LST REVIEW

Volume 15 Issue 207 January 2005

International Law Efforts to Combat Child Sexual Exploitation

The New Meaning of Justice

LAW & SOCIETY TRUST

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ISSN - 1391 - 5770

Editor's Note.........

In a previous issue of the Review (see Volume 14 Issue 198, April 2004), we published selected papers dealing with Child Rights and Child Welfare together with the Concluding Observations of the United Nations Committee on the Rights of the Child in regard to Sri Lanka's second periodic report under the Convention of the Rights of the Child.

This Issue has, as its primary theme, child rights from a different perspective that focuses more widely on prevalent international law mechanisms that can be utilised to prevent child sexual exploitation. The analysis by *Desana Plohman* has an all-encompassing focus where the writer does not confine herself to discussion of the United Nations Charter based mechanisms and Treaty based mechanisms but also proceeds to examine other elements of international law including the extra-territorial jurisdiction of States and the concept of international legal personality in the context of the struggle to combat child sexual exploitation.

The Statute of the International Court of Justice as well as the usefulness of the International Criminal Court is also examined in this regard. The discussion is preceded by a general analysis of child rights and child sexual exploitation and includes reference to recent international documents after the Convention on the Rights of the Child, more specifically *The Stockholm Declaration.*

The discussion is necessarily confined to examination of international laws and procedures that may seem somewhat abstract for those of us who are immediately confronted with Sri Lanka's specific legal and practical lacunae insofar as protection of children from abuse is concerned.

However, as is being increasingly demonstrated in regard to specific life and liberty rights such as the freedom from torture, the right to expression and information and the right to be free from arbitrary arrest and detention, international interventions have had great impact where domestic laws or the decisions of domestic courts are found to be faltering. Child rights could also join the spectrum of rights that are now receiving this special attention.

Supplementing this analysis is a short but extremely thought provoking article by *Sajeewa Samaranayake* on "The New Meaning of Justice." He argues that a broader and richer concept of *social* and *economic justice* should replace the prevalent notion of *legal justice* in the manner in which we function legally and constitutionally. Legal

justice, as presently upheld in our systems has a particular *historic sense* as he illustrates in a succinct examination of the process leading to the adoption of the British model of adversarial justice.

Notwithstanding the above, his contention is that, given the vast and complex nature of the manifold problems currently faced by Sri Lankan society many decades after independence, this model may not make *rational sense* now. Instead, we may need to embark on an exploration of what justice really means, in which context, he postulates the Directive Principles of State Policy as embodied in Chapter VI of the 1978 Constitution as containing within itself, the *raison d'etre* for the existence of a State and the true fundamental human rights of the people.

The questions that he poses are tremendously important for the constitutional revitalization of our prevailing system. Such an effort was discernible in the process of bringing about a new Constitution for Sri Lanka since the mid 1990's where a draft rights chapter was expanded to include a more holistic concept of rights as well as encourage activist litigation on behalf of persons unable to move court processes due to their vulnerability in society.

However, these efforts met with failure due to the predominant political divisiveness of our political leaders as well as the deep inability of Sri Lanka's civil society to pursue a process of constitutional reform that had as its overriding goal, the attainment of a rights chapter that was more in keeping with modern human rights norms. This is a challenge that we still face today.

Kishali Pinto-Jayawardena

INTERNATIONAL LAW EFFORTS TO COMBAT CHILD SEXUAL EXPLOITATION

*By Desana Plohman**

> *The oldest known fossil footprints of our human ancestors are those of a family leading a child across a mud flat in Africa more than a million years ago. Recognition of children's needs for special care is foremost among those basic understandings about social conduct that we call 'human rights' whose observance protects the dignity and worth of the individual. All rights imply obligations, especially by the powerful towards the powerless.*[1]

Introduction

The sexual exploitation of children is a fundamental violation of their rights, yet an estimated one million children worldwide enter the sex trade each year.[2] Child sexual exploitation is an atrocity because it is a corruption of the natural order, where adults are supposed to nurture and protect children, not exploit and take advantage of them.

However, sometimes child sex offenders can escape punishment for their crimes due to weaknesses in the domestic laws of states. In such instances, international law can step in to ensure that the accused is tried under principles of international law. Customary international law and international conventions can be utilised to fight child sexual exploitation. International human rights mechanisms can also be used to investigate human rights abuses arising out of the child sex trade.

The concept of children's rights as human rights has come to the forefront in international law in recent years. Due to their vulnerable age and physique, mental immaturity and inability to look after themselves independently; children deserve equal rights and merit special protection. The *United Nations Convention on the Rights of the Child (UNCRC)* was adopted by the General Assembly of the United Nations on 20 November 1989.[3] The Convention promotes children's human rights and rights to protection, and imposes obligations on member states to respect them.

Human rights guaranteed to children include the right to life (*UNCRC* Article 6), the right to a name and nationality (Article 7), the right to freedom of expression and the right to information (Article 13), the right to freedom of thought, conscience and religion (Article 14), the right to freedom of association (Article 15), the right to protection from physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse (Article 19), the right of access to health care services (Article 24).

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*LL.B. (Hons.), LL.M.

[1] Anonymous, in Maureen Seneviratne (ed.), *Some Expert Legal Analyses: The Sexual Exploitation of Children in Sri Lanka* (Colombo: the *PEACE* Campaign, 1996), p. 6.

[2] At web site http://www.unicef.org

[3] Adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 November 1989; entry into force 2 September 1990; at web site http://www.unhchr.ch

Other rights comprise the right to education (Article 28), the right to rest and leisure, to engage in play and recreational activities (Article 31), the right to be protected from economic exploitation (Article 32), and the right to protection from torture or other cruel, inhuman or degrading treatment or punishment (Article 37).

The trend towards recognising the special status of children can be seen by the fact that the *UNCRC* is the most widely ratified convention in the world today.[4]

The Nature of Rights

What is a 'Right'?

Susan Wolfson has some interesting views on what is meant by the term 'Child Rights.' She explains that without rights there would be no moral 'bottom line' to resolve conflicts, to protect people's vital interests, or to ensure that their status as unique individuals with dignity and worth are recognised. It is always good to have a minimum standard as a yardstick when guaranteeing rights. Another truth is that people always quietly tolerate injurious or degrading treatment they receive until they know that there is legal redress to combat the problem. Once they are aware of their rights, they are empowered to fight abuse. This is particularly true with regard to children. They will not be able to fight the abuse they face until they are aware of their rights.[5]

Of course, before people become aware of their rights, it is first important to define more precisely what a right is. According to Joel Feinberg, a right is a valid claim. What makes a claim valid is the justification of a peculiar and narrow kind, namely justification within a system of rules.[6] Feinberg also explains that the only beings that can have rights are those that can have interests. The two are intertwined. Thus this interest principle can be used to separate those that can count as right holders from those who cannot.

In specific reference to child rights, Wolfson asserts that, if we define who a right holder is by examining whether they also have interests, then children do fall into this category. When we question who has rights, and what they are entitled to, the first thing we consider is that each individual has the capacity to enjoy these rights, even if the level where rights can be enjoyed, and by whom, varies across the scale. Thus, which specific rights they have would be decided according to where they fall along the continuum, rather than by some extraneous, irrelevant or artificially imposed criterion.[7] This theory of the connection between rights and interests is important because we can use it for the protection of children. When we prove that children are right holders, then their interests are entitled to be protected.

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[4] All United Nations member states except the United States have now ratified the *UNCRC*. The most recent country that ratified it was Somalia on 13 May 2002.

[5] Susan A. Wolfson, "Children's Rights: The Theoretical Underpinning of the 'Best Interests of the Child", in Michael Freeman and Philip Veerman (eds.), *The Ideologies of Children's Rights* (Dordrecht: Martinus Nijhoff Publishers, 1992), p. 10.

[6] Joel Feinberg, *Social Philosophy* (New Jersey: Prentice-Hall Inc., 1973), p. 58.

[7] Wolfson, *supra* note 5, p. 23.

Definition of Child Sexual Exploitation

Sexual exploitation covers a wide range of abusers and different forms of abuse, and varies in the type and degree of impact on the victim. These children are often lured with promises of an education or a 'good job.' Children are forced into the sex industry at increasingly younger ages partly as a result of the mistaken belief that younger children are unlikely to be infected with the HIV/AIDS virus.[8] The most vulnerable children are those who are trafficked within and across borders for the purpose of prostitution. These children are often refugees, orphans, abandoned children, child labourers working as domestic servants or children affected by armed conflict.[9]

Firstly it is important to define what exactly is meant by the phrase 'the sexual exploitation and abuse of children.' A child is defined as any person under the age of eighteen.[10] Jane Warburton notes that commercial sexual exploitation is perhaps the most extreme form of sexual abuse.[11] She defines abuse as treatment which causes actual harm, or which places the child at risk of such harm. It includes both ill-treatment and failure to protect: acts of commission and omission.

Sexual abuse covers a range of activities, not just penetrative sex. One study defined it thus:

> Anyone under eighteen years of age is sexually abused when one or more older persons involves the child in any activity for the purpose of their own sexual arousal. This might involve intercourse, touching, exposure of sexual organs, showing pornographic material, or talking about sexual things in an erotic way.[12]

Abuse implies that an adult takes advantage of the power imbalance between child and adult in order to abuse the child. Child sexual abuse is not always synonymous with sexual violence: the abuser does not always use force but may manipulate, coerce and pressure the child to comply.[13] UNICEF defines child sexual abuse as the involvement in sexual activity of a child who is unable to give informed consent for lack of comprehension of the act and its implications, or for which the child is not developmentally prepared to give consent.[14]

The phrase 'the commercial sexual exploitation of children' can be defined as the use of a child in sexual activities for remuneration or any other form of consideration. It involves the exploitation of children primarily for financial benefit or other economic profit, in either monetary form or in kind (*e.g.*, food, shelter, and drugs.) The 1996 *Stockholm Declaration against Commercial Sexual Exploitation of Children* defined it thus:

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[8] At web site http://www.unicef.org
[9] *Ibid.*
[10] Article 1 of the UNCRC. *Supra* note 3.
[11] Jane Warburton, *Prevention, Protection and Recovery of Children from Commercial Sexual Exploitation*, 2001; at web site http://www.focalpointngo.org
[12] *Secrets that Destroy: Five European Seminars on Child Sexual Abuse and Exploitation* (London: International Save the Children Alliance, 1999.)
[13] *Ibid.*
[14] At web site http://www.unicef.org/programme/cprotection

> The commercial sexual exploitation of children is a fundamental violation of children's rights. It comprises sexual abuse by the adult and remuneration in cash or kind to the child or a third person or persons. The child is treated as a sexual object and as a commercial object. The commercial sexual exploitation of children constitutes a form of coercion and violence against children, and amounts to forced labour and a contemporary form of slavery.[15]

Sexual exploitation could occur in the form of child pornography, child prostitution, and child trafficking for sexual purposes: each is intrinsically connected to the others.[16]

The sexual exploitation of children is an international issue. The protection of children is a human rights concern, which brings the international community to the scene. Also, the greater accessibility to children in certain countries because of abandonment or parental poverty encourages exploiters to cross state borders in order to obtain a supply of these children. By crossing borders, it becomes an international crime, as now two states are involved: the 'sending' country and the 'receiving' country. Thus there are many players involved in this problem.

The *Declaration and Agenda for Action of the First World Congress against the Commercial Sexual Exploitation of Children*[17] made it clear that this problem covers many spheres: economic, political, social and legal factors. It needs to be addressed through a wide range of measures at local, national and international levels. Julia O'Connell Davidson writes that those who sexually exploit children do so in a range of different social contexts, for a variety of reasons, and cannot be distinguished by any specific inner quality or personality trait. Their only common characteristic is the fact that they engage in forms of action that constitute child sexual exploitation.[18]

The Oxford English Dictionary defines the term 'exploit' as 'to use or develop fully, especially for profit or advantage … to take unfair advantage of for financial or other gain.'[19] In the child sex trade the exploiter has an unfair advantage over the exploited, due to the imbalance of social, political, economic, physical, psychological or emotional power between them.[20] Sex exploiters can thus be defined as those who take unfair advantage of some imbalance of power between themselves and a person under the age of eighteen in order to sexually use them for either profit or personal pleasure.

Because the perpetrator invariably takes advantage of an imbalance of power between himself and the child, there is a clear lack of consent to the sexual act. This sexual exploitation includes interaction between a child and an adult which takes place for the sexual gratification of the adult. However, the term 'sex exploiter' further extends to cover third parties who have no actual sexual contact with

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[15] Drafted at the First World Congress against the Commercial Sexual Exploitation of Children, held in Stockholm, Sweden in 1996; at web site http://www.unhchr.ch

[16] K.J. Herrmann, "An International Strategy for Intervention into the Commercial Sexual Exploitation of Children", 32.6 (1987) International Journal of Social Work, 523.

