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LST REVIEW

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Children's Rights in Sri Lanka & Human Rights in Cambodia

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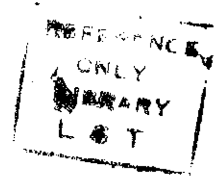
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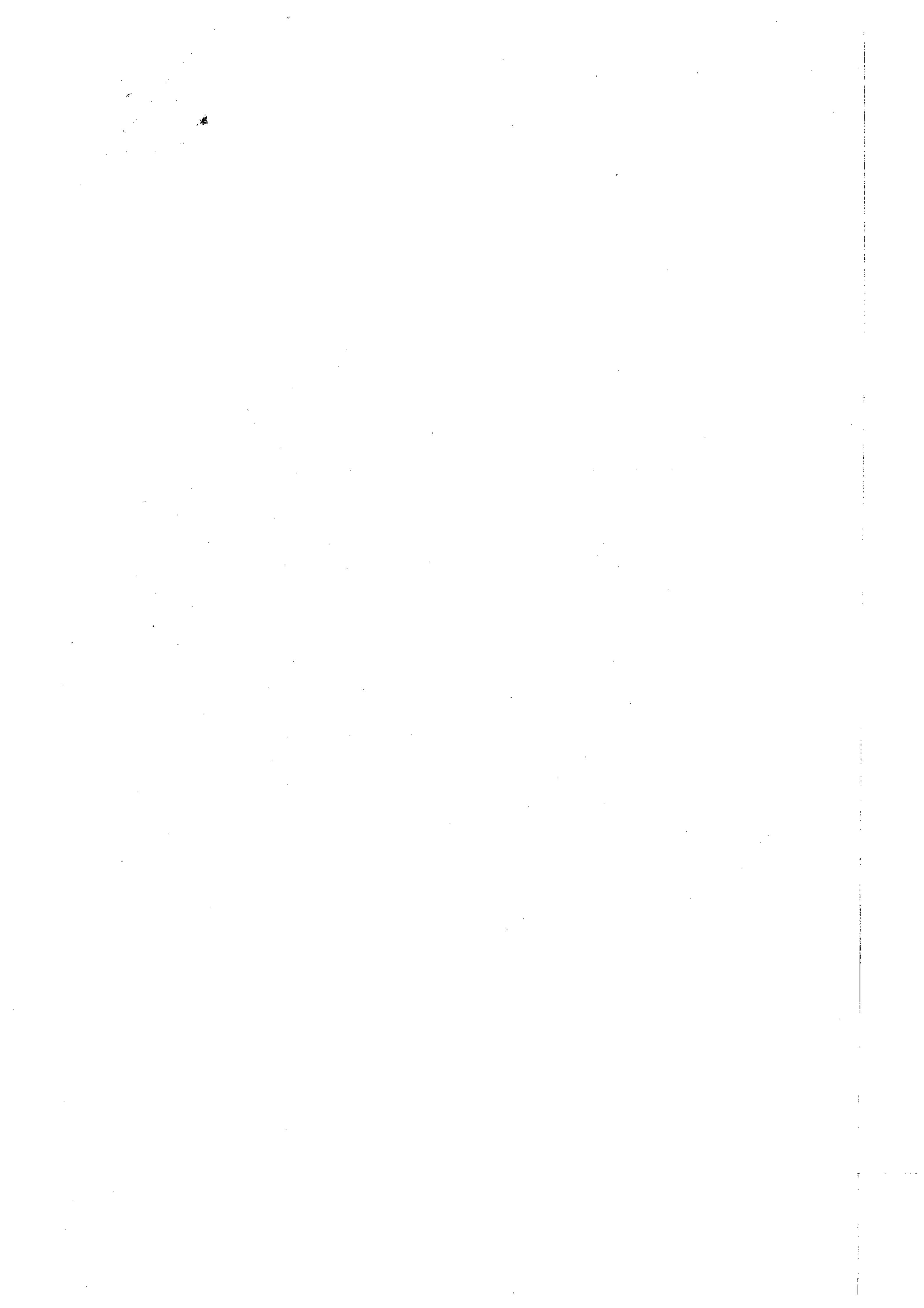
Editor's note.....

In this issue we publish a report prepared by Pam Singh, intern, Law & Society Trust, on the law relating to children's rights in Sri Lanka. In her report she discusses the relevant international standards applicable to child labour, child abuse and children in the legal process and evaluates the municipal law relating to these issues against these international standards. She also discusses the obligations of the international community in ensuring the compliance of the international standards by signatories to these international instruments. Having evaluated the municipal law in the light of the provisions in the Convention on the Rights of the child, she makes several recommendations including, amending the law, allocation of more resources, training of personnel etc.

We also publish the extracts from Olara Otunnu's report on Sri Lanka pursuant to his visit last year. He refers to the meetings he had with representatives of the government as well as those of the LTTE and states that several commitments were made by both parties with regard to the human rights situation in the country. These commitments include: the provision and distribution of humanitarian supplies; the free movement of displaced populations; the non-recruitment of children in hostilities; observing the Convention on the Rights of the Child; and non-targeting of civilian populations and sites. He also expressed concern about the use of the landmines by both parties to the conflict.

A report by the High Commissioner for Human Rights on Extrajudicial Executions in Cambodia is also published in this issue.



AN EVALUATION OF LAWS RELATING TO CHILDREN'S RIGHTS IN SRI LANKA

Pam Singh[*]

Introduction

Children are the most vulnerable group in society and as such, require special protection for their well-being. The necessity of protecting children from harm and promoting their development transcends cultural barriers. Recognition of this universal need to protect children's rights materialised in international law with the adoption of the United Nations Convention on the Rights of the child.[1] The extraordinarily wide ratification of the CRC reinforces the belief that children occupy a special place in international law. However, despite the importance attributed to children's rights at the international level, ratification does not always amount to domestic compliance with international standards. This is currently the case in Sri Lanka.

An analysis of the protection of children's rights in Sri Lanka will be done in the following manner. Part I will survey the relevant international standards binding upon Sri Lanka relating to child labour, child abuse and children in the legal process, respectively. Part II will outline the present situation of children's rights with respect to the above issues and discuss the extent of Sri Lanka's lack of compliance with its international commitments. Part III will attempt to elucidate the reasons for the absence of compliance with international law. Finally, Part IV will put forward suggestions directed towards both Sri Lanka in particular and the international community in general so as to improve Sri Lanka's compliance with its international commitments. It is hoped that this analysis will have a positive effect on the effort to improve children's rights in Sri Lanka.

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

Part I : Relevant International Standards

The UN Declaration of the Rights of the Child imposes a duty on all states to protect children because "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection."[2] While not binding, the Declaration is an important statement of policy outlining the necessity of extending special protection to children to ensure their development. This policy is the underlying rationale for all international legal norms requiring states to protect children. With respect to Sri Lanka, there are several standards that are applicable in evaluating the duty under international law to protect and promote children's rights. These standards, in descending order of relevance, will be discussed in detail below with respect to child labour, child abuse and the treatment of children in the legal process, respectively.

A. Child Labour

The most authoritative statement of international law with respect to eliminating child labour is found in the CRC, which was ratified by Sri Lanka on 12 July 1991. Specifically, Article 32 (1) of the CRC requires that

> *State Parties recognise the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with a child's education...health or physical, mental, spiritual, moral or social development.*

It is important to note that this provision makes the crucial link between ensuring a child's education and limiting a child's employment to promote his/her proper development. Article 32(2) further outlines the obligation that states must "take legislative, administrative, social and educational measures to ensure the implementation of the present article." According to Article 32(2) the CRC, this is to be achieved by (a) promulgating regulations on a minimum age of employment, (b) providing appropriate regulation of hours and conditions of employment, and (c) providing appropriate sanctions to ensure the effective enforcement of the aforementioned measures.

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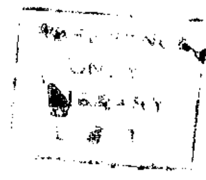
[2] *United Nations Declaration of the Rights of the Child*, 20 November 1959, UNGA Res. 1386.



The second binding instrument of international law that applies to child labour is the International Covenant on Economic, Social and Cultural Rights.[3] Specifically, Article 10(3) requires that states take special measures with respect to young people, ensuring "their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law." In addition, the state should "set age limits below which the paid employment of child labour should be prohibited and punishable by law." Thus, while the ICESCR's treatment of child labour is more general than that found in the CRC, it is a strong reinforcement of the CRC's mandate at international law and further illustrates the pressing need to eliminate exploitative child labour practices.

Another binding instrument that could be interpreted as applying in relation to child labour is the International Covenant on Civil and Political Rights.[4] Specifically, Article 24 requires that "every child shall have...the right to such measures of protection as are required by his status as a minor," thereby imposing a broad duty of care on the state to protect children from those factors undermining his/her development. This could be easily extended to include protection of children from exploitative labour practices which threaten a child's development.

The third relevant international standard pertinent to the elimination of abusive child labour practices is the ILO Convention No. 138 (1973).[5] While Sri Lanka has not yet ratified this instrument, it has been ratified by 62 countries, thus making it evidence of a binding norm with respect to labour practices involving children. Article 1 of the ILO Convention holds that each member state shall:

> *pursue a national policy designed to ensure the effective abolition of child labour and to raise progressively the minimum age for admission to employment or work to a level consistent with the fullest physical and mental development of young persons.*

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[3] *International Covenant on Economic, Social and Cultural Rights*, UNGA Res. 2200, 21 UN GAOR, Supp. (No.16)52, UN Doc. A/6316 (1966), 993 UNTS 3 (ratified by Sri Lanka on 11 June 1980) [hereinafter ICESCR].

[4] *International Covenant on Civil and Political Rights*, 19 December 1966, Can. T.S. 1976 No. 47, 999 U.N.T.S. 171, 6 I.L.M. 368 (ratified on 11 June 1980) [hereinafter ICCPR].

[5] Hereinafter ILO Convention.

Article 2(3) specifies that the minimum age for children to be employed "shall be not less than the age of completion of compulsory schooling and, in any case, shall not be less than 15 years." Article 2(4) does, however, provide an exception for those less developed countries, allowing them to "initially specify a minimum age of 14 years." Furthermore, Article 3(1) prohibits children under 18 years from employed in an undertaking that "in any way jeopardises [their] health, safety or morals."

The ILO Convention has been supplemented by ILO Recommendation 146 (1973)[6], which is not binding on states but is a useful interpretative tool. Specifically, Section 7(2) urges states to take "urgent steps" to raise the minimum age of employment to 15 years in all areas of employment. With respect to conditions of employment, section 12(1) requires states to ensure that the working conditions of young persons under 18 years are maintained "at a satisfactory standard," and shall in turn be supervised to ensure adherence. Section 14(3) requires that "labour administration services should work in close co-operation with the services responsible for the education..." of children, further illustrating the important link between education and employment stated above in the CRC.

B. Child Abuse

Child abuse, both physical and sexual, is outlined in the CRC. With respect to physical and mental abuse, Article 19(1) obliges states to

> *take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical and mental violence, injury or abuse... while in the care of parents(s), legal guardian(s) or any other person who has care of the child.*

Article 19(2) further requires states to take appropriate measures to include "effective procedures for the establishment of social programmes to provide necessary support for the child." In addition, while recognising the importance of school discipline to a child's education, Article 28(2) requires State Parties to take all measures to ensure that "school discipline is administered in a manner consistent with the child's human dignity." Article

[6] Hereinafter ILO Recommendation.

37 (a) also imposes a general protection for children against physical abuse, obliging State Parties to ensure that "no child ...be subjected to torture or other cruel, inhuman or degrading treatment or punishment." Thus, these provisions taken together can be interpreted to dictate absolutely against the use of corporal punishment by both parents and school officials.

Further, Article 7 of the ICCPR asserts generally that "no one shall be subjected to torture or to cruel, inhuman or degrading punishment." Hence, imposing a general duty on the state to protect all persons from torture and cruelty in turn reinforces the CRC's commitment to protect children from harm, given the special protection accorded to children because of their vulnerability. Thus, corporal punishment is not acceptable under any circumstances. In addition, Article 24, discussed above with respect to child labour, can also be extended to protect children from physical abuse to ensure adequate development.

