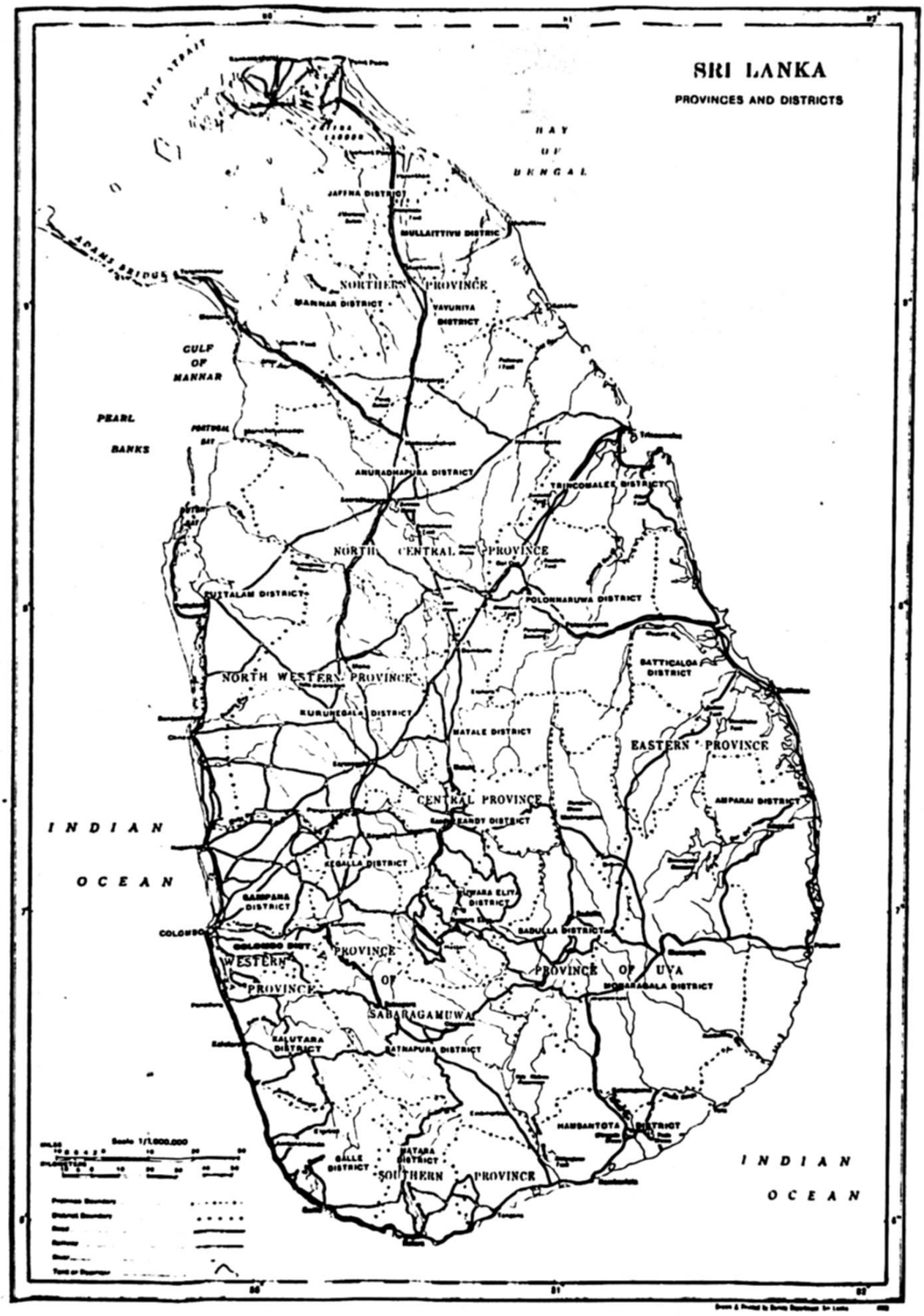
SRI LANKA

STATE OF HUMAN RIGHTS

1993

Law & Society Trust


SRI LANKA
PROVINCES AND DISTRICTS
BAY OF BENGAL
PALK STRAIT
ADAMS BRIDGE
GULF OF MANNAR
PEARL BANKS
INDIAN OCEAN
INDIAN OCEAN
JAFFNA DISTRICT
MULLAITTIVU DISTRIC
NORTHERN PROVINCE
MANNAR DISTRICT
VAVUNIYA DISTRICT
ANURADHAPURA DISTRICT
TRINCOMALEE DISTRICT
NORTH CENTRAL PROVINCE
PUTTALAM DISTRICT
POLONNARUWA DISTRICT
NORTH WESTERN PROVINCE
KURUNEGALA DISTRICT
MATALE DISTRICT
BATTICALOA DISTRICT
EASTERN PROVINCE
CENTRAL PROVINCE
KANDY DISTRICT
AMPARAI DISTRICT
KEGALLA DISTRICT
GAMPAHA DISTRICT
NUWARA ELIYA DISTRICT
COLOMBO
COLOMBO DIST.
BADULLA DISTRICT
WESTERN PROVINCE
PROVINCE OF SABARAGAMUWA
PROVINCE OF UVA
MONARAGALA DISTRICT
KALUTARA DISTRICT
RATNAPURA DISTRICT
HAMBANTOTA DISTRICT
GALLE DISTRICT
MATARA DISTRICT
SOUTHERN PROVINCE
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FOREWORD

This report represents an important watershed with regard to human rights in Sri Lanka. This is a first attempt at an annual review of human rights in Sri Lanka undertaken by concerned human rights activists and scholars. This report is consequent to an initiative by INFORM, Nadesan Centre for Human Rights Through Law and the Law and Society Trust. There have been similar efforts in Pakistan (Human Rights Commission of Pakistan), Bangladesh (Coordinating Council for Human Rights in Bangladesh), and Nepal (INSEC). The Sri Lankan report seeks to describe the present status of human rights in Sri Lanka and to assess the extent to which Sri Lanka has fulfilled its duty to protect the fundamental rights of its citizenry in terms of its international obligations. To this end constitutional guarantees, legislative enactments, and the extent of the current implementation and enforcement of these rights are examined and the impact of the restrictions they contain are discussed. The report considers civil and political rights focussing on personal integrity, freedom of expression, and the exercise of political rights, as well as economic social and cultural rights focussing on the right to food, health, education, worker's rights and freedom of association. In addition separate chapters are devoted to women's rights, children's rights, group rights, the plight of displaced persons and the humanitarian law implications of the civil war.

The report was completed within a period of nine months of intense work particularly by the staff of the Law and Society Trust. Specific chapters were assigned to individuals or organisations with special competence in the areas assigned. They were subsequently read by readers who reviewed the drafts for accuracy, objectivity and clarity

of presentation. The report was then subsequently compiled in draft form and comprehensively edited to ensure that as far as practicable there would be uniformity of style and approach. It is inevitable, however, that there would be some overlap between chapters, and that some topics would be dealt with more comprehensively than others. We have also included a bibliography of important publications and reports on human rights and a list of international instruments to which Sri Lanka is a signatory.

It is hoped that this report would serve as a focal point for dialogue between civil society institutions and the government in ensuring more effective protection and promotion of human rights within Sri Lanka. This report will also be translated into Sinhala and Tamil and distributed to non-governmental organisations and other concerned members of public.

Sri Lanka's constitution mandates "the fundamental rights which are by the Constitution declared and recognized shall be respected, secured and advanced by all the organs of government". Sri Lanka is also a signatory to several international human rights instruments, and must ensure that its domestic laws, policies and practices are in conformity with its international obligations. This report is a modest step in the continuing struggle to ensure that the state (and those non-state actors who are legitimately subject to scrutiny in this report) upholds its international and constitutional obligations to respect and safeguard human rights.

Law and Society Trust
May 31st 1994

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CHAPTER 1

LEGAL BACKGROUND

(i) Constitutional protection of human rights

The Bill of Rights contained in the 1978 Constitution speaks of the State's commitment to the protection of its citizen's dignity and well-being. Such commitment is attested to by Article 4(d) which states "the fundamental rights which are by the Constitution declared and recognized shall be respected, secured and advanced by all the organs of government, and shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided".

The Bill of Rights in chapter III of the Constitution encompasses Articles 10 through 14. The fundamental rights guaranteed by Articles 10 through 13 apply equally to citizens and non-citizens. Thus every person within the borders of Sri Lanka is assured the following rights: (a) freedom of thought, conscience and religion; (b) freedom from torture or cruel, inhuman or degrading treatment or punishment; (c) equality of person before the law and equal protection of the law (this section prohibits discrimination based on race, religion, language, caste, sex, political opinion, or place of birth); (d) freedom from arbitrary arrest, detention and punishment; (e) prohibition of retroactive penal legislation; (f) fair trial; and not to be deprived of one's life without procedures established by law. The Constitution guarantees the freedom to exercise certain rights only to citizens in Article 14. Thus, the freedom of speech and expression, freedom of

assembly and association, the right to join a trade union, freedom to practice one's religion and culture, freedom to work, and freedom of movement, are accorded to every Sri Lankan citizen and denied to non-citizens.

The Sri Lankan Constitution does not specifically protect the right to life in absolute terms, however, Article 13(4) of the Sri Lankan Constitution states that "No one shall be punished with death or imprisonment except by order of a competent court, made in accordance with procedure established by law," and this affords some protection from arbitrary deprivation of life. The term "procedure established by law" is not the same as the right to "due process of law". Due process of law requires the establishment of adequate procedures and the implementation of such procedures to avoid arbitrary infringement upon a citizen's right. The Indian Supreme Court has developed a "due process of law" standard. In *E.P. Royappa v. State of Tamil Nadu* (1974) S.C. 555 at 583,584 Justice Bhagwati adopted a due process standard, which principle was followed by *Maneka Gandhi v. Union of India A.I.R.* (1978) S.C. 597 and others. The Sri Lankan Supreme Court, however, refused to adopt the Indian interpretation stating "Natural justice is not a fundamental right in our country where the architects of the Constitution eschewed the 'due process' found in the American Constitution", *Elmore Perera v. Major Montague Jayawickrema* (1985) 1 S.L.R. 287. Article 13(4) does not come within the reach of Article 15 which authorises certain restrictions of fundamental rights under certain conditions. Nevertheless, since life and liberty can be deprived subsequent to any procedure established by law, the wide latitude in action authorized by the emergency regulations whittles away the minimum protection granted by Article 13.

The International Covenant on Civil and Political Rights guarantees not only the freedom of expression but also the right to information. The Sri Lankan Constitution on the other hand does not accord the right to information. In *Visuvalingam v. Liyanage* 2 Sri L.R. 123 (1984) Justice Wimalaratne read in the right to information. In that case, Justice Wimalaratne's statement "I am of the view that the fundamental right to the freedom of speech and expression includes the freedom of the recipient," as such includes the freedom of the press as well. To quote Justice Wimalaratne again "It is only a free press which can ... propagate a diversity of views and ideas and advance the right to a free and general discussion on all matters of public importance...". The All Party Conference recommended that explicit recognition be awarded to the right to information.

The Constitution entitles the guarantees of fundamental rights to every "person" and "citizen". As discussed above, fundamental rights enumerated in Articles 10 through 13 can be enjoyed by all persons, including "legal persons", and Article 14 enumerates rightsenjoyed only by citizens. The Supreme Court has interpreted "citizen" to exclude legal persons such as companies and corporations, who are, therefore, not entitled to Article 14 protection (Supreme Court dismissed the application by Janatha Finance and Investment Limited (application No. 116/82 Dec.14, 1982), on this basis). However, directors and shareholders of a Company may instigate action if they can show that they have suffered distinct and separate injury as individuals (*Dr. Neville Fernando et. al. v. Liyanage et. al.* (1983) 2 Sri L.R. 214).

(a) restrictions on fundamental rights

Article 15 lists the conditions under which the above rights and

freedoms can be restricted. Article 10 and 11 freedoms cannot be restricted under any circumstances. According to the Sri Lankan Constitution freedom of thought conscience and religion and freedom from torture may be considered absolute rights. However, according to Article 16, if any written or unwritten law which restricted these rights predated the Constitution, such laws would continue in force regardless of the inconsistency with constitutional provisions.

Rights guaranteed by Articles 12, 13, and 14 can be restricted for various reasons. Article 15(7) lists the conditions under which these rights can generally be restricted: on the basis of national security, public order,the protection of public health and morality, etc. Some of the enumerated freedoms can be restricted for reasons other than those listed in Article 15(7).

Article 2(1) of the Covenant on Civil and Political Rights obliges a state to respect and to ensure the rights declared to "all individuals within its territory and subject to its jurisdiction." No derogation is permitted from those provisions which guarantee the right to life, or which forbid torture or inhuman treatment, slavery, servitude, conviction or punishment under retroactive laws. The right to recognition as a person before the law and the right to freedom of conscience, thought and religion are also declared in absolute terms. Four non-derogable rights are common to the Covenant on Civil and Political Rights, the American Convention on Human Rights, and the European Convention for the Protection of Human Rights and Fundamental Freedoms: (a) the right to life, (b) the prohibition of torture, (c) the prohibition of slavery, and (d) the prohibition of retroactive penal measures.

Even those rights and freedoms which are derogable are only so at

times of "public emergency which threaten the life of the nation, "and only to the "extent strictly required by the exigencies of the situation." However, under the Sri Lankan Constitution restrictions can be imposed at any time, and for reasons such as in the interest of racial and religious harmony or national economy. Moreover, Article 15 does not condition the restriction to be reasonable. Courts have, however, evolved a reasonableness standard through case law (*Wickramabandu v. AG* Appl. 27/88; SCM 6.90; *Joseph Perera v. AG* SC Appl. 107-109/86). Some of the Supreme Court justices have evolved a reasonable and rational nexus standard to measure infringements of fundamental rights by emergency regulations. Whether, this standard would be applied across the board is unclear.

The Public Security Ordinance was made part of the 1978 Constitution in Article 155(1). Article 155(2) declares that Emergency Regulations cannot override, amend, or suspend the provisions of the Constitution, although they may do so to any other law in the country. However, Articles 12,13(1),(2) and 14 are subjected to restrictions under Art. 15(7) in the interest of national security or public order. Such restrictions may be in the form of regulations enacted for the purpose of public order. In other words, contrary to Art. 155(2), the constitutional protection afforded by the above articles can be amended by emergency regulations. Earlier Supreme Courts have expressed the view that in periods of national turmoil protection of fundamental freedoms must necessarily be awarded a subordinate status. (See *Visuvalingam v. Liyanage* (1984) 1 Sri L.R. 305,318; in *Kumaranatunga v. Samarasinghe* F.R.D (2) 347 Justice Soza stated "It is well recognised that individual freedom has in times of public danger to be restricted when the community itself is in jeopardy, ... These [Emergency] Regulations overshadow the fundamental rights guaranteed by Articles 13(1) and (2) of the Constitution.")

Later cases indicated a welcome trend as evidenced in *Wickramabandu v. AG* where the Court stated "The State may not have the burden of establishing the reasonableness of the restrictions placed by law or Emergency Regulations, but if this Court is satisfied that the restrictions are clearly unreasonable, they cannot be regarded as being within the intended scope of the power under Art. 15(7)." In a landmark decision in *Joseph Perera v. AG* SC Appl. 107 - 109/86; SCM 25.5.87: the Supreme Court struck down an emergency regulation dealing with the infringement on the freedom of speech on the basis it lacked clarity and permitted arbitrary and capricious action by the police.

(b) judicial protection of human rights

Article 118 expressly confers on the Supreme Court jurisdiction over constitutional matters and the protection of fundamental rights. Article 125 grants the Supreme Court sole jurisdiction over constitutional interpretation and to inquire into complaints of fundamental rights violations and determine the appropriate remedy and compensation.

The Constitution does not permit judicial review of Bills passed by Parliament. The Supreme Court, however, may review Bills before they become law. The jurisdiction of the Supreme Court to review such a Bill for constitutionality can be invoked by either the President or by a citizen. The Supreme Court cannot act on its own initiative (R.K.W.Goonesekere, "Fundamental Rights and Judicial Approaches, III Fortnightly Review #49 [Law and Society Trust, 1 & 16 Dec. 1992]). When the President invokes the jurisdiction of the Supreme Court, the Attorney General sets the agenda as to which provisions are presented for judicial scrutiny. Once the Court rules on the validity of the Bill and identifies inconsistencies with the Constitution it has no

further role in the enactment of the said Bill. It neither has the authority to scrutinise the amendments to the Bill nor any procedure undertaken to pass the Bill. A Bill may still be passed even after judicial invalidation if it receives an endorsement by a 2/3 majority in Parliament.

Urgent Bills go automatically to the Supreme Court for review. The Supreme Court must give its determination in 72 hours. Due to the short time period, concerned citizens and NGOs do not have sufficient time to raise issues and assist the Supreme Court in its scrutiny. Often, government suspends standing orders and pushes legislation through.

Order papers of proposed Bills are published in the Gazette. These Gazettes are not easily accessible. Subordinate legislation, such as Provincial Council statutes and regulations and laws issued by bodies instituted by legislation under Article 76(2) and (3) and emergency legislation under the Public Security Ordinance is subject to judicial review even after the enactment of the law.

Article 17 grants every person the right to apply to the Supreme Court when any right guaranteed by Chapter III is violated by executive or administrative action. According to Article 126(2) only the individual or his/her attorney may petition the Supreme Court charging infringement of fundamental rights. New Rules of the Supreme Court which came into operation at the end of April 1992, seek to expand the scope of the locus standi to file fundamental rights applications. Rule 44 of the new Rules of Court allow those other than the injured to file applications if a judge sitting in chambers determines that a prima facie case of "an infringement, imminent infringement, of fundamental right or language right", has been established. In this

case the judge may exercise his discretion to treat it as a "petition in writing under and in terms of Article 126(2)..." if two conditions exist. Firstly, the person injured must not have the means to pursue complaint according to Article 126, and secondly, the victim of infringement or imminent infringement would be substantially prejudiced.

An individual cause of action under the Constitution would arise when an executive or administrative action infringes on the rights guaranteed by the Constitution. This is much narrower than justiciable infringement by state action provided by the Indian and U.S. Constitutions. In the past infringement of fundamental rights by a state owned insurance company was held to be non justiciable as according to the court it did not fall within "executive and administrative action." However, in *Rajaratne v. AirLanka Ltd* (1987) 2 Sri L.R. 128. Justice Atukorale held that Air Lanka was an agent of the government and as such its actions would amount to "executive and administrative action," invoking Article 126 jurisdiction.

When a private party violates an individual's rights under the Constitution, no constitutional cause of action arises, unless it falls within Article 12(3) which prohibits preventing individual access to public places such as shops, restaurants, hotels, places of worship, etc. on the basis of race, religion, language, caste, or sex. Hence, a cause of action under the Constitution need not be triggered only by executive or administrative action.

In a landmark decision in 1993 the court held that in certain instances actions by private individuals can be considered state action if there is a sufficient nexus between the private actor or actors and the Executive. In *Mohamed Faiz v. The AG* Supreme Court Application

No 89/91 (decided 19/11/93), the petitioner, while in police custody, was assaulted by two Ministers of Parliament and a Provincial Council member. The police officers stood by and allowed the MPs and Councillor to assault the petitioner. The Court also found that the petitioner had been arrested and detained at the prompting of the MPs and Councillor. Under such circumstances the executive officer and the private individual would be held responsible for the action which infringed upon the fundamental rights of a citizen (see also section on Habeas Corpus and Fundamental Rights Cases in the chapter on Civil and Political Rights).