[17] *Supra* note 15.

[18] Julia O'Connell Davidson, *The Sex Exploiter*, 2001; at web site http://www.focalpointngo.org/yokohama

[19] Helen Liebeck and Elaine Pollard (eds.), *The Oxford English Dictionary* (Oxford: Oxford University Press, 1995, 4th ed.), p. 180.

[20] O'Connell Davidson, *supra* note 18.

children, but profit from facilitating or orchestrating children's sexual contact with another person.[21] Sometimes sexual exploitation may include extreme forms of sexual violence. The exploiter may derive sexual pleasure from performing sadistic acts including torture and murder, or he may seek to profit from the production of pornographic videos of such violence.[22]

The child sex trade can be divided into the formal sector and the informal sector. Within the formal sex industry, sex is sold as if it were a commodity like any other. Here, the exploiter enters into narrow and explicit contracts, with monetary consideration. In the informal sector, the exploiter and exploited often enter into more loosely specified exchanges, within which the exploited may provide a range of services (*e.g.*, perform sexual acts, pose for pornographic photos, clean, cook, shop, converse, etc.,) in exchange for a range of benefits (*e.g.*, a meal, gifts of jewellery or clothing, a place to live, etc.)[23]

Children's Rights in International law

From Declaration to Convention

The early part of the last century reflected a growing international concern for the protection of women and children. International instruments such as the *Convention for the Suppression of the Traffic in Women and Children* of 1921,[24] and the *Slavery Convention* of 1926,[25] set important international standards against exploitative practices that impacted on the lives of women and children.

The idea of a formal document of children's rights dates back to the 1920s. The founder of the Save the Children movement, Eglantyne Jebb, believed that the obligation to protect children was not the responsibility of parents alone, but also of the wider community.[26] She drafted the five points of the first *Declaration on the Rights of the Child* in 1923, and the League of Nations (predecessor to the United Nations) adopted it in 1924.

The *Universal Declaration of Human Rights (UDHR)*[27] was adopted in 1948 as a reaction to the human rights violations that occurred during the Second World War. Its preamble refers to the "recognition of the inherent dignity and equal and inalienable rights of all members of the human family." Article 3 of the *UDHR* states that "Everyone has the right to life, liberty, and security of the person."[28] This no doubt includes children. Article 4 says that no one shall be held in slavery or servitude, which is prohibited in all its forms. And Article 5 prohibits torture and cruel, inhuman or

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[21] International Labour Organisation, *Child Labour: Targeting the Intolerable* (Geneva: ILO, 1996.)
[22] *Ibid.*
[23] B. Svensson, *Victims and Perpetrators: On Sexual Abuse and Treatment* (Stockholm: Save the Children Sweden, 2000), p. 48.

[24] 30 September 1921; entry into force 15 June 1922; at web site http://www.un.org/Depts/Treaty
[25] 25 September 1926; at web site http://www.unhchr.ch
[26] Save the Children Alliance, *Children's Rights: Reality or Rhetoric?* (London: International Save the Children Alliance, 1999), p. 13.
[27] Adopted and proclaimed by General Assembly Resolution 217 A (III) of 10 December 1948; at web site http://www.un.org/rights

degrading treatment or punishment. Child prostitution can be considered as a form of slavery and cruel, inhuman, degrading treatment and punishment. Article 23 refers to the fact that everyone has the right to just and favourable working conditions. The protection of children is covered by all these provisions in the *UDHR*. Article 25(2) emphasises this fact by stating that childhood is entitled to special care and assistance.[29]

However, it was felt that there should be a separate instrument exclusively for the protection of children, which would specifically address their needs. In 1959, the United Nations adopted a revised version of Eglantyne Jebb's original *Declaration on the Rights of the Child.*[30] This was the first international instrument that focused on children as persons entitled to rights in their own capacity. It had several principles emphasising necessary safeguards and care. Unfortunately however, the *Declaration* did not have the influence that was expected of it. It did not have the 'teeth' that an international convention would normally possess, where state parties are bound by the provisions of the treaty. It was a statement of principles rather than a document by which governments could be held accountable for their actions.

In the thirty year period between the *Declaration on the Rights of the Child,*[31] and the *Convention on the Rights of the Child,*[32] there were few international human rights instruments available to improve the status of children in law. The *International Covenant on Civil and Political Rights (ICCPR)* of 1966[33] and the *International Covenant on Economic Social and Cultural Rights (ICESCR)* of 1966[34] did incorporate protections of human rights that extended to children, and were binding in international law on states that ratified these instruments. However these covenants did not specifically recognise the special place of children in society, and there was an urgent need for an international instrument that would recognise this.

The *UNCRC*[35] was drafted because there was a need to document all the child protection provisions in one comprehensive treaty. The drafters of the *UNCRC* were appointed by the United Nations High Commission on Human Rights and comprised of government delegates and representatives of the United Nations and specialised agencies such as the Office of the United Nations High Commissioner for Refugees (UNHCR), the International Labour Organisation (ILO), the United Nations Children's Fund (UNICEF) and the World Health Organisation (WHO). There were also a number of non-governmental organisations that participated.[36]

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28 *Ibid.*
29 *Ibid.*
30 Proclaimed by the General Assembly Resolution 1386 (XIV) of 20 November 1959; at web site http://www.unhchr.ch
31 *Ibid.*
32 *Supra* note 3.
33 Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A of 16 December 1966; entry into force 23 March 1976. U.N Doc. A/6316. (1966); at web site http://www.hrweb.org/legal/cpr
34 Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A of 16 December 1966; entry into force 3 January 1976. U.N Doc. A/6316. (1966); at web site http://www.hrweb.org/legal/escr
35 *Supra* note 3.
36 At web site http://www.unhchr.ch

The drafting of the *UNCRC* began in 1979, the International Year of the Child. On 26 January 1990, the convention was opened for signature, and sixty-one countries signed it on the first day. This is a record first-day response. The *UNCRC* entered into force only seven months later on 2 September 1990.[37] Fifty-seven more countries ratified the convention by the end of 1990. By 1996, 185 countries had ratified: a number that is unprecedented in the field of human rights.[38]

The preamble to the *UNCRC* contains the spirit of the convention and proclaims that children are entitled to special care and assistance. It explains that because children are physically and mentally immature, they need special safeguards and care, including appropriate legal protection, before as well as after birth. The preamble also recognises that for children to develop fully and harmoniously, they need to grow up in a family environment: in an atmosphere of happiness, love and understanding. And because the family is the fundamental group in society, it should be given protection and assistance. And finally the preamble emphasises the importance of international co-operation in order to improve the living conditions of children in every country, particularly in the developing countries.[39]

The principle that the 'best interests of the child' should be paramount in any issues concerning children is the thread that we see running throughout the *UNCRC*. The convention emphasises that whenever states pass legislation affecting children, or when judges make decisions on issues affecting children even as third parties, they must consider the issue from the angle of what would be best for the child. Article 3(1) of the *UNCRC* provides:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.[40]

By ratifying the *UNCRC*,[41] state parties undertake to carry out certain obligations in their home countries. According to Article 34 of the *UNCRC*,[42] parties undertake to protect the child from all forms of sexual exploitation and abuse. Article 34 declares:

> States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:
> (a) The inducement or coercion of a child to engage in any unlawful sexual activity;
> (b) The exploitative use of children in prostitution or other unlawful sexual practices;
> (c) The exploitative use of children in pornographic performances and materials.[43]

It is vital that children's rights are specially protected. No society can afford to ignore the status of children in society, because the welfare of the entire community, its growth and development depends on the health and well-being of its children. Child protection must be implemented at the domestic as

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[37] *Ibid.*
[38] *Ibid.*
[39] *Ibid.*
[40] *Ibid.*
[41] *Ibid.*
[42] *Ibid.*

well as the international level, as international treaties are binding on the states that ratify them. By doing so, the states undertake obligations under the treaty to bring their national laws into conformity with the provisions in the treaty.

Another important point that has emerged from the *UNCRC* is the recognition of child rights as part of human rights. Previously human rights were perceived as part of the adult world. But the *UNCRC* incorporates most of the rights guaranteed in the *ICCPR*[44] and the *ICESCR*,[45] with the focus on children. World leaders have also recognised the link between child protection and human rights. At the Stockholm Conference on 'Realising Child Rights' in 1989, Prime Minister Ingvar Carlsson of Sweden stated: "Children are not only children – they are human beings like all of us. And like the rest of us, they shall have their rights."[46]

After the Convention on the Rights of the Child: Recent International Documents

The Stockholm Declaration[47]

This is an international document aimed at combating the sexual exploitation of children by calling on governments to give high priority and dedicate more financial and human resources to solving the problem. The *Stockholm Declaration* calls for action from states, society, and national, regional and international organisations to help prevent the commercial sexual exploitation of children.[48] It encourages states to promote stronger co-operation among all sectors of society; to strengthen the role of families in protecting children from sexual exploitation; to penalise offenders; to review, revise, enforce and promote relevant laws, policies, programmes and practices; to develop methods to prevent, protect, recover and reintegrate children vulnerable to exploitation; and to try to involve more children in the fight against their sexual exploitation.[49]

The Stockholm Conference also produced an *Agenda for Action* which called on governments to put together national plans of action with indicators, goals and a time frame to reduce the number of children who are sexually exploited each year, as well as to implement and monitor ways of measuring progress at all levels while collecting and sharing data. All 122 governments who attended the conference adopted the *Stockholm Declaration* and committed to creating national plans of action by the year 2000. However, only fifty of these countries have drafted national plans of action to date.

In its preamble the *Stockholm Declaration* says that every day more and more children around the world are subjected to sexual exploitation and sexual abuse; and that concerted action is needed at the local, national, regional and international levels to bring an end to the phenomena. It also recognises that every child is entitled to full protection from all forms of sexual exploitation and sexual abuse.

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[43] *Ibid.*
[44] *Supra* note 33.
[45] *Supra* note 34.
[46] Radda Barnen Conference Report, *Making Reality of Children's Rights* (Sweden: Radda Barnen, 1989), p. 23.
[47] *Supra* note 15.
[48] *Ibid.*
[49] *Ibid.*

States are required to protect the child from sexual exploitation and sexual abuse and promote physical and psychological recovery and social reintegration of the child victim.[50]

The preamble also emphasises that poverty cannot be used as a justification for the commercial sexual exploitation of children, even though it contributes to an environment which may lead to such exploitation. Other reasons for entering the sex trade include economic disparities, inequitable socio-economic structures, dysfunctional families, lack of education, urban-rural migration, gender discrimination and trafficking of children.[51]

It notes that criminal networks take part in procuring and channelling vulnerable children towards commercial sexual exploitation. These criminal elements service the demand in the sex market created by customers, who seek unlawful sexual gratification with children. A wide range of individuals and groups at all levels of society contribute to the exploitative practice. This includes intermediaries, family members, service providers and customers.

The commercial sexual exploitation of children can result in serious, life-long, life threatening consequences for the physical, psychological, spiritual, moral and social development of children, including the threat of early pregnancy, maternal mortality, injury and sexually transmitted diseases, including HIV and AIDS. Their right to enjoy childhood and to lead a productive, rewarding and dignified life is damaged.

The *Stockholm Declaration* calls upon all states to give high priority to action against the commercial sexual exploitation of children, and to promote stronger co-operation between states and all sectors of society to prevent children from entering the sex trade. It also calls upon the states to criminalise the commercial sexual exploitation of children, and to condemn and penalise all offenders involved, whether local or foreign, while ensuring that the child victims of this practice are not penalised.[52]

It urges states to create a climate through education, social mobilisation, and developmental activities to ensure that parents and others legally responsible for children are able to fulfill their rights, duties and responsibilities to protect children from commercial sexual exploitation. It also requests states to enhance the role of people's participation including that of children, in preventing and eliminating the commercial sexual exploitation of children.