With respect to sexual abuse and exploitation, Article 32 requires states to "protect the child from all forms of sexual exploitation and sexual abuse." State parties are required to take all appropriate measures, including bilateral and multilateral measures to prevent: (a) coercing children to engage "in any unlawful sexual activity," (b) the exploitative use of children in prostitution and (c) the exploitative use of children in pornography.

C. Children in the Legal Process

In discussing children in the legal process, the main focus will be on the treatment of child victims of abuse after reporting incidents of abuse and/or exploitation. Article 3(1) of the CRC outlines the general obligation to recognise the best interests of the child as a primary consideration "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies." Article 3(3) addresses institutions in particular, obliging State Parties to ensure "that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities" in addition to maintaining suitable staff. Article 18 also imposes the obligation to "ensure the development of institutions, facilities and services for the care of children." In addressing the general treatment of children, Article 37(c) of the CRC states that all children, under whatever circumstance, who are "deprived of their liberty shall be separated

from adults." Further, Article 39 places the obligation on the state to take all necessary and appropriate measures to assist in the "recovery and social reintegration" of a child victim of "...... exploitation, abuse, torture or any other form of cruel, inhuman or degrading treatment or punishment..."

Another relevant instrument addressing children in the legal process is the UN Standard Minimum Rules for the Administration of Juvenile Justice (1985).[7] While these Rules are not binding under international law, they do provide a very useful international standard for the administration of juvenile justice. The Beijing Rules focus primarily on the administration of justice with respect to juvenile offenders, but there are several standards articulated that can be applied to all children involved in the legal process. Rule 13.1 identifies that "detention pending trial shall be used only as a measure of last resort and for the shortest possible period of time" because detention is recognised as being contrary to the best interests of the child. Similarly, Rule 19.1 states that "the placement of a juvenile in an institution shall always be a disposition of last resort and for the minimum necessary period." Thus, if detention and institutionalisation are the last resort for those children accused of committing an offence, then child victims of crime should not, under any circumstances, be put in detention. In addition, Rule 13.4 states that "juveniles under detention pending trial shall be kept separate from adults and shall be detained in a separate institution or in a separate part of an institution also holding adults," further reinforcing the standard articulated in Article 37(c) of the CRC. Rule 26.3 outlines the same standard with respect to institutions. Hence, if juvenile offenders are to be separated from adults, then correspondingly child victims should be separated from adult offenders, without exception. These standards are to be adhered to for the the best interests of the child in the administration of juvenile justice.

D. Obligations of the International Community

In addition to placing obligations on the state to protect and promote children's rights, the CRC also recognises the obligation of the international community to assist in a particular state's realisation of its goals concerning children. Specifically, in addition to requiring the state to take whatever legislative, administrative and other measures to implement to CRC, Article 4 also outlines that "State Parties shall undertake such measures to the maximum

[7] 29 November 1985, UNGA A/RES/40/33 [hereinafter "the Beijing Rules"].

extent of their resources and, where needed, within the framework of international co-operation." In addition, Article 28(3) reiterates the importance of international co-operation with respect to education to eliminate "ignorance and illiteracy throughout the world," particularly with respect to developing countries.

The obligation of the international community is reiterated in the World Declaration on the Survival, Protection and Development of Children.[8] Specifically, section 17 requires "a continued and concerted effort by all nations, through national action and international co-operation." This obligation is reiterated in the Plan of Action for Implementing the World Declaration on the Survival, Protection and Development of Children.[9] Section 22 states that children in difficult circumstances require protection from "national efforts and international co-operation." Further, section 31 urges "the international community ... to work with developing countries and relevant agencies to support debt relief for children." Thus, the above standards articulate the obligation on the international community to assist individual states, particularly developing states, realise their international obligations with respect to children.

Part II - Evaluation of the Situation in Sri Lanka

A. Child Labour

As outlined above, Sri Lanka has an obligation under Article 32 (1) of the CRC to take all of the necessary legislative and administrative steps to eliminate abusive and exploitative child labour practices. However, the problem of child labour persists in Sri Lanka. It is estimated that there are between one and two million "child labourers" below the age of 18 years in Sri Lanka.[10] While statutory provisions exist against exploitative labour practices, the limited applicability of these provisions reveal their inadequacy to end child labour exploitation. Moreover, the role of the family and current state education policies are instrumental in upholding exploitative child labour practices. Adding to this are problems regarding the complexity and confusion surrounding the existing legislation which precludes its proper

[8] 30 September 1990, New York, New York.
[9] 18 October 1990, UNGA A/45/625.
[10] S. Peiris, "Taking a Step Against Child Labour" (March 1998) 26 PEACE Newsletter 1.

enforcement. The lack of resources for enforcement of legislation and the mismanagement of existing resources, coupled with the administrative shortcomings in terms of judicial process and punishment of offenders further contribute to the persistence of the economic exploitation of children. These elements will be discussed in detail below.

i) Relevant Legislation

An examination of the provisions addressing child labour in Sri Lanka illustrates the state's limited effort at controlling child labour. The primary piece of legislation addressing child labour is the *Employment of Women, Children and Young Person's Act (1956)*,[11] which embodies a series of provisions aimed at regulating child labour practices.[12] The legislation prohibits the employment of children under 12 years, recognising that all work involving children younger than 12 years is considered prejudicial to their health and development.[13] However, children over 12 years can be employed in certain areas. The Employment Act regulates the types of permitted employment for children between 12-14 years. Specifically, section 2(b) of the Employment Act prohibits all persons under the age of 18 years from engaging in night work in industrial undertakings, and section 7(1) prohibits all children under 14 years from working in industry during the day. Section 9(1) further prohibits the employment of children below 14 years at sea. Furthermore, section 13(a) prohibits the employment of children under 14 years during school hours, subsection (e) prohibits children in this category from being employed to lift, carry or move any object likely to cause injury, and subsection (f) states no child can be involved in any occupation likely to be injurious to his life, limb, health, or education.

The protection of children and young persons is not only limited to the above provisions. Even amongst those permissible forms of employment, section 15 empowers the Commissioner of Labour to ban ordinarily permissible forms of employment if it can be proven to prejudice a child's health and

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[11] Hereinafter Employment Act.

[12] For the purposes of this paper, "children" will refer to describe those persons under 14 years, while "young person" will be used to describe persons between 14-18 years.

[13] S.W.E. Goonesekere, *Child Labour in Sri Lanka: Learning from the Past* (Geneva: International Labour Office, 1993) at p 28. It is important to note that adopting 12 years as the minimum legal requirement contravenes Article 2(3) of the ILO Convention, which states that the minimum age of employment "shall not be less than 15 years."

development. Moreover, various regulations have been promulgated under the Employment Act. For example, regulations introduced under the Employment Act have extended prohibitions on child labour to include scavenging; aviation; fishing and diving; working with earth-moving equipment, explosives, lead and chemicals; and working in the plantation sector, laboratories, hospitals, night clubs and theatres.[14] Thus, both section 15 and the regulations have in effect broadened the scope of protection offered by the Employment Act.

Employment of young persons over 14 years is also addressed by the Employment Act, the focus again being on the regulation of their employment rather than abolition. Section 2(b) prohibits children under 18 years from being employed in industry at night, but allows them to work in industry during the day. Regulations adopted under the Employment Act also specify that young persons between the ages of 14-16 years can work a maximum of 9 hours per day to a maximum of 50.5 hours per week. Those above 16 years can work an extra 5.5 hours per week.[15]

With respect to family undertakings, the Employment Act chooses a more deferential approach, as the protection accorded to children mentioned above does not apply to children in family enterprises. Specifically, section 7(2)(a) allows a child under 14 years to be employed in an industrial undertaking in which only members of the same family are employed, and section 8(2)(a) makes a similar exception with respect to undertakings at sea. It can also be presumed that the provisions applicable to children between 14-18 years will not apply in the case of family enterprises.

ii) Evaluation in the light of the CRC

An examination of the aforementioned provisions reveals that the existing legislation does not conform with the provisions of the CRC. Despite the protection accorded to children and young persons elsewhere in the Employment Act, the provisions relating to employment in family enterprises in industry and at sea undermine attempts to prohibit child labour. The decision not to regulate family enterprises is indicative of the state's belief that a flexible policy is needed to accommodate the necessity of child labour

[14] *Ibid* at p 35.

[15] *Ibid* at pp 37-8.

amongst the poor.[16] That is, there is a tendency amongst parents, particularly in poorer communities, to view the child as a valuable economic asset necessary to assist with the family's needs. Thus, the Employment Act's acceptance of child labour in family enterprises illustrates the state's recognition and subsequent endorsement of the perception of the child as a valuable economic resource essential to the short-term economic survival of the family. Thus, by failing to regulate family enterprises, the state inadvertently supports the employment and potential familial exploitation of all children, including those children under the minimum legal age of 12 years. Accordingly, the Labour Force Survey of 1990 conducted by the Department of Census and Statistics estimates that 82,000 children between 10-14 years are employed, of whom about 70% of the male children are unpaid family workers while 42% of the female children fall into this category.[17]

One explanation for this deference by the state with respect to family enterprises is the state's assumption that parents are necessarily concerned with protecting a child's best interests by virtue of their position as primary caregivers. However, as pointed out during the Parliamentary debate of the Employment Act, given the traditional values of the extended family system, family labour should also be controlled since it is potentially the greatest source of child labour abuse in Sri Lanka:[18] children in family enterprises are just as vulnerable as in other enterprises precisely because of the traditional focus on child obedience and parental respect. Moreover, health and safety standards are ignored due to the lack of state regulation, which correspondingly allows for the economic needs of the family to take precedence over a child's developmental needs when circumstances dictate.[19]

The gravity of this situation is intensified by increasingly market-oriented policies by the state to attract capital investment.[20] The focus on consumerism creates the risk of further entrenching familial child labour practices, as economic interests become even more paramount within the family. Correspondingly, as the state becomes more industrialised and focuses

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[16] *Ibid* at p 28.
[17] *Report on the Implementation of the Convention on the Rights of the Child 1994* at p 38.
[18] *Supra* n 13 at p 29.
[19] *Ibid* at p 4.
[20] S.W.E. Goonesekere, *Children, the Law and Justice: A South Asian Perspective* (New Delhi: Sage Publications India Pvt Ltd, 1998) at p 111.

more on the private sector, there will likely be an increased demand for children and young persons as docile, cheap labour.[21] Moreover, increased focus on the private sector often occurs at the expense of social welfare programmes designed to assist families. The revocation of such programmes in turn forces parents to rely on their children's labour to fill the gap.[22]

The persistence of child labour practices is also the result of the lack of enforcement of legislation compelling parents to send children under 14 years to school. Consequently, poor households dependent on family labour are likely to draw on their children at the expense of their education.[23] Monitoring of school attendance has long since ceased, as the state has neglected to either appoint officials to carry out this work or to initiate prosecutions.[24] The urgent need to recognise the link between mandatory education and child labour is implicit in the CRC which is intolerant of those labour practices which "interfere with the child's education" [Article 32(1)]. Thus, the failure to monitor school attendance directly corresponds to the state's failure to make this crucial connection, in violation of Article 32(1) of the CRC.[25] The ILO Convention also makes the essential connection between employment and education, and it could be strongly argued that Sri Lanka's failure to ratify the ILO Convention further demonstrates its questionable commitment to the eventual elimination of exploitative child labour practices.

In addition to the lack of regulation governing family enterprises and the failure to enforce provisions relating to compulsory schooling, the current method of controlling child labour based on age and occupation has created a framework for regulating child labour that is both complex and confusing. The varying age requirements for different occupations makes it difficult for

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[21] *Ibid* at 221.

