seen to be blatantly breaking the law, it is not possible for the state party to implement the obligations under the ICCPR.

Yet another result of the long period of civil conflict with regard to the police has been the manner that information books and other records are tampered with at police stations. The Supreme Court condemned this practice in no uncertain terms in the case of **Kemasiri Kumara Caldera**:

> *"I may add that the manner in which the B.C.I.B.s [Grave Crimes Information Book], R.I.B.s [Register/Investigation Book] etc. have been altered with impunity*

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[4] SCFR 328/2002, SCM 4/4/2003

[5] AHRC UA-35-2003

[6] AHRC UA-35-2003 and Supreme Court Fundamental Rights Application No. S.C. FR 484/2003) (see a affidavit filed by the victim in his application to the Supreme Court.

[7] Article *2*, Volume 1, Number 4, August 2002, p. 24, published by the Asian Human Rights Commission, Hong Kong.

and utter disregard of the law makes one wonder whether the supervising A.S.P.s and S.P.s are derelict in the discharge of their duties or in the alternative condone such acts.

In a case in which I pronounced judgment a few days ago too, I found that the B.C.I.B. had been altered, and therefore it appears that, that was not an isolated instance. Thus, the police force appears to be full of such errant officers. The question is what is the 5th Respondent Inspector General of Police doing about it? In my view, it is unsafe for a Court to accept a certified copy of any statement or notes recorded by the police without comparing it with the original. It is a lamentable fact that the police who are supposed to protect the ordinary citizens of this country have become violators of the law. We may ask with Juvenal, quis custodiet ipsos custodies? Who is to guard the guards themselves?"[8]

Further illustrating the same practice, it was widely publicised by the Sri Lankan media in July 2003, that two information books are kept at the Negombo Police Station, one containing original statements and another containing manipulated records created by some police officers. The latter is often produced for official purposes with the actual contents falsified.

The Politicization of the Police

The above was the acknowledged reason for bringing about the 17th Amendment to the Constitution of Sri Lanka. As a result of politicization of the police, the commanding structure within the police force has been severely disrupted with politicians playing a key role within the police force.

Thus, the normal principles upon which an organization driven by a unified command system functions, have been seriously disrupted. The NPC has declared on many occasions that they would outlaw this process and that the police force would be brought within an internal command system.[9] This objective needs to be achieved if the obligations under the ICCPR are to be respected and observed by the state parties.

Loss of Competence in Criminal Investigations Resulting in Fabrication of Cases

A study engaged in by ALRC,[10] on custodial deaths and torture in police stations in recent years, clearly establishes a pattern of implicating innocent persons in serious crimes as substitutes for the actual criminals whom the police have failed to detect.

Often, when many un-investigated crimes are piled up at a police station, innocent persons are arrested and forced to confess to crimes that they know nothing about. Often, unresolved crimes lead to strong public protest. On the other hand, when charges are filed against someone, it appears as a resolved crime and may even lead to promotions of those police officers.

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[8] Justice Edussuriya with Justices Amerasinghe and Wadugodapitiya agreeing in the case of Kemasiri Kumara Caldera (S.C. FR Application No. 343/99, SCM 6.11.2001)

[9] ("No more political interference with police transfers, NPC Chief," by Jayampathy Jayasinghe, *Daily News*, 31 March 2003).

[10] *Article 2*, Volume 1, Number 4, August 2002.

- In the well known murder case of a 76-year-old Catholic priest named Fr. Aba Costa on 10 May 2001, Kurukulasuriya Pradeep Niranjan and another male named Gamini were arrested by the police within 3 days of the murder and allegedly severely assaulted. Thereafter, they were charged with the murder of Fr. Aba Costa and kept in remand for a long time. After almost two years, the Attorney General withdrew the charges against the accused on 21 February 2003 as the actual criminals were allegedly found. It was also revealed that some senior police officers of the area were involved in the crime.

- Waragodamudalige Gerald Mervyn Perera[11] was arrested and tortured on 3 June 2002 by the officers attached to the Wattala Police Station on the basis that he was implicated in a triple murder case. The Supreme Court held that it was a case of mistaken identity.

- Mulakandage Lasantha Jagath Kumara[12] was tortured between 12 – 17 June 2000 by the officers attached to the Payagala Police Station. Due to injuries suffered at the police station, the victim later died on 20 June 2000. The Supreme Court later held that the police had tortured the victim. The arrest and detention at the police station was apparently for the purpose of implicating the victim for several unresolved crimes.

- Lalith Rajapakse[13] was severely beaten on 19 and 20 April 2002 by the officers attached to the Kandana Police Station to the extent of causing him to lose consciousness for about three weeks. He was implicated in two petty theft cases without any complaints against him by anyone and without any evidence.