(ii) Sri Lanka's international obligations

Sri Lanka is a party to several of the international human rights covenants including the two major covenants (on Civil and Political Rights and on Economic Social and Cultural Rights) and to the conventions protecting women's rights, children's rights, and workers' rights. A list of international instruments to which Sri Lanka is a party is provided in Appendix 1. Despite committing itself to these obligations Sri Lanka has in some instances failed to bring national laws into conformity with its international obligations and in many instances has also failed to implement the requirements of the international legal instruments.

Sri Lanka is yet to ratify several key international instruments. For example, it is not a party to the Optional Protocols to the ICCPR. The Optional Protocol accepts the competence of the Human Rights Committee to consider complaints by individuals. The Second Optional Protocol aims at abolishing the death penalty. For a complete list of international instruments Sri Lanka has either not signed or not ratified, see Appendix 2.

In 1991 The Sri Lankan government announced to the UN Human Rights Commission that a 17th Amendment to the Constitution had been drafted in order to strengthen the protection afforded to fundamental rights. The All Party Conference (APC) in 1990, comprising representatives of all the major political parties in Sri Lanka, drafted a 17th Amendment to the present Constitution after a six month deliberation, and debate. The Amendment sought to: firstly, strengthen the existing chapter on fundamental rights by bringing the chapter into conformity with Sri Lanka's obligations under the International Civil and Political Covenant and the International Socio-Economic Covenant; secondly, to curtail the wide and general restrictions and powers of derogations currently allowed by Article 15(7) by deleting that provision and introducing a case by case analysis and rationalisation of restrictions; and thirdly, to broad-base and democratise rights by providing for public interest litigation.

The proposed 17th amendment although published by the government in December 1990, is yet to be put before Parliament for debate. At the 49th session of the Human Rights Commission in 1991, the Sri Lankan government also undertook to establish a Human Rights Commission. The legal draftsman is said to be engaged in drafting legislation at present to set up a Human Rights Commission. It is hoped that the legislation will be presented to Parliament during the course of the year and a Commission established by the end of 1994.

In 1993 Sri Lanka submitted reports to the UN Sub-commission on Prevention of Discrimination and Protection of Minorities (45th session on 11 Aug. 1993). Sri Lanka informed the Sub-commission that steps were underway to introduce constitutional reforms which would strengthen existing constitutional guarantees of fundamental rights. The statement by the government professed that a

Parliamentary select committee comprised of all parties represented in Parliament would be mandated to make recommendation for constitutional reform.

Sri Lanka has been remiss in its reporting obligations under some of the instruments which it has signed and ratified. The International Covenant of Economic Social and Cultural Rights requires biannual reports. Sri Lanka is yet to submit one. Sri Lanka has neither presented reports under the Convention on the Elimination of Discrimination against Women nor the Convention on the Elimination of All Forms of Racial Discrimination.

CHAPTER 2

EMERGENCY REGULATIONS

(i) Introduction

Emergency rule continued during the whole of 1993. Emergency regulations are made by presidential decree under the Public Security Ordinance, by-passing the normal legislative procedure. Thus, unlike in the case of normal legislation, there is no opportunity for either public discussion or debate in the legislature before the provisions become law.

Usually, on the declaration of an emergency (or, to use the technically correct term, on Part II of the Public Security Ordinance being brought into operation) a set of regulations called the Emergency (Miscellaneous Provisions and Powers) Regulations is made. These grant wide-ranging powers of arrest, preventive detention, search, etc., and their provisions are liable to be frequently amended.

It is a common mistake to think that the Emergency (Miscellaneous Provisions and Powers) Regulations are *the* emergency regulations, and that there is nothing else. There can be, and are at present, numerous other regulations on specific subjects, such as the Emergency (Prevention of Subversive Political Activity) Regulations, and the Emergency (Restriction on Transport of Articles) Regulations. Quite often the nexus between the emergency and the regulations seems rather dubious, for instance those relating to School

Development Boards and Provincial Education Boards, or the Emergency (Validation of Driving Licenses) Regulations.

It is extremely difficult to keep track ot emergency regulations. No listings or indexes of them are published by the government. The regulations themselves are published in the government gazette amidst a myriad of other government notifications, and they do not have a separate numbering system with the result that one can never be sure whether one's private compilation is complete.

Furthermore emergency regulations come into effect when made (i.e. when signed by the President) and there is a time gap before the gazettes are published and available at the Government Publications Bureau. There is no governmental institution to which a member of the public or a lawyer can go and as of right ask to be shown all the emergency regulations currently in force.

(ii) Regulations in force during 1993

During 1993 a diversity of subjects continued to be dealt with by emergency regulations. See Annex I on page 24 for a list of subjects on which, so far as it has been possible to ascertain, emergency regulations were either made or continued to be in torce. The list gives an indication of the variety of subjects dealt with by emergency regulations.

(iii) Revision of major emergency regulations during 1993

The year saw several amendments to the Emergency (Miscellaneous Provisions and Powers) Regulations. These amendments were a response to sustained criticism both internationally and locally over the

years, in particular by the UN Working Group on Enforced and Involuntary Disappearances, Amnesty International, and the Civil Rights Movement of Sri Lanka (CRM). Pressure for reform was increased further when a review of the emergency regulations was undertaken by the Centre for the Study of Human Rights of the University of Colombo in association with the Nadesan Centre in 1992, and a number of recommendations were made to the government. The report of this study was published in early 1993.

(a) amendments to the Emergency (Miscellaneous Provisions and Powers) Regulations made in February 1993

The first amendments to the Emergency (Miscellaneous Provisions and Powers) Regulations were made in February 1993. They were the subject of study by CRM which observed that they did not constitute a thorough review of the regulations now in force. Nor did they constitute, even in the areas they touched upon, measures that would meet the criticisms that have been levelled against them.

A description of these amendments and CRM's assessment of them are to be found in "Emergency Regulations - The Recent Amendments", (CRM Document E 03/2/93). In it CRM concludes:

> A number of emergency regulations which, though in themselves undesirable, were in fact "dead letters", i.e. never or hardly resorted to, have been dropped. Though this is obviously desirable, as the potential for abuse was always there, one should not overrate such removals as constituting important concessions by the government.
>
> As regards improvements on matters of substance, it is

disappointing to find that these are on the whole minimal. A large number of extremely important safeguards against abuse of arrest/detention powers, torture and ill treatment in custody, remain absent. The major part of the recommendations of the comprehensive review of the emergency regulations made by the Centre for the Study of Human Rights of the University of Colombo have, regrettably, not been implemented. Such improvements as have been made bear very much the character of small and grudging concessions - often not even a "half way house" towards meeting the needs pointed to time and time again by the clear and specific criticisms of non-governmental groups both nationally and internationally over the years.

The draconian provisions that limit trade union rights, for example, (see further Emergency Law and Trade Union Rights [CRM E01/10/92]), remain virtually untouched. This has serious implications, for strengthening the democratic process and the stability of society itself, which requires that legitimate and peaceful avenues of expression and action be kept open.

(b) amendments to the Emergency (Miscellaneous Provisions and Powers) Regulations made in June 1993

Thereafter in June 1993 a more far reaching change was made. The Emergency (Miscellaneous Provisions and Powers) Regulations were rescinded and a new set substituted.

The new regulations made some important changes in the provisions relating to arrest and detention. These are described in the chapter on Civil and Political Rights, Section I, Personal Integrity. (See also "Arrest and Detention under the New Emergency Regulations"

(Nadesan Centre legal briefing, 20 September 1993.)

Civil liberties bodies, while welcoming some positive features of the revision, expressed disappointment that other criticisms remain unaddressed. The positive features of the revisions made during 1993 include the following:

(1) Places of detention have to be designated and a list published;

(2) Arrests made on suspicion have to be reported forthwith to the Human Rights Task Force;

(3) Persons arrested by the armed forces outside the Northern and Eastern provinces must be handed over to the OIC of the nearest police station;

(4) Arrests must be reported to a superior officer within 24 hours;

(5) "Receipts" are to be issued to relatives when a person is arrested;

(6) A decision must be made within 7 days in the North or East, and 48 hours in the rest of the country, as to whether there is reasonable cause for further detention;

(7) If there is no such cause then the person must be released upon production before a magistrate;

(8) Detention for purposes of investigation is limited to 60 days or, if the arrest took place outside the North and East and was in respect of an offence committed outside the North and East, 7

days;

(9) The existence and addresses of authorised places of detention are required to be notified to the magistrate;

(10) The Officer-in-Charge of places of detention to furnish a list of detainees once in 14 days and the magistrate to display this on the notice board;

(11) Magistrates are to visit places of detention once a month and the officer in charge is to ensure that detainees held otherwise than by order of a magistrate are produced before the magistrate;

(12) A person may now be taken by the police from prison custody for purposes of investigation only for 48 hours (earlier 7 days) on authority of a Deputy Inspector General of Police and after notifying the appropriate magistrate. (However the University Centre Study had recommended that Court permission be obtained, and that a prison officer accompany the prisoner);

(13) The emergency regulation which provides for the by-passing of the normal law making an inquest mandatory when a person dies in custody is rephrased, so as to limit it to a certain category;

(14) The omission of a number of offences created by the earlier Emergency (Miscellaneous Provisions and Powers) Regulations (however some new ones were created);

(15) Persons who surrender must now be handed over to prison custody within 7 days (earlier it was 28 days, CRM had suggested that in most of the country the limit should be 24 hours). The

circumstances must now be reported to the Superintendent of Police and the Defence Secretary. Earlier such persons were liable to indefinite detention; this has now been remedied (but the possible period of detention is still unconscionably long);

(16) Improvements in the emergency regulations relating to essential services and labour disputes. (These are described more fully below).

Civil liberties bodies have however expressed disappointment at the following:

(1) The continued provision for prolonged detention in the custody of interrogators, i.e. police custody, which for obvious reasons is particularly conducive to ill treatment;

(2) The failure to require that the taking into custody of persons for the purpose of preventive detention (regulation 17) be reported to the Human Rights Task Force, (the reporting requirement applies only to persons arrested under regulation 18 on suspicion of having committed an offence);

(3) The continued failure to provide any rules of law governing the conditions of detention under the emergency regulations;

(4) The continued failure to impose any limit on the period of preventive detention, which remains indefinite, i.e. for as long as the emergency is in force;

(5) The failure to fully restore the normal law of inquests whenever a person dies in custody. The exception made in cases

where a police officer or a member of the armed forces has reason to believe that the death took place in the course of an "armed confrontation", and that the victim was waging war against the state, is considered unsatisfactory;

(6) The relief felt by the abolition of offences under the emergency regulations relating to the distribution of leaflets and incitement proved short-lived, for they were re-introduced on 21 December 1993.

(c) Amendments to emergency regulations relating to essential services and labour disputes

The changes made to the emergency regulations relating to essential services and labour disputes during 1993 merit separate attention. The rigours of the regulations in this field have been mitigated by the omission or revision of some of their most indefensible provisions. These changes have surprisingly received little or no publicity.

The changes include the following:

(1) The list of "essential services" was to some extent curtailed. However, the "improvement" in this regard is more apparent than real, and there has been some giving with one hand and taking away with the other. Thus the state controlled Associated Newspapers of Ceylon Ltd. ceased to be an "essential service", as appears also to be the case with broadcasting and television services, which were earlier specifically listed. On the other hand, the category comprising the work of the Ministry of Public Administration, Provincial Councils and Home Affairs has been recast to include the work of "all Ministries, government

departments and public corporations". (Amongst other things, this brings back into the category of "essential services" the state-run broadcasting and television services, from which the undiscerning reader may have thought they were now omitted.) Furthermore, the following "catch-all" category remains unchanged:

> "(k) all services of any description whatsoever necessary or required to be done in connection with the sale, supply or distribution, of any article of food or medicine or any other article required by a member of the public."

(2) The offence of failure of an employee of an essential service to turn up for work (which entails being deemed to have vacated his/her post in addition to entailing liability to prosecution) has been mitigated by the introduction of the words "without lawful excuse";

(3) Acts or omissions committed in furtherance of a strike in an essential service commenced by a registered trade union, of which 14 days notice has been given to the Commissioner of Labour and to the employer, are now protected and are no longer an offence under the emergency regulations;

(4) The extreme penalty of forfeiture of property has been omitted in relation to offences connected with essential services;

(5) All industrial disputes arising after 24 June 1989 and remaining unsettled are referred to settlement by arbitration under the Industrial Disputes Act. Any worker who was a party to such a dispute shall be deemed not to have terminated or vacated his/her employment. This revision seeks to remedy the practice,

> repeatedly condemned by civil liberties organisations and trade unions over the years, of resorting to harsh emergency regulations to deal with labour disputes and by-passing existing mechanisms of dispute resolution. This practice was all the more indefensible as a reference to arbitration under the Industrial Disputes Act means that the workers must return to work pending the hearing, in order to meet the need to avert disruption of essential services. It is most unfortunate however that defective wording of this new provision, the Emergency (Industrial Disputes) Regulations No.1 of 1993, means it does not have the desired effect.

A severe provision imposing collective punishment which, moreover, depends solely on an opinion formed by the President, remains in force. Where in the opinion of the President members of an organisation are committing certain offences relating to essential services, then he may proscribe the organisation. The consequences that follow are that every member of such an organisation is guilty of an offence, any member who is a government or a public corporation officer is deemed to have vacated his/her post, and the bank account of the organisation is frozen.

In its statement "Emergency Law and Trade Union Rights" issued in 1992, CRM commented:

> ...An interesting contrast is found [in] regulation 47. This provides (quite reasonably) that when an offence under any emergency regulation is committed by a body of persons, then every director (if it is a body corporate, eg. a company) or partner (if it is a firm) shall be deemed guilty unless he proves that the offence was committed without his knowledge, or that he exercised due diligence to prevent it. No such escape route is

provided for even an ordinary member, let alone a Committee member, of an organisation other members of which (in the opinion of the President) commit offences relating to essential services...

(iv) Conclusion

The year ended on a disappointing note so far as emergency regulations were concerned.

First they remained as inaccessible as ever. The "compilation and publication of a consolidated version of all current emergency regulations to promote public awareness" promised by the Sri Lankan government at the meeting of the UN Commission on Human Rights in March 1993 has not been carried out.

The revised Emergency (Miscellaneous Provisions and Powers) Regulations brought out in June 1993 are in convoluted language and it is difficult to extract the meaning of some of their provisions. On occasion the Sinhala, English and Tamil texts say different things. Furthermore, the value of such improvements as were contained in the June revision was put in doubt by indications that detention in clandestine centres still takes place, that the issue of "receipts" for arrested persons is more often than not observed in the breach, and that the implementation of other safeguards such as the display of lists of detained persons on the notice boards in magistrates courts is not taking place.

Even more disturbing was the reintroduction, at the end of 1993, of the regulations relating to sedition and distribution of leaflets.

Further there is continued resort to emergency regulations to deal with subjects outside the scope of national security. Not only do many regulations of this sort remain in force but new ones have been made. The very last emergency regulations made during the year, promulgated on 22 December 1993, imposed a regime of monitoring of non-governmental associations. Registration is made compulsory where the yearly receipts of NGOs falling within the definition of the regulations exceed Rs.50,000. In addition, monitoring by a government official of all receipts and disbursements is imposed if these exceed Rs.100,000 a year. Sources of receipts, and particulars of persons to whom disbursements are made (including names and addresses) have to be disclosed. There is no provision for confidentiality. Any person may seek and obtain access to this information.

CRM has commented:

> The basic premise of the measure, which is that all non-governmental organisations are likely to be engaged in activities prejudicial to national security etc., will inhibit the provision of services by such organisations, to the detriment of a free and democratic society. It is curious and tragic that such a mindset, reminiscent of the concept of some Big Brother to watch over all activities, should manifest itself in present times, which have seen the dismantling of totalitarian regimes elsewhere.

ANNEX I

SUBJECTS DEALT WITH BY EMERGENCY REGULATIONS IN EFFECT IN 1993

Banking (Special Provisions) (692/9 of 10.12.91, 694/16, 694/17 of 28.12.91)
Births and Deaths (569/10 of 1.8.89, 621/4 of 31.7.90, 629/8 of 26.9.90)
Business Undertakings (574/10 of 4.9.89)
Civil Affairs (572/5 of 21.8.89)
Code of Criminal Procedure S.291(4)(694/8 of 26.12.91)
Colombo International Airport (798/2 of 20/12/93)
Commissions of Inquiry (666/12 of 11.6.91, 668/7 of 28.6.91)
Confiscation of Property (610/2 of 15.5.90)
Customs Bail (625/2 of 27.8.90)
Customs, Appt. of Asst. Collectors of, (574/8 of 4.9.89)
Edible Salt (635/7 of 7.11.90)
Encroachment on State and Private Land (581/22 of 27.10.89)
Enhancement of Punishment for Offences Relating to Antiquities and Treasure Trove (742/26 of 28.11.92)
Finance Companies (637/4 of 20.11.90, 642/6 of 26.12.90, 645/9 of 16.1.91, 699/20 of 30.1.92)
Forest (707/8 of 26.3.92)
Firearms (778/4 of 2.8.93)
Firearms Licensing Authority (566/14 of 13.7.89) (see also Licensing of Firearms)
Games of Chance (665/13 of 6.6.91)
Greater Colombo Economic Commission (731/19 of 10.9.92)
Human Rights Task Force (673/2 of 31.7.91, 674/17 of 10.8.91)
Immigration and Emigration, Appt. of Asst. Controllers of, (574/9 of 4.9.89)
Industrial Disputes (786/7 of 28.9.93)
Issue of Driving License Cards (689/13 of 20.11.91, rescinded by 758/4 of 15.3.93)
Joint Operations Council (735/22 of 9.10.92, rescinded by 783/1 of 6.9.93)
Licensing of Firearms (581/8 of 24.10.89, 737/10 of 20.10.92, 795/23 of 2.12.93) (see also Firearms Licensing Authority)
Local Authorities Elections Ordinance (794/16 of 25.11.93)
Local Authority (Special Provisions) Act of 1988, amendment of (588/7 of 30.11.89, 597/10 of 15.2.90, 600/17 of 9.3.90)

Local Government (Terms of office of Local Authorities) (688/15 of 13.11.91, 742/25 of 28.11.92, 789/13 of 22.10.93, 798/8 of 21.12.93)

Maintenance of Essential Supplies and Services (565/17 of 6.7.89)

Maintenance of Minimum Income Levels of Garment Manufacturing Trade Workers (741/8 of 17.11.92)

Mallakam, unnamed regulation relating to judicial district and division of (784/11 of 14.9.93)

Miscellaneous Provisions and Powers (563/7 of 20.6.89, 771/16 of 17.6.93)

Monetary Law Act (703/18 of 28.2.92, 731/4 of 7.9.92)

Monitoring of Fundamental Rights of Detainees (673/2 of 31.7.91, 674/17 of 10.8.91)

Monitoring of Receipts and Disbursements of Non Governmental Organisations (79 8/14 of 22.12.93)

Motor Traffic (Registration of Motor Vehicles) (785/20 of 24.9.93

Payment of Gratuity 801/3 of 10.1.94)

Poisons, Opium and Dangerous Drugs Ordinance, amendment to, (701/5 of 11.2.92)

Police (714/9 of 13.5.92)

Possession of Explosives (719/17 of 18.6.92)

Prevention of Subversive Political Activity Regulations No.1 of 1991, (661/17 of 11.5.91.) This was rescinded by (761/11 of 8.4.93) but reintroduced by (761/1 of 17.5.93)

Private Omnibus (653/22 of 15.3.91, 692/8 of 10.12.91)

Prohibited Zone, Establishment of (736/17 of 16.10.92, 752/5 of 1.2.93, 784/20 of 17.9.93)

Prohibition of Importation of Instruments and Appliances for Gaming (664/9 of 31.5.91, 665/3 of 3.6.91)

Prohibition on use of Boats (782/7 of 1.9.93)

Re-registration of Printing Presses (566/7 of 12.7.89)

Requisitioning of Vehicles (761/15 of 8/4/93, rescinded by 770/16 of 10.6.93)

Restriction on Transport of Articles (674/16 of 9.8.91, (but note fresh notification) (692/4 of 9.12.91)

School Development Boards and Provincial Boards of Education (701/12 of 12.2.92)

Sri Lanka Foundation (673/2 of 31.7.91, 674/17 of 10.8.91)

Sri Lanka Rupavahini (581/21 of 27.10.89)

Terms of Office of Local Authorities (798/8 of 21.12.93)

CHAPTER 3

CIVIL AND POLITICAL RIGHTS

1. RESPECT FOR THE INTEGRITY OF THE PERSON

(i) Relevant international standards

Sri Lanka has ratified a number of international human rights instruments relevant to the rights concerning respect for the integrity of the person and consequently has accepted the obligation to bring its national laws and practice into accordance with the provisions of those instruments. Of particular relevance here are the International Covenant on Civil and Political Rights (ICCPR) which was ratified by the Sri Lankan government in 1980, and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (ratified 3 January 1994).

