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In this issue we publish the section on the 'Impact of Armed Conflict on Children' in the Report of the Expert of the Secretary-General, Ms Graca Machel, submitted pursuant to General Assembly Resolution 48/157. The Report surveys the relevant legal instruments on humanitarian law (the Geneva Conventions and the Protocols) and human rights law as they apply to children during armed conflict. From these, the expert identifies the Convention on the Rights of the Child as being of particular relevance to the discussion, but points out that it needs strengthening with respect to the participation of children in armed conflict. The Report embodies several recommendations and standards to be adopted by states for the protection of children during armed conflict.

We also publish a review by Dr Neelan Tiruchelvam of Dr Rohan Perera's book entitled *International Law - Changing Horizons*. In his review Dr Tiruchelvam discusses the contribution Sri Lankans have made to international law, the role of the International Court of Justice and the necessity for the involvement of developing countries in the formulation of international law. Also included is a press release prepared by the South Asia Forum for Human Rights on the peace accord signed recently between the National Committee on Chittagong Hill Tracts Affairs and the Parbatya Chattagram Jana Sanghti Samity (PCJSS) to end the 20 year old conflict in the Chittagong Hill Tracts. The article by Adilur Rahman Khan discusses the national security law in Bangladesh.

## ***PROTECTION OF CHILDREN DURING ARMED CONFLICT***

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# THE IMPACT OF ARMED CONFLICT ON CHILDREN

## Extracts from the Report of the Expert of the Secretary-General, Ms. Graca Machel, submitted pursuant to General Assembly Resolution 48/157

United Nations, New York (1996)

### A. Humanitarian law

211. The international humanitarian law of armed conflict, usually referred to simply as international humanitarian law<sup>1</sup> limits the choice of means and methods of conducting military operations and obliges belligerents to spare persons who do not, or who no longer, participate in hostilities. These standards are reflected in the four Geneva Conventions of 12 August 1949 and the two 1977 Protocols Additional to these Conventions.

212. The Fourth Geneva Convention relating to the Protection of Civilian Persons in Time of War is one of the main sources of protection for civilian persons, and thus for children. It prohibits not only murder, torture or mutilation of a protected person, but also any other measures of brutality whether applied by civilian or military agents. The Fourth Geneva Convention has been ratified, almost universally, by 186 States.

213. The Geneva Conventions of 1949 have been considered to apply primarily only to conflicts between States. However, the Conventions also include common Article 3 which applies also to internal conflicts. This article enumerates fundamental rights of all persons not taking an active part in the hostilities, namely, the right to life, dignity and freedom. It also protects them from torture and humiliating treatment, unjust imprisonment or being taken hostage.

214. In 1977, the Geneva Conventions were supplemented by two additional Protocols that bring together the two main branches of international humanitarian law - the branch concerned with the protection of vulnerable groups and the branch regulating the conduct of hostilities.

215. Protocol I requires that the fighting parties distinguish at all times between combatants and civilians and that the only legal targets of attack should be military in nature. Protocol I covers all civilians, but two articles also offer specific protection to children. Article 77 stipulates that children shall be the object of special respect and shall be protected against any

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<sup>1</sup> The International Committee of the Red Cross (ICRC), the International Federation of Red Cross and Red Crescent Societies (IFRC) and the National Societies have adopted the following as a full definition of international humanitarian law: "international rules, established by treaties or custom, which are specifically intended to solve humanitarian problems directly arising from international or non-international armed conflicts and which, for humanitarian reasons, limit the right of parties to a conflict to use the methods and means of warfare of their choice or protect persons and property that are, or may be, affected by conflict."

form of indecent assault and that the Parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason. Article 78 deals with the evacuation of children to another country, saying that this should not take place except for compelling reasons, and establishing some of the terms under which any evacuation should take place.

216. Non-international armed conflicts, that is to say, conflicts within States, are covered by Protocol II. Protocol II supplements common Article 3 and provides that children be provided with the care and aid they require, including education and family reunion. However, Protocol II applies only to a restricted category of internal conflicts: they must involve conflicts between the armed forces of a High Contracting Party and dissident armed forces or other organised armed groups. According to this criterion, it can be argued that Protocol II would not apply to the majority of current civil wars. The reason is obvious: few Governments (High Contracting Parties) are likely to concede that any struggle within their borders amounts to an armed conflict. Protocol II does not apply to an internal disturbance or tension, a riot or isolated acts of violence. Naturally, for children who are victims of such struggles, it makes little difference that the violence to which they are subject does not rise above this minimum threshold.

217. While the Fourth Geneva Convention has been almost universally ratified, the Protocols have been ratified by far fewer States. To date, 144 States have ratified Protocol I, and those absent include a number of significant military powers; of Gulf War combatants, for example, the United States of America, the United Kingdom of Great Britain and Northern Ireland, France and Iraq have yet to ratify Protocol I. The situation with Protocol II is even less satisfactory: only 136 have ratified.

218. In general, humanitarian law represents a compromise between humanitarian considerations and military necessity. This gives it the advantage of being pragmatic. It acknowledges military necessity; yet, it also obliges armed groups to minimise civilian suffering and, in a number of articles, requires them to protect children. However, these articles cannot be considered adequate to ensure the safety and survival of children trapped in internal conflicts.

## **B. Human rights law**

219. Human rights law establishes rights that every individual should enjoy at all times, during both peace and war. The obligations, which are incumbent upon every State, are based primarily on the Charter of the United Nations and are reflected in the Universal Declaration of Human Rights [General Assembly Resolution 217 A (III)].

220. In formal legal terms, the primary responsibility for ensuring human rights rests with States, since they alone can become contracting parties to the relevant treaties. It follows that opposition groups, no matter how large or powerful, cannot be considered directly bound by human rights treaty provisions. It is significant, however, that the situation is precisely the

opposite in relation to the application of international humanitarian law to non-state entities in internal conflicts. This relative inconsistency between the bodies of law is further ground for insisting that non-state entities should, for all practical purposes, be treated as though they are bound by relevant human rights standards. Nevertheless, just as the international community has insisted that all States have a legitimate concern that human rights be respected by others, so too it is clear that all groups in society, no matter what their relationship to the State concerned, must respect human rights. In relation to non-state entities, the channels for accountability must be established more clearly.

221. Although human rights law applies both in peacetime and in war, there are circumstances where the enjoyment of certain rights may be restricted. Many human rights treaties make allowance for States to derogate from their obligations by temporarily suspending the enjoyment of certain rights in time of war or other public emergency. However, human rights law singles out certain rights that can never be subject to derogation. These include the right to life; freedom from torture and other inhuman or degrading treatment or punishment; freedom from slavery; and the non-retroactivity of penal laws. In relation to rights from which derogation is permitted, strict conditions must be met: the emergency must threaten the life of the nation (and not merely the current Government's grip on power); the relevant international bodies must be notified; any measures taken must be consistent with other applicable international obligations. International bodies such as the Commission on Human Rights, the Human Rights Committee and the Committee on the Rights of the Child carefully scrutinise the assertion by any Government that derogation is necessary and justified.