- Galappathy Guruge Gresha De Silva[14] was arrested and tortured on 22 March 2002 by the officers attached to the Habaraduwa Police Station with a view to implicate him in a murder case.

- Bandula Rajapakse, R. P. Sampath Rasika Kumara, Ranaweera and Chaminda Dissanayake[15] were arrested and tortured on 19 and 20 February 2002 by the officers attached to the Ja-ela Police Station. They were made scapegoats in an inquiry into the loss of 46 rails of clothes from a company store without police having any evidence against them.

- Ehalagoda Gedara Thennakoon Banda[16] was arrested and tortured on 12 June 2002 by officers attached to the Wilgamuwa Police Station and later released without any case. It was an attempt to implicate him in some illicit liqueur charges without any evidence.

- Eric Antunia Kramer[17] was arrested and tortured on 28 and 29 May 2002 by the officers attached to the Mutwal Police Station, it being an attempt to implicate him for a robbery at the company where he worked without any evidence against him. He was not charged with any offence later.

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[11] S.C. FR Application 328/2002, SCM 4/4/2003
[12] S.C. FR Application 471/2000, SCM 8.8.2003
[13] UA – Urgent Appeals – AHRC-UA-19-2002
[14] AHRC UA-20-2002; *article 2*, Volume 1, Number 4, August 2002, p. 24
[15] *Article 2*, Volume 1, Number 4, August 2002, p. 24
[16] (AHRC UA-25-2002)
[17] (AHRC UA-36-2002)

- 10-year-old T. K. Hiran Rasika and 12-year-old E. A. Kusum Madusanka[18] were arrested and tortured on 8 July 2002 by officers attached to the Hiniduma Police Station, in a case of trying to implicate the children for a petty theft in the school canteen without having any evidence to support such a charge.

- V. G. G. Chaminda Premalal[19] a 16-year-old student, was arrested and tortured on 9 and 10 July 2002 by the officers attached to the Aralaganvila Police Station, again in an attempt to implicate him on a petty theft case without any evidence.

The following cases were also attempts to obtain evidence of undetected crimes by torturing persons against whom there were no grounds for suspicion.

- Subasinghe Aarachchige Nihal Subasinghe[20] was tortured by officers attached to the Keselwatte Police Station, Panadura;

- Korala Gamage Sujith Dharmasiri[21] was tortured between 1–8 January 2003 by officers attached to the Kaluthara South Police Station;

- Anuruddha Kusum Kumara[22] was tortured on 29 December 2002 by officers attached to the Wellawa Police Station, Kurunegala District;

- Bambarenda Gamage Suraj Prasanna[23] was tortured on 8 January 2003 by officers attached to the Matugama Police Station;

- K. T. Kumarasinghe alias Sunil[24] was tortured from 1 – 4 April 2003 by officers attached to the Galagedara Police Station;

- Hetti Kankanamge Chandana Jagath Kumar and Ajith Shantha Kumana Peli[25] were tortured on 13 May 2003 by the officers attached to Biyagama Police Station;

- B. G. Chaminda Bandara Jayaratne[26] was tortured from 20 – 28 July 2003 at Ankumbura Police Station and as a result, according to medical opinion, lost the use of his left arm due to his being hung by his thumbs by the police;

- Bandula Padmakumara and Saman Kumara[27] were tortured between 20 – 28 July 2003 by the officers attached to the Ankumbura Police Station;

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[18] (AHRC UA-30-2002)
[19] (AHRC UA-31-2002)
[20] (AHRC UA-01-2003)
[21] (AHRC UA-02-2003)
[22] (AHRC UA-01-2003)
[23] (AHRC UA-05-2003)
[24] (AHRC UA-05a-2003)
[25] (AHRC UA-13-2003)
[26] (AHRC UA-35-2003)
[27] (AHRC UA-41-2003)

- Saliya Padma Udaya Kumara[28] was tortured between 26 – 28 August 2003 by the officers attached to the Wattegama Police Station;

- Garlin Kankanamge Sanjeewa[29] was tortured by officers attached to the Kadawata Police Station. Though the police have claimed this as a suicide inside the police station, the mother of the victim has openly challenged the postmortem inquiry held inside the police station and has buried her son's body in the home garden with a view to get an impartial inquiry and to prevent the body being stolen by the police);

- Padukkage Nishantha Thushara Perera[30] was tortured on 7 – 10 September 2003 by officers attached to the Divulapitiya Police Station;

- Mohamed Ameer Mohamed Rizwan, Suppaiya Ravichandran and Abdul Karim Mohamed Roshan Latif were tortured between 30 August - 6 September 2003 by officers attached to the Wattala Police Station and Peliyagoda Police Regional Headquarters;

- Downdage Pushpa Kumara was tortured on 1 September 2003 by officers attached to the Saliyawewa Police Post attached to the Puttlam Police Station.