Although not ratified by governments as is the case with treaties, nonetheless, various United Nations Resolutions lay down internationally accepted standards which are also pertinent. For example: concerning the treatment of people held in detention, the UN Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment (UNGA Resolution 43/173 adopted December 1989); concerning the conduct of those detaining them, the UN Code of Conduct for Law Enforcement Officials (UNGA Resolution 34/169 adopted December 1979); and concerning the protection of people from "disappearances", the Declaration on the Protection of All Persons from Enforced Disappearances (UNGA

Resolution 47/33 adopted December 1992) and the UN Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (UNGA Resolution 44/162 adopted December 1989).

(a) the right to life

By Article 6 of the ICCPR the most basic of human rights, the right to life is protected: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life". This Article cannot be derogated from in any circumstances (Art. 4, ICCPR).

(b) freedom from arbitrary arrest and detention

The right to freedom from arbitrary arrest and detention is protected by ICCPR Article 9: "Every one has the right to liberty and security of person. No one shall be subjected to arbitrary arrest and detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law".

The Covenant does permit derogation from the rights protected in Article 9, but only in times of public emergency which threaten the life of the nation and then only to the extent strictly necessary to deal with the exigencies of the situation (Art.4, ICCPR).

These provisions for derogation acknowledge implicitly that it may sometimes be necessary to detain people in the interests of national security, and they seek to strike a balance between that need and the protection of the fundamental right to liberty.

(c) conditions of detention

Article 9 of the ICCPR requires anyone who is arrested to be informed, at the time of arrest, of the reason for arrest, and to be promptly informed of any charges. It also requires the detainee to be brought promptly before a judicial officer, and to be entitled to trial within a reasonable time or to release. It further provides that anyone who has been a victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 10 of the ICCPR provides that: "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."

These protections may be derogated from in times of public emergency which threatens the life of the nation but only to the extent strictly required by the exigencies of the situation (Art.4, ICCPR).

(d) freedom from torture

Torture, a particularly serious violation of human rights, is condemned by international law. The ICCPR Article 7 provides: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". This right cannot be derogated from in any circumstances (Art.4).

On 3 January 1994 Sri Lanka ratified the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted by the General Assembly on 10th December 1984, it came into effect on 26th June 1987). This ratification is to be welcomed. The Convention requires ratifying governments to take

effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under their jurisdiction. No exceptional circumstances whatsoever, whether a state of war, internal political instability or any other public emergency, may be invoked as a justification of torture. The Convention also provides that no order from a superior may be invoked as a justification of torture.

So far the Sri Lankan government has not made the additional declarations under Articles 21 and 22 which would allow other state parties (Art. 21), and individuals subject to the government's jurisdiction (Art. 22),to forward complaints of non compliance to the Committee set up under the Convention. These procedures form an essential part of the international machinery for enforcement, and the government is urged to show its commitment to the effective implementation of the Convention's provisions by making these declarations.

The Code of Conduct for Law Enforcement Officials permits the use of force only when 'strictly necessary and to the extent required for the performance of their duty', and the use of firearms only when faced with armed resistance (Art. 3).

(e) disappearances

Any act of enforced disappearance violates a number of the rights protected by the International Covenant on Civil and Political Rights. In the words of Article 1(2) of the Declaration on the Protection of All Persons from Enforced Disappearances (adopted by the UN General Assembly in December 1992 (UNGA Resolution 47/33):

> Any act of enforced disappearance places the person subjected

> thereto outside the protection of the law and inflicts severe suffering on them and their families. It constitutes a violation of the rules of international law guaranteeing, inter alia, the right to recognition as a person before the law, the right to liberty and security of the person and the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment. It also violates or constitutes a grave threat to the right to life.

Article 7 of the Declaration provides that no circumstances whatsoever, whether a threat of war, a state of war, internal political instability or any other public emergency, may be invoked to justify enforced disappearances.

(f) right to a fair trial

Article 14 of the International Covenant on Civil and Political Rights requires that "everyone shall be entitled to a fair and public hearing by a competent, independent, and impartial tribunal established by law", and that everyone shall be presumed innocent until proved guilty according to law.

The ICCPR requires the following minimum guarantees: that detainees be informed promptly, and in a language they understand of the nature of the charge; be tried without undue delay; have an opportunity to secure and communicate with counsel; time to prepare a defense, and opportunity to cross-examine witnesses (Art.14(3)).

The ICCPR (Art.4) allows derogation from the above Article in times of national emergencies. However, as with other derogations these should only be to the extent strictly required by the exigencies of the situation.

The ICCPR (Art.15) provides that: "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence...at the time when it was committed." No derogation may be made from this provision.

(ii) Relevant Sri Lankan national law protecting human rights

In this section relevant Articles of the 1978 Sri Lankan Constitution are the main focus of consideration, with some reference to other relevant national legislation.

Fundamental rights receive protection under the Constitution, although some of its provisions do not satisfy Sri Lanka's obligations under the ICCPR. For example: the provision of Constitution Article 16(1) that existing laws remain in force even if they contravene fundamental rights is inconsistent with ICCPR Article 2.

(a) the right to life

In Sri Lanka the death penalty is mandatory in certain circumstances. However, no legal death sentences have been carried out in Sri Lanka since the 1970s. The Sri Lankan Constitution does not contain an express declaration to the effect that people have a right to life. The Constitution however does provide protection. Article 13(4) stipulates that "No person shall be punished with death or imprisonment except by order of a competent court, made in accordance with procedure established by law...". Procedure established by law, however, includes emergency regulations which by-pass some of the safeguards existing in the Code of Criminal Procedure (see the sections on fair trial and arrest and detention).

(b) freedom from arbitrary arrest and detention

Article 13(1) stipulates that a person cannot be deprived of his/her liberty except according to procedure established by law, and gives to every person arrested a right to be informed of the reason for the arrest. Article 13(5) declares the presumption of innocence, and Article 13(6) the prohibition of retroactive penal legislation. Article 13(3) entitles every person charged with an offence to be heard in person or by an attorney-at-law at a fair trial in a competent court. By Article 13(2) all persons detained are required to be brought before the judge of the nearest competent court (although no time is specified) and may not be further detained except by order of the judge.

Under the requirements of Sri Lanka's general criminal law a person arrested without warrant who is suspected of an offence must be produced before a magistrate "without unnecessary delay", and must not be detained in police custody "for a longer period than under the circumstances is reasonable, and such period shall not exceed 24 hours exclusive of the time necessary for the journey from the place of arrest to the magistrate (Code of Criminal Procedure Act sections 36 and 37). Section 23(1) Code of Criminal Procedure requires that a person who is arrested be informed of the reason for his arrest.

Freedom from arbitrary arrest and detention is subject, by Article 15(7) of the Constitution to restrictions prescribed by law in the interests of national security, public order, public health or morality. The presumption of innocence and prohibition of retroactive penal legislation is subject, by Article 15(1) to restrictions prescribed in the interests of national security. The right to freedom from arbitrary arrest and detention has been seriously curtailed by both the provisions, and manner of implementation, of the Prevention of

Terrorism Act, and regulations promulgated under the continuing state of emergency. These provisions are discussed further in a later section.

(c) conditions of detention

A comprehensive set of laws and rules: the Prison Ordinance and Prison Rules govern the running of Sri Lankan prisons, and provide for the protection of those held in detention there.

A serious omission in Sri Lankan legislation is the failure to lay down minimum standards for the treatment of detainees held in custody in places other than civilian prisons. Many of those detained under the Prevention of Terrorism Act and the emergency regulations are held, by their interrogators, in police stations or military camps or other unregulated places of detention.

(d) freedom from torture

Article 11 of the Sri Lankan Constitution provides that "no person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment".

Section 321 of the Sri Lanka Penal Code deals with the voluntary causing of hurt to extort confession or to compel the restoration of property. It stipulates that anyone who commits such acts shall be punished with imprisonment for a term which may extend to 7 years, and shall also be liable to a fine.

(e) disappearances

Not surprisingly there is no specific provision included in Sri Lankan law which sets out a right of non-disappearance. But the protections against torture, arbitrary arrest and detention, the rules governing the right to a fair trial and those laid down for the running of prisons and the safeguarding of prisoners are all relevant here.

Both the Declaration on the Protection of All Persons from Enforced Disappearances and the UN Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions are pertinent as to the types of measures which should be taken by governments in whose territories disappearances occur, (the largest numbers of "disappearances" in any Commonwealth country in recent years have occurred in Sri Lanka, the UN Working Group on Enforced Disappearances received 3,841 new cases from Sri Lanka for consideration in 1991 alone) and in whose territories lawyers and litigants seeking to bring to justice those responsible have been subjected to harassment. Since Sri Lanka has experienced all of these problems, these two UN Resolutions can be usefully consulted by the government for guidelines as to appropriate measures to adopt, and can be used as a yardstick against which the present national provisions may be measured. When this is done it will be seen that the effect of the emergency legislation is to bring the Sri Lankan government into breach with international requirements.

(f) right to a fair trial

Article 106(1) of the Constitution provides that the sittings of every court shall be held in public and that all persons shall be entitled to freely attend such sittings, with certain exceptions in which a judge

may exercise discretion to exclude persons not directly involved with the proceedings (Art. 106(2)).

Article 13(3) of the Constitution provides that any person charged with an offence shall be entitled to be heard, in person or by an attorney-at-law, at a fair trial by a competent court.

As noted above, Article 13(5) of the Constitution provides: "Every person shall be presumed innocent until he is proved guilty", however, the same Article permits placing the burden of proving certain facts on the defendant. The Evidence Ordinance (Ordinance No. 14, 1895, as amended) provides that, unless made in the presence of a magistrate, no confession made in police custody is admissible in evidence. Provisions of the Prevention of Terrorism Act and emergency regulations reduce the safeguards provided by the Constitution and by the general criminal law.

(iii) Overview of the situation in Sri Lanka

(a) introduction

As can be seen from these brief accounts of the relevant standards of international law, and of the Constitution and the ordinary criminal law of Sri Lanka, an essential aspect of the right to the liberty and security of the person is that no person may be arbitrarily arrested, and that no person may be held in detention except for the purpose of being brought speedily before a court for a fair and public trial on a charge of which the accused is clearly informed. While being held in detention the prisoner has the right to be treated with humanity and with respect to the inherent dignity of the human person.

Regrettably, a number of countries, Sri Lanka included, have enacted provisions which authorise the executive to deprive people of their liberty, to hold them in detention for long periods without proper safeguards as to their treatment while detained, and to do this without bringing any charge against them. When a trial does occur provisions exist which render that trial unfair.

In the case of Sri Lanka serious derogations from the rights protected under the ICCPR are contained both in permanent legislation: the Prevention of Terrorism Act (hereinafter PTA) and also in emergency regulations promulgated under the present state of emergency which was proclaimed on 20 June 1989.

It is contrary to the requirements of the ICCPR to enact such derogations in permanent legislation. Article 4, where it allows derogations to the above rights, permits these only during an officially proclaimed state of emergency. Hence provisions of statutes, such as the PTA, which operate to take away rights protected by the ICCPR regardless of the existence of a justified and properly declared state of emergency are in violation of the Sri Lankan government's obligations under international law.

Turning to the emergency regulations, the declaration of the state of emergency and the issue of regulations thereunder have been carried out in accordance with Sri Lankan procedural requirements (Section 5, Public Security Ordinance (No. 25 of 1947 as amended) and Constitution, Art. 155), and proclaimed as required by national and international law. Despite this, the justification for the continuing state of emergency is, in parts of the country at least, questionable and hence in those areas not justifiable under the terms of ICCPR Article 4 which allows such action only in times of "public emergency which

threatens the life of the nation...".

Even where such an emergency exists the measures taken must be no greater than actually required to meet the exigencies of the situation. Provisions of both the PTA and of the emergency regulations are of excessively wide ambit, thus offending against this requirement. Yet today these provisions have come to provide the normal framework for the exercise of executive powers and the rights, or lack of them, of individuals and associations.

The ease with which detainees can "disappear" or with which they can be subjected to torture, is in direct proportion to the extent to which the safeguards required by international law, and by the Constitution and general Sri Lankan criminal law, are whittled away by other provisions. Valuable assistance regarding the principle of proportionality can be found in the draft Guidelines for the Development of Legislation in States of Emergency, drawn up by the UN Special Rapporteur on states of emergency in 1991, and the government is urged to reconsider its emergency legislation in the light of that document.

(b) arrest and detention

Turning to the situation in relation to arrest and detention, it is pleasing to report that the number of persons held under the emergency regulations and the Prevention of Terrorism Act declined sharply in 1993.

At the end of 1993 approximately 2000 detainees were thought to be still held under the emergency regulations, compared to approximately 5000 held at the end of 1992. Many detainees who were being held

for suspected involvement with the JVP have been either released, charged with criminal offences, or sent to rehabilitation camps in preparation for release.

Justice Jayalath, head of the Committee looking into the situation of detainees (the Committee to Process, Classify and Recommend Rehabilitation and Release of Suspects/Surrendees), reported (September 1993 Inform Situation Report) that only 2,123 persons remained in detention. According to HRTF statistics (HRTF stands for the Human Rights Task Force, a body set up to register and monitor the welfare of detainees held under the emergency regulations and the PTA), at the time of its latest Annual Report (August 1993), there were 1545 emergency legislation detainees in rehabilitation and detention centres. HRTF statistics for January 20 1994 record 1054 detainees at Boossa Detention Camp, Magazine Prison, Kalutara Prison, Mahara Prison and Welikada Prison.

Despite the encouraging decline in numbers, nonetheless, continuing into 1993 thousands of people have been arbitrarily arrested, and some have been held incommunicado, without access to lawyers and relatives. In a number of cases detainees have been tortured and in some cases killed while held in custody.

There have been reports that from the latter part of 1992, Tamil irregulars, armed and paid by the government, have been operating their own detention facilities in Colombo. Reports also indicate that government security forces continue to hold persons incommunicado in undisclosed places of detention. New emergency regulations promulgated in June 1993 made secret detention illegal. Nonetheless, it continues, without some of the places of detention being gazetted as is now required. Suspected LTTE sympathisers continue to be picked

up in unmarked vehicles and taken to undisclosed places of detention. One undisclosed place of detention which recently came to the attention of the Human Rights Task Force, a Special Task Force (STF) camp at Gonahena, is underground.

Surveillance of Tamils in the South is intense. Since the assassination of President Premadasa on May Day, 1993, there has been an escalation of cordon-and-search operations aimed at detecting LTTE supporters. Hundreds of young Tamils have been arrested in waves, especially in Colombo. According to government sources (Amnesty International [AI], Balancing human rights and security, Feb.94, p.6) there were more than 15,0000 arrests under emergency legislation in Colombo alone during 1993, almost 3,500 people being arrested in October. Most of those arrested were Tamils, many on no specific evidence and solely because of their ethnic origin.

Generally these detainees are released within one or two days after an identification check. But, despite being properly registered (Emergency (Miscellaneous Provisions and Powers) Regulation 23 requires owners of lodging houses to provide daily lists of lodgers and every "house-holder" must register the names of everyone living in the house, including guests, with the local police) many young Tamils have been arrested several times in quick succession. Some have been held for more than 2 months and are reported to have been ill-treated while detained, creating a climate of fear among parts of the Tamil community. On some occasions the arrests have been carried out by unidentified men coming in unnumbered cars, blindfolding and removing people from their homes during the night. Further, in police stations in Colombo detainees are generally questioned in Sinhala, which Tamils may not understand, and any documentation is invariably in Sinhala (AI, Balancing human rights and security,

Feb.94, p.17).

There have been unconfirmed reports that the Liberation Tigers of Tamil Eelam (LTTE) is holding over 2000 prisoners in the North. The LTTE does not give the ICRC or other humanitarian organisations access to its detainees, nor are relatives informed either of the place of detention or the fate of prisoners. As part of its fund-raising effort the LTTE is believed to be holding numerous people at ransom, among them over 30 policemen taken as hostages in 1990, people presumed to have wealthy relatives living abroad, and Muslim businessmen.

In June 1993 amendments were made to the Emergency (Miscellaneous Provisions and Powers) Regulations. They contain some welcome improvements (inter alia they now prohibit secret detentions, require notification of the existence and addresses of places of detention, require detentions to be notified to HRTF and require certificates of arrest to be issued by the arresting officer). Other aspects of the regulations are less commendable as they continue to permit long periods of detention without trial, authorise detention in places other than state prisons, and continue to fail to provide minimum safeguards for the detainees while held in such locations. Further, the amendments are complex and difficult to understand, making it onerous to work out their precise import, and making it unlikely that a detainee untrained in legal analysis could ever do so.

Because of their currency and complexity the amendments are considered in some detail later in this report.

At two separate meetings with Tamil political leaders in June 1993 the government gave undertakings that new safeguards, including a

requirement that relatives be informed of the location to which detainees were being taken, would be introduced. Despite these undertakings and despite the safeguards which are theoretically provided by the June 1993 amendments to the Emergency Regulations, reliable reports indicate that: release certificates are seldom provided (they would assist in the prevention of unjustified rearrests); receipts recording the arrest are not given by the arresting officer; people are being held in unauthorised and unnotified places of detention, and families are not being notified of the detention.

The UN Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions require governments to:

> ensure that persons deprived of their liberty are held in officially recognized places of custody, and that accurate information on their custody and whereabouts, including transfers, is made promptly available to their relatives and lawyer or other persons of confidence. (Principle 6)

The Chairman of HRTF notes in the organisation's second report (covering the period August-August 1992-3) that not all cases of detention are reported to him as required by law, that the army often neglects to send reports to the HRTF officer of persons kept at the smaller camps, and that relatives are frequently the first to make contact (p.33). This contact has been greatly facilitated through the new round-the-clock telephone service at the Colombo office.