222. Human rights law has a number of specialised treaties which are of particular relevance to the protection of children in armed conflict. The International Covenant on Civil and Political Rights [General Assembly Resolution 2200 A (XXI)] covers many rights including the right to life and the right to freedom from slavery, torture and arbitrary arrest. The International Covenant on Economic, Social and Cultural Rights [General Assembly Resolution 2200 A (XXI)] recognises the right to food, clothing, housing, health and education. The Convention on the Elimination of All Forms of Discrimination against Women (General Assembly Resolution 34/180) is of particular note. In addition, there are treaties that deal with particular themes or groups of people, covering such issues as genocide, torture, refugees, and racial discrimination. In the context of this report, the most notable specialised treaty is the Convention on the Rights of the Child.

### **1. Convention relating to the Status of Refugees**

223. As armed conflicts frequently produce large numbers of refugees, refugee law is of particular relevance. In its work, UNHCR relies principally on the Convention Relating to the Status of Refugees adopted on 28 July 1951 and its Protocol of 1967. These instruments provide basic standards for the protection of refugees in countries of asylum; most important is the principle of *non-refoulement*. The 1951 Convention and the 1967 Protocol are complemented by regional refugee instruments - notably, the Organisation of African Unity

Convention Governing the Specific Aspects of Refugee Problems in Africa of 1969 and the Cartagena Declaration on Refugees of 1984. States have the primary responsibility to ensure the protection of refugees within their boundaries. UNHCR is mandated to provide international protection for refugees and to find permanent solutions to refugee situations.

224. Many refugees fleeing armed conflict have reason to fear some form of persecution on ethnic, religious, social or political grounds at the hands of one or more of the parties to a conflict, but others are fleeing the indiscriminate effects of conflict and the accompanying disorder, including the destruction of homes and food stocks that have no specific elements of persecution. While the latter victims of conflict require international protection, including asylum on at least a temporary basis, they may not fit within the literal terms of the 1951 Convention. States Parties and UNHCR, recognising that such persons are also deserving of international protection and humanitarian assistance, have adopted a variety of solutions to ensure that they receive both. This is most recently exemplified by the regime of "temporary protection" adopted by States in relation to the conflict in former Yugoslavia.

225. The standards of the Convention on the Rights of the Child are also of particular relevance to the refugee child. Through its guidelines on the protection and care of refugee children, UNHCR seeks to incorporate the standards and principles of the Convention into its protection and assistance framework.

## **2. Convention on the Rights of the Child**

226. The most comprehensive and specific protection for children is provided by the Convention on the Rights of the Child, adopted by the General Assembly Resolution 44/25 in November 1989. The Convention establishes a legal framework that greatly extends the previous recognition of children as the direct holders of rights and acknowledges their distinct legal personality. The Convention on the Rights of the Child has, in a very short space of time, become the most widely ratified of all human rights treaties. Currently, only six States have not ratified the Convention on the Rights of the Child: Cook Islands, Oman, Somalia, the United Arab Emirates, Switzerland and the United States of America.

227. The Convention recognises a comprehensive list of rights that apply during both peacetime and war. As stressed by the Committee on the Rights on the Child (A/49/41) these include protection of the family environment; essential care and assistance; access to health, food and education; the prohibition of torture, abuse or neglect; the prohibition of the death penalty; the protection of the child's cultural environment; the right to a name and nationality; and the need for protection in situations of deprivation of liberty. States must also ensure access to, and the provision of, humanitarian assistance and relief to children during armed conflict.

228. In addition, the Convention on the Rights of the Child contains, in Articles 38 and 39, provisions specifically related to armed conflict. The former article is of major significance because it brings together humanitarian law and human rights law, showing their

complementarity. Its provisions require that States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to children in armed conflicts, and paragraph 4 states that:

*In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.*

229. If the Convention on the Rights of the Child were to be fully implemented during armed conflicts, this would go a long way towards protecting children. Children's right to special protection in these situations has long been recognised. The Convention on the Rights of the Child has no general derogation clause and, in the light of this, the Committee on the Rights of the Child stresses that the most positive interpretation be adopted with a view to ensuring the widest possible respect for children's rights. In particular, the Committee has stressed that, in view of the essential nature of Articles 2, 3 and 4, they do not admit any kind of derogation (A/49/41).

230. As with other human rights treaties, the Convention on the Rights of the Child can only be formally ratified by States. Nevertheless, it is well worth encouraging non-state entities to make a formal commitment to abide fully by the relevant standards. Many non-state entities aspire to form governments and to invoke an existing Government's lack of respect of human rights as a justification for their opposition. In order to establish their commitment to the protection of children, non-state entities should be urged to make a formal statement accepting and agreeing to implement the standards contained in the Convention on the Rights of the Child. There are encouraging precedents here. In 1995 in Sudan, for example, several combatant groups became the first non-state entities to commit to abide by the provisions of the Convention on the Rights of the Child. Significantly, once the commitments were enacted, the non-state entities immediately put information, reporting and complaint systems in place.

231. While the Convention on the Rights of the Child offers comprehensive protection to children, it needs strengthening with respect to the participation of children in armed conflict. The Committee on the Rights of the Child has recognised the importance of raising the minimum age of recruitment to 18 years, and in 1994 the Commission on Human Rights established a working group to draft an optional protocol to the Convention to achieve this. The scope of the draft text has been significantly broadened to include articles on non-state entities, on rehabilitation and social reintegration of child victims of armed conflicts, and on a procedure of confidential enquiries by the Committee on the Rights of the Child. Despite the progress that has been made, there continues to be resistance on the issue of voluntary recruitment and on distinguishing between direct and indirect participation. The argument that the age of recruitment is merely a technical matter to be decided by individual Governments fails to take into account the fact that effective protection of children from the impact of armed conflict requires an unqualified legal and moral commitment which acknowledges that children have no part in armed conflict.

### **C. Implementation of standards and monitoring of violations**

232. Standards will only be effective, however, if and when they are widely known, understood, and implemented by policy makers, military and security forces and professionals dealing with the care of children, including the staff of United Nations bodies, specialised agencies and humanitarian organisations. Standards should also be known and understood by children themselves, who must be taught about their rights and how to assert them. Everyone professionally concerned with the protection of children during armed conflict should familiarise themselves with both humanitarian and human rights law.