Torture of children

The cases detailed in the above section amply illustrate this pattern as well.

Extra-judicial killings and custodial deaths

- T. A. Premachandra[31] was shot and killed on 1 February 2003 by the officers attached to the Kalutara South Police Station;

- Yoga Clement Benjamin[32] was shot and killed on 27 February 2003 by the officers attached to the Kalutara South Police Station;

- Sunil Hemachandra[33] was tortured to death on 26 June 2003 by the officers attached to the Moragahahena Police Station;

- Saliya Padma Udaya Kumara[34] was tortured to death between 26 – 28 August 2003 by the officers attached to the Wattegama Police Station;

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[28] (AHRC UA-42-2003)
[29] (AHRC UA-41-2003; AP news under the title, "Fearing police may steal the body [of] her alleged torture victim son, mother buries body in garden," 1 September 2003)
[30] (AHRC UA-45-2003)
[31] (AHRC UA-07-2003)
[32] (AHRC UA-12-2003)
[33] (AHRC UA-34-2003)
[34] (AHRC UA-42-2003)

- Garlin Kankanamge Sanjeewa[35] was tortured to death by the officers attached to the Kadawata Police Station;

- Okanda Hevage Jinadasa[36] was assaulted and died of those injuries on 5 September 2003 by officers attached to the Okkampitiya Police Post in Moneragala District.

Loss of Discipline in the Police Force

The Supreme Court of Sri Lanka has made the following observation on this issue:

> *"The number of credible complaints of torture and cruel, inhuman and degrading treatment whilst in police custody shows no decline. The duty imposed by Article 4(d) [of the Constitution] to respect, secure and advance fundamental rights, including freedom from torture, extends to all organs of government, and the Head of the Police can claim no exemption. At least, he may make arrangements for surprise visits by specially appointed Police officers, and/or officers and representatives of the [National] Human Rights Commission, and/or local community leaders who would be authorized to interview and to report on the treatment and conditions of detention of persons in custody. A prolonged failure to give effective directions designed to prevent violations of Article 11, and to ensure the proper investigation of those which nevertheless take place followed by disciplinary or criminal proceedings, may well justify the inference of acquiescence and condemnation (if not also of approval and authorization)."*[37]

In a statement issued by the NHRC of Sri Lanka on 4 September 2003, an agreement arrived at by the NHRC with the IGP, (Inspector General of Police), mentioned the following item:

> *"The NHRC agreed to draft guidelines together with the NPC and the IGP (Inspector General of Police) for the interdiction of officers who have been found to have violated fundamental rights by the Supreme Court (translation from Sinhala)."*

Meanwhile, the NPC is also engaged in drafting a public complaints procedure under Article 155 G (2) of the Constitution of Sri Lanka to entertain, investigate and redress complaints against police.

However, while these measures are pending, no procedure is operative to take disciplinary action against the police at the moment. In the absence of a proper and impartial disciplinary process, investigations against the police are left in the hands of other police officers. Usually, a higher-ranking police officer such as Assistant Superintendent of Police (ASP), Superintendent of Police (SP) or Deputy Inspector General of Police (DIG) is assigned to investigate such complaints.

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[35] (AHRC UA-41-2003)
[36] (AHRC UA-48-2003)
[37] [Justice Mark Fernando, with Edussuriya, J. and Wigneswaran, J. agreeing, in Gerald Mervin Perera's case, SCFR 328/2002, SCM 4/4/2003)

It is quite well known that these officers try to work out some compromise rather than properly investigate a complaint. Often complainants are even threatened into withdrawing complaints. The knowledge of ineffectiveness of internal procedures relating to complaints against the police has resulted in the officers believing that they are quite safe despite whatever act they may commit.

A circular issued by the IGP in September 2003 states that higher officers such as Officers in Charge (OICs) of police and ASPs and others will be held liable for custodial deaths and torture taking place at police stations. However, there is no procedure in force to hold such officers liable for such actions.

Judicial Administration: Lack of a Public Prosecutor's Department

Another institution that needs reorganization, if there is to be any change in the prevalent practices ensuring impunity, is the Attorney General's (AG's) department.

The most important aspect of such reorganization would be the separation of the public prosecution function from the AG's department and the creation of a public prosecutor's office.

We would like to highlight the fact that such a separation has been recommended by numerous bodies in the past, including the Justice Soertsz Commission (1946), Basnayake Commission (1970) and Jayalath Committee (1995).

If the inherent inefficiency in the present set-up is to be addressed, a separate department for the public prosecutor needs to be created wherein prosecuting functions could be more thoroughly specialized and pursued. This would remove one of the major impediments to the rule of law in Sri Lanka. In 1973, the Office of the Public Prosecutor was created in Sri Lanka. However, this office was abolished after 1978.