In Batticaloa and its environs improvements are reported. Releases of persons have generally been swift and detainees are no longer held in the Forestry Camp (known as Belsen), where treatment was

particularly brutal. However, families of detainees are not informed of the arrest and reports indicate that when inquiries are made, the police may deny the detention for several days (University Teachers for Human Rights [Jaffna][UTHR], Report No.11, April 93, p.40). Improvements are reported also in Trincomalee.

Repressive laws provide the opportunity for systematic corruption. In recent arrests in Colombo it is reported that young people working in jewellery shops have been targeted, and that an average sum of Rs. 5000/-is being requested for their release (Olsen, Draft report on Sri Lanka, Jan. 10,1994, pp.33,34).

There are allegations from responsible sources that Tamil youth, particularly those arriving in Colombo with plans of foreign travel, are detained regularly for the purpose of extortion. According to these sources young Tamils are often inveigled into signing a statement recorded in Sinhalese which they cannot comprehend. This is then used for extorting money. There are also reports of similar treatment being accorded to Tamils returning from places like Saudi Arabia and Germany. Others have said that signatures are obtained on blank sheets and statements inserted later.

(c) conditions of detention

During 1993 the HRTF has continued its efforts to monitor the conditions of detention and to build up a central register of detainees. In addition to the HRTF, the International Committee of the Red Cross (ICRC) has been regularly visiting over 400 places of detention. The visits of these two organisations are reported to have effected considerable improvement in the conditions of detention in the locations visited, nonetheless serious violations of detainees' rights

continue to occur (interview with HRTF Chairman). Conditions of detention have received some mention above and are discussed in the sub-section immediately following.

(d) torture

Turning specifically to the danger that detainees might be seriously ill-treated or even tortured while held in custody, reliable reports indicate that this commonly continues to be the fate of detainees both in the North East and in the South of the country. Military and police personnel as well as the LTTE and members of different Tamil organisations operating alongside government forces are all reported to mistreat prisoners. Beating is said to be routine during interrogations. Government security personnel for quite some time have admitted that torture has been used to extract information and force co-operation from suspected members of the LTTE (eg. to the Asia Watch delegation in December 1991).

Reports of torture have included: near drownings; placing of insecticide or gasoline filled bags over the head, and beating the soles of the feet with metal rods. Severe beatings, sometimes resulting in broken bones or other serious injuries have been reported by many detainees. There also has been one reported incidence of genital mutilation. Female detainees are reported to be victims of physical attacks, beatings, abuse and rape.

(e) disappearances

In relation to disappearances, while details are difficult to obtain, there are some official documents that confirm the fact of disappearances. The HRTF in its latest annual report (AR) says that it received 2351

complaints about persons said to be missing during the period September 1, 1992 to August 31 1993. Out of this number 733 were received at the Batticaloa regional office, 689 at Kandy, 296 at Kalmunai, 215 at Trincomalee, 203 at Anuradhapura, 116 at Matara, 42 at Vavuniya, 26 at Badulla, and 31 at Ampara (HRTF, AR, Annex-6). The HRTF says that it has been able to locate 114 of these persons (HRTF, AR, Annex-8). Most were being held either at police stations both in the East and the South or in military camps. Since that time more people have been located and their relatives informed.

In mid-February soldiers from the Rugan Army Camp were reported to have detained 16 farmers working in fields at Vannathi Aru. None has been seen since. Army and police enquiries were said to be underway, however, no progress has been reported (HRTF AR 1992/3, pp.21,22).

The number of cases registered by the Presidential Commission of Inquiry into the Involuntary Removal of Persons, set up to investigate and report on allegations of disappearances, has decreased from 649 in 1991 to 150 in 1992, and from 11 January to 10 September 1993 only 34 cases were recorded.

The UN Working Group on Enforced and Involuntary Disappearances released its second report, based on its visit to Sri Lanka in late 1992, in February 1993. In it the Group stated that the number of disappearances reported to it decreased from 146 in late 1991 to 62 in 1992.

The Peoples Liberation Organisation of Tamil Eelam (PLOTE), an anti LTTE Tamil militia allied with the government is believed to be responsible for the disappearance of several persons in the district of

Vavuniya who were detained following an LTTE attack on a security check point manned by the PLOTE. There are also reports of disappearances in the Polonnaruwa District, in the North-Central Province. Witnesses report that local police were responsible for up to 15 disappearances.

Observers in the North East report that the LTTE has been responsible for a number of disappearances, but it has been impossible to determine how many. The LTTE has regularly refused requests for information concerning the fate of the people it detains. Members of rival Tamil groups are reported to have been killed. The LTTE is said to be operating a "purification" campaign within its ranks, and to be executing people thought to be disloyal. Tamils accused of being "traitors" are reported to have been executed. In December 1993 reports were received that the LTTE had executed 9 civilians whom they accused of collaborating with the security forces (Inform Situation Report, December, 1993).

(f) fair trial

Turning to the right to a fair trial, the ICCPR requires everyone to be tried "without undue delay", yet in Sri Lanka excessive delays in being brought to trial are not unusual. The ratio of pre-trial detainees to convicted persons was about 4 to 1 in 1990 and the figure may well be higher in 1993 since thousands of Tamils were rounded up and detained during the latter part of the year.

People spend more time in prison as accused persons than as convicted prisoners. This is due to delays in bringing cases to trial, lengthy trials, excessive amounts ordered as bail, and inadequate use of bail provisions (Shantha J.R. Pieris, "The Reform of the Criminal Justice

System", unpublished paper researched for Law and Society Trust in 1992). Many Sinhalese held in detention camps and prisons in 1993 are reported to have been held for more than 2 years without trial (AI, Summary of human rights concerns, Feb.94, p.3).

Many detainees who have been held for long periods have become restive. Early in 1993, 467 political detainees in the Boossa camp obtained approximately 600 signatures to an appeal demanding that all those against whom charges could be laid should be indicted within one month and that the rest should be released. Later more than 100 inmates went on a hunger strike to bring attention to their demands. The HRTF intervened, and a large number of the detainees have been released, only 138 remained in Boossa Camp on January 20, 1994. (interview with HRTF Chairman).

In August 1993 it was reported that at one prison alone (Kalutara) 464 Tamils had been held for more than 32 months without trial. Some people detained during 1993 have been held for several months without being brought to trial (AI, Summary of human rights concerns, Feb.94, p.3).

Often detainees are released without ever being informed of the reason for the arrest, despite the fact that Article 13(3) of the Constitution guarantees this right.

Relatives of detainees claim that they have been asked for money to negotiate the dropping of charges. Even when a charge does not have a basis, contesting it can take time, perhaps years. Fears that a case could drag on indefinitely creates pressure to plead guilty to a less serious charge.

Cases under the PTA and Emergency Regulations are frequently based on "confessions". Despite the substantial amendments of June 1993, the Emergency (Miscellaneous Provisions and Powers) Regulations continue to allow the use in court of confessions made to police officers (while in police custody and in the absence of a magistrate), and to place on the detainee the burden of proof that the confession was obtained under duress. The PTA contains similar provisions.

It is reported that political interference occurs at all levels of the police department. One instance is cited here: in October 1993 Magistrate Champa Buddhipala heard a case in which an 11-year old girl alleged that her former employer, a 65-year-old retired Assistant Superintendent of Police, had raped her. The magistrate considered the evidence sufficient to recommend that the former Superintendent be charged. The Attorney General advised the police to withdraw the case and the magistrate was transferred to Galle. A public outcry over the actions of the Attorney General followed, including representations by the Sri Lankan Bar Association to the effect that the discharge of the suspect was 'wrong in law' (Inform, Situation Report, October '93). The Attorney General has since directed the CID to conduct a fresh enquiry into the case (Inform, Situation Report, November '93).

(iv) Provisions of the Emergency Regulations and the Prevention of Terrorism Act relating to arrest, detention and fair trial

(a) the emergency regulations generally

(The reader is referred also to the chapter on Emergency Regulations.) Section 5 of the Public Security Ordinance (No. 25 of 1947, as amended), authorises the executive to issue emergency regulations in the interests of public security, the preservation of public order, the

suppression of mutiny, riot, civil commotion, or for the maintenance of supplies and services. Such regulations when promulgated under a properly declared state of emergency have the effect of overriding, amending, or suspending the operation of the provisions of any law, except the provisions of the Constitution (Constitution, Article 155 (2)). In addition Section 8 of the Public Security Ordinance ousts the jurisdiction of the courts to question the validity of any emergency regulation or any order, rule or direction made or given thereunder.

The passage of emergency regulations enables the executive to by-pass the normal legislative process through Parliament, so stultifying the possibility of public discussion and debate, and hence in a democratic society they should be used only in the most sparing manner. Regrettably in recent years the Sri Lankan government has not exercised appropriate restraint in the use of its emergency powers, and many regulations are now on its books which have no real relevance to an emergency: for example, the regulations promulgated in December 1993 which require, for no obvious or stated reason connected with the emergency, the registration and monitoring of the income and expenditure of NGOs.

New regulations concerning, amongst other matters, arrest and detention and procedures at trial, were promulgated in June 1993: the Emergency (Miscellaneous Provisions and Powers) Regulations, No. 1 of 1993. These amendments rescind and replace the Emergency (Miscellaneous Provisions and Powers) Regulations, No. 1 of 1989, as amended. Sustained criticism had been made by national and international human rights organisations and other bodies regarding the excessive width of the earlier regulations.

The UN Working Group on Enforced or Involuntary Disappearances

in its report on its October 1991 visit said that the emergency legislation needed to be brought into line with accepted international standards regarding the due process and treatment of prisoners, adding:

> Grounds for and powers of arrest, as well as grounds for the transfer of detainees, should be clearly circumscribed. Time limits for bringing a person before a judge following his arrest should be drastically shortened...

In 1992 the Centre for the Study of Human Rights of the University of Colombo (CSHR) carried out an extensive study of the emergency legislation and submitted recommendations for reform to the government. The recommendations were published in February 1993. In March 1993, at the meeting of the UN Human Rights Commission, the government undertook, inter alia, to take these recommendations into consideration and to carry out "a comprehensive review and revision of the emergency regulations relating to arrest and detention". In order to promote public access to, and awareness of, the requirements of the regulations, it undertook to compile and make available a consolidated version of all current emergency regulations. The government has said that the June 1993 amendments take the CSHR recommendations into account.

The CSHR's general recommendations were:

> (1) that emergency powers should not be used in any circumstances to circumvent the normal legislative process merely for reasons of expediency;
>
> (2) that those regulations which are not, and those which are no

longer, relevant to national security concerns should be rescinded;

(3) that those regulations which are too broadly framed, or which do not contain sufficient safeguards for basic rights should be revised;

(4) that wide publicity should be given to emergency regulations at the time that they are promulgated, that a preamble to each regulation should explain its purpose, and that an official compilation of regulations should be published with an index of amendments and with periodic updates.

The government's commitment to carrying out its stated undertakings has been disappointing. Despite an announcement that it would remove any emergency regulation having no bearing on national security matters, as mentioned above, in December 1993 new regulations requiring the registration and monitoring of the income and expenditure of NGOs were promulgated. Under these regulations detailed information is required to be disclosed to the government. Compliance will be onerous, and will interfere substantially with the functioning of NGOs. No public security issue is apparent, and no such justification was given. Indeed the explanation provided by the government in its official press release that "the enactment of legislation is going to take time" goes against the first CSHR recommendation.

Some, but not all, of the CHSR suggestions are addressed by the amendments, and this is to be welcomed although of course, mere enactment of improvements does not of itself change the situation and regrettably, in many instances during 1993, the improvements remained changes on paper only (for some examples see discussion on

detentions and disappearances in the Overview section above).

In other areas the text of the regulations continues to fall short of the government's obligations under the ICCPR, and short of the requirements of the UN Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment: for example, the procedures for the investigation of deaths in custody remain unsatisfactory, the regulations continue to authorise the holding of detainees for long periods in the custody of their interrogators, and the treatment of detainees in places other than civilian prisons continues unregulated without the safeguards which apply to ordinary prisoners.

In the past the regulations have been published in an ad hoc manner with little or no publicity accompanying their promulgation, and frequent unavailability of a published text, making it difficult to be sure that all relevant regulations on a particular topic had in fact been located.

At first sight it appears that this particular difficulty has been resolved at least as far as the Emergency (Miscellaneous Provisions and Powers) Regulations are concerned. The June 1993 amendments are all contained in a single volume which is publicly available. This is certainly helpful. However, since different sets of emergency regulations relating to other subjects exist, and since some regulations pertaining to detention procedures continue to be contained in these other regulations, the possibility of confusion remains. In addition it is apparent that even lawyers and court officials are unaware of some of the requirements of the June 1993 amendments. More recently, however, it appears that greater effort is being made by the government to create public awareness.

There continue to be difficulties in understanding and invoking any available rights and remedies as the new regulations are not easy to follow. In addition there are discrepancies between the Sinhala, Tamil and English texts. The following account is based on the English text.

(b) detention of persons under Regulation 17, Emergency (Miscellaneous Provisions and Powers) Regulations, No 1 of 1993

Regulation 17(1) authorises preventive detention. The Secretary to the Ministry of Defence is empowered to make a detention order where he is satisfied on the material available to him that this is necessary to prevent such person from acting in any manner prejudicial to the national security, to the maintenance of public order or to the maintenance of essential services. Despite some restrictions of the ambit of the regulation which are to be welcomed, in some ways its reach has been extended as new offences have been added (created under Regulations 26 and 25), and other offences previously covered under Regulation 23 are now encompassed by Regulation 17.

Under Regulation 17 a detention order may be made for a period not exceeding 3 months. It may then be renewed any number of times, again for a period not exceeding 3 months (17(1)). In effect this provides for indefinite detention so long as emergency rule continues. This does not satisfy the requirement in the CSHR recommendations that a limit be set on the length of possible detention.

There is no requirement that persons detained under this Regulation be produced before a court at any stage. There is provision for a detainee to make objections to a three member Advisory Committee appointed by the President (17(6)), and "aggrieved" detainees are required to be informed of this right (17(7)). The Secretary to the

Ministry of Defence is not bound by the recommendations of the Committee (17(10)), and it seems that in practice most detainees are not generally informed of the reason for their detention or of the provision of the law under which they are detained, nor served with detention orders (although at the end of 1993, after HRTF enquiries into this, detention orders were being issued more regularly). Further there is no requirement that detainees be informed either of the Advisory Committee's recommendation, or of the grounds for the final decision of the Secretary.

The detainee need not be held in a prison, but may be held in such place as the Secretary authorises (17(3)). A list of the authorised places of detention must be published together with the addresses (19(4)). 343 such places, mostly police stations, were listed in Gazette No. 773/8 of 29 June 1993. Holding a person in any unauthorised place is an offence (19(8)). These provisions are a clear improvement over the earlier regulations which allowed secret detentions. However, since the gazetting of the list in June, other places of detention are known to have been authorised (see Overview section) yet no further listing has been gazetted.

Regulation 19 requires that magistrates within whose jurisdiction places of detention are located must be notified both of the existence and the addresses of those places (19(4)). The Officer In Charge (OIC) of any place of detention authorised by the Secretary must furnish to the local magistrate once in 14 days a list of persons detained, and the magistrate must cause the list to be displayed on the court notice board (19(5)). Under Regulation 19(6) magistrates are required to visit such places of detention once a month and the OIC is required to ensure that every person detained otherwise than by order of a magistrate is produced before such visiting magistrate. These

requirements are again an improvement on the earlier situation but do not come near to satisfying the recommendation that detainees be brought within a short time before a court, the magistrate has no discretion over the detention (see 19(7)) and a month may have passed before the visit. In addition it seemed that even well into the second half of 1993 court officials and lawyers were unaware of the reporting requirements and that they were not being implemented (AI, New Emergency Regulations, Jan. '94, p.9).

There is no requirement in relation to Regulation 17 that the detentions be reported to the Human Rights Task Force. However, the regulations creating the HRTF (Gazette No. 673/2 of 31 July 1991) continue to be in force and they require a copy of the detention order to be forwarded to that body, although no time is specified within which this must be done. (Note this is one instance where all relevant requirements are not to be found in the new volume of June 1993.)

There is no requirement under Regulation 17, as there is under Regulation 18 (see below), that the arresting officer issue a receipt to the relatives of the detainee.

If the place of detention is a prison, then the Prison Ordinance and Prison Rules apply as though the detainee were a civil prisoner. These provisions contain safeguards protecting the rights of those who fall within their ambit. However, the Secretary may direct that any of the provisions shall not apply, or may amend or modify them (17(3) and its proviso). There are no fetters on the Secretary's power to suspend the provisions of the Prison Ordinance and Prison Rules and, once these requirements are suspended, or where the Secretary authorises a place of detention other than a prison, Sri Lankan law provides no minimum standards.

The dangers to a detainee of detention by his/her interrogators are obvious. The provision of legally binding rules on the conditions of detention of people held in police or army custody is vitally important. Despite repeated calls by concerned national and international NGOs and UN bodies for the introduction of adequate standards, the new regulations fail to provide them. This lack of provision of safeguards (and the power to modify the normal rules pertaining to civilian prisons in relation to persons detained under regulations 17 (and 18, see next sub-section) is a serious shortcoming in the protection of the rights of detainees in Sri Lanka.

The evaluation of the revised Regulation 17 made by the Human Rights Task Force in its August 1992-3 Annual Report is in the following terms:

> (It) is cast in new form but it remains unlikely that any change for the better will result...Between the old and the new Regulation 17 in effect we have a distinction without a difference.(p.11)

(c) detention under Regulation 18, Emergency (Miscellaneous Provisions and Powers) Regulations, No 1 of 1993

Regulation 18 confers powers on any police officer or member of the armed forces to search, detain for purposes of such search, or arrest without warrant, any person who is committing, has committed, or whom he has reasonable grounds for suspecting to be concerned in or to be committing or have committed, an offence under any emergency regulation. There is also provision for search and seizure of any thing connected with the offence (18(1)).

The arresting officer is required to issue to a close relative of a person

arrested under this regulation a document in the specified form acknowledging the fact of the arrest (18(8)). However the prescribed format does not specify the grounds for arrest, and no time is given within which the certificate must be issued.

The provisions noted above in relation to Regulation 17 regarding the authorisation of the place of detention, discretion to waive the provisions made under the Prison Ordinance, publication of the existence and addresses of all such places of detention, submission of lists of detainees to local magistrates, etc. apply here also (19(4),19(5),19(6),19(7),19(8)).

In addition, in the case of arrest under Regulation 18, paragraph 7 specifies that the Superintendent of Police or the Commanding Officer (regarding arrests by police and members of the armed forces respectively) is required to notify the arrest to the HRTF forthwith. This notification must set out "all information relating to such offence", and must be in the form prescribed by the Secretary (reg. 18(7)). This new requirement is to be welcomed but the latest HRTF Annual Report makes it clear that during the period covered (August 1992-3) its implementation was inadequate (p.12).

For some purposes there are different periods stipulated for detention under Regulation 18 according to whether the arrest is made in the North or East or elsewhere in the country. This has resulted in the introduction of some safeguards for detainees in the South. For example, the proviso to Regulation 18(1) sets a limit of 24 hours to the time for which a person in the South can be held in the custody of the armed forces.