233. International peacekeepers in particular, must be trained in humanitarian and human rights law and, particularly, about the fundamental rights of children. The Swedish Armed Forces International Centre has developed a training programme for peacekeeping regiments which includes components on child rights as well as rules of engagement, international humanitarian law and ethics. Child rights components, developed in collaboration with Radda Barnen, provide an orientation about the impact of armed conflict on children and situations that peacekeepers are likely to encounter that would require a humanitarian response.

234. Human rights and humanitarian standards reflect fundamental human values which exist in all societies. An aspect of implementation requiring greater attention is the translation of international instruments into local languages and their wide dissemination through the media and popular activities such as expositions and drama. In Rwanda, Save the Children Fund-US, Haguruka (a local NGO) and UNICEF supported the development of an official Kinyarwanda version of the Convention on the Rights of the Child. This has been adopted into Rwandan law and projects are being developed to implement its provisions widely.

235. An effective international system for the protection of children's rights must be based on the accountability of Governments and other actors. This in turn requires prompt, efficient and objective monitoring. The international community must attach particular importance to responding effectively to each and every occasion when those involved in armed conflicts trample upon children's rights.

236. Within the organs of the United Nations, the principal responsibility for monitoring humanitarian violations rests, in practice, upon the Commission on Human Rights. The Commission can receive information from any source and take an active role in gathering data. The latter role is accomplished through a system of rapporteurs and working groups, whose reports can be an effective means of publicising violations and attempting to persuade States to change their policies. The reports of each of the rapporteurs and working groups should reflect the concerns of children in situations of armed conflict.

237. Another dimension of monitoring by international bodies relates to the supervision of treaty obligations. Each of the principal human rights treaties has its own monitoring body composed not of formal representatives of States, but of independent experts. The various committees and, in particular, the Committee on the Rights of the Child, should embark upon



more concerted and systematic monitoring and reporting to protect children in situations of armed conflict. They should also assist States in translating their political commitment to children into action, consequently elevating the priority accorded to this concern.

238. The Geneva Conventions entrust to ICRC, IFRC and their National Societies the mandate to monitor respect for international humanitarian law. ICRC, IFRC and their National Societies report breaches of international humanitarian law and make concrete recommendations on how to end breaches and prevent their recurrence. As has been noted, international humanitarian law also recognises a role for other humanitarian organisations.

239. Where protection of children is concerned, much broader participation in the monitoring and reporting of abuses is required. Many of those working for relief agencies consider that reporting on infractions of either humanitarian or human rights law is outside their mandate or area of responsibility. Others are worried that they will be expelled from the country concerned or have their operations severely curtailed if they report sensitive information. But a balance must be struck. Without reports of such violations, the international community is deprived of vital information and is unable to undertake effective monitoring. Appropriate public or confidential channels should be established nationally through which to report on matters of grave concern relating to children. The High Commissioner for Human Rights, national institutions and national ombudspersons, international human rights organisations and professional associations should be actively utilised in this regard. The media should also do more to raise awareness of infringements of children's rights.

#### **D. Specific recommendations on standards**

240. The expert submits the following recommendations on standards:

- (a) The few Governments which have not become Parties to the Convention on the Rights of the Child should do so immediately;
- (b) All Governments should adopt national legislative measures to ensure the effective implementation of relevant standards, including the Convention on the Rights of the Child, the Geneva Conventions of 1949 and their Additional Protocols and the 1951 Convention relating to the Status of Refugees and its Protocol;
- (c) Governments must train and educate the judiciary, police, security personnel and armed forces, especially those participating in peacekeeping operations, in humanitarian and human rights law. This should incorporate the advice and experience of ICRC and other humanitarian organisations and, in the process, undertake widespread dissemination.

- (d) Humanitarian organisations should train their staff in human rights and humanitarian law. All international bodies working in conflict zones should establish procedures for prompt, confidential and objective reporting of violations that come to their attention;
- (e) Humanitarian organisations should assist Governments in educating children about their rights through the development of curricula and other relevant methods;
- (f) Humanitarian agencies and organisations should seek to reach signed agreements with non-state entities, committing them to abide by humanitarian and human rights law;
- (g) Civil society should actively disseminate humanitarian and human rights law and engage in advocacy, reporting and monitoring of infringements of children's rights;
- (h) Building on existing guidelines, UNICEF should develop more comprehensive guidelines on the protection and care of children in conflict situations;
- (i) Particularly in the light of Articles 38 and 39 of the Convention on the Rights of the Child, the Committee on the Rights of the Child should be encouraged to include, in its report to the General Assembly, specific information on the measures adopted by States Parties to protect children in situations of armed conflict.

# Sri Lanka and the New Frontiers of International Law

*Neelan Tiruchelvam\**

Dr. Rohan Perera is to be congratulated for publishing a second book within a few months. The first book was based on his doctoral thesis and has been favourably reviewed by several persons including the Bombay based Constitutional lawyer and columnist Gafoor Noorani. It is not often that a Sri Lankan publishing house will publish a book on international law by an author who is based in Sri Lanka. It, therefore, presents us with an opportunity to review the contributions Sri Lankans have recently made to the development of contemporary international law.

The pride of place in any assessment of the contribution of Sri Lankans to international law must be given to Shirley Amerasinghe as President of the Law of the Sea Conference for steering one of the most complex and comprehensive international law conferences of the second half of the twentieth century. He was Conference President from 1970 until his death in 1980, and has been described as "a moderator par excellence" who was determined to search for consensus. It has been said that nonetheless, on occasion, he attempted to push decisions through rapidly, which earned him the nickname of "fastest gavel in the East." His interventions as President provided crucial sources of momentum at times when the negotiations were in difficulties. He evolved innovative and what some scholars have described as 'controversial,' even 'desperate' procedural devices to enable delegates to overcome their differences and to produce an agreed single text. These 'active' consensus procedures resulted in a concentration of power in the hands of the chairman of the three Committees and had a salutary impact by providing incentives to delegates to initiate compromises.<sup>1</sup> This method of working which was considered unique to the United Nations Conference on the Law of the Sea (UNCLOS) was clearly attributable to the boldness and the imagination of Hamilton Shirley Amerasinghe whose untimely death in December 1980 prevented him from being at its successful conclusion.

Another Sri Lankan who rendered a significant contribution to the development of modern International law is Christopher Pinto who served as a member of the International Law Commission from 1973 to 1981 and became its chairman in 1980. He established the Legal Division at the Foreign Ministry. He has represented Sri Lanka at every session of the UN Committee on the Sea Bed from 1968 to 1972, and again represented Sri Lanka at every session of the Third UN Conference on the Law of the Sea from 1973 to 1977. Christopher Pinto's own role as a key negotiator and mediator has been commended by several scholars and he was seriously considered as a successor to Shirley Amerasinghe as a man of infinite patience, but

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\* Review of Dr. Amrith Rohan Perera's book *International Law-Changing Horizons* published by Sarvodaya Vishva Lekha Publishers, Ratmalana, Sri Lanka, 1997, Rs. 400/=.