Under the topic of *prevention*, Article 3 of the *Agenda for Action* declares that states should improve access and provide relevant health services, education, training and a supportive environment to families and children vulnerable to commercial sexual exploitation, including those who are displaced, homeless, refugees, stateless, unregistered, in detention and/or in state institutions. They should also initiate media and information campaigns to raise awareness and educate members of the public about child rights and the illegality and harmful impact of the commercial sexual exploitation of children.[53]

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[50] *Ibid.*
[51] *Ibid.*
[52] *Ibid.*
[53] *Ibid.*

Member states should also strengthen and implement national, social and economic policies and programs to assist children vulnerable to commercial sexual exploitation; families and communities in resisting acts that lead to the commercial sexual exploitation of children, with special attention to family abuse, and to promoting the value of children as human beings rather than commodities; and reduce poverty by promoting gainful employment, income generation and other supports.[54]

Under the topic of *protection*, Article 4 of the *Agenda for Action* urges state parties to develop or strengthen and implement national laws to establish the criminal responsibility of service providers, customers and intermediaries in child prostitution, child trafficking, and other unlawful sexual activity, and to develop or strengthen national laws, policies and programs that protect child victims of commercial sexual exploitation from being penalised as criminals, to ensure that they have full access to child-friendly personnel and support services in all sectors, and particularly in the legal, social and health fields.

In the case of sex tourism, states should develop or strengthen laws to criminalise the acts of nationals of the countries of origin when committed against children in the countries of destination (extra-territorial criminal laws); to promote extradition and other arrangements to ensure that a person who exploits a child for sexual purposes in another country (the destination country) is prosecuted either in the country of origin or the destination country; to create safe havens for children escaping from commercial sexual exploitation and protect those who provide assistance to child victims of commercial sexual exploitation from intimidation and harassment.[55]

This type of *Agenda for Action* is deeply needed today, if all areas of society are to come together to fight child sexual exploitation. This need was highlighted at the Stockholm Conference by Hon. Lloyd Axworthy when he said, "The act of forcing a child into prostitution is no less heinous than the sniper in war who fixes the sights of his rifle on a child playing in the street and coldly squeezes the trigger…".[56]

The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography[57]

This is the most recent document on child protection. It was adopted and opened for signature, ratification and accession by the U.N General Assembly on 25 May 2000. It entered into force on 18 January 2002.[58] The *Optional Protocol* was designed to be a complementary treaty to the *UNCRC*. Negotiated over a number of years with governments, experts and non-governmental organisations, the *Optional Protocol to the UNCRC* seeks to raise the standards in protecting children from all forms of sexual exploitation and abuse. The *Protocol* has been signed by eighty-nine countries and ratified

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[54] At web site http://www.focalpointngo.org
[55] *Ibid.*
[56] Host Committee for the World Congress against Commercial Sexual Exploitation of Children, *Report of the World Congress against Commercial Sexual Exploitation of Children: Statements by Heads of Delegation.* August 1996, p. 35; at web site http://www.unhchr.ch
[57] Adopted and opened for signature, ratification and accession by General Assembly Resolution A/RES/54/263 of 25 May 2000; entry into force 18 January 2002; at web site http://www.unhchr.ch/html/menu2/dopchild
[58] *Ibid.*

by sixteen. These include: Andorra, Bangladesh, Cuba, Democratic Republic of Congo, Iceland, Kazakhstan, Morocco, Norway, Panama, Qatar, Romania, Sierra Leone, Spain, Uganda, the Vatican and Vietnam.[59]

The *Optional Protocol* calls for governments to take tangible steps to ensure that adults involved in the exploitation of children are punished. It also urges governments to take decisive action when their nationals take part in the abuse of children abroad. Countries are encouraged to co-operate to ensure the protection of children trafficked across borders. The *Protocol* stipulates the need to protect particularly vulnerable groups of children and to further protect the rights of child victims, especially those who are witnesses in court proceedings. It also calls on state parties to ensure that children who have been sexually trafficked, exploited or sexually abused receive services designed to allow for their full social reintegration, as well as their physical and psychological recovery.[60]

Article 1 of the *Optional Protocol* declares: "State parties recognise that crimes of sexual exploitation of, or trafficking in, children represent crimes against humanity."[61] Under Article 2(a), state parties agree to give effect in their national legislation to the principle of universal criminal jurisdiction concerning sex crimes against children.[62] Article 3 directs state parties to establish penal sanctions for abusers. Article 4 allows states to take jurisdiction over child sexual abuse taking place on their territory or by their nationals. According to Article 5, the offences are 'deemed to be included as extraditable offences in any extradition treaty existing between state parties' as well as any to be concluded between them. This *Protocol* is also to be considered as a legal basis for extradition if the state parties do not have a treaty. Article 6 calls upon state parties to give each other the greatest measure of assistance with investigations, in criminal or extradition proceedings.

Article 8 says that states are to adopt appropriate measures to protect the child victims, including their special needs as witnesses, and the need to protect the persons and organisations that are involved in helping the victims. In Article 9 the states are told to use various prevention methods, such as education programs and prohibition of material advertising the offences. Article 10 calls upon the states to co-operate internationally to address the root causes of the child sex trade, such as poverty and underdevelopment. They are asked to provide financial, technical, or other assistance where they are in a position to do so.[63]

Extra-Territorial Jurisdiction of States

It is imperative that the sexual exploitation of children be strongly portrayed as a human rights issue. Today the protection of children from sexual exploitation has become *erga omnes* obligations for states, which means that all states have an obligation to see its enforcement. The sexual exploitation of children is now considered to be in the same category as war crimes such as torture, genocide and

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[59] *Ibid.*
[60] At web site http://www.unicef.org
[61] *Supra* note 57.
[62] *Ibid.*
[63] *Ibid.*

enslavement.[64] Today it is treated as a delict *jure gentium* by which all state parties are entitled to try and punish all offenders in their own courts. Thus no case should be able to slip away untried.

In order to promote children's rights, countries must work together to fight child sexual exploitation by implementing international programs that protect children. If countries enter into bilateral and multilateral treaties prohibiting child sexual exploitation, this would make it difficult for any would-be offender to exploit children in any country, because together the states could apply the treaties they entered into. States can hold each other accountable in this respect.

One of the most fundamental principles of international law is that every state is sovereign and equal to other states. All sovereign states have complete jurisdiction over their territories, and this includes the land, territorial sea and airspace over their territory. This principle can be utilised to combat the sexual exploitation of children. States can exercise extra-territorial jurisdiction over child sex tourists. As Vandana Rastogi argues, since most sex tourists return to their home countries before trial begins, extra-territorial legislation will ensure that the accused stands trial, no matter where he or she may be.[65] It is vital therefore that governments develop their extra-territorial laws and undertake the strict supervision of travel agencies in order to ensure that they do not flaunt their country as a paradise for child sex tourists.

Today some countries have provisions to try in their own countries, their nationals who commit offences abroad. One country that has implemented this is Sweden. Recently, a Swedish court convicted one of its nationals of molesting a child in a Thai beach resort. Even though the crime took place outside Sweden, the Swedish court said it had jurisdiction to try this man under the principle of extra-territoriality. This can be an effective method of ensuring that such criminals do not escape prosecution. Chapter 2 of the Swedish *Penal Code* deals specifically with prosecuting Swedish nationals who commit crimes abroad.[66] However, in order for this provision to be effective, Sweden has to depend to a great extent on the country where the crime occurred. That country needs to assist Sweden by gathering sufficient evidence against the suspect. If this aspect is lacking, then the power of Sweden's extra-territorial jurisdiction is weak.

Australia also has extra-territorial jurisdiction over its citizens who commit crimes abroad by the *Crimes (Child Sex Tourism) Amendment Act* of 1994.[67] Section 50BA of the Act declares that a person must not, while outside Australia, engage in sexual intercourse with a person who is under sixteen years. A violation of this provision carries a penalty of seventeen years in prison. Australia has also circumvented some of the problems facing Sweden, with regard to the gathering of evidence. The Act allows the court to authorise a witness to give evidence by video-link if the witness is outside Australia, when it would cause considerable expense and inconvenience to have the witness present to testify in court. It also makes provision for the witness to give evidence in this manner if it would cause the witness psychological harm and distress to face the accused by giving evidence in court.

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[64] Levesque, Roger J. R, *Sexual Abuse of Children: A Human Rights Perspective.* (Bloomington: Indiana University Press, 1999), p. 6.
[65] Rastogi, Vandana, *Preserving Children's Rights: The Challenges of Eradicating Child Sexual Exploitation in Thailand and India.* 22 Suffolk Transnational Law Review, 1998, p. 259.
[66] http://www.loc.gov/law/guide/sweden
[67] Act No. 105 of 1994. http://www.scaletext.law.gov.au/html/comact

This protects witnesses who are intimidated by the accused's presence in court. Germany is yet another country which now recognises the extra-territorial jurisdiction of its courts. In 1993, Germany passed a law that provides for up to ten years of imprisonment for any German national engaging in sexual activity with a child under the age of fourteen, irrespective of where the act occurs.

The U.S too has taken steps in this area. In 1994, the U.S passed the *Violent Crime Control and Law Enforcement Act.*[68] This Act makes it illegal for anyone to travel or conspire to travel outside the U.S for the purpose of engaging in sexual activity with minors. Thus, the actual act *(actus reus)* need not occur for a person to be prosecuted. If it can be proved that the accused intends to engage in this activity, this is sufficient for a conviction. *Mens rea* alone is enough.

Even though today a few countries have extra-territorial jurisdiction over their nationals when they commit crimes abroad, most countries have no such legislation. However, even though these countries have not enacted specific legislation in this area, they can still try their nationals under various principles of international law. Under the *Nationality Principle*,[69] a state may exercise jurisdiction over one of its nationals for crimes committed elsewhere, simply on the basis that the perpetrator is a national of the prosecuting state. Under the *Effects Doctrine*,[70] a state may apply its law to acts occurring outside its territory, but having substantial effect in its territory. Examples of this are child pornography. Sometimes child pornographic photographs and videos may be produced outside the territory of a particular country, but the effects of it are experienced in the country where these materials are being distributed. Yet another international law principle is the *Universality Principle*,[71] which recognises that some crimes are so universally condemned that perpetrators are enemies to the entire world community.

There is also the *Territorial Principle*,[72] which recognises that the state where the crime was committed has jurisdiction with regard to that offence. For example, if a national of another country was caught sexually exploiting a child in Canada, then the Canadian courts would have jurisdiction under this principle. Finally there is the *Passive Personality Principle*,[73] according to which foreigners can be punished for acts committed abroad which are harmful to the nationals of that particular country.

Other International Efforts to Combat the Sexual Exploitation of Children

The Statute of the International Court of Justice

According to Article 38(1) of the *Statute of the International Court of Justice (ICJ)*, the sources of international law are as follows:

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[68] http://www.lawresearch.com/v2/statute/statfed

[69] Hugh M. Kindred, Karin Mickelson, Rene Provost, Ted L. McDorman, Armand L.C de Mestrel, Linda C. Reif, Sharon A. Williams, *International Law Chiefly as Interpreted and Applied in Canada.* (Toronto: Emond Montgomery Publications Ltd., 2000, 6th ed.), p. 517.

[70] *Ibid.*, p. 519.

[71] *Ibid.*, p. 519.

[72] *Ibid.*, p. 516.

[73] *Ibid.*, p. 517.

- International conventions
- International custom, as evidence of a general practice accepted as law
- General principles of law
- Judicial decisions and teachings of the most highly qualified publicists.[74]

In Article 38(1)(b) of the *Statute of the International Court of Justice*, custom is accepted as a source of law. The existence of customary rules in international law can also be inferred from the practice and behaviour of states. An international custom is one which is:

(i) a general practice of states, and
(ii) the practice is accepted as law *(opinio juris).*

If both criteria are met, then the custom is binding on all states, even if they do not consent to a particular custom. For a custom to be considered as one, its duration, consistency, repetition and the generality of a particular practice should all be taken into account.

The duration of state practice need not be very long, provided that it has a constant and uniform usage, as laid down in the Asylum Case[75] and further elaborated in the North Sea Continental Shelf Cases.[76] A customary rule could therefore be proven by a series of usages. Furthermore, even though a custom need not be universal, there should be evidence of its general usage for it to be accepted as a custom. Once the existence of a specified usage has been established, it is important to consider how the state views its behaviour. If the state feels it is legally bound to follow a particular practice, this factor turns the usage into a custom, which then becomes binding on all states.[77] Protection against genocide has now become so vital that it is recognised as a principle of customary international law. If the protection of children too can receive this same level of protection, then all states are bound by this rule in all circumstances.

The unrestrained authority of states can also be restricted through treaties or conventions. Their application is referred to in Article 38(1)(a) of the *Statute of the International Court of Justice.*[78] Article 2 of the 1969 *Vienna Convention on the Law of Treaties* defines a treaty as an international agreement between states, which is in written form and governed by international law.[79] When a state ratifies a treaty, it agrees to be bound by certain obligations. This is the principle of *Pacta Sunt Servanda:* treaties are binding and must be followed in good faith. It is a principle of customary international law codified in the *Vienna Convention.*

Treaties are a more direct and formal method of law-making than custom. The *Vienna Convention on the Law of Treaties*[80] discusses the creation of a treaty. According to Article 9, consent is vital. The text of an agreement is approved at an international conference if two-thirds of the states vote for it.