[22] The failure to adequately regulate family enterprises could also reflect the state's attitude towards the child as an inextricable member of the family unit, thereby indirectly facilitating the exploitation of children by their parents in the name of family privacy. Children therefore, require recognition of their autonomy to preclude arguments asserting family privacy to justify exploitative labour practices for short term economic survival. This assumption of autonomy is inherent in the CRC's statement of the rights of the child and the protection required to ensure that these rights are respected.

[23] *Supra* n 13 at p 38.

[24] *Ibid* at p 61.

[25] It could also be strongly argued that the failure to monitor school attendance is a violation of Article 28(1)(e) of the CRC, which obliges states to "take measures to encourage regular attendance at schools."

potential employers to understand these regulations and for law enforcement officers to monitor.[26] Furthermore, while the promulgation of regulations has somewhat expanded the scope of the Employment Act, the numerous regulations that have been adopted to expand the scope of the Employment Act have exacerbated problems of confusion and uncertainty. Moreover, some regulations are very ambiguous in the protection offered to children. For example, a child between 12-14 years can be employed in domestic service, subject to some qualifications, even though this type of work places the child in the employer's custody and can prejudice both physical and mental well-being.[27] Because of the potential detrimental effects on children, regulating rather than banning child employment in domestic services is a violation of Article 32(1) of the CRC, which obliges states to protect the child from economic exploitation that interferes with a child's health, well-being and education. This is also in violation of Article 10(3) of the ICESCR, which dictates against the employment of children where it is likely to harm their morals and hamper their normal development.

The ambiguity inherent in legislating against certain types of child labour while allowing others equally harmful indicates the state's haphazard approach toward establishing a regulatory framework with respect to child labour. This, in turn, impedes effective enforcement of the provisions of the Employment Act. In the formal sector, this is largely the result of apathy with respect to demystifying the complex regulation of certain activities, whereas in the informal sector, lack of enforcement is due to ignorance of the numerous provisions and regulations. The piecemeal sanctions that accompany these provisions augment problems of confusion because many provisions carry different penalties. This, in turn, creates more justifications for the lack of enforcement.[28]

In addition, there is a marked lack of enforcement of the provisions aimed at protecting young persons between 14-18 years, in large part due to the

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[26] S. de Soysa, "Children's Rights" in *Sri Lanka: State of Human Right Report 1997* (Law & Society Trust, Colombo, 1997) at p 220.
[27] *Supra* n 13 at p 35.
[28] Effective enforcement of the protection is also undermined by the vagueness inherent in the existing legislation. For example, in section 13(e) and (f) of the Employment Act, references to the "likelihood" of causing injury to children under 14 years provide sufficient ambiguity to allow wide interpretation of the law, often providing employers with greater protection than their child employees, *ibid.*

acceptance of these workers in the general workforce,[29] because this means that employers are apathetic in granting the protections outlined in the Employment Act to young persons they view as 'ordinary' employees. Even if these provisions are enforced, they can hardly be said to be conducive to promoting a young person's health and development. Allowing a young person over 14 years to work 50.5 hours a week does not guarantee adequate rest and leisure time essential for a child's development.[30] In addition, permitting a young person over 14 years to work up to 50.5 hours a week inadvertently contributes to the drop-out rate from secondary education amongst those 14 years and older, particularly in poorer communities. This is particularly pertinent when the ILO standard of 15 years for compulsory education is considered.[31] Thus, examining the existing protection for young persons between 14-18 years reveals an ambiguous commitment by Sri Lanka towards the elimination of exploitative child labour practices.

Another key factor in the persistence of exploitative child labour practices is the lack of resources aimed at enforcing child labour protections and the mismanagement of existing resources. At present, the Women and Children's Affairs Division of the Ministry of Labour is responsible for enforcing child labour laws. The Labour Division is understaffed, as only seven people are working in this division to monitor child labour laws for the entire island.[32] The Division is headed by a Deputy Commissioner of Labour, who claims that these offices are poorly equipped and there are no reliable statistics on child labour with which to work.[33] Admittedly, the government has established several agencies to monitor the situation of children in general, such as the Children's Secretariat and the Women and Children's Bureau of the Colombo City Police. The mandate of the newly-created National Child Protection Authority (1998) include addressing issues of child labour. However, the

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[29] *Ibid* at p 39.

[30] *Ibid* at p 37.

[31] While the state may try to argue that the standard of 14 years is applicable due to the insufficiently developed economy and educational facilities via Article 2(4), one needs only look to the progressive education policy in Sri Lanka since 1945 and the initial enforcement of mandatory education.

[32] Information supplied during an interview on 24 July 1998 with Mr. Arun Tampoe, a prominent lawyer and child-rights activist in Colombo. It should be mentioned that some of this authority has been delegated to Probation Officers. However, given that these officers are already over-worked, which has been exacerbated by the fact that there is a general decline of the number of officers due to financial constraints, the impact of this delegation is very limited.

[33] *Supra* n 13 at p 49.

creation of so many agencies illustrates the inefficient use of available resources, resulting in duplication of work. The government is too vertical in its approach to children's rights; its narrow focus results in a piecemeal and, therefore, ineffective approach to dealing with problems related to the realisation of children's rights.[34] This is intensified by the fact that these agencies rarely collaborate.[35] Thus, in addition to lacking in resources, these units lack the commitment and the capacity for independent monitoring of action in the interests of children.[36] The current lack of resources directed towards the elimination of exploitative labour practices is, therefore, in violation of Article 32(2) of the CRC, which obliges states to take all necessary legislative, social, educational and administrative measures towards eliminating exploitative child labour practices.

The apathy found in the agencies mandated to protect children's rights is also found amongst the judiciary. This is encouraged by the lack of co-ordination between the differing law enforcement agencies on matters concerning children.[37] Although there is a juvenile court exclusively for children, the juvenile judge does not have jurisdiction to impose sanctions on transgressors of children's rights. Prosecution of an adult employer for violating child labour laws requires permission from the Commissioner of Labour, which in turn must be handled by the Women's and Children's Unit of the Ministry of Labour.[38] Given the lack of resources of the Women's and Children's Unit, and the absence of dedicated staff this is rarely done. Rather, it is more common for exploiters of child labour to simply issue a compensatory sum in the child's name.[39] Moreover, in enacting a settlement for a child domestic servant, judges very often only account for the cost of the physical labour performed by a child and not the emotional trauma that the child may have suffered.[40] In addition, a child is rarely compensated for injuries suffered during employment. The efficiency of this settlement procedure is preferred by judges over punishing offenders through a reference to the magistrate's court. However, allowing efficiency to supersede punishment ignores the concept of deterrence, which is illustrated by the employer's ability and the

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[34] Interview with S.W.E. Goonesekere, 5 August 1998.
[35] *Supra* n 13.
[36] *Supra* n 20 at p 362.
[37] *Supra* n 13 at p 33.
[38] *Supra* n 20 at p 278.
[39] *Supra* n 13 at p 54.
[40] V. Samaraweera, *Report on the Abused Child and the Legal Process of Sri Lanka*, Submitted to the National Committee on the Children's Charter, 4 July 1997 at 82.

willingness to pay.[41] Thus, the leniency in the law in this regard clearly encourages the exploitation of children at work.[42] The lack of deterrence with respect to child abuse by employers, in turn, encourages the abuse of child workers, worsening their exploitation. Hence, reticence by the judiciary to effectively punish abusers of child labour is a key factor in the persistence of exploitative child labour practices in Sri Lanka.

Hence, as illustrated above, perceptions of the child as an economic resource necessary for family survival, coupled with legislative ambiguity, administrative inefficiency and judicial apathy contribute to the persistence of exploitative child labour practices in Sri Lanka.

B. Child Abuse

In Sri Lanka, the approach to child abuse is very ambiguous. With respect to physical abuse, until recently, there has been a lack of legislation addressing the problem. On the contrary, legislation permits corporal punishment of child offenders, in addition to allowing the use of moderate forms of corporal punishment by parents and teachers in certain situations. This deference to custodial authority in disciplining a child reflects the state's unwillingness to transgress the notion of family privacy to protect children, a view that is unacceptable in the light of the provisions of the CRC. By contrast, with respect to the sexual abuse of children, the state has taken a more proactive approach with the new amendments made to the Penal Code in 1995. The amendments have redefined old notions of sexual abuse to include more reprehensible behaviour, and tougher penalties have been imposed on offenders. These amendments illustrate the state's intolerance of sexual abuse and exploitation of children. However, because of their recent enactment, the efficacy of these amendments remains to be seen.

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[41] *Ibid* at p 83. Judges may argue that their decision to enact a settlement is in the best interests of the child as it spares him/her from future trauma of additional proceedings at the Magistrate's level. While this may be true, it should not be forgotten that effective deterrence has the power to prevent such abuse from even occurring.
[42] *Supra* n 13 at p 54.

1. Physical Abuse

i) Relevant Legislation

The Sri Lanka's approach to the problem of physical abuse has in the past been one characterised by apathy. Prior to 1995, the main provision dealing with cruelty to children was found in section 71(1) of the Children and Young Person's Ordinance (1939) (CYPO). However, this provision was never brought into effect so children were afforded no protection against threats to their physical integrity. However, there was an amendment made to the Penal Code in 1995 regarding physical abuse, essentially re-stating the provision found in the CYPO.[43] Specifically, section 308A makes it an offence for anyone who "wilfully assaults, ill-treats, neglects, abandons or exposes" a child in his/her custody under 16 years, or "causes or procures him to be assaulted, ill-treated, neglected, abandoned or exposed, in a manner likely to cause him unnecessary suffering or injury to health." Since this is a relatively new enactment, evaluation of its effectiveness cannot yet be accurately done.

ii) Evaluation in the light of the CRC

Notwithstanding the recently-enacted Penal Code amendment, past treatment of physical abuse of children has been problematic, to say the least. The primary legislative enactments addressing child abuse were found in the CYPO but, as mentioned, these provisions were never brought into force. By contrast, there are several provisions in the CYPO which illustrate the state's sanctioning of violence against children in the context of administering punishment for misconduct. Specifically, section 29(1) of the CYPO allows the state to inflict corporal punishment on a child or young person "where a child or young person who is a male is found guilty by any court for any offence." The child sentenced shall accordingly receive "not more than six strokes with a light cane or rattan." This is in direct violation of the CRC. Specifically, sanctioning corporal punishment contravenes Article 37(a) of the CRC obliging states to protect children from torture or other cruel, inhuman or degrading treatment or punishment. This provision also stands in violation of Article 7 of the ICCPR which enacts a similar standard of treatment.

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[43] Hereinafter CYPO.

This violation of international law is further exemplified by section 341 of the Penal Code (1883), which indicates that the 'reasonable use' of corporal punishment would not be an offence, thus suggesting that a parent has a legal right to cause simple injury.[44] While this provision cannot be used due to the absence of mandatory school attendance, it is still indicative of the state's permissive approach to abuse disguised as 'justifiable' punishment. In addition, despite the protection against cruelty outlined in section 71 of the CYPO, section 71(6) states that "nothing in this section shall be construed as affecting the right of any parent, teacher, or other person having lawful control or charge of a child or young person to administer punishment to him." Although this provision is part of the CYPO that was not brought into effect, it is still useful in further demonstrating the state acquiescence with respect to violence against children in the context of the family. In addition, section 56(2) of the Education Ordinance (1939) permits courts to pass a sentence of caning for consistent failure to attend school.[45] Thus, these provisions, in turn, illustrate that the legal system is permissive in its attitude towards the use of corporal punishment in the family or in the school and attempts to regulate rather than eliminate it.[46]

The policy of non-intervention out of respect for family privacy indicates the state's assumption that parents bear the responsibility for child care and development.[47] To a degree, the CRC recognises the importance of the family as the best unit to ensure a child's development. Article 18(1) recognises that parents have the primary responsibility for the upbringing and development of the child, and correspondingly imposes on the state the responsibility to assist parents in their child-rearing responsibilities. Recognition of the importance of the family as the natural and fundamental group unit of society entitled to state protection is also found in Article 23(1) of the ICCPR and Article 10(1) of the ICESCR. Thus, the family unit is recognised as the promoter of a child's interests and, as such, deserves recognition and support from the state.