<sup>1</sup> Barry Buzan, "Negotiating by Consensus: Developments in Technique at the United Nations Law of the Sea Conference," *AJIL* vol. 75 (1981), p.324 at p.334.

his candidacy was apparently resisted by those who considered him to be "politically too left wing." Pinto, as Chairman of the Sea Bed Committee's 33 nation working group drew up the principles of a draft treaty and developed the international machinery for the exploitation of sea bed minerals. He also served as the chairman of a Special Working Group on Joint Ventures and was also the Secretary-General of the Iran-US Claims Tribunal.

Jayantha Dhanapala has also received high commendations for the diplomatic and negotiating skills he demonstrated in negotiating the indefinite extension of the Nuclear Non-Proliferation Treaty which is the principal international instrument aimed at preventing the spread of Nuclear weapons.

Three other Sri Lankans have provided imaginative, legal and intellectual input into the work of international organisations. Lakshman Kadirgamar in respect of the World Intellectual Property Organisation (WIPO), Sinha Basnayake in respect of the United Nations Commission on International Trade Law (UNCITRAL), and M. Shanmuganathan in respect of the International Atomic Energy Agency (IAEA).

Two scholars who have contributed significantly to the development of public international law are my former law teachers, C.F. Amerasinghe and M. Sonnarajah. C.F. Amerasinghe has written extensively on international law issues and his most recent publications include *Local Remedies in International Law*, published by Cambridge University Press in 1990 and *Principles of Institutional law in International Organisations* also published by Cambridge University Press in 1994. Professor Sonnarajah, who presently teaches at the University of Singapore, published a book on the nationalisation of foreign property called the *Pursuit of Nationalised Property* in 1986 and a more widely read book on *International Commercial Arbitration* published by Orient Longman in 1990. His book on the *Law of Joint Ventures* was published by Orient Longman in 1992, and a book on *International Foreign Investment* was published by Cambridge University Press in 1994. Some reference also needs to be made to Christopher Weeramantry whose contribution to the development of international law as a member of the International Court of Justice (ICJ) has been referred to by the author who has quoted from his dissenting opinion in the *Lockerbie Case*, the *Case Relating to the Nuclear Tests in the Pacific* and the Advisory Opinion requested by WHO on the *Legality of the Use of Nuclear Weapons in Armed Conflict*.

This collection of selected essays on international law draws attention to some of the more important conceptual developments in international law as reflected in the decisions of the ICJ and other developments which he has characterised as "changing the horizons of international law." These have included important normative and institutional developments such as the Treaty on the Law of the Sea, the Maastricht Treaty and the effort to establish an International Criminal Court. An important concern of the author has been the peaceful settlement of disputes, including current trends relating to non-use of force and the role of the ICJ in advancing the frontiers of international law. These essays are, therefore, not only directed to the specialised reader but also enable the less specialised reader to examine some of the more important developments in the international community such as the disputes over the French

nuclear tests, the issues relating to the exploitation of the global commons, the Lockerbie dispute between the US and Libya and the campaign for the elimination of use of nuclear weapons in armed conflict. Even an average reader is able to examine these issues in the context of the interaction between competing interests and conflicting conceptions of international law. Dr. Rohan Perera has the advantage of a close familiarity with academic writings, the principal judicial decisions in the field of public international law, complemented by the practical insights that he has gained as the legal advisor to the Foreign Ministry in some of the more important multilateral negotiations.

One of the particular issues on which Dr. Perera has focused on relates to what he describes as "the dismantling of the concept of the common heritage." He points out in this essay that the concept of common heritage was a revolutionary principle which implied a new order for the oceans based not on competition and conflict but on co-operation.<sup>2</sup>

In the early phase of the negotiations relating to the UNCLOS much emphasis was placed on the need for a strong regulatory authority for the equitable exploitation of the resources of the deep sea bed, particularly by developing countries whose claim was premised on a strong belief in the principle of the common heritage of mankind. However, the crucial features which were evolved at the protracted UNCLOS conferences were shaped by the changes taking place in the international political scenario, the most significant of which was the ushering in of the Reagan administration in the United States in 1980, just as the conference seemed to have broadly agreed upon the terms for the exploitation of the deep sea bed. The Reagan administration campaigned for the establishment of a sea bed regulatory regime which allowed the developed countries greater freedom to exploit the deep sea bed. This ultimately resulted in the Deep Sea Bed Authority being reduced to a mere licensing authority rather than the initially contemplated regulatory authority. The concomitant conceptual change was a substantial erosion of the principle of the common heritage of mankind as the premise for the mandate of the Deep Sea Bed Regulatory Authority. The author thereby has skillfully outlined the dominant ideas during the different phases of the negotiations and points out how the shifting nature of the balance of negotiating power impacted on the final outcome. He has pointed out that, in insisting on a mandatory transfer of technology, developing countries over-reached themselves and with the deletion of these provisions the joint venture mechanisms assumed significance in facilitating the transfer of mining and processing technologies.<sup>3</sup>

Many of the essays are also centred on the ICJ, given its important role both in the development of public international law and in fulfilling its role as the principal judicial organ of the UN. He has examined the judgment of the Court arising out of the dispute between Libya and the US in relation to the aerial incident at Lockerbie i.e. the crash of a Pan Am flight over Lockerbie in Scotland. A Grand Jury in the US indicted two Libyan nationals charging them, *inter alia*, with having caused a bomb to be placed on board the plane which subsequently

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<sup>2</sup> Amrith Rohan Perera, *International Law - Changing Horizons: A Collection of Selected Essays on International Law* (Sarvodaya Vishva Lekha Publishers, Ratmalana) (1997), p.136-145.

<sup>3</sup> *Ibid.*

exploded. The Libyan government refused the UK and US governments' requests to extradite the suspects and opted, instead, to prosecute the suspects in its own courts. The matter was thereafter taken up in the Security Council which adopted Resolution 731 urging Libya to fully co-operate in establishing responsibility for the criminal acts committed against Pan Am flight 103. Libya instituted proceedings before the ICJ invoking the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation. Under this Convention, Libya claimed the right to either extradite or prosecute the offenders before its own courts and pointed out that US pressure to surrender its nationals was in breach of its international legal obligations. Three days after the close of hearings, the Security Council adopted Resolution 748 which called upon Libya to cease all forms of terrorist actions and to demonstrate its renunciation of terrorism.<sup>4</sup>

The Court, in a majority opinion, held that the obligations of the parties under the Charter to comply with Security Council Resolution 748 supersedes any other treaty obligations under the Montreal Convention. The Court also found that the circumstances of the case did not warrant the exercise of its power to grant provisional relief to Libya. Dr. Perera is rightly critical of the majority decision pointing out that the Court "wilted under the weight" of the political issues surrounding the case and sought refuge in a strict and technical interpretation of the Charter provisions. He has further critiqued the Court for its failure to discharge its obligations to prevent the escalation of disputes and to facilitate peaceful settlement of disputes.<sup>5</sup>