Regulation 19(2) and its proviso provides for a period of detention for

the purposes of investigation in relation to the alleged offence, of up to 60 days in the North and East but if both the arrest took place, and the offence was committed, outside the North and East the maximum period of detention is 7 days (19(2)). At the end of this maximum period of detention for the purpose of investigation, the person shall be released unless a detention order is issued under Regulation 17 (if this happens the detention is converted from detention with a time limit to detention with the possibility of indefinite extension), or unless the person is produced before a court of competent jurisdiction (19(2)). Such court shall order that such persons be detained in a prison established under the Prisons Ordinance (19(9)).

Any person so detained shall remain in such custody for a continuous period of 3 months and shall not be released earlier without the consent of the Attorney General (19(10) and 55). After the period of three months, the magistrate may release on bail unless the Attorney General directs otherwise, except in relation to certain offences where the prior written consent of the Attorney General is necessary (55(3) and its proviso).

Regulation 19(3) provides that after 7 days in the North and East, and 48 hours elsewhere, if there is no reasonable cause for further detention the detainee must be released upon production before a magistrate. Hence, by implication, a decision needs to be made at this point regarding the necessity for further detention. The requirement of production before a magistrate assists in safeguarding the detainee at the time of release.

Although there are some improvements in the provisions noted above (Regulations 18 and 19 receive a positive evaluation from the latest HRTF Annual Report [p.13]: "The changes...will no doubt serve as

curbs on the abuses which were earlier rampant when detentions took place") further changes remain necessary - too long a time, for example, is still permissible in police or military custody in the North-East.

Any contravention of, or failure to comply with, the requirement of an emergency regulation is an offence (36(1)). However, prosecutions may be instituted only by or with the written sanction of the Attorney General, subject to certain exceptions (13 and 14).

(d) other forms of detention under the Emergency (Miscellaneous Provisions and Powers) Regulations, No 1 of 1993

Under Regulation 39 police officers or members of the armed forces investigating any emergency regulation offence may, with the written approval of a Deputy Inspector General of Police, take back a person into their custody for up to 48 hours. Under the rescinded regulations police could, without safeguards, move detainees from place to place for as long as 7 days, hence this is an improvement. It still fails, however, to provide adequate protection, for this to be achieved it is desirable that a prison officer be required to accompany a detainee in these circumstances.

Regulation 20 continues the provision of the earlier regulations for referral of detainees for rehabilitation without their ever having been charged or tried. In addition, for the first time, it makes this referral possible for detainees held under the Prevention of Terrorism Act.

The period of rehabilitation is required to be specified in the order (20(1)) but no maximum time limit is laid down for the rehabilitation period, nor is the order required to specify the place of rehabilitation,

making follow-up difficult.

Regulation 22 lays down new procedures regarding people who surrender. These procedures improve on the earlier position but still are not satisfactory. The regulations require that all who surrender must be detained, yet many may have committed no offence, and the time limits for which people may be held in detention are excessive.

(e) the Prevention of Terrorism Act

The Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979, as amended by the Prevention of Terrorism (Temporary Provisions) (Amendment) Act, No. 10, is referred to in this report as the Prevention of Terrorism Act (PTA). It was originally intended to be in force for a period of three years only. However, when amended in 1982, it was made a permanent law despite the indications of a temporary nature still contained in its name.

In June 1993 the Act was amended by Regulation 53 of the new Emergency (Miscellaneous Provisions and Powers) Regulations of 1993. This amendment increased the acts for which arrest and detention are authorised by adding a further offence ("committing robbery whilst being armed with any firearm, offensive weapon or deadly weapon") to Section 2.

Amendment of legislation by emergency regulation, by-passing both the normal discussion in Parliament and general public debate is undesirable in any event. This amendment is, in addition, difficult to locate since amendment of a statute by emergency regulation is not normally expected. To add to the difficulties Regulation 53 is in the miscellaneous section, Part V, of the regulations, and not in Part II,

the section dealing with search, arrest and detention where it might logically be expected to be located.

Under the Act's provisions persons "connected with or concerned in or reasonably suspected of being connected with or concerned in any unlawful activity" become, without any further justification, subject to the exercise of very wide powers (section 9). "Unlawful activity" is a concept which receives an extremely wide definition and embraces comparatively minor offences (section 2). Even actions committed before its enactment are within the ambit of the Act's provisions although, at the time that they were committed, they may not have contravened any law then in existence (section 31). This retroactivity contravenes ICCPR, Article 15.

Section 3 provides penalties for the preparation, abetment, conspiracy, or incitement to commit such offences and section 5, for the failure to give certain information pertaining to any person who has committed or is making preparation to commit such an offence.

Section 6 deals with the powers of entry, search and seizure. It gives wide powers of arrest and detention to the police. A Superintendent of Police or any other police officer not below the rank of a Sub-Inspector authorised in writing by a Superintendent "may...without warrant...notwithstanding any other law to the contrary...arrest any person...connected with or concerned in or reasonably suspected of being connected with or concerned in any unlawful activity". The Act also permits search of premises and vehicles, seizure of documents, and the taking of measures for identification (ss.6,7).

A person arrested under section 6(1) must be brought before a magistrate within 72 hours unless a detention order under section 9 has

been made in respect of that person. The magistrate may then make an order, on an application made in that behalf by a police officer not below the rank of Superintendent, remanding that person until the conclusion of the trial of such person. The magistrate has no jurisdiction to order the earlier release of the detainee. This can be done only with the consent of the Attorney General.

Any police officer can remove a person arrested under section 6(1) or remanded under section 7(1),(2) to any place of interrogation and from place to place for investigation purposes (section 7(3)). As observed in relation to the emergency regulations the holding of detainees in the custody of their interrogators is dangerous. Moving them from place to place as well increases the difficulties of lawyers, friends and relatives in keeping track of their whereabouts and greatly facilitates ill-treatment.

Section 9 provides that "where the Minister has reason to believe or suspect that any person is connected with or concerned in any unlawful activity", he may order such person to be detained "in such place and subject to such conditions as may be determined by him", and that detainees may be held without charge for successive periods of three months up to a maximum of eighteen months. Under section 9 there is no requirement that detainees be brought before a magistrate upon detention.

Section 10 stipulates that an order made under section 9 is final and may not be called in question in any court or tribunal by way of writ or otherwise. Section 11 provides that suspects under the Act may be subjected to orders restricting their movements, and/or their activities with associations or organizations and political activities.

Section 13 provides that detainees may make representations, in respect of the detention or restriction orders concerning them, to an Advisory Board of three persons appointed by the President.

Under the authority of the PTA detainees are held, not only in ordinary prisons, but in army camps and in police stations. Even when charged and awaiting trial, and during trial, the Secretary to the Minister may order the detainee to be held in any place and subject to any conditions he directs (15A).

As is the case with the emergency regulations discussed above many of these provisions contravene accepted international standards. The fact that they are contained in permanent, and not emergency, legislation exacerbates the government's breach of its international obligations.

(f) provisions of the emergency legislation affecting fair trial

Emergency (Miscellaneous Provisions and Powers) Regulation 52, authorises the use in court of a statement certified by a police analyst, in the absence of that analyst, as conclusive proof of the truth of the matter stated. This procedure denies the accused the right to cross-examine witnesses whose testimony he or she may well wish to challenge.

Other provisions, taking away the ordinary protections of the criminal law, are contained in Regulation 50 which concerns the admissibility of statements in evidence. The Evidence Ordinance (Ordinance No. 14, 1895, as amended) provides that, unless made in the presence of a magistrate, no confession made in police custody is admissible in evidence. Under Regulation 50, on the other hand, at the trial of any

person for an offence under any emergency regulation, confessions made while the detainee is in police custody are admissible in evidence whether or not such statement was made in the presence of a magistrate, provided that they were not made to a police officer below the rank of Assistant Superintendent (50(1)).

However, if the detainee is able to prove that the statements are "irrelevant" under section 24 of the Evidence Ordinance (statements are "irrelevant", for instance, if obtained under duress) the statements are inadmissible. The burden of proof is on the detainee (50(3)). It would not be easy for a detainee to prove such an allegation.

Under the Prevention of Terrorism Act confessions made while the detainee is in police custody are admissible in evidence, provided that they were not made to a police officer below the rank of Assistant Superintendent unless the detainee is able to prove that the statements are "irrelevant"(S.16). As noted in relation to the similar provision of the emergency regulations, it would not be easy for a detainee to prove such an allegation.

In addition further restrictions on the ordinary protections of the criminal law are contained in PTA Section 18, which concerns the admissibility of certain types of documents as evidence and the procedure which may be adopted concerning contradictory statements of witnesses.

(v) The need for accountability

In the words of the UN Working Group on Enforced or Involuntary Disappearances:

> Impunity is perhaps the single most important factor contributing to the phenomenon of disappearances. Perpetrators of human rights violations...become all the more irresponsible if they are not held to account before a court of law. (Report to the 47th session of the UN Commission on Human Rights, E/CN.4/1991/20, p.85, para 406).

Whether or not the perpetrators of serious human rights violations are members of government security forces, members of groups working under the control of those forces, or persons otherwise acting in an official capacity, they must be held accountable for their actions. It is clear that impunity from punishment (for instance the granting of amnesties to security personnel) leads to continuing atrocities. Bringing to account those who commit acts endangering the life or liberty of others is an indispensable part of effective human rights protection. (For this reason the Sri Lankan government is urged to make the additional declarations under Articles 21 and 22 of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.)

If governments are to honour the human rights commitments they undertake on ratifying international human rights instruments, they must give careful consideration to their systems of accountability. Some Conventions (eg. Article 5 of the Genocide Convention) spell out this requirement expressly. Article 12 of the Convention Against Torture requires a ratifying government to promptly and impartially investigate cases of torture and ill-treatment wherever there is reasonable ground to believe such acts have occurred within its jurisdiction.

Article 3 of the International Covenant on Civil and Political Rights

provides that the parties to the Covenant undertake:

> (a) to ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
>
> (b) to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
>
> (c) to ensure that the competent authorities shall enforce such remedies when granted.

The UN Human Rights Committee has stressed the necessity for ratifying states to investigate serious human rights violations and "to hold responsible" their perpetrators (see eg. HRC Report 37, UN GAOR Supp. No. 40, Annex V, General Comment 7(16), para.1, 1992). UN Special Rapporteurs and Special Representatives have repeatedly called on governments to punish those responsible for serious breaches of human rights, and these exhortations have been endorsed by UN General Assembly Resolutions and by the Commission on Human Rights. The UN World Conference held in Vienna in June 1993 recommended:

> States should abrogate legislation leading to impunity for those responsible for grave violations of human rights and prosecute such violations thereby providing a firm basis for the rule of law.

Over the last few years the Sri Lankan government has repeatedly stated its acceptance both of the need for the implementation of human rights provisions and of the need for state personnel to be held to account in order for its international obligations to be fulfilled. It has reported (eg. at meetings of the UN Human Rights Committee in Geneva) that it has recently taken a variety of measures to address the concerns voiced by national and international bodies about the climate of impunity which has prevailed in Sri Lanka in recent years.

Looking first at the emergency regulations: the repeal of former Emergency (Miscellaneous Provisions and Powers) Regulation 71 is to be commended (although in fact judicial decisions had already curbed the effect of the regulation in practice). Regulation 17 had provided that no action, whether civil or criminal, could be brought in relation to anything done in good faith under the emergency provisions, unless such action was consented to, or initiated by, the Attorney General.

However, other provisions which contribute to an atmosphere of non-accountability remain. They also should be repealed. Regulations 45 and 46, concerning inquest procedures and post-mortems, continue to be inadequate to ensure impartial investigation of deaths caused by members of the security forces. Indeed they can be used to conceal illegal killings. It is difficult to see why these regulations have not been removed and a return to normal inquest procedures made at least in the South. This has been recommended for some time by both national and international bodies.

Regarding the Prevention of Terrorism Act, it contributes to the impunity of human rights violators, providing as it does in Article 26:

> No suit, prosecution or other proceeding, civil or criminal, shall lie against any officer or person for any act or thing in good faith done or purported to be done in pursuance or supposed pursuance of any order made or direction given under this Act.

Though its time limit has not been extended to cover the last 5 years, another piece of legislation whose existence is not helpful to the establishment of general accountability is the Indemnity Act (Act No. 20 of 1982 as amended). This legislation provides that no legal proceeding shall be instituted for an act done or purported to be done by a Minister, Deputy Minister or any public servant, "whether legal or otherwise" for the purpose of restoring law and order. Act No. 60 of 1988 extended the deadline of the period covered by this indemnity to 17 December 1988.

A positive measure taken by the Sri Lankan government to address concerns about non-accountability is the setting up of several commissions of enquiry into different incidents and atrocities, as well as bodies to monitor the arrest and detention and conditions of detention of those held under emergency legislation. This is an encouraging move. Unfortunately, however, in a number of instances these bodies are unsatisfactory in some way - for example, the mandate may not enable enquiry into the period of most flagrant abuse of rights, the staff may be inadequate and the procedures convoluted, resulting in an inability to deal with more than a very small number of the thousands of cases pending.

The Human Rights Task Force (HRTF) is one body which has done very useful work. It was appointed with effect from 23 August 1991. It is authorised both by the Sri Lanka Foundation Law No.31 of 1973, and by Emergency Regulations of 31 July 1991 and 10 August 1991.

The activities of the Task Force have been adverted to throughout this report and are not repeated here. Briefly, its main function is the monitoring of the observance of the fundamental rights of persons detained in custody otherwise than by a judicial order. It also has the mandate to create and maintain a comprehensive and accurate register of the people detained in custody.

The Task Force visits detainees in official detention camps, but does not have a mechanism for tracking down detainees transferred from temporary or unofficial sites of detention such as military outposts or interrogation centres in areas of conflict (Report of UN Working Group, E/CN.4/1994/26, para.449). Since this is where torture frequently occurs it would be desirable if HRTF's resources and mechanisms could be extended to include inspections at these points of detention.

Where HRTF does operate (in the East as well as in the South), it has regional offices and also visits are made by personnel (particularly the Chairman) based in the Head Office in Colombo. HRTF officers regularly make their visits to places where detainees are being held, without first requesting permission to do this. In an interview Justice Soza, the Chairman, stated that these unannounced visits are effective and that there has been considerable improvement in the way detainees are treated, although he notes that the mistreatment of detainees is still common. HRTF staff cannot be present everywhere at all times. Funding is a problem, much of the Chairman's time is taken up with the need to find funds, and contributions come from a variety of non-Sri Lankan sources (eg: Australian High Commission, British High Commission, Royal Norwegian Embassy, Interview with HRTF Chairman). The Chairman is critical of the continuing failure by the government to bring security personnel to account, saying that serious

abuses will inevitably persist until a real will to sheet home liability to those who violate human rights is demonstrated. Such will has not yet been made apparent.

Another recently established body with obvious relevance to the issue of accountability is the Presidential Commission of Inquiry into the Involuntary Removal of Persons with its mandate to inquire into "allegations that persons are being involuntarily removed from their places of residence by persons unknown and that the whereabouts of such persons so removed are not known". This Commission was appointed by Emergency Regulation No. 644/27 on 11 January 1991 for a one year period. In 1993 its appointment was extended to August 1995. The period of the greatest number of disappearances in Sri Lanka was in 1988 and 1989. Regrettably, the Commission is empowered to inquire only into complaints of "removal" which occurred on or after 11 January 1991. This is despite repeated urgings by national and international organizations to extend the time-frame to include the power to investigate into disappearances occurring prior to January 1991.

The Commission's enquiries have proceeded so very slowly that its existence has proved ineffective. Public hearings commenced in August 1991. Work has been completed on less than 50 of the more than 800 cases found to be within its mandate and, of these, the President has referred only 2 to the Attorney General for prosecution. As far as is known none has come to trial. By late 1993 the Commission had submitted less than 20 reports to the President from the time of its inception, and by the end of 1993 none of these had been published.

In October 1993 a unit headed by a senior police officer was

established by administrative decree to examine the "disappearance" cases for which the UN Working Group on Enforced or Involuntary Disappearances has requested clarification. The government has stated that this unit will begin with an enquiry into reported cases occurring between 1983 and January 1991, so covering the earlier period. This is a welcome step, although, by the end of the year there was no evidence of any useful activity by the unit. Its procedures are in need of improvement as at present they do not stipulate satisfactory investigative steps, and only evidence provided by the police can be considered (AI, Summary of human rights concerns, Feb 94, p.8).

In addition, as mentioned earlier, the government has agreed to adopt a number of recommendations from different bodies (eg. from CSHR) and has made undertakings to others (eg. to Tamil political leaders in June 1993) which are designed to facilitate the bringing to account of those perpetrating serious human rights violations. These undertakings are welcomed. Regrettably all too often in the past such commitments have remained paper or verbal commitments only, untranslated into practice. Some examples have been given already in the Overview section. A few additional instances are given below:

> In the second report of the UN Working Group on Enforced and Involuntary Disappearances (released in February 1993) the Group observed that, although the government had accepted the recommendations made in the Group's 1991 report, few of these recommendations had been implemented.
>
> In its 1993 report the HRTF named 4 army officers allegedly responsible for the disappearances of 158 people from a refugee camp at the Eastern University in Batticaloa district in 1990. Despite the Chairman's statement that: "This incident is a

dastardly crime which cries out for proper investigation" (p.24), as far as the authors of this report are aware, by the end of 1993 no action had been taken against the 4 officers.

32 school boys of Embilipitiya disappeared in 1989 having been taken into custody and detained at the Sevana Camp. Several Habeas Corpus cases are pending. The HRTF has identified soldiers implicated in the disappearances, eye witnesses are available, and the police dossier on the case has been sent to the Attorney-General; however, despite this, so far security personnel alleged to be responsible have not been interrogated or charged, and are still carrying out their duties (HRTF, AR, p.28; Report of UN Working Group, E/CN.4/1994/26, para.442).

Security personnel frequently fail in observance of the requirement of the newly amended emergency regulations that receipts be issued to families of detainees and that notification be made to the HRTF of all arrests. (HRTF, AR, Annex-8)).

Other instances give rise to concern as to the government's commitment to making members of the security forces accountable for their violations of human rights. Some examples are discussed in the next section, only one is given here:

On March 12, 1992 the former DIG of police, Premadasa Udugampola, filed an affidavit accusing politicians of the ruling United National Party (UNP) of using death squads, the "Black Cats", to kill hundreds of opponents and to rig elections. The affidavit further alleged the involvement of many police and army officials in the disappearances and killings of 1988/1989. Following these accusations, in April 1992 Udugampola was

charged with causing hatred, hostility, ill will and contempt for the government and a warrant was issued for his arrest. He subsequently went into hiding, left the country, and failed to appear in court when he was required to do so. This affidavit has not led to any investigations.

At the time Udugampola had been implicated in the death from torture of a lawyer, Wijedasa Liyanarachchi in 1988, whose body was found covered in wounds after a short period in police custody. An indictment was filed against 3 police officers who were charged with conspiracy to murder. While the Court established that the police officers in question were guilty of illegal acts, the judgment (handed down on 18 March 1991) found that the wrong persons had been indicted and that the officers charged had not murdered, but had only abducted, the deceased. The Court went on to suggest that further investigations be made into the conduct of Udugampola whose evidence it disbelieved. Despite this suggestion no investigation was made, no charge laid and, when Udugampola returned in 1993 after an absence from the country, no serious attempt was made to apprehend him. Three weeks after his return Udugampola filed a second affidavit in which he withdrew his allegations against the UNP. The Attorney General dropped all charges against him. Subsequently, on the 29th of July, 1993, Udugampola was appointed Vice Chairman of the Sri Lanka Port Authority.