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[74] *Charter of the United Nations* and *Statute of the International Court of Justice*, signed on 26 June 1945 in San Francisco and came into force on 24 October 1945. http://www.un.org/Overview/Statute/contents
[75] International Court of Justice (ICJ) Reports 1950, p. 266.
[76] ICJ Reports 1969, p. 3.
[77] I. A. Shearer, *Starke's International Law*. (London: Butterworths, 1994, 11th ed.), p. 36.
[78] *Supra* note 74.
[79] 23 May 1969. http://www.un.org/law/ilc/texts/treaties
[80] *Ibid.*

Article 12 of the *Vienna Convention* declares that certain treaties provide for the fact that a state can consent to a treaty by signature alone, where the treaty provides that the signature would have this effect. Article 14 of the *Vienna Convention* says that the usual practice is that only when a state ratifies the treaty, does it become binding upon them.[81]

Treaties can be divided into law-making treaties which have universal relevance, and treaty-contracts which apply to a small number of states. Parties that do not ratify a particular treaty are not bound by its terms. But where treaties codify a customary international law practice, then even states that have not ratified it are bound by its provisions. In the North Sea Continental Shelf Cases,[82] the *International Court of Justice* accepted that a provision of a treaty, coupled with *opinio juris*, could lead to a custom which binds all states.

There are specific instances where customary international law and treaties have restrained the sovereignty of states. Principles against genocide are a rule of customary international law. Even though states are sovereign, they can never authorise the killing of people because this is a crime against humanity. Apartheid – racial segregation – too is not accepted by customary international law. These fall into practices of *jus cogens:* they cannot be derogated from under any circumstances. These two customary international law principles have now been codified respectively in the *Genocide Convention* of 1948[83] and the *International Convention on the Suppression and Punishment of the Crime of Apartheid* of 1973.[84]

There has been doubt whether the United Nations General Assembly's Resolutions are binding. The accepted idea is that, if it gives rise to a new customary international law practice, then that practice is binding. In contrast, according to Article 25 of the *United Nations Charter*, the decisions of the Security Council are binding on all states. It declares: "The members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."[85]

The International Court of Justice is also governed by a statute. But because the decisions of the Court have no *stare decisis*, it is not as effective in curtailing the unrestrained authority of states as it would if its decisions could be binding on later cases. Article 59 of the *Statute of the International Court of Justice* declares: "The decision of the Court has no binding force except between the parties in respect of that particular case."[86] If *stare decisis* was allowed, the ICJ could be more effective in fettering unlimited sovereignty. But even with this limited provision, it has managed to curtail unrestrained authority in certain instances. In the case of the Legal Consequences of States of the Continued Presence of South Africa in Namibia,[87] South Africa refused to give up the control it had over Namibia. The Court held that South Africa's presence in Namibia was illegal and that it must

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[81] *Ibid.*
[82] ICJ Reports 1969, p. 3.
[83] Adopted by General Assembly Resolution 260 A (III) on 9 December 1948. Entry into force 12 January 1951. http://www.hrweb.org/legal/genocide
[84] Adopted and opened for signature and ratification by general Assembly Resolution 3068 (XXX) of 30 November 1973. Entry into force 18 July 1976. http://www.unhchr.ch/html/menu3
[85] *Charter of the United Nations* and *Statute of the International Court of Justice*, signed on 26 June 1945 in San Francisco and came into force on 24 October 1945. http://www.un.org/aboutun/charter
[86] *Supra* note 74.
[87] ICJ Reports 1971, p. 16.

withdraw from Namibia. This decision of the ICJ was enforced. Therefore this was a situation where there was a restriction on South Africa's sovereignty.

Unlike municipal law, in international law there is a lack of a uniform legislature, executive and judiciary as fixed organs of governance. Therefore, it is important that all states are made aware of certain rules so that they can co-exist peacefully. Every state has certain fundamental rights. One of them is independence. Every state should be independent and free from the domination of other states. Independence implies the idea of non-intervention: each state has a duty not to get involved in the internal affairs of another sovereign state and a duty to respect the sovereignty of other states. According to Article 2(7) of the *UN Charter*, even the United Nations is bound by this principle of non-intervention. It says: "Nothing in this present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state."[88]

This duty of non-intervention was addressed in the *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States.* It declared: "No state or group of states has the right to intervene, directly or indirectly, for any reason whatsoever, in the internal or external affairs of any other state".[89] Thus, the principle of non-intervention is found in a treaty and it restricts the authority of states that are parties to it. This proves that treaties are a suitable mechanism to curtail the threats posed by the unrestrained authority of states. This was emphasised by the International Court of Justice in the Corfu Channel Case,[90] where they said that each independent state must respect the territorial sovereignty of other states. Hence, it is illegal for a state to exercise control over other states.

The element of equality of states is also reflected in a treaty and therefore is binding on states. The 1970 *Declaration on Principles of International Law* says: "All states enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature."[91]

Reservations to Treaties

Article 2 of the *Vienna Convention on the Law of Treaties* declares: "Reservations are a unilateral statement made by a state where it opts to modify or exclude some legal provisions of a treaty in its application to that state."[92] Where a state is satisfied with the treaty but unhappy with a provision, it may refuse to be bound by that provision. States are allowed to make reservations to treaties because of the rules of state sovereignty. They can decide what they want to be bound by. However, Article 19 of the *Vienna Convention* declares that a reservation may not be made in the following instances:

- Where reservations are specifically prohibited by the treaty;

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[88] *Supra* note 85.
[89] General Assembly Resolution 2625 (XXV) of 24 October 1970. http://www.un.org/Depts/dpa/ead
[90] ICJ Reports 1949, p. 4.
[91] *Supra* note 89.
[92] *Supra* note 79.

- Where the treaty provides that only certain reservations may be made, and these do not include the reservation in question; and
- Where the reservation is not compatible with the object and purpose of the treaty.[93]

The Reservations to the Genocide Convention case[94] was about the fact that the *Genocide Convention*[95] contained no clause permitting reservations to the treaty. But some parties to the convention wanted to have reservations about the compulsory jurisdiction of the International Court of Justice (ICJ). The ICJ had to determine whether this was acceptable. They said a reservation must always be compatible with the object and purpose of a treaty.

With regard to child rights, the *UNCRC* permits reservations to the treaty. However Article 51 of the convention says: "A reservation incompatible with the object and purpose of the present convention shall not be permitted."[96]

International Human Rights

Malcolm Shaw notes that certain human rights now fall into the category of customary international law in the light of state practice.[97] Some of these are the prohibition of torture, genocide and slavery, and the principle of non-discrimination. These are binding on all states in all circumstances. The prohibition of genocide has been codified in *The Convention on the Prevention and Punishment of the Crime of Genocide.*[98] The principle against discrimination is found in *The International Convention on the Elimination of All Forms of Racial Discrimination.*[99] And torture is prohibited according to *The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.*[100] States should not deviate from these principles because they are international customs.

There are other treaties which are only binding on states that have ratified them. Some of these are the *U.N Convention on the Rights of the Child,*[101] the *International Covenant on Economic, Social and Cultural Rights,*[102] and the *International Covenant on Civil and Political Rights.*[103] Therefore, we see human rights law in both customary international law and in treaties.

Since treaties need expressed consent and since customary international law does not; some writers believe that treaties are superior to custom. But other writers argue that custom is superior because it has a binding effect even if states do not consent to it. Both have their advantages. Custom is

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[93] *Ibid.*
[94] ICJ Reports 1951, p.15.
[95] *Supra* note 83.
[96] *Supra* note 3.
[97] Shaw, Malcolm N, *International Law* (Cambridge: Cambridge University Press, 1998, 4th ed.), p. 780.
[98] *Supra* note 83.
[99] Adopted and opened for signature and ratification by General Assembly Resolution 2106 (XX) of 21 December 1965. Entry into force 4 January 1969. http://www.unhchr.ch/html/menu3/b/d_icerd
[100] Adopted and opened for signature, ratification and accession by General Assembly Resolution 39/46 of 10 December 1984. U.N Doc. A/39/51. Entry into force 26 June 1987. http://www.hrweb.org/legal/cat
[101] *Supra* note 3.
[102] *Supra* note 34.
[103] *Supra* note 33.

important because it incorporates fundamental international law principles which need to be observed, even without ratification. On the other hand, although treaties need to be ratified, they set out principles clearly and without ambiguity. Therefore, both custom and treaty can be used as suitable mechanisms to protect human rights and children's rights.

International Mechanisms that Could Remedy Human Rights Violations

The International Bill of Human Rights consists of the *Universal Declaration of Human Rights (UDHR),*[104] *the International Covenant on Economic, Social and Cultural Rights (ICESCR),*[105] the *International Covenant on Civil and Political Rights (ICCPR),*[106] and the two Optional Protocols to the *ICCPR*..

In responding to Human Rights violations, the mechanisms available at the national level must first be exhausted before resorting to international mechanisms. Under this heading, I will analyse the U.N Charter based mechanisms and treaty based mechanisms.

U.N Charter Based Mechanisms

These mechanisms have been set up under the auspices of the *UN Charter.*[107] Among its other powers, an important function of the UN High Commission on Human Rights (hereinafter referred to as "The Commission") is its role in developing effective procedures for responding to human rights violations.[108] During its early years, the Commission's focus was primarily on standard setting and the drafting of international human rights instruments. But in 1966, as a result of a General Assembly request to examine ways and means to put a stop to human rights violations, the Commission began to tackle specific violation issues.[109] These developments resulted in the *1503 Procedure,*[110] the *1235 Procedure*[111] and the *Thematic Procedures.*[112]

The Confidential Consideration of a Situation under the 1503 Procedure[113]

This is a confidential procedure which gives non-governmental organisations and individuals the right to petition the UN in order to seek redress for human rights violations. By this, the Commission can identify situations involving a consistent pattern of gross and reliably attested violations of Human

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[104] *Supra* note 27.
[105] *Supra* note 34.
[106] *Supra* note 33.
[107] *Supra* note 85.
[108] Alston, Philip, *The United Nations and Human Rights: A Critical Appraisal.* (Oxford: Clarendon Press, 1992), p. 126.
[109] *Ibid.*, p. 144.
[110] United Nations Economic and Social Council (ECOSOC) Resolution 1503 (XLVIII) (1970).
[111] United Nations Economic and Social Council (ECOSOC) Resolution 1235 (XLII) (1967).
[112] Henry J Steiner and Philip Alston, *International Human Rights in Context.* (Oxford: Oxford University Press, 2002, 2nd ed.), p. 612.
[113] *Supra* note 110.

Rights.[114] Each year 300,000 complaints are received by way of the *1503 Procedure*, which reflects people's faith in it. Between 1972 and 1999, seventy-five countries have been subject to scrutiny under the *1503 Procedure.* Of these, twenty were in Africa, twenty three in Asia and the Middle East, fifteen in Latin America, twelve in eastern Europe and five in Western Europe.[115]

The *1503 Procedure* involves several stages in processing complaints. Firstly, the Communications Working Group of the UN Sub-Commission on the Promotion and Protection of Human Rights examines the complaints that have been received. Complaints can be rejected if they are anonymous, lack clear evidence, if domestic mechanisms have not been exhausted, if a "consistent pattern" is not established, or if the violations are not "gross". After the Working Group has identified countries where violations occur, the second stage is where the Sub-Commission examines these reports and decides whether to send the reports of the violations to the Commission. At this point, the Government concerned is invited to defend itself before the Commission. The third stage involves the Commission itself establishing a Working Group to look into the situation. And fourthly, the Commission considers all relevant material at its annual sessions. The Commission then has several ways to deal with the violations:

(a) the case can be kept "under review" for a time;
(b) the Commission can send an envoy to seek further information and report back;
(c) it can appoint an *ad hoc* committee to conduct a confidential investigation; or
(d) it can go public and transfer the case to the *1235 Procedure.*[116]

In the absence of a decision to go public, the entire *1503 Procedure* is absolutely confidential. But one of the main criticisms against this mechanism is that it is very time-consuming. Complaints have to go through several channels before being taken up, at which point violations could have reached disastrous proportions. Alston, quoting the NGO observer David Weissbrodt, notes: "The *1503 Procedure* is painfully slow, complex, secret and vulnerable to political influence at many junctures."[117] But in spite of this, it could be an effective mechanism for dealing with the problem of child prostitution.