Similarly, the ICJ declined to give an advisory opinion sought by the WHO on the legality of the use by a state of nuclear weapons in armed conflict. The court came to the conclusion that the WHO Constitution could not be interpreted to confer competence on the organisation to address the legality of the use of nuclear weapons. The Court further reasoned that international organisations are governed by the principle of "speciality" in that their powers are limited to only the promotion of those common interests which states entrust to them. Accordingly, the regulation of armaments and disarmament was outside the competence of specialised agencies. Here again, the author is critical of the majority for its rigid and formalistic application of the "speciality" principle. He has rightly argued that the rigid compartmentalisation of the UN system will be prejudicial to the humanitarian objectives of the Charter.<sup>6</sup>

On 21 August 1995, New Zealand sought to invoke the jurisdiction of the ICJ in view of the announcement by the President of France that France would conduct a series of eight nuclear weapons tests in the South Pacific commencing from September 1995. The Prime Minister of New Zealand pointed out that the objective was to bring as much moral and political pressure as possible on France in relation to the decision to resume testing. The Court on a divided vote of 12 to 3 dismissed the request by New Zealand for an examination of the situation on what the author has critiqued as a retreat into judicial formalism. The Court reached the conclusion

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<sup>4</sup> *Supra* n.3, pp.55-56.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid* at pp.167-176.

that its judgment of 1974 dealt exclusively with atmospheric tests and consequently it was not possible for the Court to now take into consideration questions relating to underground nuclear tests.<sup>7</sup>

The author has not limited his analysis to judicial doctrine; he has also examined several policy recommendations to strengthen the role of the ICJ in relation to the peaceful settlement of disputes. Firstly, he has supported the view that the scope of the advisory jurisdiction of the Court should be widened to enable entities other than the UN and its specialised agencies to seek advisory opinions from the Court. These could include the UN Secretary-General, regional organisations and other international organisations charged with the protection of the global commons. He also favours the proposal that other international judicial institutions and even national courts should submit, through the General Assembly, requests for advisory opinions with a view to promoting the uniform application of international law. Secondly, he concurs with the view that the consensual character of the Court's jurisdiction needs to be re-examined and that all states should be required to accept the unconditional compulsory jurisdiction of the Court with regard to disputes involving human rights, genocide and the protection and immunities of diplomats.<sup>8</sup>

Although the different essays in this volume deal with distinct themes, the author has endeavoured to locate them within a wider framework which he has described as the changing structure of international law. Implicitly he has sought to address issues relating to the nature and function of international law. There are two competing view points. The first view point is that international law is about rules. It consists of a system of neutral rules and all that international lawyers have to do is to identify and apply them. The classical formulation of this view was made by judges Fitzmaurice and Spender in the *South West Africa Cases* in 1962 where they stated as follows:

*We are not unmindful of, nor are we insensible to, the various considerations of a non-judicial character, social, humanitarian and other .... But these are matters for the political rather than for the legal arena. They cannot be allowed to deflect us from our duty of reaching a conclusion strictly on the basis of what we believe to be the correct legal view. This formulation reflects the assumption that the "correct" legal view can be discerned by applying "rules" that is to say "the accumulated trend of past decisions regardless of context or circumstances." This view further seeks to distance international law from social policy. The ICJ pointed out in 1966 that "Law exists, it is said, to serve a social need, but precisely for that reason it can do so, only through and within the limits of its own discipline."<sup>9</sup>*

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<sup>7</sup> Ibid at pp.149-165.

<sup>8</sup> Ibid at pp.37-52.

<sup>9</sup> Rosalyn Higgins, *Problems and Process; International Law and How We Use It* (Clarendon Press, Oxford, 1994), p.4.

The opposing view that has been advanced by scholars such as Rosalyn Higgins, presently a member of the ICJ, is that international law is not a system of rules but a normative system that is harnessed to the achievement of certain common values. They argue that "without international laws, safe aviation could not be agreed, resources could not be allocated, people could not safely choose to live in foreign lands." The proponents of this view argue that, while rules play a part in law, they do not form the only part and international law is more appropriately described as a process rather than as "rules." Rosalyn Higgins points out that "international law is a continuing process of authoritative decisions .... it is not just a trend of past decisions which are termed rules .... where the trend of past decisions is not overwhelmingly clear there is .. (a concern inevitably).. with policy alternatives for the future." They contend that only such a view of international law would enable it to contribute to and cope with a changing political world.<sup>10</sup>

A third approach to international law has been advanced by the Critical Legal Studies school. They take as the starting point the view that law is deeply rooted in social theory and legal processes are located in social contexts in which the place of values is quite explicit. A Critical Legal Scholar rejects the notion of law as rules and as exceptions. He sees law as "contradictions" or as "essentially indeterminate at its core" rather than as complementary norms between which choices have to be made in particular circumstances. A Critical Legal Scholar believes that the "contradictions are either historically contingent or inherent in the human experience." Critics of this approach argue that this leads to the pessimistic conclusion that "what international law can do is to point out the problems but not assist in the achievement of goals."<sup>11</sup>

Professor David Kennedy contrasts the writings of the 'primitive' scholars with the 'traditional' international legal scholarship of the post-Westphalia period and the 'modernists' of the twentieth century. In his reading the traditional scholars emphasise state sovereignty and make a sharp distinction between international and national law, while 'modernists' attempt in various ways to overcome this, without returning to the naïve universalism of the 'primitives.'<sup>12</sup>

Professor Sol Picciotti argues that the central limitation of international law lies in the personification of the state, which draws a veil over the very real contradictions and changes that have been taking place in the nature of the state and the international system.<sup>13</sup> The conceptualisation of international law, according to him, requires a rethinking of the relationship between law and power. Usually this leads the students of international law either to collapse law into a simplified and absolute notion of power and assert that international law merely legitimises the interests of the powerful; or to idealise law as the expression of popular needs

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<sup>10</sup> Ibid., p.1.

<sup>11</sup> Ibid., p.9.

<sup>12</sup> Professor Sol Picciotti, "International Law in a Changing World" in Geoffrey P. Wilson (ed.) *Frontiers of Legal Scholarship* (John Wiley & Sons, Chichester) (1995), p.154.