There are instances of recent government action to bring officials to account. Some are listed below:

Eight officials of the Mahara jail are to be indicted over the deaths of 5 prisoners in their custody. These cases are pending.

The High Court in Matara found 2 police officers guilty of abducting and killing 3 persons during the period of the JVP uprising and has sentenced them all to 45 years rigourous imprisonment and fined them Rs.3,000/- (Inform Situation Report, October '93).

23 soldiers are to be brought before a court in the Batticaloa district charged with the massacre of 35 Tamil civilians in Batticaloa in August 1992. This case was transferred to a predominantly Sinhala district. The Tamil witnesses were scared to travel to this district.

In addition the government's decision in 1989 to give the ICRC unhindered access to detention centres, police stations and army camps has played an important role in reducing the number of disappearances attributable to the security forces, as has the work of the Human Rights Task Force noted above.

(vi) Habeas Corpus applications and fundamental rights cases

As noted above if there is to be confidence in government assurances about the protection of human rights, it is vital, when it appears that the basic rights of individuals have been violated by organs of the state, that immediate and effective steps be taken both to provide a remedy for the victim (where, in the particular circumstances, a remedy is feasible) and to hold personally accountable those who perpetrated the violation. In Sri Lanka people held under the emergency regulations and PTA (or others acting on their behalf) may challenge the legality of their detention by filing Habeas Corpus applications in the Court of Appeal or by bringing a fundamental rights action before the Supreme Court.

Access to the Supreme Court is provided for in Article 126 of the Constitution: the Supreme Court shall have the sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by executive or administrative actions of any fundamental right or language right declared and recognised by Chapter III or Chapter IV.

The Court has relaxed its interpretation of the one month time limit under Article 126 in relation to the lodging of these claims, and has made it clear that it will take a less strict view where unlawful arrest and detention or torture is concerned. In *Siriwardena v. Rodrigo* [1986] 1 Sri L.R. 384, it was held that time will begin to run from the date the petitioner becomes aware that his fundamental rights have been violated and has knowledge of all the facts required for an application to the Court. (For a restrictive interpretation of the time limit in relation to a claim against the public service see *Gamaethige v. Siriwardena* [1988] 1 Sri L.R. 384).

543 Habeas Corpus applications were filed on behalf of detainees in 1993, 343 were dealt with during the year, the rest are pending. In some long-term detainees were ordered to be released, for example this was the result in the case of Pavil Anthony who was reported to be released in March 1993 after more than 2 years in detention. Generally only a few detainees secure release. The Habeas Corpus applications lodged in 1993 in relation to missing persons brought no result (Interview with HRTF Chairman).

In a welcome development, the Supreme Court has over the last few years begun to exercise an epistolary jurisdiction in relation to letters received from detainees claiming that their detention is illegal. A letter is in effect treated as a petition. The Supreme Court sends the

letters it receives to the Bar Association, which follows them up and, if a case of illegality seems to exist, lodges a claim before the Court. A large number (541) of special cases begun in this way were filed during the year, and 1,989 such cases were dealt with (number includes cases pending from previous years, which were disposed of in 1993). More than one complainant frequently signs the letters and it is estimated that around 5,500 have sought relief in this manner since 1990. In addition, 486 regular fundamental rights cases were filed in 1993 (226 of these were against police officers), and 757 cases were dealt with (Report of Supreme Court Registrar 1/3/94).

Without the case ever reaching adjudication the involvement of the Supreme Court has assisted detainees in obtaining various forms of relief: unconditional release; short term rehabilitation followed by release, and long term rehabilitation followed by release. In other instances the right of access by lawyers has been recognised. Alternatively, the detainee may be charged. He/she may be then entitled to either bail or release if not sentenced to imprisonment. (Report of Supreme Court Registrar 1/3/94).

On February 26 1993 the Supreme Court made an order directing the HRTF to begin inquiring into the legality of individual cases of detention. The HRTF has so far advised the Court on over 70 cases. More than 60 of these detainees have been released (Interview with HRTF Chairman). Where the HRTF has become involved the executive may review the detention orders without the need for recourse to the Court (Report of Supreme Court Registrar 1/3/94).

Some examples of the Court's activism in advancing constitutional protection of fundamental rights in 1993 are given below:

In *Herath Banda v. Wasgiyawatte* (S.C. Appl.270/93 (decided 28/5/93)) alleging violation of petitioner's right under Article 11, Justice Amerasinghe disallowed the petitioner's attempt to withdraw the case since the medical evidence clearly supported the petitioner's complaint and, in addition, information before the Court indicated that attempts had been made by the respondents to dissuade him from going to court;

In *Dillymalar v. Wakishta* (S.C. Appl. 988/92, decided 19/7/93) Justice Wijetunge found that a vague general suspicion is not a sufficient ground for continued detention;

In *Rajadurai Surendran v. The University Grants Commission* (S.C. Appl.480/92, decided 26/3/93) the Court held that the petitioner's fundamental right to equality before the law had been infringed as a result of sub-dividing the merit quota on a geographical basis. Due to the sub-division 28 students from the Jaffna district, who would otherwise have gained university admission, were denied it. Justice Fernando said: "Justice must not only be done but must be seen to be done. And in the field of higher education this requirement that the system of University admissions, both as formulated and as implemented, must not only be fair but be seen to be fair. I therefore consider that granting the petitioner relief personally would be insufficient, and that it is just and equitable that the entire scheme of admission be set aside.";

In *Amaratunga v. Sirimal* (S.C. Appl.468/92, decided 1993) a protest march organized by several political parties was stopped by the police. The Court found that the march was stopped because the petitioners were shouting anti-government slogans. Justice

> Fernando upheld the right of a citizen to criticise the government. He said: "The right to support or to criticise governments and political parties, policies and programmes is fundamental to the democratic way of life.."

When an individual violates another's rights under the Constitution, no constitutional cause of action arises, unless the action falls within Article 12(3) which prohibits the prevention of individual access to public places such as shops, restaurants, hotels, places of worship, etc. on the basis of race, religion, language, caste, or sex.

The Supreme Court recently held that in certain instances actions by private individuals can be considered state action if there is a sufficient nexus between the private actor and the executive. In *Mohamed Faiz v. AG* (S.C. Appl. No 89/91, decided 19/11/93) the petitioner, while in police custody was assaulted by two MPs and a Provincial Council member. The police officers stood by and allowed the MPs and Councillor to assault the petitioner. The Court found that the petitioner had been arrested and detained at the prompting of the MPs and Councillor. The Court held:

> Article 126 speaks of an infringement by executive or administrative action; it does not impose a further requirement that such action must be by an executive officer. ... The act of a private individual would be executive if such act is done with the authority of the executive;... such authority may be express, or implied from prior or concurrent acts manifesting approval, instigation, connivance, acquiescence, participation, and the like, including inaction in circumstances where there is a duty to act; and from subsequent acts which manifest ratification or adoption...responsibility under Article 126 would extend to all

situations in which the nexus between the individual and the executive makes it equitable to attribute such responsibility.

Although people are heartened by the fact that increasing numbers of fundamental rights cases are being heard by the Supreme Court, and by the findings in those cases, there is nonetheless concern that these decisions are not deterring the perpetrators of violations. Partly this is because many breaches never reach the courts at all, and thus their perpetrators have no fear of being brought to account. In southern Sri Lanka the dangers for lawyers prepared to take human rights cases were at their height in 1988-89: some were killed (eg. Kanchana Abhayapala, Sanath Karaliyadde and Neville Nissanka); some were taken into detention and subsequently released and some received threats. As well as lawyers, litigants and witnesses have been subject to intimidation and harassment, and some have been killed. Although the situation since then has improved markedly, in 1993 reports have continued that people filing fundamental rights petitions are harassed and threatened by those against whom the petition is filed.

Additional difficulties operate to limit the numbers of cases which can be brought. Practical difficulties can arise where the relevant court sits only in Colombo. It is often difficult to travel to the capital from outlying districts, particularly travel from the North and East. In the case of the High Court the position has been improved in recent years as the Provincial High Courts have been enabled to issue writs of Habeas Corpus. This development is to be welcomed. It facilitates action by people resident within those jurisdictions.

The main concern, however, is that accountability is not laid at the feet of those who actually carry out the violations, so that they still feel that they can continue to act with impunity. As indicated above,

although over the last few years numbers of fundamental rights cases have been filed in the Supreme Court concerning the torture and ill treatment of detainees, and although in many cases violations of rights have been found established, seldom is the compensation ordered to be paid by the person who perpetrated the violation. It is to be noted that there are instances in which those responsible for violations have been ordered to make compensation payments, and these instances are to be welcomed. Recently two MPs were ordered to pay compensation (Report of Supreme Court Registrar 1/3/94), and it was reported in October 1993 that the Supreme Court had ordered the OIC of the Udagama police and the state to make payments of Rs.5,000./- and Rs.10,000/- as compensation to Mr. Ariyatilleke, Attorney-at-law, for infringement of fundamental rights (Inform Situation Report, October '93)). However, this is not generally done.

Further, on more than one occasion the government has not only failed to punish those responsible, but has in addition subsequently granted those same people promotions. The 1993 November Inform Situation Report noted that 11 chief inspectors and inspectors out of the 87 police officers implicated by the Supreme Court in serious fundamental rights violations in the period 1/1/80 and 31/12/92 had since been promoted.

Where allegations of wrongful arrest, wrongful detention or torture are proved, the Court in some cases has demanded an explanation from the Inspector General of Police as to why action has not been taken against officers implicated in the violation of rights (Report of Supreme Court Registrar 1/3/94). This was done for instance in the case of the violation of the rights of a person in Anuradhapura (Inform Situation Report, October '93). Clearly instances of such queries being made from time to time will not be sufficient to ensure the

observance of fundamental rights.

Where a finding of a violation is made (eg. a finding of illegal arrest and detention, a finding of mistreatment or torture while in custody) a formal enquiry should be held as a matter of course and, where there is evidence implicating one or more state officials, charges should be laid. There is no procedure under which this is done, and even flagrant cases escape follow up (see for eg. the Udugampola case discussed above in the section on accountability). Such lack of follow-up, together with payment of compensation by the state rather than by the offender will not, and cannot, have a deterrent effect on individual violators. On the contrary, it in effect gives official condonation of their actions.

Punishment of the individuals guilty of the breaches is the only way to prevent their recurrence. If the government is to honour its obligations under international law it will need to address the problems enumerated here. The real indication of success will be when the people living in Sri Lanka have confidence that the rights which are protected by international law will be honoured by the government and that, if these should be breached, both an effective remedy will be available to them, and the persons responsible will be brought to justice.

II. FREEDOM OF EXPRESSION

This chapter first sets out the constitutional and legal framework in which rights to free expression are located in Sri Lanka. It then notes restrictions and restraints that generally affect that right. There follows in detail a record of the year indicating how exactly the right to free expression has been honoured or dishonoured.

(i) Relevant international standards

Article 19 of the International Covenant on Civil and Political Rights (ICCPR) guarantees the right to freedom of expression. This article, according to the ICCPR includes the following freedoms:

> freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media ...(Art. 19(2))

(ii) The constitutional guarantees

Article 14 of Chapter 3 of the Constitution of 1978 guarantees every citizen "freedom of speech and publication". This article also guarantees citizens the right of freedom of assembly.

The restrictions that may be placed on the enjoyment of fundamental rights are set out in Article 15(2) of the Constitution. With regard to the right to free expression, it says:

> The exercise and operation of the fundamental right ...shall be subject to such restrictions as may be prescribed by law in the interests of racial and religious harmony or in relation to

> parliamentary privilege, contempt of court, defamation or incitement to an offence.

These restrictions are far wider than those allowed under the International Covenant on Civil and Political Rights (ICCPR) which stipulates that restrictions:

> shall only be as such as are provided by law and are necessary,
> (a) for respect of rights and reputations of others;
> (b) for the protection of national security or of public order or of public health or morals.

Necessity is not a requirement under Sri Lankan law. The Supreme Court in a 1982 decision said:

> In Sri Lanka the operation and exercise of the right to freedom of speech are made subject to restrictions of law not qualified by any test of reasonableness. Neither the validity nor the reasonableness of the law imposing restrictions is open to question .. (*Malalgoda v. AG* (1982) 2 Sri L.R. 777)

The Constitution provides no guarantees of the right to information, but the Supreme Court has held that the right to know is necessarily implied in the right to free expression.

(iii) Other laws that affect free expression

The Sri Lankan Constitution also permits wide restrictions on freedom of speech with reference to parliamentary privilege. The Parliament (Powers and Privileges) Act No. 21 of 1953 created one offence - the publication of committee proceedings before they were reported to the

House. Even here, Parliament had only the powers of admonishment and removal; only the Supreme Court could, after a trial, order a fine or a term of imprisonment.

This Act was amended in 1978 so as to broaden the range of offences. Under this amendment the following were made offences:

(a) wilfully publishing any false or perverted report of any debate or proceedings in the House or a Committee or wilfully misrepresenting any speech made by a member in the House or in Committee;
(b) wilfully publishing any report of any debate or proceedings of the House or a Committee, the publication of which has been prohibited by the House or Committee;
(c) the publication of any defamatory statement reflecting on the proceedings or character of the House; and
(d) the publication of any defamatory statement concerning any member in respect of his conduct as a member.

The Act of 1980 created a further offence; the "wilful publication of any report of any debate or proceedings of Parliament containing words or statements after the Speaker has ordered such words or statements to be expunged from the official report of Parliamentary debates".

The Act of 1978 also gave Parliament the power to mete out criminal punishment for those found guilty of this broad range of offences.

The Prevention of Terrorism Act, first enacted in 1978 on a temporary basis and made a part of the permanent law in 1982, enables the government to punish acts that are deemed to be "terrorist" or

"subversive". It includes a provision that prevents the publication of any matter relating to the commission or investigation of any act that constitutes an offence under the Act. Even the non-violent articulation of views supportive of secession is an offence.

(a) emergency regulations and their impact on freedom of expression

The constitutional guarantees, with all the limitations implied in the restrictions, are further affected by the state of emergency which has been in force in the country since 1983, except between January and June 1989. The state of emergency, justified in the name of the civil war that has been engendered by the ethnic conflict, and brought into force by a declaration under the Public Security Ordinance of 1947, enables the government to make regulations that override all laws except the Constitution and affect in various ways the operation of fundamental rights including the right to free expression.

The publication of any matter that would or might be, in the opinion of a Competent Authority,

> prejudicial to the interests of national security or the preservation of public order or the maintenance of supplies and services essential to the life of the community or of matters inciting or encouraging persons to mutiny, riot or civil commotion, or to commit breach of any law

is prohibited by article 14(1) of the emergency regulations.

Censorship has been imposed from time to time on the ground of national security and public order. Emergency regulations that affect

the right to free expression vary from time to time. During the year under review, the regulations that were in force and affected in some way the right to free expression are set out below:

i. regulation no. 1 of 1989 which requires the re-registration of all printing presses with provincial and district government authorities;

ii. regulation no. 1 of 1991 which places restrictions on political activity including the holding of meetings, demonstrations, processions, pasting posters, placards or paintings.

Political parties in opposition to the government have combined to protest against government measures that affect freedom of expression. In March in a joint statement, they pledged to uphold press freedom. In December, they protested against the reimposition of emergency regulations regarding incitement. In September the SLFP issued a new policy statement in which they reaffirmed their commitment to freedom of expression. This did not, however, hinder Mr. Richard Pathirana, a leader of the SLFP and opposition whip in Parliament, threatening a few days later to nationalise The Island group of newspapers when his party came into power; he alleged that these had shifted into an anti-SLFP line. In spite of rhetorical protestations, most political parties do not show in action a deep rooted respect for the right of free expression.

(b) judicial affirmation of freedom of expression

The political parties of the opposition organized on July 1, 1992 a "sound protest" (Jana Ghosha). Members of the public were asked to demonstrate their opposition to the government by making any kind of

loud noise at 12 noon, wherever they were at the time. The protest was obstructed by the police in various ways.

A member of the Horana Pradeshiya Sabha (Horana Divisional Council) whose participation in the protest had been obstructed by the police appealed to the Supreme Court, alleging that his fundamental right to criticise the government in power had been violated. The Supreme Court found in his favour, saying that "criticism of the government is, per se, a permissible exercise of the freedom of expression under Article 14(1)(a) of the Constitution"; the state was ordered to pay him Rs. 50,000 as damages (*Amaratunga v. Sirimal*, S.C. Appl.468/92 [decided 1993]). The Supreme Court also instructed the Inspector General of Police to bring this decision to the notice of all police officers so that similar violations do not take place in the future (see also chapter on Legal Background).

(iv) The press in 1993

To sketch in the background, there is the mainstream daily and weekly press in all 3 languages and a large number of weekly tabloids. Within the mainstream press, the major group is state-owned, following the nationalisation of the Lake House group in 1973; 2 other groups are privately owned - one headed by an uncle of the Prime Minister and the other by a brother of Mrs. Bandaranaike, the leader of the SLFP. These connections determine broadly the political trends within their newspapers. Language and readership also make a difference.

The weekly tabloid press consists generally of publications devoted to various sectional interests like students, women, children, astrology etc.; there are also 5 tabloids in Sinhala and one in Tamil that are

politically oriented. These tabloids are a recent phenomenon; they came into prominence round about the time of the impeachment crisis in 1991. They deal with issues and news stories not normally covered in the daily press and are more critical in their approach. They have a reasonably large readership and manage to survive with almost no advertising revenue. Some of them receive support from NGOs. The tabloids are now collectively described as the 'alternative press'.

The tabloid newspapers as well as the 2 dailies run by private interests were, at the beginning of the year very critical of the late President, Mr. Premadasa, and of his policies and actions. Mr. Premadasa was critical of the press in many of his public speeches. He complained that their reporting was biased and unfair in that they ignored the many positive achievements of his government. He said that they were primarily concerned with attacking him personally. He hinted that these newspapers, particularly the tabloids, were part of a conspiracy to de-stabilise the government.

Other members of the government also claimed, with a great deal of vehemence, that the tabloids, which enjoyed no advertising revenue, only existed with foreign funding and were therefore the agents of foreign interests. These interests were committed not only to the de-stabilisation of the government but also to the destruction of indigenous values and the dismemberment of Sri Lanka. The state-owned press too joined the chorus of denunciation, and in condemning what they called the selective and partisan reporting of the alternative press and their financial base. Lankaputhra, a columnist of the Sunday Observer, wrote in the issue of 13 Jan. 1993 as follows:

> Most of the journalists who spoke at the Nugegoda meeting (a public meeting organised by the Free Media Movement) run

> weeklies and magazines without a single advertisement. Anybody who knows about publishing will know that this is a miracle that could be performed only by these journalists. Obviously there is a hidden source that finances these miracles.

Actual harassment of the media quickly followed.

Officials of the Inland Revenue, claiming to check whether the laws regarding income taxes, and particularly the business turnover tax, were being complied with, simultaneously visited on 1st February the offices of The Sunday Times and Lankadeepa (mainstream dailies), of the Yukthiya, Lakdiva and Ravaya (privately managed tabloid weeklies) and of Aththa (the Communist Party bi-weekly). They also examined the accounts of the Navamaga Press, a commercial press that prints Yukthiya (Inform, Human Rights Situation in Sri Lanka: 1993).