Public Debate under the 1235 Procedure[118]

According to this procedure, the UN Commission on Human Rights is able to hold an annual public debate, focusing on gross violations of human rights. In this way, the Commission can investigate and apply pressure on states that are violating human rights. When complaints are made, first the Sub-Commission on the Promotion and Protection of Human Rights examines all communications, to identify consistent patterns of violations. Secondly, the Commission examines any situations referred to it; and thirdly, the Commission reports the findings and recommendations to the U.N Economic and Social Council.[119]

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[114] Steiner and Alston, *International Human Rights in Context, supra* note 112.
[115] http://www.unhchr.ch/html/menu2/8/stat1.htm
[116] Alston, *The United Nations and Human Rights, supra* note 108, p. 147.
[117] *Ibid.*, p. 153.
[118] *Supra* note 111.
[119] Alston, *The United Nations and Human Rights, supra* note 108, p. 156.

With regard to violations occurring in each country; at the end of the public debate:

- the Commission makes a declaration or resolution of the human rights standards discussed with regard to each country;
- a resolution fails if it does not carry enough votes and in this situation, the Chairman makes a statement urging the Government in question to take action with regard to the violations; or
- if the situation is very serious, the Commission can appoint country specific Rapporteurs to monitor the situation and report back to the Commission.

To date, eighteen countries[120] have been subject to the public debate under *the 1235 Procedure.*[121] It can be effective in dealing with the problem of child prostitution because it is a very public procedure. When human rights violations in specific countries are brought before the Commission, it should be so embarrassing that the relevant governments are kept on their toes. In this situation, the cited country can be galvanised into action at the domestic level, because of pressures from the international arena.

The Thematic Procedures

Under this procedure, the Commission designates a 'thematic' rapporteur or working group to consider violations anywhere relating to a specific theme.[122] Working Groups and Special Rapporteurs established under *Thematic Procedures* can investigate the problem of child prostitution and help solve it. Since each group works in a specific human rights field, it is able to apply its specialised knowledge to that particular field, unlike the procedures of *1503* and *1235.* According to Alston, unlike other UN efforts to monitor human rights violations, the thematic procedures have much more flexibility. They are able to obtain information from a wider network of sources; and on-site visits to countries where violations take place provide unrivalled opportunities for collection of information.[123]

When a working group begins an investigation, it requests the Government concerned to provide information with regard to the alleged violation. This is designed to pressure the Government to ensure that no further harm occurs to the individuals being victimised. By the "prompt intervention" procedure, the working group's chairman sends a cable to the Minister of Foreign Affairs of the country concerned, requesting that immediate steps be taken to protect all the rights of those involved in trying to stop the human rights violations.[124] Another way in which the working groups and thematic rapporteurs can apply pressure on Governments is through their annual reports to the Commission.

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[120] The countries that have been scrutinised are Afghanistan, Bosnia and Herzegovina, Burundi, Congo, Croatia, Cuba, Cyprus, East Timor, Equatorial Guinea, Federal Republic of Yugoslavia, Iran, Iraq, Israel, Kosovo, Myanmar, Rwanda, Sierra Leone and Sudan.
[121] Steiner and Alston, *International Human Rights in Context, supra* note 112, p. 619.
[122] *Ibid.*, p. 641.
[123] Alston, *The United Nations and Human Rights, supra* note 108, p. 177.
[124] *Ibid.*, p. 179.

U.N. Treaty Based Mechanisms

These mechanisms are specifically set up under a Human Rights Treaty and lead to the monitoring of human rights of citizens in participatory states by bodies constituted in terms of the treaty mechanisms. The Committee on the Rights of the Child was set up under the Convention on the Rights of the Child discussed earlier in this paper. Another mechanism that is important in this respect is the Human Rights Committee (HRC) which is regulated by two treaties, viz; *The International Covenant on Civil and Political Rights (ICCPR)*[125] and the *Optional Protocol to the ICCPR.*[126]

The HRC (see Article 28 of the *ICCPR* which states that the committee shall consist of eighteen members, who are nationals of state parties to the covenant and who are persons of high moral character and recognised competence in the field of human rights) can be an effective mechanism for dealing with child prostitution. According to Article 40 of the *ICCPR*,[127] state parties to the Covenant must submit reports to the HRC on the measures they have adopted which give effect to the rights recognised under the Covenant, and on the progress made in the enjoyment of those rights. The HRC then studies and makes comments on these reports. This is to ensure that the state of human rights in these countries is in keeping with the *ICCPR*.

Article 41 of the *ICCPR* makes provision for a system of inter-state complaints, if another state party is not fulfilling its obligations under the Covenant. Thus, if another country which is party to the *ICCPR* feels that a country's government is not adhering to some of its obligations under the treaty, they can make a complaint to the HRC. However, Article 41 specifies that the committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in this matter.

International Legal Personality

Legal personality is essential in international law. Without it, entities cannot sue and be sued in the international arena. They must be recognised as legal persons before courts. Traditional principles follow a narrow view as to who can be considered subjects under international law. This is also reflected in Article 34(1) of the *Statute of the International Court of Justice*, which declares: "Only states may be parties before this Court."[128] But today the approach has widened, and other entities are recognised as legal persons, including individuals, international organisations, and multi-national corporations. International legal personality means participation coupled with acceptance at the international level. The relevant entities must have the status, competence and capacity to be recognised as legal persons.

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[125] *Supra* note 33.
[126] Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A of 16 December 1966. It entered into force on 23 March 1976. U.N Doc. A/6316. (1966.) http://www.hrweb.org/legal/cpr/op
[127] *Supra* note 33.
[128] *Supra* note 74.

The Reparations Case[129] examined whether the United Nations (UN) has international legal personality. The ICJ looked at the *UN Charter*[130] to determine this. Article 1(1) of the *Charter* declares that the purpose of the UN is to maintain international peace and security. The court also interpreted Articles 104 and 105 of the *Charter*. Article 104 says:

> The organisation shall enjoy in the territory of each of its members such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes.[131]

And Article 105 (1) declares:

> The organisation shall enjoy in the territory of each of its members such privileges and immunities as are necessary for the fulfillment of its purposes.[132]

Thus, in the Reparations case[133] the ICJ examined the duties, powers and functions of the UN and concluded that the organisation does need international legal personality to carry out its functions. This shows that international law has widened in the area of subjects of international law, to accommodate the UN itself.

Individuals as Subjects of International Law

With regard to individuals, traditional principles of international law dictate that individuals are not subjects of international law. The *International Court of Justice* was established after World War II, but unfortunately its jurisdiction does not extend to individual crimes. As mentioned above, Article 34 of the *ICJ Statute*[134] clearly says that only states may be parties before the court. But the late twentieth century has seen remarkable changes in this area of the law. With the development of international human rights, individuals are now considered subjects of international law.

The *Optional Protocol to the International Covenant on Civil and Political Rights*[135] also departs from tradition. According to Article 1, an individual can petition the Human Rights Committee if a state party to the *Protocol* has violated a civil or political right of the individual in question. But he must first have exhausted all local remedies before lodging his complaint. Therefore, if a state which is a party to the *Optional Protocol* arbitrarily restricts certain human rights, then an individual who is subject to the jurisdiction of that state can petition the Human Rights Committee (HRC). The *Optional Protocol* is a step forward in international law, because it recognises individuals as legal persons. And not only can an aggrieved party petition the HRC: even a close relative of a victim can do so.

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[129] ICJ Reports 1949, p.174.
[130] *Supra* note 85.
[131] *Ibid.*
[132] *Ibid.*
[133] ICJ Reports 1949, p.174
[134] *Supra* note 74.
[135] *Supra* note 126.

In the Nottebohm Case,[136] the ICJ recognised that individuals have legal personality. They held that an individual could petition the *International Court of Justice* (ICJ) through his state. But there must be a genuine link between the individual and the state. International law also recognises individual criminal responsibility for certain crimes like piracy and other offences that incur universal jurisdiction of states. At the Nuremberg Trials,[137] the military tribunal said there is individual criminal responsibility for war crimes, crimes against humanity and crimes against peace. The tribunal declared: "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[138] The *Genocide Convention*[139] also recognises this.

More recently, the *Rome Statute of the International Criminal Court*[140] in Article 25 recognises individual criminal responsibility for war crimes, genocide, crimes against humanity and the crime of aggression. This is the first time individual criminal responsibility has been given recognition by a permanent international court. The Yugoslav and Rwandan War Crimes Tribunals also held individuals liable for certain war crimes. The *ad hoc* tribunal for the former Yugoslavia imposed individual liability in The Prosecutor v. Tadic.[141] And in the Jean Paul Akayesu case,[142] the Rwandan Tribunal applied individual criminal responsibility when they held that the defendant was held individually responsible for genocide, crimes against humanity and war crimes.

This recognition of individual criminal responsibility is an example of how the twentieth century has witnessed remarkable changes in the manner in which the international community responds to events around the world. Traditional principles have been superseded to ensure that individuals cannot get away with the heinous crimes they commit. This indicates that the focus is on justice and not on blindly following tradition. The fact that individuals today are recognised as having legal personality in international law indicates that the types of offences that can be tried by international tribunals are widening, so that even people who are guilty of sexually exploiting children can be tried according to principles of international law.

Establishment of the International Criminal Court

The world around us has many scars which remind us that man's capacity for evil knows no limits. One remedy to this unfortunate reality is in the *Rome Statute of the International Criminal Court* (hereinafter referred to as the ICC), drafted in 1998.[143] It entered into force on 1 July 2002. The preamble, which contains the spirit of the statute, highlights the fact that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the

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[136] ICJ Reports 1955, p.4.
[137] http://www.yale.edu/avalon/imt
[138] D.J Harris, *Cases and Materials on International Law.* (London: Sweet and Maxwell, 1998, 5th ed.), p. 742.
[139] *Supra* note 83.
[140] Drafted on 10 November 1998. Entry into force 1 July 2002. U.N Doc. A/CONF. 183/9. http://www.un.org/law/icc/statute
[141] Case no. IT-94-1-AR72. http://www.icrc.org/icrceng/ncf
[142] Case no. ICTR-96-4-T. http://www.diplomatiejudiciaire.com/UK/Tpiruk/Akayesu
[143] *Supra* note 141.

conscience of humanity. It affirms that the most serious crimes must not go unpunished. The *ICC Statute* offers specific provisions that can be utilised to fight the sexual exploitation of children.

An important feature of the ICC is how it acts as a restriction on state sovereignty: it can interfere in acts under the domestic jurisdiction of a state if the acts are offences under the *ICC Statute*. In the last few years *ad hoc* tribunals have been set up to try crimes of genocide committed in Rwanda and Bosnia. In November 1998, the War Crimes Tribunal at The Hague convicted many Bosnian Serbs for atrocities committed against Bosnian Muslims. But these tribunals are temporary: a permanent international criminal court is more effective in remedying human rights abuses.

The need for this was realised when it came time to trying accused war criminals after the Second World War. Because there was no permanent international criminal court, the Security Council of the UN set up *ad hoc* tribunals for this purpose. The Nuremberg and Tokyo Tribunals convicted many people of war crimes and crimes against humanity. More recently, the Security Council revived this process when it set up tribunals for the former Yugoslavia and Rwanda. But it must be borne in mind that these *ad hoc* tribunals are founded upon the insecure base of Security Council Resolutions. This means that they could be established only if all five permanent members of the Security Council agree to it. According to Article 27(3) of the *UN Charter*,[144] such decisions must be made by an affirmative vote of nine members, including the concurring votes of the permanent members. Thus if even one permanent member votes against such a proposal, an *ad hoc* tribunal cannot be set up. In contrast the ICC, because it does not depend on the Security Council, is permanent and therefore more stable. President Clerides of Cyprus emphasised this when he said: "The existence of an International Criminal Court as a permanent institution would provide objectivity and continuity."[145]

Because there has been no permanent international criminal court, in the past the states themselves have undertaken to punish violators for war crimes. Due to the principle of Universal Jurisdiction, any state could have the jurisdiction over such crimes. But this has always been unsatisfactory because national machinery is being utilised to punish international crimes. This has sometimes led to chaos, due to the lack of a uniform method of conducting such trials. This can clearly be seen in the Lockerbie case.[146] Here Libya did not want to extradite the accused criminals to the USA, in the fear that if convicted, the USA would impose the death penalty. Therefore they chose to prosecute the offenders themselves. In contrast, the ICC will be able to fill this jurisdictional vacuum. A permanent international criminal court based on certain standard rules can send out a clear message that crimes against humanity will no longer go unpunished.