<sup>13</sup> Ibid., at p.202.



or the embodiment of justice which is flouted by the powerful states.<sup>14</sup> He points out that the new wave of debate in the 1980s, as writers from various perspectives sought to rethink the nature and role of law in international affairs, pre-dated the major changes in inter-state relations which occurred in the 1990s. Much of the writing on international law in the 1970s had taken a functionalist and even instrumentalist view of law, arguing for an adaptation of law to the changed 'realities' of international society, especially the creation of many new states by decolonisation. The current international scholarship in this area reflects, he opines, the ferment of intellectual debates about the possibility and limits of reason, order and justice in society. In earlier periods dissatisfaction with traditional perspectives and explanations led either to projects for a new world order, or at least to critiques of the existing bases of social power, aiming to empower the oppressed. In relation to the central issue of the changing nature of the state and of the global system, the limitations of some of the critical and theoretical approaches which are confined to the conceptual framework of international law have become apparent.<sup>15</sup> He also opines that in general, there seems to be a large gulf between the debates within theory and any engagement with or attempt to understand the changes taking place in international society.<sup>16</sup> Dr. Rohan Perera does not seek to explicitly locate himself within this debate. It is, however, clear that he would not associate himself with the ultra-classicist position of Fitzmaurice that international law is about "rules." He has argued that the international community must harness international law in a positive and creative manner to regulate the conduct of states in such areas as the peaceful use of outer space, disarmament, and in developing the principles of environmental law relating to the global commons. Unlike the Critical Legal Scholars, Dr. Perera is animated by an almost passionate faith in the normative power of international law and the potential of international institutions to respond to the challenges of a changing political world.

Finally, the question remains as to whether international law is really a universal system. Historically, socialist and developing countries had a different view of its nature and content. However, in the last three years there has been a radical shift in the approach of international legal scholars based in the former socialist states. The emphasis now is on international law as the articulation of a universal interest in the common threat to human survival. International law is thus conceived by these scholars as a vehicle for achieving universal human values.

Developing countries have, on the other hand, consistently pointed out that they played little or no part in shaping much of customary international law. The author has correctly observed that, until recently, it was little more than the public law of Europe. The early jurists who profoundly influenced the nature and content of international law from the sixteenth century to the nineteenth century were almost entirely based in European centres of learning. Pre-eminent amongst them was the Dutch scholar, jurist and diplomat Grotius (1583-1645) whose systematic

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<sup>14</sup> Ibid., at p.189.

<sup>15</sup> Ibid., at p.191.

<sup>16</sup> Ibid., at p.192.

treatise on the Law of War and Peace first appeared in 1625. He thus created the first comprehensive framework for the modern science of international law.

Rosalyn Higgins has argued that, while developing countries have questioned the substance and content of international law, they have not questioned its universality or refused to be bound by its detailed provisions.<sup>17</sup> This does not, however, appear to be entirely accurate. In the field of human rights the challenge of maintaining a consensus amongst nations has remained formidable. One significant development has contributed towards the increasing trend to question the universality of human rights law in particular. The economic success of East and South-East Asia is the central strategic fact of the nineties. For the first time since the adoption of the Universal Declaration of Human Rights, countries which are outside the Judo-Christian intellectual traditions are in the first rank. These countries are becoming increasingly conscious of their own civilisations, traditions and institutions. It is, however, disturbing that even the consensus achieved in framing the Universal Declaration of Human Rights is now being questioned and its continuing validity disputed. Bilabhari Kaushikan has argued that "many of its 30 articles are still subject to debate over interpretation and application. It is not only pretentious but wrong to insist that everything has been settled."<sup>18</sup> In South Asia where there is a legal and ideological commitment to multi-party democracy, fundamental rights, the rule of law, and the independence of the judiciary, this thesis cannot be accepted. Certainly, South Asian civil society is extremely sceptical of any effort to question human rights in the guise of protecting Asian values or a model of developmental authoritarianism. On the contrary, we believe that the discourse on human rights should not be appropriated by the West, and that South Asia should draw on its own traditions and experiences to further advance the frontiers of international human rights law.

Aung San Suu Kyi has effectively refuted the challenge to the universality of the Universal Declaration. She has argued "it is a puzzle to the Burmese how concepts which recognise the inherent dignity and the equal and inalienable nature of human rights, which accept that all men are endowed with reason and conscience and which recommend a universal spirit of brotherhood can be inimical to indigenous values. It is also difficult for them to understand how many of the rights contained in the thirty articles of the Universal Declaration of Human Rights can be seen as anything but wholesome and good."

I do, however, agree with the author that the developing world cannot once again be left behind in the formulation of international norms and principles which would govern the international community in the years to come. The question remains, are we adequately equipped to respond to the challenge? In the Colombo Law Faculty, international law is still an optional subject. The revisions to the curriculum adopted recently have made international law a compulsory subject in the third year of study. Even the Law Faculty's collection on international law has significantly declined and it is barely able to acquire the basic text books. It is almost

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<sup>17</sup> Ibid., p.12

<sup>18</sup> B. Kaushikan, "Asia's Different Standards" in Steiner and Alston (eds), *International Human Rights in Context - Law Politics Morals: Texts and Materials* (Clarendon Press, Oxford, 1996), p.230.

impossible to gain access to the more important journals or the decisions of international judicial organs or those of arbitral tribunals. There were private libraries such as that of the late S. Ambalavanar which had an excellent collection of journals on public international law, or specialised aspects of international trade, investment and tax law. But these libraries are no longer intact and are unable to sustain the collection. The lack of access to books is further compounded when we confront the problems of teaching in Sinhala and Tamil.

The author has made a significant contribution to our understanding of the contemporary challenges faced by international law. The author presents his arguments clearly, lucidly and elegantly. It is his fervent wish that the publication would stimulate renewed interest in the serious study of international law. Vishva Lekha Press must be commended for the high quality of the printing and the boldness of its commitment to serious publications in the law.

Rosalyn Higgins has pointed out that "we must expect in the international system an endless kaleidoscope of problems. Major changes in the international system ..... will change the pattern of the problems, but not eliminate the phenomenon. International law is a process for resolving problems. And it is a great and exciting adventure."<sup>19</sup>

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<sup>19</sup> Rosalyn Higgins, *supra* n.9 at p.267.

## CHITTAGONG HILL TRACT PEACE ACCORD\*

The signing of the peace accord between the Awami League-led Bangladesh government and the *Parbatya Chattagram Jana Sanghati Samiti* ("PCJSS") on 2nd December was welcomed hoping it will finally end the twenty-year old conflict in the Chittagong Hill Tracts (CHT). The 13,231 square kilometres of the CHT is home to several non-Bengali speaking ethnic groups collectively known as *Jummas* (after *jhum*, or the "slash-and-burn" agriculture practice). The devolution of power in Bangladesh through the formation of a Tribal Affairs Ministry and a regional council to oversee the welfare of the indigenous people of the CHT, both to be headed by tribal leaders of the CHT, as stipulated by the treaty, will strengthen the entire political process in Bangladesh and provide stability to the country. Bangladeshi and Indian academics expressed these views at a discussion programme entitled "Dialogue Between Bangladesh Government and the Jumma People - The Possibilities of Success" organised by the South Asia Forum for Human Rights.