However, this recognition is not without qualification. As was illustrated with respect to child labour, the family can, in fact, be the greatest exploiter of

[44] *Supra* n 20 at p 259.
[45] *Ibid* at p 260.
[46] *Ibid*.
[47] *Ibid* at p 99.

children precisely because of the nature of the parent-child relationship.[48] Accordingly, the CRC recognises that a child may require protection from abuse inflicted by his/her family in Article 19(1). This protection is extended with respect to school authorities in Article 28(2). Admittedly, simply imposing criminal sanctions on parents for their reprehensible conduct is questionable as doing so undermines the family unit, often to the child's detriment. However, it is apparent that the incidence of domestic violence against children stemming from the legitimacy of parental authority creates an urgent need to use the law to pierce the traditional notion of family privacy to protect children.[49] Parents, like everyone else, should be legally accountable for the excessive use of force and abuse of authority like anyone else.[50] Failure to hold parents accountable for their actions thus represents a violation of Article 19(1) of the CRC.

As mentioned, the most recent amendment to the Penal Code is a promising step in the right direction in protecting children from physical abuse. However, the provision on cruelty to children only applies to those persons under 16 years, leaving those young persons between 16-18 years unprotected. Since the CRC defines a child as being under 18 years, this is in violation of Article 37(a) of the CRC and Article 7 of the ICCPR prohibiting torture and cruel, inhuman and degrading treatment or punishment of children. With respect to the protection of children under 16 years, only time will tell if these provisions are effectively implemented or if they are simply cosmetic additions to the Penal Code.

2. Sexual Abuse[51]

i) Relevant Legislation

Several key amendments were made in 1995 to the Penal Code regarding offences of sexual abuse and exploitation. Section 360B(1)(b) makes it an

[48] A parallel argument regarding family privacy was made in the context of child labour at n 20.
[49] *Supra* n 20 at p 262.
[50] *Ibid.*
[51] It should be noted that the problem of sex tourism will not be addressed in this paper. As of late, there have been a series of well-publicised prosecutions of international child paedophiles. It is precisely because these cases have been so well-publicised that they do not require additional attention here. Moreover, they are not necessarily indicative of the overall situation of child sex abuse in Sri Lanka.

offence for anyone to "act as a procurer of a child for the purpose of sexual intercourse or...sexual abuse." Subsection (d) addresses those individuals who attempt to take advantage of his/her influence over a child to procure a child for sexual intercourse or abuse; subsection (e) prohibits the use of violence in procuring a child for a sexual purpose and subsection (f) prohibits the exchange of monetary consideration for sexual gratification. In addition, section 365B creates the new offence of "grave sexual abuse" which covers a wide range of sexual abuse without consent that does not fall under the definition of rape in section 363. Amendments were also made to the Code of Criminal Procedure Act (1979) in 1998. Specifically, section 43A(2) mandates that a person arrested for child abuse must be produced within 24 hours before a Magistrate who has the discretion to detain the accused for a further three days. These amendments illustrate the state's increased legislative commitment to the protection of children from sexual abuse and exploitation, both by deterring sexual abuse of children and more severely punishing transgressors.

ii) Evaluation in the light of the CRC

It is difficult to assess yet whether or not these new provisions will be successful in effectively deterring the sexual abuse of children. Effective implementation cannot be measured by the successful prosecution of a few high-profile cases but rather the consistent application of the law over time. One notable obstacle to the effective implementation of these instruments and their sanctions is the lack of awareness of their existence, even amongst the judiciary.[52] Thus, it remains to be seen whether these new amendments are indicative of an over-reliance on legal formalism in addressing problems of the abuse of children, or whether they prove to be effective tools for the protection of children. Correspondingly, a complete evaluation of Sri Lanka's obligation under Article 19(1) of the CRC cannot be done until the effect of these provisions can be fully gauged.

With respect to the obligations under Article 19(2) of the CRC, the evaluation of the administrative treatment of children who have been physically and/or sexually abused will be substantially addressed next examining the overall treatment children in the legal process.

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[52] Lecture delivered at ICES by Mrs. Shirani Thilakawardena, Judge of the High Court, Colombo on 23 July 1998.

C. Children in the Legal Process

Overall, children are abominably treated in the legal process in Sri Lanka. This is particularly evident with respect to child victims of abuse and exploitation. The process from the outset does not make any distinctions between child victims and child offenders, which results in victims of abuse being treated as offenders. Furthermore, the primary focus of the legal process is on institutionalisation which, in turn, exacerbates the tendency to treat victims as offenders. Moreover, these institutions are so poorly equipped that they cannot be reasonably expected to facilitate a child's rehabilitation and subsequent development. These inadequacies are magnified by the inadequacy of resources and trained staff to assist and protect abused children in the legal process.

i) Relevant legislation

The main statute applicable to children in the legal process is the Children and Young Person's Ordinance, discussed above with respect to child abuse. Part I of the CYPO establishes a juvenile court exclusively for the purpose of dealing with children in the legal process. In terms of the special provisions granted to children and young persons, section 13 states that arrangements must be taken to prevent children and young persons from associating with an adult who has been charged with any offence other than an offence with which a child or young person is jointly charged. In addition to having exclusive jurisdiction over child offenders, section 34 states that the juvenile court possesses primary jurisdiction over those children "in need of care and protection." Among other qualifications, the definition in section 34 includes those children upon whom an offence has been committed, meaning situations of child abuse which constitute offences under the CYPO. Further, section 35 states that any child "in need of care or protection" can be ordered by a court to be: (a) sent to a certified school, provided he/she is over 12 years; (b) committed to the care of any fit person; (c) released to his/her parents, who are in turn ordered to exercise proper guardianship; or (d) placed under the supervision of a probation officer. The effects of these provisions are discussed below.

ii) Evaluation in the light of the CRC

The most serious problem facing an abused child in the initial encounter with

police is the non-segregation of children from adults. Specifically, many older children, both male and female, are kept overnight in Police cells, at times in the company of adults, largely because this is the only way in which the custody of the child can be ensured.[53] The non-segregation is thus permitted under the guise of protecting children from the dangerous circumstances they are reporting. However, keeping children and adults together in the legal process, no matter how brief, provides opportunities for further physical and sexual abuse of children.[54] This is in violation of section 13 of the CYPO, which mandates that all children under 16 years must be separated from adults at all times for his/her own protection. This is also in direct violation of Article 37(c) of the CRC, which obliges states to ensure the separation of children and adults in the legal process.

Furthermore, the initial documentation that must be filled out by the child victim, in addition to being complex and inefficient, treats every child either as a 'suspect' or 'prisoner,' as there is no legal term equivalent to 'victim.'[55] Thus, all child victims of abuse are classified at the outset as 'suspects.' The failure to make a distinction in official documentation between those children who have allegedly committed offences and those who have not, epitomises the official mind which treats all children the same, regardless of their particular situation.[56] This, in turn, results in probation officers and courts perceiving placement as a detention or 'remanding the victim,' which strongly influences bureaucrats who handle child abuse cases.[57] Thus, this initial characterisation follows the child victim throughout the legal process, detrimentally affecting the 'care' received by government officials.

The failure to distinguish between victims of child abuse and children in conflict with the law results in an over-reliance on institutionalisation as the most appropriate solution for all children in the legal process: despite the alternatives offered in section 35 of the CYPO for children "in need of care and protection," it is rare for an abused child to be placed with parents/guardians, especially since they are often responsible for the situation of the child.[58] Given their severe scarcity of resources and personnel,

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[53] *Supra* n 40 at p 68.
[54] *Ibid* at p 69.
[55] *Ibid* at p 58.
[56] *Ibid* at p 61.
[57] *Supra* n 20 at p 283.
[58] *Supra* n 40 at p 79.

probation officers are almost never designated responsibility for the custody of an abused child. Rather, the final outcome is almost always institutionalisation in a certified school or approved home.[59] Apparently, these children are being detained at these institutions in safe or protective custody, though they are invariably referred to in the official documents as 'suspects.'[60] This over-reliance on institutions for rehabilitation is in contravention of the international standards set out in the Beijing Rules. In particular, Rule 19.1 stipulate that institutionalisation should be a measure of last resort, and when used, it should be of minimum duration because of the detrimental effects on the child. By identifying institutionalisation as a last resort, these rules unequivocally illustrates the spuriousness of the assumption that institutionalisation is in the best interests of children in the legal process. This over-reliance on institutionalisation by the judiciary, in turn, violates Article 3(1) of the CRC, which requires that in all actions concerning children taken by courts of law, in addition to social welfare institutions, administrative authorities and legislative bodies, shall place the best interests of the child as a primary concern.

An examination of the institutions themselves illustrates how ill-equipped they are to adequately ensure an abused child's best interests. Without exception, all institutions house both child victims of abuse and children who are in conflict with the law.[61] In addition, the facilities themselves are in an appalling state. For example, the Kitulampitiya Boy's Remand Home, has reportedly housed up to 36 children at one time, with only a single toilet and shower for the entire home.[62] This is a locked facility, and the children do not leave their narrow confines unless they are transported to the court or hospital, completely ruling out any kind of physical exercise.[63] Even if a new facility is constructed, experience has shown that the comfort of the children who use them is clearly not taken into consideration.[64] The inadequacies of these facilities also constitute a violation of Article 3(1) of the CRC, as it is obvious that a child's best interests are not even considered in design and administration of these social welfare institutions. Rather, the inadequacies that plague these institutions illustrate the abject failure on the

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[59] *Ibid* at p 79. See also *supra* n 13 at p 283.
[60] *Ibid* at p 89.
[61] *Ibid* at p 48.
[62] *Ibid* at p 50.
[63] *Ibid*.
[64] *Ibid*.

part of institutions to live up to their mission, as 'rehabilitation' is an euphemism for 'make work' projects necessary to keep the institutions in operation.[65] Often, these homes are the source of additional suffering by child victims of abuse. This, in turn, violates Article 39 of the CRC, requiring State Parties to take all measures necessary to promote physical and psychological recovery and social reintegration of the child victim of abuse.

Augmenting the problems of injustice related to treating child victims as offenders is the fact that the state does not provide adequate legal representation for child victims of abuse in the legal process. The representation of children is very *ad-hoc* in nature, the representatives often being police or probation officers. As a result, in many instances there is a serious imbalance between the quality of representation of child victims and their abusers, almost always to the detriment of the child victim of abuse.[66] The necessity of legal representation is addressed by the CRC with respect to children in conflict with the law. Specifically, Article 40(1)(b)(iii) of the CRC dictates that children have a right to "legal or other appropriate assistance" during all legal proceedings against them. It may be recalled that Article 37 imposes a general duty to protect children in the legal process, particularly with respect to the deprivation of liberty. It is, therefore, submitted that Articles 37 and 40 taken together directly address the treatment of all children involved in the legal process, both offenders and victims.[67] Thus, according to international law all children involved in legal proceedings have a right to legal representation, whether they are victims or offenders. The state's failure to ensure adequate representation, therefore, constitutes a violation of the CRC.

The general absence of resources for the care and protection of children further exacerbates the dismal state of children in the legal process. The juvenile justice system is very centralised. There is only one juvenile court for all cases which is located in Colombo, which is inadequate to handle even the cases in Colombo alone.[68] Moreover, while the government has established 33 women's and children's desks in police stations throughout the island at present to handle allegations of child abuse, these units are not allocated sufficient resources to operate and there is a marked lack of trained

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[65] *Ibid* at p 106.
[66] *Ibid* at p 102.
[67] *Ibid* at p 12.
[68] *Supra* n 20 at p 285.

personnel.[69] Furthermore, the devolution of power to the provinces has resulted in differential treatment to issues of child abuse, as the priority allocated to child abuse depends greatly on the leadership qualities of the individual provincial Commissioners.[70] Thus, there is no consistent approach to the treatment of child victims of abuse. Overall, however, there has been a deterioration in welfare agencies dealing with child victims of abuse. Specifically, there has been a decline in the number of Probation Officers, as those who have chosen to leave are rarely replaced, which reflects the reality of financial restraints.[71] The Probation Officers that remain are often overworked, precluding them from giving a child victim of abuse the necessary attention he/she deserves. This shortage of Probation Officers epitomises the lack of infrastructure to support child victims of abuse, which constitutes yet another violation of Article 39 of the CRC obliging State Parties to promote recovery and social reintegration of child victims of abuse.