Jurisdiction of the ICC

Article 1 of the *ICC Statute* emphasises that the Court would complement domestic legal mechanisms and would not conflict with them. According to Article 4, the Court has international legal personality so that it can perform its functions effectively. Articles 5 to 8 define the crimes over

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[144] *Supra* note 85.
[145] In an address at the Commonwealth Heads of Government meeting, October 1993. http://www.hrweb.org/legal
[146] ICJ Reports 1992, p. 3.

which the ICC has jurisdiction. They are genocide, crimes against humanity, war crimes and aggression.[147]

Article 6 of the *ICC Statute*[148] defines the crime of genocide in broad terms to ensure that violators are prosecuted. It says genocide amounts to acts committed with the intention of destroying a national, ethnic, racial or religious group. It includes killing them, causing serious bodily or mental harm, preventing births within the group and forcibly transferring children from the group. This is similar to definitions of genocide in the 1948 *Convention on the Prevention and Punishment of the Crime of Genocide,*[149] and also of the *Statute of the International Criminal Tribunal for the former Yugoslavia.*[150]

Crimes against humanity are defined in Article 7 of the *ICC Statute*[151] and include murder, extermination, enslavement, deportation, imprisonment, torture, sexual violence, persecution, enforced disappearances and apartheid. These crimes have been given wide definitions, so as to encompass many areas. The *Statute* also indicates its sensitivity to crimes against women. It prohibits persecution on the grounds of gender. "Enslavement" includes the trafficking of women and children. When the statute was being drafted, many women's groups pushed for a broad definition of sexual violence, in the context of the grave cases of sexual abuse that took place recently in Bosnia. As a result of this and for the first time ever, rape, sexual slavery, enforced prostitution, forced pregnancy and enforced sterilisation are classified as crimes against humanity, indicating that changes are occurring in the international arena.

Article 7(1)(g) of the *ICC Statute* classifies rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence as crimes against humanity.[152] The commercial sexual exploitation of children is not specifically mentioned as a crime against humanity, but if Article 7(1)(g) can be interpreted broadly to include this, then the ICC will have jurisdiction in this area as well.

The broad definitions given to crimes listed under Article 5 seeks to ensure that violators of such crimes are brought to justice. Thus, with the establishment of the ICC the focus has shifted from merely following traditional principles to ensuring that justice is done. The crime of child sexual exploitation should be specifically listed in the *ICC Statute.* In seven years' time (from 12 July 1999), when the Review Conference meets to consider amendments to the *Statute* under Article 123, the list of crimes can be expanded. Until such time, the ICC can be given the role of interpreting whether individuals involved in child prostitution can be liable under the category of crimes against humanity.

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[147] *Supra* note 141.
[148] *Ibid.*
[149] *Supra* note 83.
[150] Adopted on 25 May 1993. http://www.un.org/icty/basic/statut/statute
[151] *Supra* note 141.
[152] *Ibid.*

With regard to war crimes, Article 8 of the *ICC Statute* defines these as breaches of the *Geneva Conventions*[153] and violations of the laws and customs of war. These include wilful killing, torture and inhuman treatment, extensive destruction of property, taking of hostages, intentionally attacking civilians and protected persons, employing poisonous gases as a method of warfare, using weapons which cause unnecessary suffering, or using civilians as human shields. The conscription of children under fifteen years as soldiers is also considered a war crime. Sexual violence such as rape, sexual slavery and forced pregnancy fall into this category as well. Article 8C speaks of crimes that are not of an international nature (i.e., internal warfare and civil wars). If there are serious violations of common Article 3 of the *Geneva Conventions*,[154] then these violations amount to war crimes.

The *ICC Statute*[155] also gives the ICC jurisdiction over the crime of aggression. This has not been defined in the *ICC Statute*,[156] but it is defined in Article 5(2) of the UN General Assembly Resolution 3314 (XXIX) of 1974 (19th Session) as: "A war of aggression is a crime against international peace. An aggression gives rise to international responsibility."[157] Perhaps a definition of aggression will be included in the *Statute* later under Articles 121 and 123, which provide for amendments to the *Statute*. According to Article 12, only states that have ratified the *Statute* are subject to the jurisdiction of the Court. The Court can exercise jurisdiction if the crime was committed in the locality of a state party or if the accused is a national of a state party. Unfortunately, the proposal to give the Court automatic and wider jurisdiction failed. With the "opting in" approach of Article 12, a state which is not a party to the *Statute* can opt to accept the Court's jurisdiction regarding certain crimes. This is dangerous because it can be used for the convenience of a particular state whenever they perceive a disadvantage. Similarly, Article 124 is dangerous. After becoming a party to the *Statute*, a state may declare that it does not accept the jurisdiction of the Court for seven years after its entry into force, with regard to war crimes committed on its territory or by its nationals. This sends a message that there are several loopholes in the *Statute,* which could be amended at the Review Conference. Thus although the ICC has heralded a new age in international law, it can still be made more effective.

Defences in the ICC

Even though the twentieth century has seen the development of individual liability, this does not mean the accused is without a defence. To be held liable, the defendant should have had *actus reus* as well as *mens rea.* If there is an absence of *mens rea,* this proves the accused had no intention to commit the crime. In this manner, he can be excluded from liability if he suffered a mental illness at the point of the commission of the crime, if he was intoxicated, or if he was acting in self-defence or under duress. The *ICC Statute*[158] refers to this in Article 30. These provisions assure the accused that the law is fair and excuses certain conduct in exceptional situations.

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[153] Adopted on 12 August 1949 by the Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War. Entry into force 21 October 1950. http://www.irtc.org/instruments/intlhumanlaw
[154] *Ibid.*
[155] *Supra* note 141.
[156] *Ibid.*
[157] Article 5(2) of the UN General Assembly Resolution 3314 (XXIX) of 1974 (19th Session). http://www.un.org/law
[158] *Supra* note 141.

Mistake of Fact was recognised in the Hans case,[159] where the accused was charged with carrying out unlawful executions. He was acquitted because he thought they were routine judicial executions. In the Peleus case,[160] the British Military Court at Hamburg applied Mistake of Law as a defence. The court said the accused could not be held liable if he was not aware of the illegality of his acts. The defence of Duress is an accepted defence if the accused committed a crime because he feared for his life and had no alternative action. But the harm caused by the accused should not be out of proportion to the harm he was threatened with. Duress was accepted as a defence in USA v. Flick.[161]

Immunity from Jurisdiction

Traditional principles of international law accept sovereign and diplomatic immunity. By this, a head of state or a member of a diplomatic mission of a particular country is immune from jurisdiction in the municipal courts of another country. According to the maxim of *par in parem non habet imperium,* an equal cannot exercise authority over an equal. Historically, immunity granted to a sovereign of another state was considered to be absolute, irrespective of the nature of the act in question. It is also linked to the idea that a state has a duty of non-intervention over another state. The early nineteenth century case of Schooner Exchange v. McFaddon[162] reflects this idea. Here, the U.S. Supreme Court declared that the jurisdiction of a state within its own territory was exclusive and absolute; but it did not encompass foreign sovereigns.

The traditional approach to sovereign immunity can also be seen in the case of Underhill v. Hernandez.[163] The court said: "Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." The purpose of sovereign immunity is to give leaders the freedom to exercise their duties without being constantly wary of potential suits against them. But the danger here is that sovereign immunity could be used as a shield, to allow a sovereign to get away with committing heinous crimes.

The traditional principles with regard to immunity from jurisdiction have undergone change in the twentieth century. In the recent Pinochet case,[164] the British House of Lords held that the accused, a former head of state of Chile, was not entitled to immunity from suit for the crimes committed while in office. This decision of the House of Lords, stripping political leaders of sovereign immunity, is indeed a vast change from traditional principles. It sends a clear message to all leaders that they cannot escape liability in the United Kingdom if they abuse their powers in their home country. It remains to be seen how far and how often such an invasion of another state's sovereignty will be used.

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[159] Norway, Court of Appeal, 1947. 14 International Legal Recorder (ILR) 305.
[160] British Military Court, Hamburg, 1945. 13 International Legal Recorder (ILR) 248
[161] Nuremberg, 1947. 6 Nuremberg Military Tribunal (NMT) 1201
[162](1812) 7 Cranch Reports 116.
[163] (1897) 169 U.S.456.
[164] Regina v. Bartle and the Commissioner of Police for the Metropolis and others ex parte Pinochet. http://www.reports.guardian.co.uk/sp/reports/pinochet/judgments

Immunity from suit is also not recognised by the *Genocide Convention* of 1948.[165] Article 4 says: "Persons committing genocide … shall be punished whether they are constitutionally responsible rulers or public officials or private individuals." It recognises that no matter what position a person holds, if they are guilty of genocide there can be no immunity. The *ICC Statute*[166] adopts a similar position. Article 27 prohibits sovereign and diplomatic immunity for crimes under the statute. Thus it is wrong for persons to use their official position to shield themselves from liability for such grave crimes.

Reservations to the ICC

As explained above, Article 2 of the *Vienna Convention on the Law of Treaties*[167] defines a reservation to a treaty as one which a state makes to modify or exclude the legal effects of certain aspects of the treaty with regard to that state. However, the *ICC Statute*[168] prohibits reservations to the *Statute* in Article 120. States do not have the option of picking and choosing which aspects of the *Statute* they wish to be bound by.

The Appointment of Judges to the ICC

Article 36(3)(a) of the *ICC Statute*[169] declares: "The judges shall be chosen from among persons of high moral character, impartiality and integrity." No two judges may be nationals of the same state. Article 40 speaks of how important it is that judges should be independent in the performance of their functions. Because the ICC is an international court, it is expected to deliver more unbiased judgments. Professor B.V.A. Roling observed this when he wrote: "For the very reason that war crimes are violations of the laws of war, that is of international law, an international judge should try international offences. He is the best qualified."[170] Antonio Cassese is of the same opinion: "International judges may … be in a better position to be more impartial and unbiased than judges who have been caught up in the milieu which is the subject of the trials."[171] He cites as an example the failure of the Leipzig Trials of 1921, where the judges were under enormous pressure when they tried their own countrymen for war crimes. Cassese explains that national courts are more subject to political manipulations than international tribunals. "By contrast, international judges have no national, ethnic or political axe to grind."

Furthermore, international judges have the advantage of being less emotionally involved in a case. According to Hans Kelsen: "The punishment of war crimes by an international tribunal … would certainly meet with much less resistance since it would hurt national feelings much less,"[172] adding

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165 *Supra* note 83.
166 *Supra* note 141.
167 *Supra* note 79.
168 *Supra* note 141.
169 *Ibid.*
170 B.V.A Roling, "The Law of War and the National Jurisdiction since 1945", in *The Hague Academy of International Law, Collected Courses*, 1960-II, (Leyden: A.W. Sijthoff, 1961), p. 354.
171 Cassese, Antonio, *Reflections on International Criminal Justice*. Modern Law Review, January 1998, p. 7.
172 Kelsen, Hans, *Peace through Law* (Chapel Hill: University of North Carolina Press, 1944), p. 115.

that internationalisation of the whole process makes punishments more uniform. If war criminals were tried in various national courts, the penalties could vary greatly. Thus it is a good development that the judiciary of the ICC is truly international in nature.

The *Statute* says that judges should have established competence in criminal law and international law. Article 36(8) refers to the fact that there should be a fair representation of female judges as well. This provision is also seen in the new South African Constitution. It reflects the twenty-first century trend towards gender equality. The *Statute* particularly emphasises the need to include judges with legal expertise in issues of violence against women and children. This shows its sensitivity to the delicate nature of such offences.

The Rights of Suspects

Even though the ICC deals with horrendous crimes, the accused still has certain rights at all stages of an inquiry. This is connected to the Presumption of Innocence, guaranteed in Article 66 of the *Statute*, which states that a person is innocent until proven guilty. In fact, Article 22 specifies that if there is ambiguity regarding the definition of a crime, it should be interpreted in favour of the person being investigated. Article 55 says that during an investigation, a person shall not be compelled to incriminate himself or herself. They should also not be subject to duress or threats. They should not be deprived of their liberty unless there is a reasonable suspicion against them. They have the right to be informed of the charges against them, the right to remain silent and the right to legal assistance. The *Statute* always seeks to ensure that the rights of all persons are guaranteed and upheld.

Article 63 emphasises the importance of the accused being present during the trial. This ensures that arbitrary conduct is not allowed. Article 67 says that the accused has a right to a fair hearing conducted impartially. Even when it comes to dealing with the accused, the *ICC Statute*[173] ensures that international human rights standards are not violated.