In the subsequent years, the independence of the AG's department suffered a great deal like all other public institutions. In recent years, there has been some attempt to improve the situation. However, without the development of an independent public prosecutor's department, it is unlikely that this could be remedied to a great extent.

This is particularly so in relation to crimes where the alleged perpetrators are police officers and other state officers. Due to the nature of the complete separation between criminal investigations and prosecutions prevailing in the country, the AG's department has a close connection with the police officers in relation to crimes that are being prosecuted, as the department depends entirely on the police for investigations.

The investigation of normal crimes is in the hands of the police. The officers of the AG's department base their prosecution on the investigations done by the police. Thus, close co-operation between such investigators and the prosecutors is inevitable. Some of these very same police officers or their colleagues are often being accused of torture, custodial deaths and the like. Naturally, in such circumstances, conflicts and even public perception of conflicts of interest do arise.

Some units have been created under the AG's department for the prosecution of state officers, for example, the Disappearances Investigation Unit (DIU) established in November 1997 and the

Prosecution of Torture Perpetrators Unit (PTPU) established recently. These units function under the direction of the AG's department. While they may be free to investigate when directions are given to investigate, they do not have the power to initiate investigations independently on receipt of reliable complaints. Further prosecution into matters entirely depends on the discretion of the AG's department.

These units suffer from the same general problems that affect the Attorney General's department. For example, though the Presidential Commission "recommended prosecution of a large number of persons, only a handful of cases were filed and even some of them were lost due to the defects of prosecution. Due to much delay in prosecution, such as 12-year delays before vital witnesses make their statements in court, the prosecution has been abandoned."[38] Even in torture cases when complaints are made immediately after the incident, often investigations begin quite some time later, thereby creating doubts about the credibility of evidence and of identification. The impression that such investigations and prosecutions are delayed or otherwise hampered by the unwillingness of the state to prosecute state agents is quite prevalent. It is also a common, criticism that investigations by such units are conducted only due to pressure particularly from the international community.

Curbing Bribery and Corruption

Studies by Transparency International (Sri Lanka) have pointed to inadequate legal provision to curb bribery and corruption and defects in the existing legal procedure as well as many defects relating to the Commission to Investigate Allegations of Bribery and Corruption (hereinafter the 'Bribery Commission').

The following observations are relevant in this regard:

a. The investigating officers of the Bribery Commission are drawn from the Police Department itself. This questions the credibility of the Bribery Commission and particularly, raises doubts as to the capacity of the Bribery Commission to investigate bribery and corruption within the police force and of politicians who patronize the police. The Bribery Commission does not have the capacity to recruit personnel on its own. The study of successful models such as the Independent Commission Against Corruption (ICAC) of Hong Kong Special Administration Region of the People's Republic of China, clearly shows that one of the most important elements of a successful institution is that it is completely independent of the police. Particularly in the early years of establishing effective control of corruption, the concentration of the ICAC had been on creating accountability within the police force. Given the historical circumstances of policing in Sri Lanka as described in paragraph 1 above, it is counter-productive to have police officers as investigators in the Bribery Commission. The 2001 annual report of the Bribery Commission, which was issued very recently showed that for the year 2001, there had not been any successful prosecutions on corruption or bribery;

b. Further, the Bribery Commission lacks financial independence. The Bribery Commission has to depend upon the Treasury for its funds, and thus the executive subjects it to indirect control.

[38] (ALRC written statement "Enforced or involuntary disappearances in Sri Lanka (E/CN.4/2003/NGO/88) 2003 on disappearances).

There are no mechanisms to guarantee independence of the Bribery Commission by way of receiving necessary funds without executive control. A properly functioning corruption control agency needs adequate funding for many office functions such as investigations, prosecutions and education. Dealing with fraud and corruption in the modern context requires the capacity to use modern technology and forensic facilities. In fact, from the point of view of limited funding available to the Bribery Commission, it can be said that it is not equipped to deal with bribery and corruption in the country except by way of some symbolic investigations and prosecutions. The Bribery Commission has not won the confidence of the country as a body able to carry out its mandate.

c. The Bribery Commission has not been able to function upon a vacancy arising in the Commission due to the non-appointment of a Commissioner to fill the vacancy. This has seriously affected the functioning of the body.

d. Proper functioning of a corruption control agency requires different forms of talents required for different functions such as investigations, prosecutions, public education, public relations and management. The limited structure that exists under the present law does not fulfil these requirements.

e. The public perception is that there is no real political determination to genuinely establish a powerful corruption control agency in the country. The existing structure only allows for a symbolic institution, which does not have real capacity and resources to control corruption to any significant degree.

The implementation of article 2 of the ICCPR is seriously hampered by the institutional defects of the three institutions mentioned above. As a consequence, there has been failure of the implementation of many of the recommendations made by United Nations bodies in the past.