D. Other Legislative Initiatives

In addition to the legislation examined above with respect to child labour, child abuse and children in the legal process, Sri Lanka has taken additional legislative measures to promote children's rights generally. First, Article 12(4) of the Fundamental Rights Chapter of the 1978 Constitution allows for "special provisions [to be] made by law, subordinate legislation or executive action, for the advancement of... children."[72] Thus, while not guaranteeing rights specific to children, this provision does protect those initiatives aimed at ameliorating the situation of children. The concerns of children are addressed somewhat in Article 27(13) of the Constitution, which urges the state "to promote with special care the interests of children and youth so as to ensure their full development... and to protect them from exploitation." However, this provision is found in the Directive Principles of State Policy and Fundamental Duties Chapter, and as such, it is not binding.

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[69] *Ibid* at p 305. This lack of trained staff is especially detrimental with respect to victims of sexual abuse. Too often cases of sexual abuse go unreported because children rarely volunteer information regarding sexual abuse, very likely because of the fear of social stigma attached to such abuse and the immense feeling of violation. *Supra* n 40 at p 67.

[70] *Supra* n 40 at p 44.

[71] *Ibid.*

[72] Hereinafter the Constitution, as amended.

Furthermore, Article 11 of the Constitution bans torture or cruel, inhuman or degrading treatment or punishment, which is applicable to all persons. Article 13 outlines the requirements of due process, most notably the freedom from arbitrary arrest, detention and punishment. However, Article 16(1) of the Constitution precludes judicial review of existing legislation that may violate fundamental rights. Hence, with respect to children's rights, there can be no judicial review of past legislation containing provisions sanctioning corporal punishment or the arbitrary detention of child victims involved in the legal process. Correspondingly, any new legislative initiatives that affect fundamental rights will only have a limited effect as long as old legislation continues to be in force.

The development of the Children's Charter (1992)[73] is a positive sign of Sri Lanka's commitment to protect children's rights. The Charter provides for the establishment of a National Monitoring Committee[74] for monitoring the implementation of the Charter. However, like Article 27(13) of the Constitution, the Charter is only a policy directive and as such, its provisions are not binding. Moreover, while there is some NGO representation, the Committee is chaired by the Secretary to the Ministry of Social Services and is thus not strictly independent of government whose performance the Committee must monitor.[75] It is thus unrealistic to expect the NMC to efficiently and accurately monitor and report objectively the shortcomings of the government with respect to the protection of child rights.[76]

The recently enacted Child Protection Authority Act (1998)[77] is another development with regard to the protection of children's rights. As the first ever statutory authority to protect children's rights, it has considerable potential to oversee the enforcement of existing provisions and develop new

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[73] While the Children's Charter does set some standards higher than the CRC, it also dilutes some of the standards of the CRC, which in turn can encourage governments and policy makers to ignore or lose sight of the international value base they must work towards in realising child rights. The development of higher standards is very positive, but these standards cannot be used to justify the establishment of lower standards in other areas of child rights. Rather, the CRC should be seen as providing a minimum standard for the realisation of child rights, thereby discouraging national initiatives from setting lower standards in their policies affecting children. *Supra* n 20 at p 60.

[74] Hereinafter the NMC.

[75] "Workshop on the Child Protection Authority," Background Paper, Centre for Policy Alternatives (July 1998) at p 2.

[76] *Ibid.*

[77] Hereinafter Child Protection Authority.

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policies to protect children. However, precisely because of its broad mandate, it is unclear what its role will be in relation to the existing institutions supposedly aimed at protecting children's rights. Given Sri Lanka's history of resource mismanagement, however, it is likely that this new legislative initiative is met with some scepticism as to its effectiveness. In addition, the allowance for only one NGO representative raises similar problems as discussed with respect to the NMC, specifically the independence of the Authority to effectively evaluate government initiatives.

The October 1997 version of the Draft Constitution embodies Children's Rights and is a positive development. However, the status of the draft Constitution remains uncertain.

Despite these developments since ratification, Sri Lanka exhibits an overall lack of domestic compliance with the CRC. Some of the reasons for this lack of compliance are discussed in the next section.

Part III: The Absence of Compliance with the CRC

Problems with Compliance with the CRC in Sri Lanka

As mentioned, Sri Lanka ratified the CRC in July 1991. While the ratification did inspire several notable policy initiatives such as the adoption of the Children's Charter and the establishment of the National Monitoring Committee, these initiatives have been of little effect in protecting children's rights. The lack of incentives to comply with the CRC can be attributed to the fact that there is no significant priority attached to children's rights domestically. This lack of priority, coupled with perceptions of the limited applicability of the CRC as a 'Western' document consequently hinders any incentive to enter into a community of interests. This in turn precludes the development of legitimacy with respect to the CRC. The repercussions of this will be discussed below.

The absence of domestic priority attributed to children's rights is exemplified in a number of ways. As outlined in Part II, children's rights have never historically been given sufficient priority in Sri Lanka. The limited range of protection outlined in the Employment Act illustrates the state's attempt at controlling rather than eliminating child labour practices. The dangers of this ambiguity are magnified by the apathy hindering the enforcement of existing

protection. This apathy is also applicable to the CYPO, both with respect to child abuse and children in the legal process. Prior to the recent amendments to the Penal Code, child physical abuse was never a punishable offence. The lack of concern associated with apathetic enforcement is further illustrated by the appalling conditions of state institutions, compromising their ability to 'rehabilitate' a child, whether victim or offender. Thus, an evaluation of existing legislation reveals only a marginal commitment to the protection of children's rights.

An examination of Sri Lanka's administrative capacity to implement the CRC further reveals the lack of priority and the limits for future prioritisation of children's rights. As noted above, the current allocation of resources is too vertical in its approach and as such, wastes resources.[78] Resource mismanagement is typified by the proliferation of agencies with overlapping mandates. Agency duplication results in existing resources being spread very thin, thereby compromising each agency's effectiveness. This mismanagement and subsequent waste of existing resources is further exacerbated by the lack of commitment by agency officials to collaborate with other agencies. The weak administrative infrastructure with respect to children's rights hinders the already limited effectiveness of existing laws and compromises the implementation of future laws. Thus, while the recent amendments to the Penal Code and the newly enacted Child Protection Authority Act should be lauded as a renewed effort by the state to prioritise children's rights, they must also be met with scepticism as to their effectiveness given these serious administrative limitations.

Moreover, the potential for future prioritisation of children's rights is somewhat uncertain. Past amendments to the Penal Code were the result of extensive lobbying by several high-profile NGOs to prioritise the protection of children from sexual and physical abuse. However, the future effectiveness of NGOs is compromised by a recent amendment to the Voluntary Social Services Organisation (Registration and Supervision) Act passed on March 3, 1998.[79] This amendment allows the government to appoint an "Interim Board of Management" to administer the affairs of a voluntary organisation where a Board of Inquiry appointed by the Minister reports that there is evidence of fraud or misappropriation of funds. Thus, this amendment

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[78] *Supra* n 34.

[79] Hereinafter the Organisation Act. Incidentally, it was one of 21 items passed in 35 minutes in Parliament on the same day.

essentially allows the government to take over an NGO. This legislation will affect the existing NGOs in Sri Lanka,[80] undermining the overall effectiveness of the NGO community as an independent check on government activity. Thus, the ability of NGOs to effectively lobby the government to prioritise children's rights in the future may have been jeopardised by this statute.

Hence, without domestic priority, there is no incentive to establish a community of interests based on children's rights to promote adherence to the CRC. There are several possible reasons behind this lack of prioritisation of children's rights in Sri Lanka precluding the development of a community of interests. The potential for a community of interests amongst SAARC countries surrounding children's rights was exemplified at the Bangalore Summit of 1986, where priorities were articulated for concerted efforts to create an environment favourable to the realisation of the rights of children.[81] Subsequently, 1990 was designated the Year of the Girl Child and 1991-2000 was designated the Decade of the Girl Child.[82] However, no follow-up initiatives have yet been undertaken to implement these declarations.[83]

Moreover, the international community at present does not place enough priority on the realisation of children's rights in international law. Given the absence of incentive for Sri Lanka to participate in international regimes, it is essential that the greater international community provide assistance to encourage prioritisation at the domestic level and subsequent regime formation. That is, while the development of the CRC is indicative of the international community's interest in protecting children's rights at international law, ratification is not sufficient to induce compliance amongst individual states. Monitoring a country's implementation every five years is not enough to ensure compliance with international norms, as there is no lasting sense of accountability to encourage increased efforts at implementation beyond cosmetic adherence.[84] A more concerted effort must be made by the international community to make children's rights a higher priority at

[80] V. Samaraweera, *Promoting Three Basic Freedoms, Sri Lanka: Politics, National Security and the Vibrancy of NGOs* (Colombo: Law and Society Trust, 1997) at p 6.
[81] *Supra* n 20 at p 47.
[82] See http:\\ www.saarc.com.
[83] *Supra* n 20 at p 47.
[84] This is not to advocate the use of sanctions, as this would only exacerbate the problem in developing countries that require resources, not punishment, to prioritise child rights.

international law, thereby encouraging increased efforts to comply with the CRC by states. The anticipated role of the international community will be discussed in more detail below.

Part IV – Recommendations

In order to increase compliance with its international obligations under the CRC, several recommendations pertaining to child labour, child abuse and children in the legal process have been made to ameliorate children's rights in Sri Lanka. Several overall recommendations are also outlined to supplement the recommendations relating to the aforementioned areas in order to improve the situation of children generally. In addition, recommendations concerning the role and responsibility of the international community in encouraging compliance are outlined.

A. Child Labour

i) Repeal and Replace Existing Legislation

It is recommended that the Employment of Children and Young Person's Act be repealed. The protection offered in this Act is wrought with ambiguity and is inadequate to promote child development. Furthermore, both the Employment Act and the subsequent regulations enacted have, in some instances, legitimised certain forms of child labour, as was illustrated with respect to family enterprises and domestic service. In addition, the existing combination of legislation and regulations ineffectively protects children's rights as it promotes confusion resulting in apathy with respect to implementation. Moreover, in Sri Lanka, given the limited power of judicial review, the Employment Act, like all colonial laws, can still give legitimacy to administrative acts and will continue to do so until it is repealed by new legislation.[85]

Hence, legislation must be enacted in place of the Employment Act which is more child-sensitive and which more accurately reflects CRC values. Consequently, the aim should be to eliminate child labour, contrary to the current approach of regulation. Correspondingly, Sri Lanka should ratify the ILO Convention, as doing so would illustrate the increased commitment to the

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[85] *Supra* n 20 at p 257.

elimination of exploitative child labour practices. In conjunction with the ILO Convention, new legislation should then raise the minimum age requirements for participation in the labour force to at least 15 years of age, as well as stringently regulating participation of children over the age of 15 years. Raising of the minimum age of employment should also correspond with the minimum age of mandatory education, which also requires increased monitoring to ensure enforcement. This would illustrate the state's recognition of the crucial link between child labour and education articulated in both the ILO Convention and the CRC.