"The peace accord will pre-empt any further insurgency in the CHT region which has claimed thousands of lives in the past two decades. The people have suffered so much," said Raja Devashiah Roy, the traditional chief of the *Chakma* people. The *Chakmas* are the biggest indigenous group in the CHT. The accord will also pave the way for further repatriation of thousands of *Jummas* who are living as refugees in India. He stressed, however, that groups opposing the peace accord, like the Bangladesh Nationalist Party, have to be convinced that the accord will not undermine the security of Bangladesh. There has been opposition to the accord because of fears that the tribal people of the CHT may be given title deeds to the land which was originally theirs.

Commenting on the Peace Accord, Professor Anu Mohammad, economist and Co-ordinator of the National Committee for the Protection of Fundamental Rights in the CHT, said that the accord's failure to recognise the main demand of the PCJSS that the *Jummas* should be accepted as a "national minority" and that the Constitution of Bangladesh should be amended to incorporate safeguards to protect the cultural, social, religious and political rights of the national minorities, could lead to serious problems in the near future. He also felt unhappy about the fact that the accord was silent on the issue of punishment of those members of the Bangladesh security forces who were guilty of violating the basic human rights of the *Jumma* people. He pointed out that the accord was silent on one of the main demands of the PCJSS and all the human rights groups of Bangladesh that the kidnappers of Ms. Kalpana Chakma, the leader of the Hill Women's Association, must be identified and punished.

The partition of the Subcontinent in 1947 saw the CHT with its Buddhist population go to Muslim East Pakistan. The Pakistani and, after 1971 the Bangladeshi governments, encouraged plains people to settle in the hills. The Bangladeshi army unleashed a reign of terror on the tribal people in the CHT forcing tens of thousands to take refuge in Tripura and Mozoram.

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\* Press Release prepared by South Asia Forum for Human Rights, Kathmandu.

"Although the peace accord may fuel discontent among sections of the Bengali population, there is support for it as well," said Roy. The peace accord paves the way for trust and dialogue between the PCJSS and the Bangladesh government. This is important because legalities still have to be addressed. For one, the customary rights of the indigenous people over land, forests and resources of the CHT have to be defined and legitimised. "The Bengali-speaking new settlers cannot be expelled *per se* as a result of the accord but a legal definition is necessary to ascertain which lands have been illegally occupied," said Roy who participated at the final phases of the negotiations leading to the accord. According to the accord, a land commission will be formed to settle land disputes. Also, there is no constitutional recognition that the CHT is a distinct region within Bangladesh and that the *Jumma* people of the CHT are distinct people. The peace agreement also stipulates that the government and the PCJSS will jointly set a date and place for the surrender of arms by the *Shanti Bahini*, the armed wing of the PCJSS. Those cadres surrendering their arms and ammunition will be granted amnesty.

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### **SRI LANKA: STATE OF HUMAN RIGHTS 1997**

This report is a detailed account of the state of human rights in Sri Lanka focusing on events which occurred in the country in 1996.

The report considers civil and political rights in relation to the integrity of the person; emergency rule; freedom of expression and media freedom and judicial protection of human rights. Separate chapters are devoted to environmental rights; internally displaced persons and the freedom of movement; nationality and citizenship laws; violence against women; and children's rights. The report also discusses the human rights implications of the devolution proposals and the Office of the Ombudsman.

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# NATIONAL SECURITY LAWS IN BANGLADESH

*Adilur Rahman Khan\**

Under the colonial rule of the British and Pakistanis, statutes such as the Indian Safety Act, Defence of Pakistan Ordinance etc., sanctioned preventive detention, the seizure of property and restrictions on the media, all in the name of protecting the security of the state.

The struggle against colonial rule and for independence was deeply imbued with the aspiration to ensure the right to a life of human dignity and to enjoyment of their fundamental human rights and freedoms. It envisaged a democratic society allowing for the full exercise of political freedoms. Within a year of independence, on 16 December 1972, the Constitution of Bangladesh came into effect. It guaranteed the fundamental rights to life, to liberty, to security of the person, freedoms of assembly, speech and expression, freedoms of thought, conscience and religion and the right to property. The Constitution allowed no scope for derogations from these fundamental rights.

Twenty six years on, the reality is different: the aspirations of the liberation struggle remain largely unfulfilled and democratic rights unprotected. The survival of millions is threatened by vicious poverty. The security of the people, to live with dignity, to enjoy access to food, shelter, health and education, cannot be ensured. And yet, in the name of national security the Bangladeshi government continues to deploy repressive laws to violate political rights. Such laws violate the right to life, to liberty and to security of the person; they are discriminatory in their application and violate all safeguards against arrest and detention and the prohibition of torture or cruel, degrading or inhuman punishment. Such laws are found in: (i) Articles 33, 141A, 141B, and 141C of the Constitution of Bangladesh; (ii) special laws such as the Special Powers Act of 1974 and the Special Security Forces Act of 1986; (iii) the ordinary criminal laws such as section 505A of the Penal Code of 1860 and section 99A of the Code of Criminal Procedure of 1898.

## **Proclamation of Emergency**

The second amendment inserted a new section, Part IXA, to the constitution. This empowers the President, under Article 141A, to proclaim a State of Emergency if he is satisfied that "the security or economic life of Bangladesh, or any part thereof, is threatened by war or external aggression or internal disturbance." He may make such a Proclamation prior to the occurrence of any war, aggression or disturbance if he is "satisfied that there is an imminent danger thereof." The President may, pursuant to Article 141B, also make laws or take executive action curtailing certain fundamental rights, the freedoms of movement, assembly, association, speech and expression, of thought and conscience, the right to property and the right to practise a

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\* The writer is an advocate in the High Court Division of the Supreme Court of Bangladesh.

profession or trade. He further has the power, under Article 141C, to suspend the right to move the courts for the enforcement of any of the fundamental rights guaranteed in the Constitution.

Some level of accountability ensured, however, by the requirement that the Prime Minister must countersign any Proclamation of Emergency and any order to suspend the enforcement of fundamental rights; and that no such declaration shall remain valid beyond 120 days, unless ratified by Parliament. However, given the reality of majority parliamentary politics, the ruling party has effectively been handed a constitutional weapon to attack fundamental rights in the name of internal or national security - its main victims being the people of Bangladesh.

### **Removal of safeguards on Arrest and Detention**

Amendments to Article 33 restricted the safeguards available to those under arrest and detention. The right of any person in custody to be informed "as soon as may be" of the grounds of arrest, to consult and be defended by a lawyer of one's choice, and to be produced before a magistrate within 24 hours of arrest or detention is denied to enemy aliens and those in preventive detention.