Officials of the Labour Department also went to Ravaya on the same day checking whether legally mandated minimum wages and provident fund payments were being made. On the same day, officials of the municipality and of the electricity and water boards checked payments due to them from Lalithakala, the commercial press that prints Ravaya. Two days later on 3rd February, Inland Revenue officials went to the offices of Wijeya Publications, the publishers of The Sunday Times and Lankadeepa; and of Upali Newspapers, publishers of the Island and Divayina (Inform, 1993).

At 8.30 p.m. on the night of 5th February, the offices of the Lakdiva newspaper were sealed by a flying squad of Colombo municipal officials, allegedly for the non-payment of rates and/or the unauthorized sub-letting of a part of their premises. The publishers

later filed a fundamental rights case on this issue. The Supreme Court ordered the Municipality to open up the premises (Inform, 1993).

The orchestration of the visits and checks indicate an attempt to harass and intimidate those sections of the press that are critical of the government. The blatant use of state agencies and officials for partisan purposes is also a sign of the government's contempt for democratic processes. While criticising the press, President Premadasa had repeatedly declared that he would not seal or suppress newspapers as his predecessors had done. He demonstrated by these actions that he was not, however, above using the state apparatus to achieve the same ends. That no prosecutions have been launched as a result of these checks indicate their intimidatory intent.

Other and more violent methods of suppression have also been resorted to. In September 1992, the UNP Mayor of Nuwara Eliya had apparently decided that her town should not be sullied by the Sinhala tabloid Yukthiya. She along with her guards visited the news agent responsible for distribution, seized all the copies and destroyed them. The paper promptly filed a fundamental rights case before the Supreme Court. The case first came up for hearing on 10 Jan. 1993. It had not been brought to a conclusion by the end of the year (Inform, 1993).

The law has been resorted to often in order to suppress coverage of incidents, the most notorious being the case of the Udugampola affidavits. Mr. Udugampola was the Deputy Inspector General of Police in the Southern range during 1988 and 1989 and was largely instrumental in suppressing the JVP insurgency in the area. His family was killed by the JVP and he was accused of unleashing a reign of terror in the region. He later fell out with the government and his

services were not retained after he reached the optional age of retirement. He then swore out a series of affidavits, in April 1993, in which he revealed the names of a number of persons who had "disappeared", and details of the vigilante squads responsible (Inform, 1993).

Yukthiya, Aththa and Lakdiva published these affidavits in full while the Sunday Times and The Island published extracts. The first 3 newspapers were then charged by the Attorney General with bringing the government into hatred or contempt, creating ill-will or dissension among the citizens and/or slandering public officials. The newspapers were also visited by police officials who attempted to find out the provenance of these affidavits since Mr. Udugampola was himself in hiding.

Effective discussion of the matters referred to in the affidavits was prevented on the ground that the matter was sub-judice. After the assassination of President Premadasa, Mr. Udugampola made his peace with the government and swore out new affidavits claiming that the matters referred to in his earlier affidavits had been based only on hearsay. The cases against the newspapers were then quietly withdrawn.

Many incidents of personal harassment of journalists either by members of the security forces or by persons associated with political forces have been recorded during the year. The Free Media Movement, an association of journalists and media personnel committed to the freedom of expression, has spoken of over 50 such incidents. We record below some of the more significant:

Ruwanthi Kariyawasam, freelancer for the Lankadeepa, while

covering a strike at a Ratmalana factory on 9th June; Dudley Wickremasinghe, Lankadeepa photographer at the police morgue after the assassination of President Premadasa; and journalists covering the mobile Presidential Secretariat in Batticaloa, were harassed by police and prevented from either reporting on or photographing the events (Inform, 1993).

Kamal Jayamanna, Lankadeepa photographer at a student picket in Colombo on 5th April; and Sena Ambalangoda, Divayina photographer, at a student demonstration in Kalutara on 20th April, were attacked by unknown persons (Inform, 1993).

A number of journalists have received death threats, mainly because of their coverage of politics or of corruption (Inform, 1993).

Journalists and photographers covering an International Human Rights Day celebration on 10 December 1992 at Slave Island, Colombo were assaulted by the police. In the face of the resulting publicity, the government appointed on 20th January retired former Court of Appeal judge Tudor de Alwis as a one man committee to inquire into the incident. He concluded his sittings on 25th February after hearing evidence from a number of journalists and others present at the demonstration. The report has not been published, and it probably found a number of police officers guilty of using unwarranted force. The Officer In Charge at that time, B.P.D. Karunaratne was sent on compulsory leave in March. He and several other officers will face trial (Inform, 1993).

(a) parliamentary reporting

The parliamentary reporters of Lankadeepa were censured and 'banned' from Parliament for a week in July. After this incident, the Parliamentary Privileges Committee said it would issue certain guidelines for reporters covering parliamentary proceedings; these related particularly to the reporting of matters ordered to be expunged by the Chair and not appearing in the Hansard, the official record of the proceedings (Inform, 1993).

This would have created difficulties in the immediate reporting of parliamentary proceedings, as the Hansard takes days to appear. The Prime Minister, in the face of severe criticism, later declared that Parliament would be flexible about reports appearing on the day after parliamentary sittings but that any reports appearing after the publication of the relevant Hansard would have to conform to the official version.

(b) reporting the war

Writing about the war in the North-East poses many difficulties, particularly any investigative reporting that questions the official versions put out in army communiques.

Mr. Iqbal Athas, defence correspondent of The Sunday Times, wrote an article critical of an army operation in its issue of 10th October. He alleged that a caller, identifying himself as General Cecil Waidyaratne, Army Commander, threatened him with death on tyres. It is reported that tabloids which highlighted this incident and Mr. Bernard Soysa, General Secretary of the Lanka Sama Samaja Party which issued a statement, have also been threatened (Inform, 1993).

When this issue was raised in Parliament, the Minister for Parliamentary Affairs said that the Army Commander had categorically denied issuing any threat, directly or indirectly, to Mr. Athas; all that he had done was to bring to the notice of the editor of The Sunday Times a "complete distortion of facts in the paper's defence column which he believed would have a demoralising effect on the armed forces." A funeral wreath was delivered later to Mr. Athas' home by a funeral parlour allegedly in the name of the Sinha Regiment (Inform, 1993).

The army also expressed its unhappiness over what was called negative reporting in connection with operations in Jaffna in September and October. There was a call for some kind of censorship which was fortunately not heeded.

Reporting the war is tied up with the question of access to information. The practice was to have a press briefing after the weekly cabinet meeting. At the briefing at which defence spokesmen were also present, cabinet decisions were made known. There was also the opportunity for local and foreign journalists to question government and army spokesmen directly. The briefings were discontinued in August, despite protests by local journalists and the Foreign Correspondents Association, and were replaced by a communique.

(v) The electronic media

Both radio and television were state monopolies until 1993.

Two private radio stations were permitted this year. However, these are purely entertainment channels and, according to reports, are

prevented from airing independent news bulletins. They may reproduce the news bulletins put out by the state radio (Inform, 1993).

Two television channels, both owned and operated by state agencies, were the only ones available at the beginning of the year. Since then 2 private channels have been licensed. It is understood that one of the terms of the license is that they do not put out independent news bulletins covering local events; the fact is that they reproduce international news taken over from CNN or other sources but do not cover the local scene (Inform, 1993).

Another private channel relays two services taken over from Star TV in Hong Kong, reportedly without authority. The services are the BBC world service and the Star sports channel, both on a 24 hour basis. The operator, obviously under state direction, scrambles the BBC news telecasts whenever any news pertaining to Sri Lanka begins to come over. The order is probably so rigidly worded that even news of a Sri Lankan cricket team abroad is known to have been scrambled.

Despite the opening of new radio and television channels, the government appears determined to keep its monopoly of news.

A cabinet reshuffle in August 93 saw the appointment of a new Minister of Information and Broadcasting, Mr. Tyronne Fernando. He began by assuring the public that his aim would be to safeguard freedom of expression. However, he also proposed to set up a "monitoring unit" for the media and advertising; fortunately we have had no further news of this unit. The President announced shortly thereafter a new set of guide lines for the radio and television, allowing the channels a degree of discretion in the choice of material and presentation. However, these do not appear to have influenced

the channels in any way, they continue to project the policies of the government, albeit with a degree of tact, less blatant and more discreet than earlier.

Nevertheless, the government's concern with using the electronic media for its own advantage or at least in a way that does not benefit its opponents is illustrated by a rather bizarre incident. Soon after the announcement that Provincial Council elections would be held on 17th May, government banned, on both radio and television, all advertisements and even other programme material which mentioned the election symbols of political parties.

(vi) Freedom of expression in the arts

Public performances of plays and exhibitions of films require a license from the Public Performance Board. While the licensing of stage plays has been reasonably liberal, films have suffered from standards that do not apply uniformly to imported and locally produced films.

The Public Performance Board does not concern itself with dramas and serials presented on television. The state television authority has developed its own internal mechanisms for their evaluation and control. Scripts were examined and approved by one panel of evaluators, with or without amendment; thereafter the scripts went into production. Another panel of judges saw the finished film; their approval was necessary for telecasting. The efficacy and independence of these internal mechanisms was brought to public attention during the year when two television serials were stopped in midstream.

Ava Sanda (The Waning Moon) was a teledrama in 24 weekly episodes. It dealt in part with the situation in the country in 1988/89

and disappearances of students through the story of a female university student whose mind had been somewhat unhinged by these incidents. After 15 episodes had been televised, it was brought to an abrupt end on 28th January. Viewers were told that the telecasting of the serial had been stopped "due to unavoidable circumstances" (Inform, 1993).

Mahamera Pamula (At the Foot of the Great Mountain), a serial in 14 episodes, dealt with moral and financial corruption at high levels in society and of the various methods, including murder, adopted by those involved to hide and cover up their misdeeds. On January 10th, viewers were expecting the 10th episode of the serial. They saw instead a badly botched version of the last episode with an abrupt incomprehensible ending (Inform, 1993).

Both these serials had gone through the internal approval and vetting procedures of the television authority as being suitable for exhibition. Nevertheless, their exhibition was brought to an abrupt end by an order of the minister responsible for broadcasting. When questions were raised in Parliament, Mr. A.J. Ranasinghe, the Minister of State for Information, justified his action by referring to Article 7(2) of the Sri Lanka Rupavahini Corporation Act and declaring that these two teledramas had "violated norms of decency". In public speeches, Mr. Ranasinghe has declared that he was not prepared to allow television film-makers to corrupt the minds of young children (Inform, 1993).

The government has not been able to mount any justification of these actions. It is reasonable to accept that the programmes were suppressed because of their content; it was probably deemed prudent not to remind televiewers of the methods adopted to suppress the insurgency in the South or of corruption at top levels.

The Internal Review Board which had given final approval to these two serials also found itself replaced.

(vii) Conclusion

There is no overt censorship currently existing, either in terms of the normal law or even the emergency regulations. Yet, as indicated by the facts reported above there have been conscious attempts by the State to prevent, by harassment and intimidation, the expression of views that are not congenial to it. The State's control of the largest newspaper publishing group, radio and television means that these organs are not ordinarily open to the expression of any dissenting opinion. While it is true that there are newspapers that are critical of the state, the media with the largest circulation does not usually give equal or reasonable space to alternative viewpoints.

III. FREEDOM OF ASSOCIATION

A. Non-governmental organisations

(i) Background

The Constitution, by Article 14 (1) (c), guarantees freedom of association; this is, however, "subject to such restrictions as may be prescribed by law in the interests of racial and religious harmony or national economy" in terms of Article 15 (4).

This section will deal with this particular right as it has been so far exercised to form, organise and operate NGOs and the threats to the exercise of this freedom that have manifested themselves over the last two years.

There are many lawful options open at present to individuals or groups who desire to form an NGO: to incorporate (i.e. as a non-profit making company) under the Companies Act, to create a trust in terms of the Trusts Ordinance, to register under various acts of Parliament such as the Voluntary Social Service Organisations (Registration and Supervision) Act, or simply to form an unincorporated association. Each of these options carries with it various levels of relations with appropriate governmental authorities; the last mentioned model - an unincorporated association - does not require any sort of governmental intervention or registration but is nevertheless recognised in law. Groups are free to decide on the form of organisation that best accords with their objectives and needs.

Over the last decade there has been a significant growth in the number of NGOs; the total number operating in 1991 was roughly reckoned

to be about 3000. This growth can be attributed to an increase in civic consciousness and the appearance of many areas in which governmental action is absent or is insufficient to meet perceived needs. The NGOs cover a wide spectrum of activity: research and training, relief and rehabilitation, development, rural upliftment, the rights of women and advocacy of a wide range of issues such as human rights and the preservation of the environment. However, the largest number of NGOs are concentrated in the areas of relief, rehabilitation and development.

With the growth in the number of NGOs and the expansion of their area of activity, public and state interest also became more pronounced. Some sections of the public began to view the NGO sector with some distrust; a principal criticism was that they were foreign funded and were therefore subject to direction from outside; this was in the context of rising hysteria that foreign countries and agencies were attempting to intervene in the domestic affairs of the country and particularly in the ethnic conflict. The state became interested too in the increasing flows of assistance to the NGO sector and anxious to harness these funds to complement government plans and projects.

It was against this background that the government commissioned from a team of officials, in 1989/90, a report on the NGO sector; it was this report that was used to provide the rationale for the appointment of a Commission of Inquiry.

(ii) The Presidential Commission of Inquiry

The Presidential Commission of Inquiry into NGOs was appointed by the late President Mr. Premadasa on 14 December 1990. The

Commission's work is set out in some detail because it forms the basis for subsequent developments.

The warrant appointing the Commission refers in its preamble to the report mentioned earlier. This report has never been published; NGOs which requested copies were refused. Nevertheless, the warrant refers to three of the Commission's main findings which are quoted below:

> (a) about 3000 NGOs, both local and foreign, are functioning in Sri Lanka today;
> (b) no framework has been established for monitoring the activities and the funding of the said organisations;
> (c) some of the funding received from foreign sources as well as generated locally are allegedly being misappropriated and/or being used for activities prejudicial to national security, public order and/or economic interests and for activities detrimental to the maintenance of ethnic, religious and cultural harmony among the people of Sri Lanka.

These conclusions formed the basis for the appointment of the Commission. It was asked to inquire into and obtain information on the activities of NGOs, whether registered under current laws or unregistered. The Commission was to ascertain whether any funds received by these NGOs either from local or foreign sources, had been misappropriated, and/or "are being used for activities prejudicial to national security, public order and/or economic interests and for activities detrimental to the maintenance of ethnic, religious and cultural harmony among the people of Sri Lanka."

The Commission was also asked to look at the laws and institutional arrangements currently in force "for the monitoring and regulating the

activities and funding of such organisations" and determine whether they were adequate.

The warrant required the Commission to report on all the matters referred to above; we quote for the purposes of this analysis three of the sections of the warrant:

> (b) whether any funds received from foreign sources or generated locally are being used for any purpose other than the declared objects of any such organisation,
>
> (c) whether any such organisation is apportioning funds disproportionately for buildings, equipment, vehicles, staff and other such establishment overheads at the expense of the objectives publicly declared in their incorporation orders and constitutions and which are intended to ameliorate the social and economic deprivation in Sri Lanka,
>
> (d) whether the existing provisions of the law for monitoring the activities and funding of such organisations are adequate and if not, what legislative provision would be required to prevent such funds being misappropriated and/or from being used for activity prejudicial to national security, public order and/or economic interests and for activities detrimental to the maintenance of ethnic, religious and cultural harmony among the people of Sri Lanka or resulting in the exploitation of labour rendered by any person or group.

The warrant makes clear certain underlying assumptions: the NGOs were ill-managed, spending more on establishment than on projects; their funds were being misappropriated or were being diverted to anti-

state activities; their employees were being exploited; and therefore they needed to be regulated and their activities monitored by the state.

The Commission began work in the first week of January 1991 and continued till December 1993. It first published a notice in the newspapers on 10 Jan. 1991 inviting "any person or organisation having any information or complaints" or "desirous of making representations" to communicate with it. The Commission then sent a detailed questionnaire to a number of NGOs, the exact number being yet unknown. Supplementary questionnaires were sent to some NGOs asking for very detailed information, not only of the organisations themselves but also of the assets of principal office bearers and their spouses and children.

The Commission heard evidence in public from some persons who had made representations and public officials about NGOs in general and the place they occupy in public life. The tenor of this evidence, by and large, was to confirm the existence of a growing NGO sector and that it needed monitoring and regulation by the state.

The Commission also had organised a police unit whose task was to make investigations and record statements.

The Commission thereafter held public hearings into allegations against three NGOs: World Vision, an American NGO which it was alleged was making conversions to Christianity by the offer of material inducements; the Eye Donation Society, and Sarvodaya, which is the largest Sri Lankan NGO and primarily concerned with development at a rural level. The Commission had framed some charges against Sarvodaya and was preparing to examine them when its public activities were brought to an end. Newspapers reported that the

Commission had been asked to submit its report by the end of 1993 on the basis of the material it had already collected.

The Commission's methods of work were scrutinised by a representative of the International Commission of Jurists. Some of the representatives' conclusions were:

> The commission must be genuinely, and not merely nominally, a vehicle for finding facts that will be relevant to the regulation of NGOs. It must not be used as a device for intimidating NGOs....
>
> Bearing this general principle in mind, several aspects of the Commission's operations call for serious reexamination. One is the extreme breadth of the terms of reference. This is an extremely worrying factor when considered in conjunction with two other aspects of the commission's activities: (a) the general notice of January 1991, inviting any one from the public at large to come forward to testify and (b) the high level of press attention accorded to the commission's hearings.
>
> These three factors, in combination if not singly, make for an unacceptably repressive atmosphere...
>
> Another general consideration of the utmost importance is that the NGO Commission's activities ought not to cross over the line from information-gathering into the sphere of criminal prosecution..., The preferable course of action ...would be to have the police unit attached to the Commission disbanded. As things stand presently, there is unacceptably great scope for police harassment of NGOs under the general auspices of the Commission.

At least one organisation complained against the fairness of the investigatory process (Angelika Planitz, Gerald Noack, Politics in Sri Lanka: The Case of Sarvodaya (University of Konstanz, Germany, 1992).

The Commission handed in its report to the President on 11th December 1993. The government announced on 24 December that it was promulgating regulations under the continuing state of emergency for implementing two of the main recommendations of the Commission. This procedure was being resorted to, the government stated, because action was urgently necessary and the enactment of appropriate legislation would take time.

(iii) Emergency regulation on NGOs

The regulation, to be cited as the Monitoring of Receipts and Disbursements of Non-Governmental Organisations Regulation No. 1, defines an NGO as:

> any organisation formed by a group of persons on a voluntary basis and which,
> (a) is of a non-government nature;
> (b) is dependant on public contributions, grants from the government or donations, local or foreign, in carrying out its objects;
> (c) has as its main objects, the relief of suffering, assistance to orphans, the sick, the unwanted, the disabled, the deprived, the disadvantaged or the poor, the development and upliftment of the community, research and training or the protection of the environment.

Excluded are, co-operative societies and death donation societies and those NGOs whose total receipts per year of money, goods and services are less than Rs. 50,000.

The first thing to be noted about this definition is that it follows the definition of social service organisations given in the Social Service (Voluntary) Organisations Ordinance, adding the two separate areas of research and training and the environment.

All NGOs falling within this definition whose annual disbursements exceed Rs.100,000 are compelled to register with the Director of Social Services and to submit to him details of all receipts of money, goods and services, the sources of such receipts and details of all disbursements of money, goods or services. The last requirement goes far beyond the normal audited statement of accounts. The NGO is compelled to give details of every disbursement, together with the name and address of every person to whom such disbursements had been made.