Protection of Victims and Witnesses

Article 68 of the *Statute*[174] highlights the importance of protecting victims and witnesses during the trial. This is important because of the highly sensitive nature of the offences in question. It declares: "The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses". It allows special protection where the crime involves sexual violence or violence against children. As an exception to the principle of public hearings, the Court may conduct any part of the trial *in-camera*, to protect such victims.

The *Statute* demonstrates its sensitivity to the trauma experienced by witnesses. Article 43 makes provision for the setting up of a Victims and Witnesses Unit, which would provide protection, security and counselling for witnesses. The Unit shall include staff with expertise in trauma, including trauma

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[173] *Supra* note 141.
[174] *Ibid.*

related to crimes of sexual violence. For these reasons too the ICC is a positive development in international law. It is not only concerned with bringing violators to justice, but it is also involved in assisting victims to overcome their trauma. This aspect of the ICC is vital in fighting child sexual exploitation.

Penalties and Sentencing

Once the Court convicts an accused person, it may sentence him or her to life imprisonment, imprisonment for a specified number of years, forfeiture of proceeds, property and assets obtained by criminal conduct, and fines. But no matter how grave the crime in question is, Article 77 does not make provision for imposition of the death penalty. This is because it must be in accordance with Article 1 of the *Second Optional Protocol to the International Covenant on Civil and Political Rights*,[175] which prohibits the death penalty as a form of punishment. Even in this situation, the *ICC Statute*[176] seeks to keep in line with international human rights norms.

It is true that it is difficult for victims of sexual exploitation to get over the pain of their abuse. However if they see their abusers brought to justice it is easier for them to deal with it and get on with their lives. When justice is done, they feel a sense of closure in their lives. Antonio Cassese speaks of the importance of justice. If justice is not done, the victims feel cheated. He says: "The memory always lingers and - if nothing is done to remedy the injustice – festers."[177] He observes that justice dissipates the call for revenge and lessens much of the bitterness victims may feel, because when the Court imposes the punishment the victims receive their retribution. Therefore the ICC provides that, even if the sexual exploitation of children occurs in other countries, offenders can still be tried by an international court.

Establishment of the ICC guarantees justice for crimes that often do not fall within the domestic legislation of states. Speaking on this matter, the U.N. Secretary General, Kofi Annan, said: "There can be no global justice unless the worst of crimes – crimes against humanity – are subject to the law. The establishment of an International Criminal Court will ensure that humanity's response will be swift and will be just."[178]

He went on to explain that the overriding interest must be that of the victims and the international community as a whole. The court must be an instrument of justice. Its purpose is to protect the weak against the strong. Thus its creation indicates how the international community should respond to events around the world. When we examine the *ICC Statute*, we see that traditional principles of international law have indeed undergone a vast change. *Hominem causa omne jus constitutum:* all law is created for the benefit of human beings. The ICC can definitely be utilised to fight child sexual exploitation.

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[175] Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A of 16 December 1966. It entered into force on 23 March 1976. U.N Doc. A/6316. (1966.) http://www.hrweb.org/legal/cpr/op

[176] *Supra* note 141.

[177] Cassese, *supra* note 172, p. 10.

Conclusion; Let Justice Prevail

This paper has attempted to explore the multifarious means whereby the sexual exploitation of children can be combated in a manner that goes beyond domestic legal regimes. It has looked at several international mechanisms that can be utilised in this regard including treaty-based and UN Charter-based procedures. The widening of the concept of *locus standi* in international law has meant that individuals can be tried for crimes in international law. All this indicates that perpetrators will receive their just punishment, and they can no longer rely on loopholes in the domestic laws of different states to escape their crimes.

[178] At the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, June 1998. http://www.un.org/law/icc

THE NEW MEANING OF JUSTICE

By Sajeeva Samaranayake*

Introduction

"Human rights" is our collective aspiration to assure justice to our fellow human beings. But what do we understand by the word 'justice' in Sri Lanka today? This article is an endeavour to indicate the historical forces of the 19th and 20th centuries which shaped and narrowed its meaning to *legal justice* and the need for a broader and richer concept of *social* and *economic justice* to serve as the benchmark for this island nation in the 21st century. It will be argued that the present concept of legal justice makes *historic sense* but not *rational sense.* The time has come for the modern Sri Lankan to throw off the mind forged shackles of history, revolt with intelligence and guide and direct his or her fellow citizens towards an inclusive concept of justice that metes out, justice to *all* rather than justice to *some.*

The jurisprudential or holistic approach adopted in this article does not require justification or excuse. Nevertheless to re-assure those timorous souls amongst us, we repeat Lord Radcliffe's advice to lawyers in 1961:

> *You will not mistake my meaning or suppose that I deprecate one of the great humane studies when I say that we cannot learn law by learning law. If it is to be any thing more than just a technique it is to be so much more than itself, a part of history, a part of economics and sociology, a part of ethics and a philosophy of life.*[1]

The unfinished journey

The far-reaching institutional changes effected by the Colebrook – Cameron Reforms in 1833 led to the break up of feudalism and initiated our transition from the medieval to the modern age. This is a journey which has not been completed. As Mendis[2] points out the normal process is for economic changes to lead to social changes and social changes to lead to institutional changes.[3] In the case of Ceylon this process was almost reversed. The ancient Sinhalese and Tamil social systems were undermined as Western values and ideas developed within a different socio-economic context encroached upon our culture. The political, economic and judicial institutions that evolved bore a decisive colonial imprint rather than being the expression of a free and autonomous people. They sub-served the needs of global colonialism and not the needs of Ceylonese People. This position has still not changed. The paradigm shift that underpinned the induction of Ceylon into the capitalist world

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[1] Radcliffe, Lord (1961) *The Law and its Compass* 92-93.

[2] Mendis, G.C. (1957) *Ceylon today and Yesterday: The Main Currents of Ceylon History,* Colombo: Lake House, p 70.

[3] Ibid. In Europe this transition took place over a period of three centuries as an autonomous and natural process.

economic order was the replacement of an inter-dependent group identity and co-operation with an ethic of individualism and competition.

Historical roots of psycho-social insecurity

The continued alienation and disempowerment of the common man after self-rule in 1948 produced three violent upheavals in society, each one assuming a progressive descent to new depths of despair.[4] Chandraprema[5], naming this the *collective suicide of a generation* refers to the psychological conditions that produced these movements.

> *The JVP was the nemesis of societal complacency and under-development – a fatal mixture. In a situation of economic stagnation, widespread poverty and unemployment, when the privileged continue to live it up with their standards of living rising ever higher, it tends to breed envy of the sickest kind.*

It would be a mistake to confine the causes of these *collective suicides* to the developments in post – independence Sri Lanka. A great many of the marginalized and alienated under-classes of today may well trace their ancestry to the peasantry whose lands were robbed to pave the way for a plantation economy in the 19th century.[6] This economic disempowerment of the peasant was calculated to turn them into wage labourers, a status held by a majority within the low income groups today. By the end of the 19th century, about 82 percent of the peasant holdings came below one acre in extent and a third of the peasantry were without any land of their own. European visitors to the island during its last quarter deplored the gross negligence of the provinces where no commercial cultivation took place, and where hundreds of thousands of peasants lived in a state of semi-starvation.[7]

Moreover the destruction of the traditional institution i.e. the system of chiefs, which had kept peasant society and its social relations (including those of economic relations) in order, brought about complete disorganisation and confusion in peasant society.[8] The resultant state of psycho-social insecurity would in all probability have been transmitted from generation to generation leading to the present behavioural problems within low-income families.

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[4] The JVP in 1971 and 1987-89 and the separatist Eelam war between Tamil rebel groups and the government from 1983 to 2001.

[5] Chandraprema, C.A. *Sri Lanka: The Years of Terror, The JVP Insurrection 1987-89,* Colombo: Vijitha Yapa p 314.

[6] Initial competition for economic advancement after the 1833 reforms naturally favoured the elite class over the peasant. Moreover it was based on exploitation. Secondly whilst social mobility after independence increased, the lack of a social vision and the perpetuation of colonial forms of administration and justice including the dominance of English ensured that the villager would always remain a second class citizen.

[7] Hettiarachchy, Tilak (1982) *The Sinhala Peasant in a Changing Society: Ecological Change among the Sinhala Peasants from 1796 to 1909,* Lake House Investments: Colombo p 98.

[8] Ibid, p 97.

It is postulated by the attachment theory that the internal working model 'predicts continuity and the inter-generational transmission of relationships.'[9]

It would also be a mistake to assume that psycho-social insecurity is an issue of the marginalized. On the contrary it is as much an issue with all agents of dualism – irrespective of class, for at the bottom of every kind of anti-social behaviour among both the leaders and the led is a sense of insecurity that finds ready fuel in a society trapped within a judgemental and punitive mould. The deeper the insecurity the greater the excesses the leaders commit their followers to. A pre-occupation with forms and matter instilled by the British Raj and perpetuated since 'independence' continues to dominate contemporary thought and action.

Faith in law and the pending revolution of thought

Having pitted man against man in the economic and social spheres the British *imposed* on the island their tried and tested model of adversarial justice for the resolution of the inevitable disputes that proliferated. This was done against the better judgement of civil servants and visitors who pointed out to the rulers and the Colonial Office the unsuitability of the system of courts to the conditions in Sri Lanka.[10] As Hettiarachchy pointed out,

> *The new system of justice was an essential pre-requisite for the establishment and maintenance of capitalist relations of production. Hence it is quite understandable that the British administration was so much concerned about establishing the rule of law in the island than doing justice to the peasants.*[11]

Skinner wrote that the only people who benefited from the judicial system were the government which benefited through stamp fees and the new class of Western educated lawyers.[12] All these observations remain accurate more than 100 years later as the design, structure and function of the capitalist model and its adjuncts remain essentially the same.

Insecure societies are characterised by the worship of forms and symbols. This takes expression in Sri Lankan society through an abiding faith in law as the provider of solutions to all human problems. This is the classic primacy of form over substance. As Lanerolle points out with reference to historical periods of decline, 'the effort of learned men was not to exercise their wisdom to find ways and means of solving problems pertaining to man's welfare but to study and promote rituals …'[13] Within a narrow dualistic framework which does not accommodate human values there is no structural

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[9] George C. (1996) A representational perspective of child abuse and prevention: internal working models of attachment and care-giving. *Child Abuse and Neglect,* **20**(5): 411-424, 417: This is obviously a fruitful area for research but understanding them as victims of history also provides a clear basis for weaning society away from punitive reactions to intra-family abuse and neglect.

[10] *Op cit supra* n 7 p 103.
[11] Ibid, p 105.
[12] Skinner, Major Thomas (1891) *Fifty years in Ceylon. An Autobiography,* ed. Annie Skinner: London.
[13] Lanerolle, S.D.de (1976) *Origins of Sinhala Culture,* Colombo: Lake House p 24.

orientation or inducement for lawyers to act in a socially responsible manner. By working to preserve the majesty and authority of the law, which in a dualist system is part fiction and part truth, they act in a fundamental sense as guardians and upholders of the status quo. Inasmuch as they stop short of acknowledging their own complicity in maintaining this edifice of deception they become part of it; imprisoned by self – interest. As Marx and Engels wrote in 1848:

> *The Bourgeoisie has stripped of its halo every occupation hitherto honoured and looked up to with reverent awe. It has converted the physician, the lawyer, the priest, the poet, the man of science, into its paid wage labourers.*[14]

Trapped within dualistic formalism and the enduring appeal of power (as opposed to faith and reason) as an instrument of social change – a mindset that has sunk deep into the consciousness of both the common man and the professional, Sri Lankan society awaits the bursting forth of 'the light of ancient cultures … to subject every social institution to an intellectual scrutiny it had never faced before.'[15]

Myth of modernity and faith in professionals

Inequality is a psychological condition more than a fact of life. Outward appearances cloak the fact that life is essentially a search for food, clothing, shelter and companionship. Those who fulfil these needs for themselves and their families are autonomous and can devote their energies towards helping their less fortunate fellow beings.[16] Modernity is a myth that complicates this home truth and drives man in an endless search for 'self-fulfilment.' The stage is set for this rat race by depriving men and women of their autonomy. This was a relatively easy task for the British faced with a leaderless population after the suppression of the war of 1818. What commenced as an assault on the dignity of the human being took on the sophisticated capitalist guise of a battery on the senses.