II. ICCPR Article 6 - Right to Life and Disappearances

Article 6 of the ICCPR guarantees the inherent right to life of every human being; the law shall protect this right and no one shall be arbitrarily deprived of his/her life. In contravention of this right, there have been large-scale enforced or involuntary disappearances in Sri Lanka. These have occurred in the south of the country as well as in the north and east.

According to recent NHRC publications, the number of enforced and involuntary disappearances since 1995 is around 20,000 persons. This includes some government soldiers too. However, the largest number of those disappeared are Tamil youth.

As for the south, (as disclosed by the Presidential Commissions), disappearances often began with arrests by state officers. This process eventually resulted in the torture of those individuals arrested and eventually culminated in the killing and dumping of bodies. The sheer number of people killed in this manner, in Sri Lanka, exceeds the number of deaths being dealt with by some of the international tribunals now in operation in other parts of the world. Sri Lanka has a staggering number of enforced

or involuntary disappearances. This is now a matter of public record. The report on the visit to Sri Lanka by a member of the Working Group on Enforced or Involuntary Disappearances[39] states that:

> *"Three regional Presidential Commissions of Inquiry into Involuntary Removal of Persons set up in 1994 submitted their reports to the President of the Republic on the 3 September 1997. The Commissions investigated a total of 27,526 complaints and found evidence of disappearances in 16,742 cases. A further 10,135 complaints submitted to the Commissions by relatives and witnesses remained to be investigated by the present (fourth) Presidential Commission of Inquiry."*

The Government of Sri Lanka has failed to implement most of the recommendations made by the Working Group in its December 1999 report.[40]

The Final Report of the Commission of Inquiry into Involuntary Removal and Disappearance of Certain Persons[41] stated that it had been given 10,136 complaints to investigate, regarding which "no investigations [had] commenced" by earlier Commissions. The Final Report also stated that at least a further 16,305 cases had been brought to the Commission's attention that it was not empowered to investigate[42] making the number of disappearances in Sri Lanka one of the largest in any country in modern times.

Yet while this gross violation of human rights has been assessed, to date no measures have been proposed to adequately deal with it, neither by international nor domestic agencies. Lack of genuine initiatives by the authorities to prosecute the perpetrators of enforced and involuntary disappearances has demoralized the families and loved ones of victims.

Such reluctance to act according to law and punish the perpetrators has also reinforced the general loss of faith in the rule of law and law enforcement agencies in Sri Lanka, especially the department of the Attorney-General, which acts as the chief prosecuting authority.

In fact the Working Group on Enforced or Involuntary Disappearances itself has stated that their recommendations have not been implemented. The performance of the AG's department on this matter is a serious disappointment to the family members of the disappeared and local and international human rights organisations. The fact that now ten years have lapsed since these horrendous crimes have occurred and that significant success in prosecution has yet to be seen, speaks for itself in respect of the inability and unwillingness of the AG's department to effectively and efficiently deal with the issue.

In the result, the only reason for not taking action appears to be political; namely political unwillingness to deal with senior police, military and political figures who were responsible for causing these disappearances.

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[39] (E/CN.4/2000/64/Add.1)
[40] (E/CN.4/2000/64/Add.1)
[41] (All Island) (Sessional Paper No. I - 2001) dated March 2001
[42] (ch. VII, p. 45)

It must be stressed that there are no excuses for committing crimes against humanity. Sooner or later these crimes need to be dealt with in accordance with internationally established norms and standards. It should also be noted that the present crisis in the law enforcement agencies such as the police also has direct reference to the era where mass disappearances were carried out, providing ample impunity for the police to carry out these crimes.

That many law enforcement officers and politicians who carried out these crimes remain at large, is common knowledge. Such a situation results in the ordinary folk losing faith in the justice system of the country and fosters the belief that this is a country where politicians and law enforcement officers can commit crimes against humanity and go free.

III. ICCPR Article 7 - Freedom from Torture

General Situation

In August 2002, the ALRC published the "Special Report on Torture Committed by the Police in Sri Lanka," dealing particularly with instances of torture arising out of criminal investigations.

The UN Special Rapporteur on Torture, Mr. Theo Van Bovan, in his latest report, has dealt lengthily on complaints of torture in Sri Lanka,[43]

The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Act (Act No.22 of 1994) was enacted in Sri Lanka under much international pressure in 1994.

However, despite the existence of numerous complaints by victims of torture by state officials, no effective action has been taken. While a unit called Prosecution of Torture Perpetrators Unit (PTPU) was appointed under the AG's department and a few cases, (the exact number is not known as the AG's department has not published a list of cases), have been filed by the PTPU, to date, **there has not been a single conviction.**

The usual process has been that once cases are filed, this fact is reported to international bodies including the UN. Thereafter, the matter remains pending. Proper implementation of Act No. 22 of 1994 is in the hands of the Attorney General and his department. Therefore, failures in the actual prosecution must be attributed to this department.