Overall, any new legislation should be more comprehensive in scope in order to combat apathy resulting from confusion. While this does not preclude the possibility of subsequent regulations, future regulations to expand the scope of the legislation must be done in the light of the entire statute to prevent ambiguity, and must be documented with the legislation and, therefore, more easily accessible.

ii) Delegating Increased Resources to the Ministry of Labour

The current allocation of resources to the Ministry of Labour is woefully inadequate to eliminate exploitative child labour practices. Increased state resources must be directed toward the Ministry of Labour to enlist more officers to the Women and Children's Affairs division to be dispersed proportionally to the various provinces. In particular, training should be provided for those officers to increase sensitivity to children's concerns.[86] In addition, the mandate of the Ministry of Women's and Children's Affairs Division should be reassessed so as to advocate a more proactive approach to monitoring labour practices of both public and private sectors. Such an approach would also reduce the onerous burden placed on children to report incidence of exploitative labour practices to authorities, and would be in accordance with the provisions of the CRC values requiring state intervention in the protection of children's rights. This increase in resources, coupled with an increased staff and a revived mandate should in turn help to eliminate the apathy that plagues the Ministry of Labour at present, thereby encouraging increased implementation of existing protection. Increased monitoring by the

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[86] Increased sensitisation could also reduce apathy with respect to monitoring and enforcement, as officers would have more of a vested personal interest in protecting the rights of children.

state would also encourage adherence to laws banning exploitative labour practices.

iii) Changing Perceptions of the Child as an Economic Resource

The elimination of exploitative child labour practices will not be successful through enforcement of legislation alone. Rather, reform of parental perceptions of the child as an economic resource is essential to effectively eradicate child labour, particularly in disadvantaged communities where such labour is important for family survival. In addition to providing increased state support to poorer families, programmes for adult literacy can help in persuading poor communities of the importance of providing children with an opportunity for education, rather than work within or outside the home.[87] In accordance with this, a reform of education curricula to include more vocational training for children in poorer areas can motivate both children and parents about the practical value of schooling.[88] These elements, combined with an overall increased access to education, can create an aspiration for upward mobility, which can in turn undermine the short-term needs to use the child as an economic resource.[89] Attempting to change parental and, therefore, societal perceptions of the child can eliminate tolerance of exploitative labour practices, and promoting child survival and development.

B. Child Abuse

i) Repeal and Replace Existing Legislation

As noted above, the current approach to child abuse is one plagued by contradictions. Thus, it is recommended that the Children and Young Person's Ordinance be repealed because it reflects the state's ambiguous approach to protecting children from abuse. Moreover, while the recent amendments to the Penal Code are a positive step to combat child sexual and physical abuse, the Penal Code still contains provisions permitting the use of physical violence against children as a form of punishment in certain

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[87] *Supra* n 20 at p 217.
[88] S. Goonesekere & A. Abeyratne, "Child Labour and Child Prostitution in Sri Lanka and the Legal Controls," in P. Hyndman, ed., *The Conference on Child Labour and Prostitution* (Sydney: Lawasia, 1987) at 163.
[89] *Ibid.*

situations. These sections must also be repealed to eliminate any ambiguity about the state's commitment to protecting children's rights.

In addition, comprehensive legislation should be enacted containing all the protection afforded to children to eliminate the confusion which has resulted due to multiple statutes. All forms of corporal punishment should be abolished, in order to make it on par with the CRC. New legislation must also view parental obligations and state intervention on child support and maintenance as a dimension of protecting a child from exploitation and abuse.[90] Thus, while parents have rights with respect to their child, they more importantly have the responsibility to ensure the child's survival and development. The state, in turn, has an obligation to ensure that parents are fulfilling their responsibilities.

ii) Increased Resources to Ensure Implementation

Although the Penal Code contains greater protection of children from physical and sexual abuse, resources are required to ensure its effective implementation. The National Child Protection Authority is a promising addition in the effort to implement these new provisions. However, given that its mandate is so broad, extra care must be taken to ensure that it does not turn into another ineffective institution established by the state to monitor the rights of children. Furthermore, the lack of NGO representation calls into question the independence of the Authority, which in turn raises some doubts about its ability to effectively monitor governmental action.

C. Children in the Legal Process

There must be a significant increase in resources devoted exclusively to ameliorating the situation of the abused child in the legal process. Most importantly, it is imperative that child victims of abuse are separated from offenders at all stages of the legal process. This requires that the distinction is made between victims and offenders during the preliminary procedures so as to preclude prejudicial treatment of children by bureaucratic officials throughout the legal process. Correspondingly, facilities aimed exclusively at the support and maintenance of the abused child must be established: while the current approach of institutionalisation is recognised as being contrary to

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[90] *Supra* n 20 at p 257.

a child's best interests, this does not preclude the establishment of child-friendly care facilities equipped with trained professionals and comfortable surroundings aimed at healing the abused child. In addition, a monitoring body should be established as an extension of the women and children's bureau of the police department to ensure that those who man these facilities are executing their mandate of rehabilitation as intended. These desks, therefore, require increased staff and resources to execute their ordinary functions more effectively and carry out the proposed monitoring function.

With respect to the legal proceedings, several more juvenile courts must be established in the various provinces to adequately meet the needs of all children involved in the legal process.[91] Moreover, these courts must be given increased authority to refer cases of child abuse and economic exploitation to the magistrate's courts in order to prosecute violators of children's rights. The current practice of requiring the Labour Ministry's permission to refer a case of economic exploitation by an employer is unnecessary and detrimental, as it inadvertently encourages judges to settle cases of child exploitation in the interest of efficiency rather than punish exploiters. Finally, all children in the legal process should be afforded independent legal counsel as a matter of right in order to ensure their interests are effectively represented and protected.

D. Additional State Action

i) Effective Resource Allocation

In addition to the issue-specific recommendations made above, there are several measures that can be taken by the state to improve the situation of children and encourage respect for their rights. Most significantly, more care must be taken in resource allocation in order to prevent further agency duplication and resource mismanagement. Rather than having several agencies with overlapping mandates and jurisdictions, it would be more efficient to pool these resources into one agency in charge of the supervision of child welfare in Sri Lanka. This agency would have the power and mandate to delegate responsibility to specialised agencies to address the interests of children in

[91] However, this does not necessitate a total decentralisation of the juvenile justice system as doing so may result in the unequal treatment of children according to region. Rather, this decentralisation must be supervised by the state, perhaps through a supervisory juvenile justice authority in order to ensure that all juveniles are treated equally.

particular areas. The presence of an overarching authority to supervise the activities of these specialised agencies would ensure that they all operate in conformity with each other to ensure the best interests of the child overall. It is possible for the newly-established National Child Protection Authority to assume this role and effectively co-ordinate the existing agencies. However, it is not clear whether the Authority has adequate resources or personnel to facilitate this.

Furthermore, more support must be given to the family to realize the best interests of the child. Although, international law recognises the importance of the family as central in ensuring a child's best interests, it does not permit arguments of family privacy to preclude state action to protect children. Thus, there is a balance that can be struck between state action and familial development and maintenance: in addition to legislation, if government resources are channelled to providing support for responsible parents to care properly for their children, there can be a gradual reduction of government support for institutional care.[92] Hence, encouraging the recognition of child rights within the family by the state can effectively prevent children's rights from being undermined in the future.

ii) Raising Awareness

A potentially powerful protector of children's rights is the judiciary. Awareness amongst the judiciary of existing laws, including international standards, is essential in order to fully exploit this potential. Hence, the state must make an ongoing effort to ensure that judges are kept abreast of new legislative initiatives to protect child rights.

Awareness of the CRC outside the judiciary must also be encouraged. Copies of the CRC are currently available in Tamil, Sinhala and English, but there has been no significant efforts at their dissemination. In addition, a more user-friendly approach to education must be explored so that the contents of the CRC reach both adults and children. Framing the CRC in child-friendly terms and teaching it in schools is one potentially effective method of promoting awareness amongst children of their rights; children, as actors in the process, must know about their rights. The media is also an effective tool in this awareness campaign. The power of the media was exemplified in

[92] *Supra* n 20 at p 292.

1993, when the Government launched an island-wide multi-media campaign against the exploitation of child workers in domestic service and prostitution, which generated over 1,000 reports of abuse, compared with only 32 cases the year before.[93] However, elimination of the problem of abusive child labour practices requires a more concerted effort to promote awareness.

E. Responsibility of the International Community

In addition to the obligations of the state in realising child rights, the international community also has certain responsibilities. As articulated in Article 4 of the CRC, states must take measures to implement the CRC "within the framework of international co-operation" where required. Thus, apart from the state's obligation to comply with the CRC, there must be an overall increased recognition of children's rights as a priority in international law to provide an incentive for individual states to comply with their international obligations. Moreover, this obligation of co-operation is particularly relevant with respect to developing countries, as noted in section 31 of the Plan of Action for Implementing the World Declaration on the Survival, Protection and Development of Children.

Thus, the international community has an obligation to assist developing states to realise their obligations under the CRC. Monitoring and lobbying at national and international levels combined with development assistance can be used effectively to create an environment in which states feel compelled to fulfil their international obligations.[94] Providing development assistance can, therefore, encourage states to prioritise children's rights.

However, international support by itself is not enough to sustain long-term compliance with the CRC. Rather, domestic prioritisation can in turn provide the impetus for regime development with other states having similar interests. This could, in turn, facilitate community building among the SAARC countries, given that they have already developed other common interests. However, it is important to note that regional co-operation must not be used to dilute the standards of the Convention and its framework on child rights on

[93] UNICEF, *The State of the World's Children 1997* (Oxford University Press: Oxford, 1997) at p 66. In addition, it must be strongly emphasised that to be fully effective in promoting child rights, any type of media awareness campaign must be done in the context of legislative reform of existing laws to ensure they are more child-sensitive in conformity with the CRC.
[94] *Supra* n 20 at p 41.

the rationale of cultural and developmental needs which are specific to South Asia.[95]

The judiciary is a key factor in developing this community of interests and subsequent legitimacy of the CRC. As noted, the judiciary is a valuable asset in terms of promoting prioritisation of children's rights. Thus, the international community could encourage increased co-operation between the SAARC countries to enforce international rules.[96] Such co-operation would promote increased domestic awareness and, therefore, compliance with the CRC in each of the respective countries, in addition to facilitating regime-building to develop legitimacy of the CRC in the long term.

Thus, the international community has the obligation to increase the priority attributed to children's rights on a global scale in order to encourage Sri Lanka to assess its priorities and values. It is only through the increased legitimacy of the CRC that children's rights can be effectively protected and their survival and development guaranteed.

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[95] *Ibid* at p 378.

[96] A.M. Slaughter, A.S. Tulumello & S. Wood, "International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship" (1998) 92 AJIL 367 at p 392.

PROTECTION OF CHILDREN AFFECTED BY ARMED CONFLICT

Mr. Olara Otunnu[*]

Promotion and Protection of the Rights of Children

D. Sri Lanka

61. The Special Representative visited Sri Lanka from 3 to 9 May 1998 to witness and assess the multiple ways in which children are affected by the ongoing armed conflict in that country. He was received by the President, Ms. Chandrika Bandaranaike Kumaratunga, met with the Minister for Foreign Affairs, Mr. Lakshman Kadirgamar, the Minister for Justice, Constitutional Affairs, National Integration and Ethnic Affairs, Mr. G.L. Peiris, parliamentarians and other government officials. He travelled to affected areas in the Jaffna peninsula and the Vanni region, where he visited schools, resettlement villages and centres for internally displaced persons. While in those areas, he also met with local government officials, military commanders and religious and civic leaders, as well as with representatives of local and international humanitarian agencies. He had the opportunity to meet with two senior representatives appointed by the leader of Liberation Tigers of Tamil Eelam (LTTE), V. Prabhakaran, Mr. Thamilselvan, Head of the Political Section, and Mr. Balasingham, Political Advisor.

62. In his discussions with the Government and the LTTE leadership, the Special Representative raised several issues pertaining to the rights, protection and welfare of children, and obtained the following specific commitments from the parties.

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[*]Special Representative of the Secretary-General for Children in Armed Conflict.

63. Provision and distribution of humanitarian supplies. Efforts were being made to respond to the humanitarian situation in affected areas, but more needed to be done to meet the critical and growing needs of the affected populations. The Government agreed to review the list of restricted items and to examine procedures to expedite the approval and distribution of necessary supplies. The LTTE leadership made a commitment not to interfere with the flow of humanitarian supplies destined for affected populations and accepted the need for a framework to monitor this commitment.

64. Free movement of displaced populations. The Government agreed to expedite procedures for the issue of permits for movement in affected areas. The LTTE leadership made the commitment that the movement of displaced populations who wanted to return to areas now under government control would not be impeded. They also pledged not to impede the return to their homes of Muslim populations displaced by previous outbreaks of hostilities and they accepted that a framework to monitor those processes should be put in place.