Article 33 further limits the rights of any person in preventive detention. It is specified that the detainees must be informed of the grounds for detention as soon as possible, and given the "earliest opportunity" to make a representation against the order. However, the law empowers the enforcing authority to refuse to disclose such facts if he considers it to be against the public interest to do so.

### **Special Powers Act of 1974**

Constitutional limitations on the right to liberty have been supplemented by specific legislation - the Special Powers Act of 1974 ("SPA") - which provides for preventive detention. The use and abuse of the SPA in the name of protecting security interests has resulted in a steady pattern of human rights violations.

The SPA was enacted to "take special measures" for the prevention of prejudicial activities, for more speedy trial and effective punishment of grave offences." It defines a "prejudicial act" as "any act which intended or likely to:"

- (i) prejudice the sovereignty or defence of Bangladesh;
- (ii) prejudice the maintenance of friendly relations with Bangladesh;
- (iii) prejudice the security of Bangladesh or to endanger public safety or the maintenance of public order;

- (iv) create or incite feelings of enmity or hatred between different communities, classes or sections of people;
- (v) interfere with or encourage or incite interference with the administration of law or the maintenance of law and order;
- (vi) prejudice the maintenance of supplies and services essential to the community;
- (vii) cause fear or alarm to the public or to any section of the public;
- (viii) prejudice the economic or financial interests of the state.

These expansive definitions of "prejudicial acts" grant considerable scope for their abuse by the authorities.

The SPA has been widely used to detain opposition activists, especially the members of J.S.D. and the Shorbohara Party under the first Awami League and BAKSAL regimes. It has also been disproportionately deployed against the hill people of the Chittagong Hill Tracts. With the passage of years, its use has increased rapidly. According to Amnesty International, 35,000 people were detained under the first Awami League and BAKSAL regimes of Sheikh Mujibur Rahman during the period from 1972 upto August 1975; 100,000 under President Zia between 1975-1981; and 150,000 under Lieutenant General Ershad during 1982-1990. No accurate figures are available of the numbers of those who remained under preventive detention during Khaleda Zias' regime. Reportedly, the number is 3,600 under the present regime of Sheikh Hasina which commenced in June 1996.

The judiciary has, in innumerable cases, acted as a "bulwark against illegal detention." Detainees have been released by orders of the High Court Division following the filing of writs of *habeas corpus* or the initiation of proceedings under section 491 of the Criminal Procedure Code of 1898. In the vast majority of such cases, the Court has found the grounds of detention to be vague, indefinite and lacking in material particulars. In other cases, orders of release have been given for various reasons, including:

- the failure to inform the detainees of their right to representation;
- the failure to serve the grounds of detention within the statutory period of 15 days;
- the lack of a nexus between the order and the grounds of detention. For example, the order states that a person has been detained "to prevent him from acting in a manner against public safety and law and order" while the grounds specify "preventing him from acting against the economic or financial interest of the state;"



- the failure to produce the detainees before the Advisory Board within a certain time;
- retrospective issuing of orders.

On 12 March 1997, Sheikh Hasina ruled out in Parliament the possibility of repealing the Special Powers Act of 1974. She was replying a question asked by an opposition Member of Parliament, who called the Act "a jungle law framed by the previous Awami League Government."<sup>1</sup> Ironically, a High Court Division Bench recently ruled that the detention of four Bangladesh Nationalist Party (BNP) leaders, under the Special Powers Act of 1974, was illegal and ordered that each be awarded one hundred thousand taka as compensation.

### **The Special Security Force Ordinance of 1986**

The Presidential Security Force Ordinance (PSFO) established a Security Force to be under the direct command of the President, and to be controlled and administered by a Director who may be endowed with the powers of the Chief of Army Staff in respect of operations of the Force. The Force may seek the assistance of other services, such as the law enforcing Agencies, paramilitary forces, defence and intelligence agencies.

The Force was originally intended to "provide physical security" both to the President, wherever he may be, and to the VIPs (including any Head of State or Government or any person declared to be a VIP by the government). Following restoration of the parliamentary system, it was renamed the Special Security Force ("SSF"): its primary function is to protect the Prime Minister the President and other VIPs. Its work also includes "collecting and communicating intelligence affecting the physical security of the Prime Minister, the President or a VIP" (Section 8). The SSF is now accountable to the Prime Minister under the present parliamentary system. The SSF are given the following powers:

*arrest without warrant any person when there is reason to believe that the presence or movement of such person at or near the place where the Prime Minister, the President or a VIP is living or staying or through which he is passing or about to pass is prejudicial to the physical security of the Prime Minister, the President or such VIP and if such person forcibly resists the endeavour to arrest him or attempts to evade arrest, such officer may use all means necessary to effect the arrest and may, if necessary and after giving such warning as may be appropriate in the circumstances of the case or otherwise, so use force against him as to cause death (Section 8).*

The wide and unfettered powers granted to the authorities under the SSFO are exacerbated by section 11 which prevents prosecution for such acts without government sanction.

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<sup>1</sup> Daily Star 12.3.97.

## **CRIMINAL LAWS**

### **(i) Section 505A of the Penal Code**

In 1991, the SPA provisions relating to restrictions on the freedom of the press (namely sections 2d, 3g, 16, 17 and 18) were repealed. Within months, a new section, 505A, was added to the Penal Code which provided that any person who "by words, written or spoken, or by sign or visible representation or otherwise does anything or makes, publishes or circulates any statement, remark or report which threatens national security, public order, or friendly relations with foreign states or the maintenance of essential supplies and services is punishable with seven years of imprisonment.

### **(ii) Section 99A of the Code of Criminal Procedure**

If the administration considers any publication to be prejudicial to the security of the state, it may take action under section 99A of the Code of Criminal Procedure to ban and seize all copies of that publication. In the recent years the government has banned several publications, including 'Radar' and 'Satellite', which carried reports on human rights violations in the Chittagong Hill Tracts, and 'Glani' (Shame), which contained reports on communal attacks against the Hindu community.

## **Intelligence services**

The following intelligence agencies operate to protect internal or national security: National Security Intelligence (NSI), Directorate, General Forces Intelligence (DGFI), Special Branch (SB), etc. and more recently, the Special Security Force (See above). The NSI, DGFI and SSF are directly accountable only to the Prime Minister. The NSI was created by a cabinet decision in 1972; there is no statutory basis to its creation. The SB is, however, a part of the police and is accountable to the Home Ministry.

These agencies are intimately involved in the application of national security legislation. In many cases, detainees have been illegally kept in the custody of the intelligence services for interrogation purposes. Many cases have been reported of custodial violence against political activists by members of the intelligence services. Surveillance of political, socio-cultural, development and human rights organisations is also conducted by such agencies. NGOs require prior clearance by the NSI and SB to initiate projects or appoint staff.

These agencies have placed themselves in a position beyond the reach of the law. There is no provision to discuss their activities in the national parliament.

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