It is believed that there have been no cases successfully prosecuted under this Act despite the government stating that there have been ten convictions at paragraph 174 in the State Report.

Regarding the situation of minors, it should be highlighted that children who have suffered violence have to make complaints in the same way as adults, at police stations. Counseling, assistance with recovery and re-integration are largely absent and children who make complaints, face serious difficulties at police stations and schools. Despite these difficulties, the numbers of parents and children making complaints are on the increase.

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[43] "Report of the Special Rapporteur on the question of torture, Theo van Boven, submitted pursuant to Commission resolution 2002/38, Addendum, Summary of information, including individual cases, transmitted to Governments and replies received," E/CN.4/2003/68/Add.1, Paras. 1486-1695).

Types of Torture

Types of torture taking place in Sri Lanka:

- Sitting on the spine or beating the spine-this can result in dislocating discs in the spine resulting in full or partial paralysis;
- Hitting on the head or sometimes keeping books on the head and hitting with a pole-this can cause fractures in the skull and brain injuries;
- Tying hands behind the back, tying the thumbs together, putting a string through the thumbs and hanging the person from the ceiling from the thumbs-this way a person can lose the use of arms temporarily or permanently;
- Tying the hands and legs and putting a pole though the legs in a way that a person can be rolled round-while being rolled the person can be beaten on the head and the soles. This method is named by the police cynically as *Dharma Chakkra* (literally meaning the wheel of the universal law especially in Buddhism);
- Beating while hanging-this can cause renal failure and other serious injuries;
- Hitting on the genitals;
- Inserting genitals into drawers and closing them to cause pain;
- Pumping water through fire hose pipes on genitals;
- Inserting S-lon (PVC) pipes and other objects like glass bottles into the vagina;
- Beating on the ear-a person could fully or partially lose hearing this way;
- Dragging on the ground;
- Forcing a person to crawl in public places;
- Hitting the soles with a pole;
- Forcing the fingers into glass bottles making it very difficult to remove them;
- Threatening to kill;
- Threatening to rape;
- Threatening to implant drugs and file cases in courts for possession of drugs-punishment for such cases is very high;

Judging by the documentation of torture cases filed and from details available in Supreme Court judgements on torture cases, we note that these forms of torture are usually practiced at police stations.

Threats to those who make complaints

Those who make complaints against torture come under severe threat from the perpetrators. This happens in almost all cases.

In the case of Lalith Rajapakse (cited above), after he made the initial complaint, there was a plot to poison him. He had to make complaints to the NHRC and also to other authorities. AHRC intervened by writing letters and appeals to save the grand father's and the victim's life. The victim had to live in hiding for about five months. Even now, he has to be kept protected.

In the case of Gerald Perera (cited above), he and his fellow workman received threats of assassination. In the case of Dawundage Pushpakumara (14 years old)[44] attempts were made by the officers of Saliyawewa Police Post to prevent the child from obtaining medical treatment for the torture injuries. It was only through the intervention of the Child Rights Authority that the child was removed from the Saliyawewa police area to Colombo to get treatment. After that the police officers and a prominent politician threatened to burn the house of the family if complaints against the police were not withdrawn. On this matter also, the family's complaint was made known to NHRC, NPC and other authorities by AHRC.

In the case of B.G. Chaminda Bandara (cited above) who was tortured by the Ankumbura police and lost the use of his left arm completely due to the torture, his family was constantly threatened by the OIC of the Ankumbura Police. The victim went into hiding and is in hiding still. In fact, such situations arise invariably in almost all cases after complaints have been made. One of the reasons for this is that despite the complaints, police officers, particularly OICs, remain at the police station. OIC's have enormous powers in the locality. Some OIC's remain in the police stations even after the Supreme Court has found them guilty of having tortured a person. For example, the officer in charge of the Wattala Police Station, was found to have violated the rights of Gerald Perera (cited above), but is still the officer in charge of the same police station. All other OIC's of the police stations named above are also still there. The Committee is urged to take this matter up with the government of Sri Lanka and to ensure protection for those who make complaints against the police.

Compensation

Judgements by the Sri Lankan Supreme Court over the past so many years, demonstrates an effort to deal with compensation on the basis of the seriousness of the crime of torture, namely as a gross human rights violation. In such instances, the quantum of compensation has improved. However, in the majority of the cases, compensation granted does not reflect the gravity attached to the violation of rights guaranteed under Article 7 of the ICCPR.

[44] (UA-50-2003)

Furthermore, the aspect of trauma associated with torture has not yet been given much attention by the state. Facilities for treatment of trauma and adequate rehabilitation for torture are practically non-existent.