65. Recruitment and participation of children in hostilities. The LTTE leadership undertook not to use children below 18 years of age in combat and to recruit children less than 17 years old. They also accepted a proposal to create a framework to monitor those commitments. The Government of Sri lanka reiterated its commitment to the policy of not recruiting children under the age of 18 years. The Special Representative welcomed government assurances that there were no plans to embark on a recruitment derive in schools.

66. Observing the Convention on the Rights of the Child. The Government of Sri Lanka has signed and ratified the Convention. It has also prepared a National Children's Charter. The Special Representative stressed the importance for all parties, including non-state actors, to respect the principles and provisions of the Convention. In this connection, he urged the LTTE leadership to make a public commitment to respect the Convention. He was encouraged by the LTTE readiness to have its cadres receive information and instruction on the Convention.

67. Targeting of civilian populations and sites. The Special Representative expressed the gravest concern about the targeting of civilian populations and sites throughout the country. The LTTE leadership acknowledged this to be

an important and legitimate concern and undertook to review its strategies and tactics in this regard.

68. Another important issue that the Special Representative raised with the Government and with the LTTE leadership was the continuing use of landmines by both sides. He very much regretted that it had not been possible on this occasion to obtain a commitment from either party to refrain from using landmines; he indicated his intention to pursue this issue.

69. During his travel to the conflict-affected areas, the Special Representative witnessed the trauma and distress on the part of affected populations there. He saw how the protracted conflict has undermined the social and ethical fabric of society, and was struck by the deep and widespread yearning for peace on the part of all communities. At a final address in Colombo, he strongly endorsed the launching of a UNICEF-sponsored local initiative, proclaiming "children as zones of peace," as a systematic effort to apply global recommendations on the protection, rights and welfare of children to the specific context of Sri Lanka.

70. The Special Representative welcomed the commitments made by the Government of Sri Lanka and the leadership of LTTE, which represented a significant development towards ensuring the protection, rights and welfare of children affected by the ongoing armed conflict in Sri Lanka. He called upon the Government and LTTE to take concrete steps to fulfil their respective commitments, and launched a strong appeal to the international community to provide more assistance to conflict-affected populations in Sri Lanka, especially for resettlement and the meeting of their urgent health and education needs.

UNITED NATIONS
HIGH COMMISSIONER FOR HUMAN RIGHTS

Grenade attack in Phnom Penh 30 March 1997
and
Extrajudicial executions 2-7 July 1997

*An assessment of the investigations**

REPORT OF THE TWO EXPERTS IN CRIMINAL INVESTIGATIONS ON THE RESULTS OF THEIR MISSION TO CAMBODIA

A. Background

1. On 30 March 1997, unidentified men carried out a grenade attack on a peaceful political demonstration in Phnom Penh. At least 16 people were killed and over 100 were injured. The Government set up a Commission of Inquiry, which is headed by the Director-General of the National Police. The Special Representative of the Secretary-General for Human Rights in Cambodia has held discussions with the Commission on the progress of its work, and has reported on the incident to the UN Commission on Human Rights and the General Assembly.

2. On 22 August 1997, the Special Representative submitted a memorandum to the Royal Government of Cambodia providing evidence of summary executions, and torture and listing persons missing since the events of 2-7 July 1997. The purpose of the memorandum was to provide useful information to assist the Government in conducting serious and thorough investigations. The Special Representative has also reported to the United Nations General Assembly and the Commission on Human Rights on the events.

*Geneva, 13 May 1998.

3. On a number of occasions since then, the Government has pledged to carry out full investigations into both the grenade attack and the cases documented in the August memorandum, and to bring the perpetrators to justice. Nevertheless, the Government has also pointed out, most recently during the visit of the High Commissioner for Human Rights in January 1998, the difficulties it faces in conducting such investigations. The Government, therefore, welcomed the offer of the High Commissioner to assist the investigation processes through international expertise. Two experts were appointed to assess [the] progress made in the investigations and to clarify needs for further assistance.

4. The two experts are Mr. Arun Bhagat, former Director of the Indian Intelligence Bureau and Professor Peter T. Burns, Q.C., from Canada, who is a member of the United Nations Committee Against Torture.

B. Terms of Reference

5. The Experts' terms of reference pursuant to their agreement with the United Nations High Commissioner for Human Rights are:

> *The experts will explore with the relevant Cambodian authorities the measures which have so far been taken and those which are planned to investigate (i) the grenade attack of 30 March 1997 in Phnom Penh, and (ii) the executions and other human rights violations reported by the Special Representative in his August 1997 memorandum. The experts will assist the Government to determine what may be needed to improve the quality of these investigations and to bring them to a conclusion. In addition, it will identify whether any additional international assistance may be required to support the Government in meeting its objective of bringing the perpetrators to justice.*

6. The methodology of the Experts included analysis of the various reports and other pertinent material supplied by the Cambodia Office of the High Commissioner for Human Rights, consultation with member of that office, members of branches of the Royal Cambodian government and its various departments and non-governmental organisations. A meeting with Mr. Sam Rainsy, the leader of an opposition political party and the apparent target of the March 30, 1997 grenade attack, was also held.

7. the mission involved the Experts' presence in Cambodia from 18 to 25 April 1998.

8. During their meeting with Mr. Uch kim An, the Secretary of State in the Ministry of Foreign Affairs, the Secretary welcomed the Mission whole-heartedly. He said that his Government was very keen to avail of this assistance in investigation and it was eagerly awaiting the report of the FBI investigations. He further said that the Police forces of Cambodia, the Judiciary and the Prosecution Branch were handicapped due to continuous strife which the country had experienced over the last 20 years. Trained and educated candidates were available. The Government of Cambodia was keen for all the assistance they could get. He pointed out that the visit of the experts was rather short and perhaps they should visit for a longer period. This Government wanted the elections to be held in a peaceful manner and he would personally see that the meetings proposed for us materialised. It was, however, not possible to meet important officials like the Minister for Defence, the Co-Minister of Interior, the Director of the national Police, and the Director of the Criminal Department of the Police who was out of the country.

9. A full list of persons with whom meetings occurred is contained in Annex "A" of this report.

10. For the purpose of our enquiry we have adopted as a starting point the description of the 30th March 1997 Grenade Attack in Front of the National Assembly, prepared for the Office of the United Nations for Human Rights in Cambodia as an internal document, dated 31 August 1997. We were also referred to the so-called F.B.I. Report on those events, but given its lack of authenticity we felt unable to use it as a primary source.

11. We also adopted the findings of fact contained in the Memorandum to the Royal Government of Cambodia Relating to Evidence of Summary Executions, Torture and Missing Persons Since 2-7 July 1997, dated 21 August 1997 by the Cambodia Office of the United Nations Centre for Human Rights, forwarded to the Royal Cambodian Government by the Special Representative of the United Nations Secretary-General for Human Rights in Cambodia, Thomas Hammarberg, by letter dated 22 August 1997. We were not unmindful of the fact that one of the persons listed as killed had been

wrongly identified in the memorandum (his name had been confused with that of his brother).

12. In his report to the Commission on Human Rights concerning the situation in Cambodia,[1] Thomas Hammarberg, the Special Representative of the United Nations Secretary-General for Human Rights in Cambodia, stated at paragraph 26 that "he welcomed [the Government of Cambodia's] acceptance of an international expert to provide advisory assistance to its investigation and prosecution process."

13. The experts are pleased to advise that they were given access to most of the political, military, police and judicial personnel that they requested. This revealed willingness by the Royal Cambodian Government to cooperate with the experts' mission that was underscored by the fact that in many cases little notice of their requests for meetings was able to be given.

C. Modern Cambodia and the political events leading up to 1997

14. Although the Constitution of the Kingdom of Cambodia "recognise[s] and respect[s] human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, the covenants and conventions related to human rights, women's and children's rights [Article 31], this appears to be very often honoured in the breach rather than otherwise.

D. Grenade attack - 30 march 1997

15. The grenade attack on 30 March 1997 was discussed in some detail with Major General Teng Savong, Deputy General Director of the National Police, who is assisting General Hok Lundi, Chairman of the Commission of Investigation appointed by the Government to investigate the incident of the grenade attack.

16. The police account was that their investigations had found that 14 persons had died in the grenade attack and 142 persons had received injuries. The demonstration was authorised and legal. During the investigations, which had been conducted along with F.B.I. agents, only one witness had stated that one of the suspects had been chased up to the area in front of Watt Botum where

[1] See E/CN.4/4/1998/95, dated February 1998.

the bodyguards of the second Prime Minister had been deployed. There were many civilian houses there, and, after the incident, many people were running about. During their investigations, the authorities had not been able to identify any of the culprits. It had also not been possible to establish that one culprit had been allowed to enter Watt Botum by the Second Prime Minister's bodyguards. This witness had been taken to the spot, but nothing was clear. The bodyguards had also been examined in groups. Individual interviews had also been undertaken. The bodyguards of the second Prime Minister had denied that they had allowed anyone to go through their lines. From the investigations it had been determined that 4 grenades had been thrown and, therefore, there had to be 3 or 4 culprits. They suspected that the grenades which had been used were the M-07 delay fragmentation grenade which was being used by the United States Armed Forces. The Cambodian Military to whom a reference had been made had not given any reply as yet about the identity of the grenades. Similarly, the F.B.I. who had been asked to examine the fragments had not given them any report. Investigations had revealed that it was [sic] usual practice for the bodyguards to be deployed in the manner as they had been deployed on the 30 March 1997. [Although Mr. Sam Rainsy could not recall such heavily armed military personnel at any of the 4 previous demonstrations that he had led]. The bodyguards of the second Prime Minister had prior information about the demonstrations and, therefore, their deployment had been ordered. Only 15 bodyguards had been deployed and they could not be blamed or held responsible as the area they were covering was not narrow. It was possible that some people had entered the Pagoda. The Commission of Investigation had invited the attendance of the Commander and the Deputy Commander and other personnel of the bodyguard units in order to examine them. They had said that they were informed about the demonstration and the deployment had been ordered for the protection of Watt Botum. The investigations had taken into consideration the possible/likely motives for the attacks - (i) whether it was political, (ii) whether it was due to individual animosity, (iii) whether the Khmer Rouge was responsible. The Khmer Nation Party split into two parts prior to the incident of the grenade attack and there was considerable dissension within the party. The sketch of the culprits made by the F.B.I. experts resembled one Brasil who had been involved in criminal activities. The police claimed that it had not been possible for the investigators to interrogate Brasil [Kong Samreth] because he had been given shelter by Nhiek Bun Chhay and despite efforts could not be traced or arrested. No arrests had been made in the case. Brasil had been hired before to kill Sam Rainsy. It was not known who had

hired Brasil to do so. No other suspect had come up. They would welcome the assistance of the F.B.I. again and were also awaiting the report of the investigations which had been conducted by the F.B.I.

17. Sam Rainsy, the President of the Khmer Nation Party [now the Sam Rainsy Party], believed that the grenade attack was targeted at him. Earlier attempts to assassinate him had also been made, he said and conspiracies had been hatched to discredit him in the past. In this instance he believed that a conspiracy had been hatched 6 days before the incident and 8 persons had been involved. They had operated in 4 groups of 2 each. Four of them had thrown the grenades. Thoeun, Chhay Vy, Chum Bunthooun, Hing Bun Hoang and Hing Pirth were among those believed to be involved in the grenade attack. Five of the eight according to information with the K.N.P. had since then killed. All the injured and witnesses had not been examined. No compensation had been paid to the injured or the families of those killed.

18. For successful investigation of a crime, it is necessary to pursue all angles and multiple lines of enquiry. As the incident took place in broad day-light in an open area in a public place between 3 roads on which traffic was constantly moving, a vigorous and detailed examination of those who were present in the area or had passed through the area would provide useful clues. Another positive factor which would be of help, in working out this case is the large number of photographs and video recordings. More than half-a-dozen photographers were present. The size of the demonstration from all accounts appears to have been between 150-170. As the venue is a frequently visited public place, there were many vendors and spectators present. The total number of people present in and around the place of the demonstration would have been about 200. Out of this number, as many as 14[16] were killed and 142 injured. A close scrutiny of the photographs and the video tapes would enable the investigators to eliminate those who were not involved. The identities of the others should be able to be established.