This assault and battery continues today. Upward mobility serves to take the endless search to different levels, but it does not put an end to the search. As the professional structure is not geared towards *service* young men and women who achieve their cherished ambition of becoming a professionals discover that their positive energies are trapped by a professional identity that is not located within a larger Sri Lankan identity. Their work maintains the capitalist structure but does not advance society as a whole. Lacking institutional direction for progressive action they rationalise complacency by directing their light outwards. There is much *learning* but very little service and a great deal of suffering in the world outside. Professionals are well placed to break this vicious cycle but this requires a holistic vision and an enlightened leadership that goes beyond reason into the realm of caring. But the idea that only professionals can promote meaningful social change is also a myth of modernity.

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[14] Marx, Karl and Engels Frederick (1848) *Manifesto of the Communist Party,* English Edition p 53.

[15] Weeramantry, C.G. (1976) in *Equality and Freedom: Some Third World Perspectives,* Sarvodaya Vishva Lekha: Colombo p 31.

Cultural approach to national unity

With the break up of the irrigation civilisation in 1235 the island of Sri Lanka entered a period of decline with a succession of devastating invasions from South India. Magha of Kalinga established the Jaffna Kingdom around this time. The only King to unite the island after the Polonnaruva Period (1055 – 1215 AD) was Parakramabahu VI of Kotte who ruled during the first half of the 15th century. Immediately upon his death in 1566 the Jaffna Kingdom which had earlier been an extension of the South Indian Vijayanagar Empire arose independently in its own right. Western interference since 1505 postponed beyond 1948 a genuine political settlement between the Sinhalese and Jaffna Tamils.

That settlement must be distinguished from *communalism,* that bias and mistrust between men on the basis of race and language, which in its present form can hardly be traced back even to the 19th century.[17] As Mendis puts it 'it came into existence as a result of the rise of the middle class, and the conflicts are mainly due to a struggle within the middle class itself for the spoils won from the British through the recent constitutional reforms.'[18] Indeed socially and culturally the Sinhalese and Tamil *people* are heirs to a historically peaceful mode of co-existence, based on the holistic principle of essential unity between spirituality and pragmatism. As Barnett said,

> *Aryan and Dravidian influences, as well as some lesser currents, have worked to create the patterns of Sinhalese life; and although they have in some measure impinged upon one another, Aryan and Dravidian have remained fundamentally distinct. Nevertheless this distinction has often in the past allowed the various communities of Ceylon to co-operate in social service to their common homeland ...*[19] *(Emphasis added)*

The position of the Muslims is somewhat different but, they too hardly ever came into conflict with the other communities in the nineteenth century. Moreover the Islamic conception of human rights *also* emanates from the original religious system itself and from the main sources of Islamic law.[20] Islamic society just as much as the Sinhala and Tamil societies need to re-connect with their cultural roots where their true strength lies in order to mould and shape their own conceptions of equality and freedom. This process will take place away from corridors of power and narrow dualist discussions on the best *form* a new constitution should take. The people of Sri Lanka do not need to conduct a purely secular oppositional struggle to win their rights on a purely secular basis as Locke, Rousseau and Paine did in the West. According to Rollo;

> *Since the early teachings of the Upanishads, right down through Hindu, Buddhist, Muslim and Christian traditions, we can find a common light guiding us toward the concept of unity. Toward the fact that human*

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[16] This logic is true for nations as well. This is not utopian but common sense. Needs are the highway on which man should remain. Wants are a sidetrack; a temporary diversion. The present world order is a labyrinth or maze of side tracks – a triumph of deception over reality.

[17] *Op cit supra* n 2 pp 97-107.

[18] Ibid p 97.

[19] From the foreword to ***Society in Mediaeval Ceylon*** (1956) Ceylon Government Press, by Prof M.B. Ariyapala written by Dr L.D. Barnett of the School of Oriental and African Studies, University of London

[20] Weeramantry, C.G. (1988) *Islamic Jurisprudence: An International Perspective,* Colombo: Sarvodaya Vishva Lekha p 121.

mental health and social harmony are best achieved in an atmosphere that fosters equality, inclusion within the commonwealth of man, and a faith in the positive potential of the life experience. "Inclusion" is a general sense of "oneness" or "connectedness" with the fate of others and the welfare of the surrounding universe.[21]

Cultural changes take place in the related spheres of religion, literature, music architecture, sculpture, painting, sports, learning and thought. As opposed to acts of terrorism and insurgency they are peaceful and therefore constructive expressions of human psychology. They are the finest modes of appealing to the minds and hearts of the people. The deep and silent messages they convey have endured and will endure for centuries. Cultural changes as opposed to political happenings do not take place on the surface. *They move like an underground river obeying their own laws.*[22]

Negative legal system

The British legal system which was received in the island was meant for a society with a strong and effective administration in which conflicts were the exception, not the norm. Both civil and criminal courts are hierarchical, backward looking, adversarial and rigid both in regard to procedures and remedies. They administer legal justice on a convenient assumption of social justice. Never designed with the interests of the common man in mind they will never become vehicles of social justice in their present form. In particular, barriers to communication posed by the domination of lawyers perpetuate the dependency and powerlessness of ordinary people.

Social action litigation initiated by the Indian Supreme Court was a pro-active response towards shaping remedies according to the needs of the people. The minimalist maintenance function of our courts has been found increasingly wanting. However radical reforms must await the re-discovery of a conception of justice that is not bought and sold as a commodity but made available to all citizens as a matter of right. The legal profession has a key role to play but this cannot be done as long as men and women of ability specialise in commercial law to become unwitting facilitators of an exploitative economy lacking any kind of social vision.

Indigenous values of inclusion, participation and inter-dependence which formed the bedrock of the peasant agricultural economy were replaced by the British who introduced the principle of *competition*. However State management of the economy with its monopolies and controls from 1815 to 1977 served to keep in check the adverse effects of unregulated competition. Moreover the participatory and democratic form of government provided by the Westminster model was also retained by a fully independent Sri Lanka after 1972. What happened after 1977 represents a costly experiment that failed for all Sri Lankans. In short it demonstrated the fallacy of the dualistic notion that social development can be postponed until the attainment of economic development. The

[21] Rollo, Ned (1998) No one trust their enemies! http://www.openinc.org/articles/alienation.html Viewed: 18 April 2003.

[22] *Op cit supra* n 2 p 27.

experience of the West and Japan teaches us that an egalitarian social vision must go hand in hand with a realistic and sustainable economic policy for there to be true national progress.

The 1978 Constitution

The second republican constitution transferred effective power from Parliament to an elected President. Government as a participatory democratic process was thereby undermined and this entailed an overall loss of freedom. Secondly the nation was committed to a speedy process of narrow economic development. The Constitution was a document that opened the door to the foreign investor and *enabled* **competition** without adequate protection for the powerless, weak and marginalized sectors. Article 12(1) declared that *All persons are equal before the law.* But as Dr. N.M. Perera pointed out, its practical effect was 'justice for the rich and freedom for the poor to starve.'

This Constitution is an interesting document as it acknowledges holism and social justice as **the goal** of a *Just and Free Society* in Chapter VI entitled *Directive Principles of State Policy.* Three of its provisions are set out below:

Article 27 (2) (c)
... the realization by all citizens of an adequate standard of living for themselves and their families, including adequate food, clothing and housing ...

Article 27 (2) (g)
... raising the moral and cultural standards of the People, and ensuring the full development of human personality

Article 27 (7)
The State shall eliminate economic and social privilege and disparity, and the exploitation of man by man or by the State.

Article 27(9) rounds up this impressive chapter by stating in legal jargon that the State does not wish to undertake these obligations as a matter of law. Presumably this was to facilitate a principle of state policy that embraced the post-colonial development project in the following terms:

Article 27(2)(d)
The rapid development of the whole country by means of public and private economic activity ...

Accordingly the attainment of social justice was postponed. This was the classic dualist approach. Having thus evaded its primary responsibility the State undertook to provide legal justice in adversarial proceedings in the Supreme Court. What this meant was that a person had to await the imminent or actual infringement of his fundamental rights and thereafter have recourse to the highest Court in the land for 'justice' after the violation. A quarter century of fundamental rights litigation has failed to dislodge the wedge placed between the State and the individual by the very nature of those proceedings. It turned out to be another form of competition between man and man rather than an instrument of peace and justice. The fundamental rights jurisdiction has seen high points as well as low but like every other state institution it is trapped within dualism – a consequence of seeing reality

through legal spectacles in a society steeped in separation and an exclusive reliance on coercive justice. This is bound to continue until violations are seen as *opportunities* for healing, restoration and reconciliation and investigations into underlying causes.

The post 1977 period represented the grand climax of a gradual negative process which had taken a decisive turn with the Sinhala-Buddhist revival[23] of 1956. Misled by the symbolism of language the events of 1956 polarised both the Sinhala and Tamil communities. In the year 2002, the negative, dualistic and self-destructive spiral, which the nation suffered from previously, ended through a commitment to holism which took the form of a non-judgemental commitment to a negotiated settlement. Furthermore the will of the people was respected in an act of sanity which restored the Westminster form of government in *practice* – notwithstanding the elected President remaining in office.

With the dawn of peace great expectations have also dawned upon this island that the holistic approach would not be confined to the peace process but would illuminate the path towards the attainment of social justice and social citizenship for all members of the Sri Lankan family. Chapter VI of the Constitution stands eloquent testimony to a lost opportunity that has come our way again. *The raison d'etre* for the existence of a State and the true fundamental human rights of the people are laid down in this Chapter.

Conclusion; Why human rights?

'Human rights' in their present form, is a recent development in the history of mankind. It asserts the obvious and seeks to restore a portion of humanity who *lost* their human status with the proliferation of power (in economic terms) that accompanied the decline of monarchies and the rise of a capitalist middle class. Thus the short answer to the question posed is *exploitation of man by man in a manner hitherto unprecedented in human history.* The following extract from the *Manifesto of the Communist Party*[24] written in 1848 rings remarkably true of globalised capitalism today.

> *The bourgeoisie, wherever it has got the upper hand, has put an end to all feudal patriarchal, idyllic* ***relations****. It has pitilessly torn asunder the motley ties that bound man to his "natural superiors," and has left remaining no other nexus between man and man than naked self-interest, than callous "cash payment." It has drowned the most heavenly ecstasies of religious favour, of chivalrous enthusiasm, of philistine sentimentalism, in the icy water of egotistical calculation. It has resolved personal worth into exchange value, and in place of the numberless indefeasible chartered freedoms, has set up that single, unconscionable freedom –* ***Free Trade****. In one word for exploitation, veiled by religious and political illusions, it has substituted naked shameless, direct brutal exploitation (Emphasis added.)*

[23] Which took a narrow political turn thereafter

[24] *Op cit supra* n 14 p 66.

The original approach to human rights based on the French and American Declarations of the 18th century sought to protect the individual against the State without addressing the issue of capitalism. After the Second World War, Bills of Rights adopted the world over likewise recognised individual rights in opposition to State power. These rights were based upon an assumption of relative socio-economic equality. This assumption apart from being a downright falsehood in the Third World actually served to continuously erode the quality of existence of the marginalized within, including women, the aged, the disabled, children and young persons, the poor, the displaced, indigenous peoples, minorities etc.

Moreover in the form in which it was stated human rights failed to unify the people around human values. Secondly reluctance on the part of States to undertake the commitment of economic resources as a matter of human rights ensured that the basic structure of exploitation remained undisturbed. This has permitted exploitation to continue unabated in the island, in the name of political illusions in the North and economic illusions in the South. Pre-occupied with phantom dragons, Sri Lankans continue to ignore their real enemy – *economic exploitation.* Is this destined to continue? It would appear not.

The day will soon dawn when limited environmental resources will force people to adopt lifestyles which are more realistic and in harmony with nature. Secondly a new alliance between the exploited masses and humane professionals will guide mankind towards an inclusive conception of justice and truth which abandons form in favour of substance. With this will end in Sri Lanka the western forms of domination perpetuated by coercion, ideological mystification and mastery since 1833. It has been forecast that this will not be an isolated movement but a global one. According to Verhelst in 1966

> *The future of the planet cannot and will not be the simple continuation of the present neo-conservative capitalism. That economic system will never deliver the good of development and welfarism to all of us. The frustration and anger of the jobless and the hungry (and unfulfilled?) will be increasingly corroborated by the loss of confidence by a growing part of humankind in the progress and happiness promised by capitalism and its "development". Immanuel Wallerstein believes that capitalism may collapse, not primarily because it is lacking in economic technology to adjust to the crises but due to the fundamental lack of legitimacy in the eyes of both North and the South.*[25]

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[25] Quoted by Carmen, R (1997) 'How much is enough?' in *Development: The Journal of the Society for International Development,* Vol 40, No. 2, June 1997, Rome Italy.

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