Assessment of main causes for police torture

As mentioned above, the major cause for the use of police torture as it exists today, is the breakdown of the policing system during the period from early 1970's to up to about 2002. As a result, the following consequences are manifest.

a. Breakdown of the command structure of the police: higher authorities of the police either are perceived as inefficient or corrupt;

b. The OICs of the police stations, who are in fact the real authorities within the police station, are incompetent, inefficient and are often accused of being corrupt;

c. Lack of training in proper methods of criminal investigations and lack of forensic facilities. In such circumstances torture is perceived as not only a legitimate means of investigation but also as a necessary means;

d. Increase of crime and public pressure to deal with crimes. Having no real capacity to deal with crimes, the police often engage in torture to create substitutes for actual criminals in order to answer the public criticism against them. As a result, many innocent people are either severely tortured or even killed;

e. Corruption: a recent survey done by the Transparency International pointed to the police as being perceived by the public as the most corrupt institution within the country. It is well known that a person can be tortured by the police at the request of an opponent;

f. The lack of disciplinary procedure: in the recent past, the disciplinary procedure has been almost completely subverted. The only punishment that is resorted to, is a transfer when there is public criticism. Dismissal for misconduct hardly takes place;

g. Absence of a proper and impartial public complaint mechanism: complaints against the police are usually referred to higher police officers for investigations. It is quite well known that these officers try to work out some compromise rather than properly investigate a complaint. Often complainants are even threatened. As a result the police officers know that no serious threat will come to them due to complaints. Psychologically this creates in the officers an attitude of complete impunity. The NHRC, which could have dealt with the complaints against torture, did not take a serious approach to such torture in the past. They did not have a system of preliminary investigations. The concern of NHRC officers was to settle torture cases. Thus, they exerted pressure in the past even to accept settlements for such small sums as US$ 10. In August 2003, the chairperson of the NHRC stated that she has given instructions to stop this mode of settlements and to seriously investigate torture cases.

h. Another move is the implementation of the constitutional provisions requiring the NPC to establish a public complaints procedure to entertain, investigate and redress complaints against the police. The AHRC has submitted a draft for such a procedure to the NPC. This is being considered at the moment by the NPC.

Delays in Decision Making in Fundamental Rights Applications and Institution of Prosecutions under Act No. 22 of 1994

Though Article 126 of the Constitution was meant to provide an expeditious remedy for violations of fundamental rights, the actual time taken for final determination is still too long. Though an application has to be filed within a month of a violation, the final determination usually takes two or more years. Persons who become victims of brutal torture at the hands of police officers and other state agents, are thus required to wait too long before final determination of their cases. Meanwhile, the alleged perpetrators continue to hold office. Torture victims in almost all cases come under heavy pressure to give up or settle cases. They also live in great fear of reprisals for having filed such cases against the police. They also receive death threats. Thus, delay in hearing such complaints of violations of rights, helps to continue such violations.

The filing of criminal cases under the Convention against Torture-Act No. 22 of 1994 takes even longer. Of the 59 cases submitted by Police Special Investigation Teams under the Act in 2002 to the Attorney General's department, only 10 cases have been filed in Courts. The rest of the files are with the Attorney General's department. To date, we are not aware of any successful prosecutions under the Act.

Complaints of Negligence by State Medical Officers

In many cases of torture, it has been revealed that there are serious doubts regarding the professionalism of the district medical officers (DMOs) and judicial medical officers (JMOs). In the case of M. K. Lasantha Jagath Kumara, who was produced before a DMO the day before his death, the DMO did not examine him properly or prescribe immediate medical attention. There is also the case of Sunil Hemachandra, who died due to injuries suffered from torture in police custody. There are several eyewitnesses who saw him being severely beaten by the police. He was 32 years of age and had no history of epilepsy or any serious illness. His family specifically denies him having any fits at all. However, the medical report left out the possibility of injuries due to assault and speculated on the possibility of a fall due to fits caused by an illness. The family strongly believes that the medical examination has not been carried out professionally.

In the case of Garlin Kankanamge Sanjeewa,[45] who the police alleged to have committed suicide inside the police station, the family of the victim has seriously doubted the verdict of the medical officer and even keeps the dead body buried in the family garden with the hope of getting an impartial medical inquiry. The family alleges that even the sketch of the body as found was fabricated. Further observers have challenged the possibility of an adult male being able to hang himself with a belt, which the police allege happened. Further evidence that there were two persons inside the same police cell at the alleged time of hanging but they had seen nothing at all has also increased suspicion.