19. The culprits, as the investigations have shown, would be at least 4-5 in number. They, at the time of the attack, would have positioned themselves on the fringes of the crowd. They would have moved about earlier in the crowd to determine the position of their targets. The normal distance which a grenade can be lobbed is 30-35 yards. The investigating team had succeeded in recovering pins and had marked the places on the map of the scene of the crime. The lever of the grenade which sets off the detonator

detaches itself after the grenade has been lobbed. It is not clear whether the 4 levers were also reconvened from the scene of the crime or not. The position/place in which they had been found would indicate the place from where the grenades were lobbed. For successful lobbing of the grenades, the culprits would have required adequate space. They would, therefore, have positioned themselves behind the crowd. Because of the constant movement on the roads as well as in the park, it is unlikely that no one saw the actual act of lobbing of the grenades. The information available with the K.N.P. requires to be pursued and followed up thoroughly. The assistance and help of the injured and the families of the deceased needs to be taken. A determined and purposeful investigation on these lines would certainly yield results. The examination of the Police officers posted at the venue as well as the members of the bodyguard of the second Prime Minister if conducted properly and thoroughly would, no doubt, furnish vital clues. Despite the handicaps of lack of forensic training and experience in investigation as professed, a more determined and comprehensive approach would have yielded results by now.

E. Assassination of Ho Sok

20. The second case which was discussed in some detail with the concerned officers was the assassination of Mr. Ho Sok, Secretary of State in the Ministry of Interior, on 7 July 1997. This case was discussed with General Luy Savun, who was assisted by General Van Rotha, Lieutenant Colonel Mao Dara and Colonel Ten Borany. It was revealed by the police that Mr. Ho Sok was taken into custody on 7 July 1997 from the Crown Road, Phnom Penh by 4 personnel of the Serious Criminal Department of the national Police at about 4 p.m. Lieutenant Colonel Mao Dara headed this squad and all the officers were in plain clothes at the time of the arrest. The colonel revealed that he had been instructed to take Ho Sok into custody and had brought him to the Ministry of Interior in Phnom Penh. He then contacted his seniors who had given him instructions to arrest Ho Sok, to determine further action which needed to be taken, as there was no case against Ho Sok and he had not been charged with any offence. Ho Sok was made to sit in a room on the ground floor of the Ministry of Interior which houses among other departments, the Central Department of the Judicial Police. The room opens onto the lobby of the main entrance to the building. Two plain-clothes unarmed policemen were in the room when a person with red strips on his shoulder/collar entered the room at about 5 p.m. and shot

him with a AK-47 rifle. At that point Col. Mao Dara was outside the building along with his superior Brigadier Tong Lim and another General. The assailant had shouted at Ho Sok that he was responsible for killing his relatives. The door of the room was closed, but had not been bolted. About 50-60 military soldiers were outside the building at that time. The assailants after shooting Ho Sok ran away by jumping over the perimeter wall. Thereafter, the scientific unit (Forensic Team) was called and they had inspected the scene of crime and recovered empty cartridges and a spent bullet. The team had come at about 8 p.m. and made an inspection according to procedure. There were five bullet wounds on the body. The Medical Officer had also carried out an examination of the body. No post-mortem was, however, conducted and the medical examination had been carried out in the room itself. Thereafter, Colonel Mao Dara of the Serious Criminal Department left the scene and he could not say what happened to the body. General Tong Lee had given instructions about the disposal of the body. When asked about notification to the family members, we were informed that none of the family members were available or traceable. There had been a lot of fighting going on that day and only 3 policemen were present in the Ministry of Interior at that time and the rest were military personnel. No arrests had been made. The investigation of the case was, however, continuing. Ho Sok was in a car which belonged to an NGO when he was taken into custody. From the investigations, they had not been able to identify either the culprit or the military unit to which he belonged. The two policemen who were in the room at the time of the murder of Ho Sok were very frightened and shocked and were not in a position to give a cogent description of the accused. On that day, both Military and Police personnel were wearing OG uniforms, as there was a lot of fighting going on.

21. Investigation in this case apparently has not been conducted with the vigour it deserves. It should have been possible for the investigators to determine the unit of the military which was deployed on that day in the Ministry of Interior. In all likelihood, the assailant belonged to the unit itself. Once the unit is identified, forensic evidence would render it possible to identify the weapon which was used to kill Ho Sok as 3 empty cases were recovered from the scene and one spent bullet was also recovered from the scene. The investigation has not gone into the suspicious circumstances of the cremation of the body of Ho Sok which by one account was undertaken by soldiers in uniform at about 3 a.m. in a Phnom Penh Pagoda. Death and cremation certificates are reported to have been issued but this line of

investigation has not been pursued. The death certificate was irregularly issued after the cremation. The failure of the policemen and the soldiers present to chase the killer has not been explained as the nearest perimeter wall is about 200 to 250 meters away.

F. Other cases of extrajudicial executions

22. Apart from the execution of Mr. Ho Sok, Secretary of State, Ministry of Interior, 40 other instances of extrajudicial executions had been brought to the notice of the Government of Cambodia by the Special Representative of the United Nations Secretary-General for Human Rights on 22 August 1997. In most of the cases, the security forces, particularly the Army, were alleged to have been involved. In this connection, discussions were held with senior Police officers as well as officials of the Gendarmerie, the Public Prosecution Branch and the Military Prosecutor. From the discussions, it became clear that none of these cases had been seriously investigated or were being seriously investigated. The military prosecutor clearly started that while his branch had the jurisdiction, it could not act without the orders of the General Staff. No orders had been received. Efforts had been made by the Military Prosecution Branch to obtain a list of all the military personnel who had been killed in the incidents of July 1997. They had, however, not succeeded in obtaining the particulars. The Military Prosecutor's office had also not received any complaint from any family member of those killed. In case a complaint was received, the Military Prosecutor's Branch would certainly have investigated the same. There was, however, one incident of a pilot of a helicopter being forced to fly the helicopter by some soldiers to a particular place, whereafter, the pilot had been killed. This incident had been investigated by the Military Prosecutor's Branch and the offenders had been subjected to trial.

23. The Public Prosecution Branch officials were clear that their Branch had jurisdiction over all cases involving Military personnel who had committed penal offences. However, they had, themselves not investigated any of the cases cited by the Special Representative of the United Nations Secretary-General in his August 1997 Memorandum. The Honourable Minister of the Interior, however, was of the view that all offences involving Military personnel came under the jurisdiction of the Military Prosecutor and he alone was responsible for such investigation and prosecution. This, however, was not the preponderant view.

24. From the enquiries made, it became clear that none of the 42 cases have been seriously investigated or even at all. The Government of Cambodia had given assurances from time to time about conducting investigations of these cases.

G. Judicial administration

25. Under the Constitution of the Kingdom of Cambodia (Chapter III) there are elaborate provisions for the Fundamental Rights of Khmer citizens. Under Chapter IX, Article 109, it is stipulated that the Judicial power shall be an independent power and the Judiciary shall guarantee and uphold impartially and protect the rights and freedoms of the citizens and shall cover all lawsuits, including administrative ones. Under Article 110, trials are to be conducted in accordance with the legal procedures and laws in force. Article 112 provides that only the Department of Public Prosecution shall have the right to file criminal suits. Articles 114 and 115 bestows disciplinary powers over the Justice Department on the Supreme Council of the Magistracy, which is to assist the Head of the State i.e. the King. While the foundations and the framework have been laid down in the Constitution, detailed laws and regulations to assist and guide the functioning of the courts and the investigating agencies have still to be put in place. A new Criminal Procedure Code and the Penal Code have been drafted, but the Bills have yet to be submitted to and passed by the Assembly. The Evidence Act has yet to be framed. Similarly, there are no rules and regulations or Acts for the functioning of the Police and the Judiciary. These Regulations/Acts are necessary so that the authority and powers, responsibility for supervision, inspection, command and control are clearly laid down. In the absence of these vital instruments, there are large grey areas, which are adversely affecting the dispensation of justice.

26. Most of the officials whom we met as well as members of the public deplored the fact that the personnel manning the Judiciary, the Public Prosecution, the Police and other agencies lacked in education, training, skills and expertise. While the handicap of having properly qualified persons in these important departments of Justice can only be solved by new entrants who would be properly educated, training can even now be usefully imparted to the officials presently employed in these branches. Refresher and short-term courses devised to increase their knowledge of the working procedures,

improve their understanding and skills, levels of motivation and commitment are strongly recommended.

27. The Judicial Police, which was introduced a few years ago, is required to function under the Chief Prosecutor of the Court of Appeals. However, as the postings to the Judicial Police as well as the Disciplinary Authority is made by the Head of the National Police, the Prosecutors under whom they are functioning, cannot fully assert their authority. In order that the purpose of setting up of the Judicial Police under the Prosecutors is fully met changes in command and control need to be seriously considered.

28. As in the case of the Judiciary and the Police, there is need for a separate Act for the three branches of the Armed Forces. Through the new legislation, the powers and authority of the officials could be clearly set out. Offences would need to be defined and punishments prescribed. The functions and the jurisdiction of the Military Prosecutor's Branch and Military Courts and Tribunals could also be covered in this Act.

29. In the Kingdom, apart from the National Police, investigations are also carried out by the Judicial Police, the Military Judicial Police and the Gendarmerie. Clear cut demarcation of jurisdiction and responsibility has, however, not been made. The responsibilities of the controlling Ministries of Justice, Interior and Defence need to be clearly laid down for the proper and efficient working of the criminal justice system.

30. These handicaps notwithstanding, the existing system itself is capable of dispensing objective justice, provided it functions independently and realises its inherent authority and responsibility. The rule of law cannot prevail unless the judiciary and its two arms - the Prosecution and the investigating agencies - can work without hindrance and influence. From the various interactions we had with officials and others, it is clear that the Judiciary, the Public Prosecutor's Branch and the Police have not been displaying the functional independence which is required of them by the Constitution of the country.

H. Impunity

31. The United Nations experts were struck by the fact that political homicide engendered no serious attempts at investigation and resolution of the two incidents for such crimes seem deeply imbedded in the institutions of

governance in Cambodia. Only if the will to remedy this condition is manifested at the highest levels of government is it likely to change.

I. Conclusion

32. Serious human rights violations had been duly brought to the notice of the Government of Cambodia by the United Nations Secretary-General's Special Representative in August 1997. A number of meetings were held by the Special Representative with members of the Council of Ministers and senior officials of the Government, wherein the need to conduct expeditious and thorough investigations was stressed. Positive assurances were conveyed of the decision and intent of the Government of Cambodia to do so. Yet, of the serious incidents which had been reported to the Government we found that investigations have been attempted only in two. No arrests have been made in either of the 2 cases. A suspect has been identified in the grave grenade attack on a peaceful demonstration organised by a recognised political party in which several persons lost their lives and 142 received injuries. The investigations in both the cases show a lack of vigour and determination. Many areas of enquiry have been overlooked. None of the several prosecuting and investigating agencies in the country has taken cognizance of incidents which were reported to the Government by the Special Representative. Whereas the Public Prosecutor's Branch admittedly has jurisdiction over the cases in the Memorandum they have not taken any step to register and investigate them. No cogent reason for this failure was forthcoming. Rule of law and dispensation at justice is possible if there is sincerity of purpose and a determination to implement the laws. The processes of law have to move on their own volition and not depend on orders or instructions from Ministries. The Ministries of Justice and the Interior should only exercise administrative control. Working and operational freedom has to be given to the Public Prosecutor and the National Police to establish the Rule of Law in the country. Very specific and sincere efforts are required to fulfil the assurances enshrined in the Cambodia Constitution. These efforts must of necessity emanate from the highest sources of Cambodian governmental authority.

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