In the case of B. G. Chaminda Bandara Jayaratne (AHRC UA-35-2003), who has lost the use of his left arm due to police torture, the Kandy Hospital did not even produce him before a JMO for examination despite the fact that they recorded the allegation of the young boy of having been tortured by the police. He was discharged without any treatment and it was only possible for him to

[45] (AHRC UA-41-2003),

get treatment after he had been re-admitted to Peradeniya Teaching Hospital where after examination the doctors declared that he has permanently lost the use of his left arm. Many such complaints about failures by the DMOs and JMOs are being received by human rights organizations. However, there are still a number of state medical officers who carry out their duties with great care and professionalism.

IV. Administration of justice

Ratification of International Treaties

Sri Lanka acceded to the CAT on 2 February 1994. Sri Lanka has neither signed nor ratified the Rome Statutes, (International Criminal Court –ICC)

Legal definition of torture

There are several provisions of the Torture Act (Act No. 22 of 1994) passed by Sri Lanka which do not fully comply with the UN Convention against Torture.

The following observation by Amnesty International on this matter is relevant:

"The Torture Act passed by Sri Lanka's parliament in November 1994 and certified on 20 December 1994 makes torture punishable by imprisonment for a term not less than seven years and not exceeding ten years and a fine. Regrettably, however, several provisions in the UN Convention against Torture were not fully implemented in the Torture Act which uses a more restrictive definition of "torture" than that contained in the UN Convention against Torture.

As stated above, the UN Convention against Torture defines "torture" as "any act by which severe pain *or suffering* ... is intentionally inflicted on a person *for such purposes as...*" (emphasis added). In subsection (1) of Article 2 of the Torture Act, however, the causing of "suffering" is not explicitly made part of the definition of "torture", and the purposes for which torture is inflicted are listed in an exclusive (rather than inclusive) way by use of the wording "for any of the following purpose[s]". Thus, torture for other purposes, such as sadism alone, are not defined as a crime under this Act.

In addition, subsection (3) of Article 2 of the Torture Act stipulates that "the subjection of any person on the order of a competent court to any form of punishment recognized by written law shall be deemed not to constitute an offence" under the Act. This means that courts can impose cruel, inhuman or degrading punishments under the Penal Code and the Children and Young Persons Ordinance 1939. The latter provides that courts can impose whipping on male children as an additional punishment for certain offences (see also below).

Article 3 of the UN Convention against Torture, which provides that "[n]o State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture", has not been given effect in Sri Lanka. This means that under current legislation, people who could be subjected to torture or cruel, inhuman or degrading treatment or punishment in another country cannot invoke this provision to contest their return to that country.

The failure to include this prohibition in the Act is a matter of deep concern because Article 3 of the UN Convention against Torture, in contrast to the UN Convention relating to the Status of Refugees, applies to all persons and not only to asylum seekers. The Committee against Torture in May 1998 recommended a review of the Torture Act in respect of each of the above three concerns.

"Prior to the coming into force of the Torture Act, perpetrators of torture could be prosecuted under Sections 310 to 329 of the Penal Code which define the offence of causing hurt and an aggravated form of causing hurt, referred to as "grievous hurt" in order to try and extract information or a confession which may lead to the detection of an offence or to compel the restoration of property or satisfaction of a claim. Such an offence of grievous hurt is punishable by imprisonment for up to ten years and a fine (no minimum punishment is stipulated)."[46]

In many of the cases in the report cited above, the type of injuries suffered by the victims would have qualified the cases to be prosecuted also under "grievous hurt" or even under "attempted murder" where the prescribed punishment is greater than under Act No. 22 of 1992.

In fact, despite the criticisms by the Committee against Torture and international human rights organizations, no attempt has been made to bring Sri Lanka's anti-torture legislation into conformity with the Convention against Torture.

V. ICCPR Article 14 - Right to a Fair Trial

Fair trial guarantees have frequently been severely curtailed since 1971. The consistent use of emergency regulations and anti-terrorism laws significantly limited the importance of the courts and diminished the value of lawyers as defenders. As a result, the scope of fair trial guarantees has been diminished.

Added to this, law enforcement agencies acquired so much power that the legal profession often had to adjust to a situation of fear or denial of the possibility to exercise their rights as lawyers. A resigned mentality has now developed in response to this situation. Much valued due process rights no longer seem to be important.

The very system of citizen protection, which is at the basis of the ICCPR, is endangered by such developments. This threat must be faced seriously. The proposed Prevention of Organized Crimes Bill is an example of the manner in which the law is sought to be changed in order to legitimatize growing restrictions of basic guarantees of a fair trial. To this purpose, some conservatives have even suggested replacing criminal trials with arbitration. With increasing pressure to prosecute violators of senior human rights, there is also an increase in pressure from some quarters such as powerful politicians and police officials to reduce access to fair trial in favour of some form of arbitration. This threatens the very core of the values enshrined by the ICCPR.

[46] ["SRI LANKA: Torture in Custody," by Amnesty International, AI INDEX: ASA 37/010/1999, 1 June 1999]