The penalties prescribed for non-compliance are very heavy, with prison sentences up to five years and fines for officials. Non-registration itself has been made an offence.

(a) why emergency regulations ?

The need to invoke the emergency has been justified by the government on the basis that legislation in line with the recommendations of the Commission would take time. Thus one must assume that there was some very urgent need to register and monitor the workings of NGOs. This need must necessarily be one that pertains to national security or the maintenance of public order;

regulations can be issued under the Public Security Ordinance only where there is a need for regulations to meet threats to public security and public order, to quell any mutiny or commotion or to ensure the maintenance of services essential to public life.

There is at the moment no threat or even a sign of threat to these concerns from NGOs in general or even from any specific NGO.

The report of the Commission has not been released for public information. What we have to go on are certain brief government statements and extracts in the newspapers of some sections of the report. These extracts reveal no need for urgency in the national interest.

The assumption behind the appointment of the Commission was a suspicion that many NGOs acted in ways that endangered national security or the economy or harmonious relationships between various ethnic, religious or cultural groups.

If during its three years of operation the Commission had found at least some of these suspicions well founded, this fact would have received mention in its report and would have been well publicised. It would therefore be justifiable to assume that the Commission has found no material base for these suspicions.

One is therefore compelled to conclude that the government has not established any incontrovertible reason for using emergency provisions to deal with NGOs.

(b) proposed new laws

That new laws are being prepared and will be presented to Parliament soon has been stated by the President in a number of recent speeches.

President Wijetunga was the chief guest at an Awards ceremony organised by the Sarvodaya Trust Fund on 4 April 1994 and gave away the awards. His presence indicated that the rift between Sarvodaya and the government of the late President Premadasa, which many had seen as the immediate cause for the appointment of the NGO Commission, had been healed. However, there was no indication of a softening of the attitude towards NGOs in general. The President said that NGOs were doing useful work and that close cooperation between the state and the NGO sector was desirable in their joint effort to eradicate poverty. However, he also said that new legislation was being prepared for regulating NGOs; that legislation will be prepared in the open, not in a secretive manner, and the views of the NGOs will be taken into consideration in its framing.

The President again spoke of NGOs at the 28th anniversary celebrations of the Kandy YMBA on 9th April. The section of his speech that dealt with this question is reproduced below:

> For the speedy development of the country, strong bonds of cooperation and collaboration between the government and non-governmental organisations are called for. However, considerable public disquiet was created in the country recently regarding the activities of NGOs. A presidential commission too was appointed in 1990 to inquire into the working of these organisations. Existing records indicate that over 2700 NGOs operate in the country now. These organisations receive local and foreign

> assistance on a large scale. It is the desire of the government to ensure that these monies are expended to meet the urgent needs of the poor and to realize development objectives. But the government has no intention whatsoever to control or to interfere with the activities of any NGO. The only intention of the government is to encourage a reorganisation of the activities of NGOs in a manner conducive to the common good of the people. I would like to state on this occasion that the NGOs which operate moved by good motives will receive the fullest cooperation and assistance of the government.

The implications of this statement are disturbing. Shorn of the rhetoric of goodwill and collaboration, it implies that most NGOs are not acting in a manner conducive to the good of the people and that it is therefore the task of government to "encourage" by law a reorganization of their activities. NGOs with "good motives" are to be safe, but who will be the judge of good motives?

There is no conception here of the need for NGOs, as instruments of civil society, to be free and autonomous of state or government control.

Another disturbing sign is a new wave of publicity and comment on the so-called unethical conversions being made by a few evangelical organisations, and thereby to legitimize and justify a regime of state control over all NGOs.

The relationship between the government and NGOs appears to be structured not on principle but on opportunism. A few NGOs were invited to a ceremony held in connection with the opening of a new office for handling NGO registrations in terms of the Emergency

Regulation; a news report said that certain selected NGOs - unnamed - had been invited to the ceremony. The government may indeed be consulting a few selected NGOs but, as has been pointed out even by the NGO Commission, the NGO sector is extremely diverse in organisation and objectives and there seems to be no serious attempt to consult the sector in any representative manner.

In spite of claims to openness, the government has refrained from making any commitment to publish the Commission's report. This indicates that it will not be made available for public scrutiny. The material on which the government seeks to base the new law will be hidden from the public; there will be no background against which the public can judge the necessity or adequacy of the proposed legislation. To this extent, the preparation of legislation is not open, but secretive.

NGOs accept that certain activities must obviously be subject to state regulation. For instance, to ensure the maintenance of proper health standards, there must be standards set for orphanages, homes for elders, medical centers and hospitals; these institutions need to be regularly inspected. The same can be said to apply in the case of educational institutions. However, the need for supervision arises from the nature of the activity, not on who is running it, whether it is run by an individual, an NGO, a commercial venture or even the state. This kind of supervision can and must be under normal law.

The concept of accountability is being urged as a ground for state regulation. This may sound a reasonable argument. There certainly are instances when accountability is essential as, for instance, in the workings of state and governmental bodies, or desirable in varying degrees in the case of certain other activities. However, accountability can also be used as a pernicious cover for interfering with the right to

self-expression or privacy of an individual or a group of individuals.

All NGOs are accountable to their members, to donors if any, to the public where there is a legitimate public interest and to the government, again only where there is a legitimate government interest. This can arise only when an NGO, for example, seeks tax exemption or engages in an activity that should properly come under state regulation. There has been no case advanced to show that all NGOs must be made accountable to government.

That the concept of accountability is being used to interfere with legitimate rights and freedoms of NGOs appears from certain requirements laid down in the Emergency Regulation. NGOs are required to make available to the government, as well as to any member of the public who wishes to know information about them, the sources of donations and the "names, addresses and such other particulars as are necessary to identify the persons" to whom disbursements have been made or services rendered. This goes far beyond normal auditing processes and is not required from business or other organisations. This is in violation of the concept of privacy and is an attempt at crude interference.

A matter of principle arises from the freedom of association guaranteed by the Constitution. Persons have so far had the freedom to associate together and act in ways that further their concerns; these associations have taken various forms such as unincorporated associations, non-profit making companies or associations. The government has not shown any reasonable cause or justification for limiting this freedom.

B. Labour Unions

(i) The ILO principles regarding freedom of association and their application in Sri Lanka

This section seeks to look at the ILO Conventions on Freedom of Association - in particular Conventions No.87 and 98, which contain the core of the right - and to assess how far this right is available in Sir Lanka.

The ILO was established in 1919. After a period of 25 years, at its 26th Session in Philadelphia, the Declaration of Philadelphia was adopted. This emphasises: that labour is not a commodity; that freedom of expression and association are essential to sustained progress; that poverty anywhere constitutes a danger to prosperity everywhere; and that the war against want must be carried on both within each nation, and by continuous and concerted international effort.

The organisation emphasises freedom of association as a means of achieving social justice, seeing this as the only way in which lasting peace can be established. Indeed, the Preamble to the ILO Constitution states: "lasting peace can be established only if it is based on social justice".

(ii) ILO instruments and their effect

(a) types of ILO Instruments

The ILO has established labour standards by adopting two forms of instruments.

The first, "Conventions" are similar to international treaties and are ratified on a voluntary basis by member states of the ILO. On ratification the member state undertakes to bring its law into line with the standards set by the Convention. The ILO monitors the manner in which the member state honours its obligations after ratification.

"Recommendations" constitute the second type of instrument. They are not binding and member states are not expected to ratify them. They are meant to influence thinking in the formulation of national policy.

In addition, the International Labour Conference has competence to pass "Resolutions". One Resolution passed in 1952 concerns the independence of the trade union movement while another passed in 1970 refers to trade union rights and the need to respect civil liberties.

The difference between a Recommendation and a Resolution is that the Resolution does not create any obligation to report back on the implementation measures adopted by governments, whereas the Recommendation is subject to a procedure calling for a report from the member state as to the influence exerted by the Recommendation. Despite this, Resolutions do "exert considerable influence - in establishing the policy of the Organisation and providing guidance for all those involved in carrying out its principles". (Freedom of Association - A Workers Education Manual, 2nd Revised Edn., 1987, p.6).

(b) ratification and effect of Conventions

Although ratification of a Convention is necessary before a state will be bound to honour its provisions, in practice even countries which

have not ratified ILO Conventions use the standards laid down as a bench-mark. On the other hand, it has to be acknowledged that some governments which have ratified Conventions have not brought their legislation in line with the requirements of those Conventions. In these cases, the ILO takes up the matter with the government concerned, points out the shortcomings in the national law, and enquires as to why compliance has not taken place.

(iii) ILO conventions and recommendations on the subject of freedom of association

The first ILO Convention on the subject of the right to organise was adopted in 1921 (Convention No.11). This Convention, the Right of Association (Agriculture) Convention, lays down the principle that those engaged in agriculture (the Convention was not restricted in its application to wage earners, but included tenants, cultivators, share-croppers, etc.) should have the same rights of association as industrial workers.

In 1927 the International Labour Conference discussed a draft instrument on freedom of association, but it was not until 1948 that the important Freedom of Association and Protection of the Right to Organise Convention (No.87) was adopted. This was followed in 1949 by the Right to Organise and Collective Bargaining Convention (No.98).

(iv) Fundamental requirements of freedom of association

(a) freedom of choice

Article 2 of Convention No. 87 could be called the cornerstone of

organisations. It stipulates that workers and employers, without any distinction, have the right to establish organisations, to join organisations of their own choosing, and that there should be no restriction placed by a requirement of prior authorisation.

(b) constitution of trade unions

Convention No. 87 stipulates that trade unions must have the freedom to draw up their own constitutions. If the law of a state specifies the particulars which must be included in the constitution of the organisation, this in itself does not offend the principle. National law may prescribe the majority which may be required for the adoption of the constitution of the trade union. However, a provision of law that trade unions are subordinate to the economic policy of the government has been considered to be incompatible with the principle of freedom of association (Freedom of Association, Digest of Cases, ILO. 2nd(Revised) Edn.1987, p.44; also 162nd Report, Cases No.685, 781, 806, para.33, Digest of Cases, ILO. 3rd Edn. p.71, para.356; see also para.286, Freedom of Association Digest 3rd Edn. p.60).

The imposition of a model constitution would be objectionable but not if the model is only a specimen to guide new trade unions in the stage of formation (6th Report, Case No.11, paras.107 and 108; 66th Report Case No.298, paras.516 and 518, 168th Report Cases No.825 and 849, para.147, p.61).

(c) right to elect officials

It is a fundamental right that organisations should be free to elect their own representatives. State authorities cannot interfere in the laying down of eligibility criteria or of election procedures. Where the law

prescribes that a candidate for office should belong to the occupation represented by the organisation or that a candidate must be actually employed in that occupation, the limitation cannot be accepted. One of the arguments against such a limitation is that the unions so restricted may be deprived of the benefit of qualified persons, such as lawyers, or the experience of retired workers (14th Report, Case No.105, paras.135-137, 101st Report, Case No.526, para.521 etc.).

Legislative provisions which prevent persons from holding office due to specific political affiliations are also unacceptable (202nd Report, Case No.911, para.139). The fact that one of the members of a government is at the same time a leader of a trade union which represents several categories of workers employed by the state creates a possibility of interference in violation of Art.2 of Convention No.98 (84th Report, Case No.415 para.62).

Conviction for a criminal offence, unless it is one which questions the integrity of the individual, should not debar a person from holding office (133rd Report, Case No.668, para.298), and the state cannot lay down a maximum number of years during which an official can function, or the number of times that an official may be re-elected (201st Report, Case No.842, para.51).

(d) reorganisation, removal of officers, cancellation and suspension of the right to function

Article 3 of Convention No.87 states that workers' or employers' organisations have the right to organise their administration and activities and to formulate their programmes. The second part of the Article rejects interference by public authorities which would impede the lawful exercise of this right. Workers' and employers'

organisations cannot be dissolved or suspended by administrative authority (Article 4 of Convention No.87).

The dissolution of a union involves such serious consequences for the occupational representation of the workers that it is preferable, in the interests of labour relations, that actions of this kind be taken only as a last resort (Freedom of Association, p.51, 153rd Report, Cases No.763, 786 and 801 para.219, ILO Digest 3rd Edn. p.92, para.486).

It should be possible to question in a court of law any cancellation of the right to function, and an appeal should not be disposed of merely by executive or administrative authorities (47th Report, Case No.194, para.11 and 58th Report, Case No.251, para.611, Digest 3rd Edn., p.58). Further, if there is grave suspicion that trade union leaders have committed acts punishable by the penal laws of the land, this should not *ipso facto* prevent the recognition of the legal personality of the organisation (129th Report, Case No.514, para.115).

(e) right to federate or affiliate

Article 5 of Convention No. 87 gives trade unions the right to join federations and to affiliate with international bodies. The law cannot provide for the existence of only one confederation as this would offend against the principle of freedom of association (Freedom of Association, ILO Digest 3rd Edn., Ch.VI, p.96).

(f) political affiliations

It is acknowledged that trade unions cannot be restricted to occupational matters or what may be termed work related questions. Obviously larger issues like economic conditions in the country, or

even internationally, are relevant to the workers as they have a bearing on earnings or even the security of employment. Trade unions therefore need to have a link with the political world. They need to express their views on the fiscal and other policies of the government, so long as they do not do so in an illegal manner. It is justifiable for trade unions, like any other bodies, to be subject to judicial control but any general prohibition on political activity by trade unions would be unacceptable under Convention No. 87.

In 1952 the International Labour Conference passed a Resolution on the Independence of the Trade Union Movement in which it was observed that:

> when trade unions in accordance with the national law and practice of their respective countries and at the decision of their members decide to establish relations with a political party or to take constitutional political action as a means towards the advancement of their economic and social aims, these political relations or actions should not be of such a nature as to compromise the continuance of the trade union movement or its social or economic functions, irrespective of political changes in the country. (Freedom of Association, p.62.)

Article 8 of Convention No.87 cautions organisations that in exercising their rights under the Convention they shall respect the law of the land. Governments should not attempt to use trade unions in the implementation of their economic and social policies (Freedom of Association, p.63; see also p.54, para.254). By according favourable or unfavourable treatment to a given organisation as compared with others, a government may be able to influence the choice of workers as to the organisation which they intend to join. A government which

deliberately acts in this manner violates the above principle.

(v) The right to organise and to bargain collectively

Convention No.98 is entitled the "Convention Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively". Sri Lanka was among one of 116 countries which had by the 80th Session of the Conference in 1993 ratified this Convention. (Sri Lanka ratified the Convention on 13 Dec.1992). Articles 1, 2 and 3 of the Convention appear to reiterate and make explicit what is contained in Convention No.87, which Sri Lanka has not ratified. Articles 1 states as follows:

> (1) Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment,
> (2) Such protection shall apply more particularly in respect of acts calculated to:
>
> > a) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership;
> > b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours.

Article 2 states:

> (1) Workers' and employers' organisations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or

administration.

(2) In particular, acts which are designed to promote the establishment of workers' organisations under the domination of employers or employers' organisations or to support workers' organisations by financial or other means, with the object of placing such organisations under the control of employers or employers' organisations, shall be deemed to constitute acts of interference within the meaning of this Article.

Article 3 states:

Machinery appropriate to national conditions shall be established, where necessary, for the purpose of ensuring respect for the right to organise as defined in the preceding Articles.

Article 5 is also important and reads as follows:

(1) The extent to which the guarantees provided for in this Convention shall apply to the Armed Forces and the Police shall be determined by national laws or regulations.

(2) In accordance with the principle set forth in paragraph 8 of Article 19 of the Constitution of the International Labour Organisation the ratification of this Convention by any Member shall not be deemed to affect any existing law, award, custom or agreement by virtue of which members of the Armed Forces or the Police enjoy any right guaranteed by this Convention.

The question of recognition of trade unions for the purpose of bargaining is also of vital importance. The ILO Committee of Experts has accepted that the recognition could be regulated by a state, but has

stressed that such regulation should be "based on objective and pre-established criteria, so as to avoid any opportunity for partiality or abuse" (Freedom of Association & Collective Bargaining Report III (Part 4B) 1983 p.97, para.295). The Committee has stated that employers should, for the purposes of collective bargaining, recognise the organisations which are representative of the workers they employ (Freedom of Association & Collective Bargaining Report III (Part 4B) 1983 p.98, para.296).

(vi) Trade union rights in Sri Lanka - structure of unions and membership rights in general

(a) the 1978 Constitution

The present Constitution (effective from 7th September 1978, Gazette Extraordinary 332/11 of 1/9/1978) deals with the right to freedom of association more explicitly. The following guarantees relevant to this freedom receiving specific mention are:

(1) Freedom from torture, inhuman and degrading treatment or punishment (Article 11);

(2) Discrimination on the ground of political opinion (Article 12(2));

(3) Freedom from arrest, custody, detention and personal liberty, the deprivation of which shall be only in accordance with established legal procedure (Article 13), and

(4) Freedom of speech, expression including publication, the freedom of peaceful assembly, the freedom of association, the

freedom to form and join a trade union and the freedom of movement (Article 14).

These rights are, however, subject to restrictions prescribed by law in the interests of national security, public order, the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedom of others, or meeting the just requirements of the general welfare of a democratic society (Article 15(7)). The use of the word 'law' includes regulations relating to public security.

Freedom of association is subject to restrictions prescribed by law in the interests of racial and religious harmony or national economy (Article 15(4)), and the right of peaceful assembly is subject to restrictions prescribed by law in the interests of racial and religious harmony (Article 15(3)).

Freedom of speech and expression including publication is subject to such restrictions as may be prescribed by law in the interests of racial and religious harmony or in relation to parliamentary privilege, contempt of court, defamation or incitement to an offence (Article 15(2)).

Exclusive jurisdiction to hear and determine a question relating to the infringement or imminent infringement of a fundamental right is vested in the Supreme Court (Art.17, 118(b) and 126(1)).

The Constitution also states that the freedoms of speech, expression, peaceful assembly, association and right to join a trade union shall, in respect of the armed forces, police and other forces charged with the maintenance of public order, be subject to such restrictions as may be

prescribed by law in the proper discharge of their duties and the maintenance of discipline among them (Article 15(8)).

Under the Constitution the power to make emergency regulations under the Public Security Ordinance, includes the power to make regulations having the legal effect of over-riding, amending or suspending the operation of the provisions of any law except the provisions of the Constitution (Article 155(2)). Since the Constitution itself recognises that particular restrictions could be placed on fundamental rights in specified situations concerning national security etc., this Article does not interfere with the right to make emergency regulations in circumstances which would fall within the approved restrictions contained in Article 15(7) of the Constitution.

(b) the Trade Unions Ordinance

The Trade Unions Ordinance No.14 of 1935, as amended by Ordinance No.3 of 1946, Act No.15 of 1948, Act No.18 of 1958 and Act No.24 of 1970, is the main statute dealing with trade union rights prevailing in Sri Lanka.

Under the Trade Unions Ordinance a "trade union" means any association or combination of workmen or employers, whether temporary or permanent, having among its objects one or more of the following: the regulation of relations between workmen and employers, or between workmen and workmen, or between employers and employers; or the imposing of restrictive conditions on the conduct of any trade or business; or the representation of either workmen or employers in trade disputes; or the promotion or organisation of financing of strikes or lockouts in any trade or industry, or the provision of pay or other benefits for its members

during a strike or lockout, and includes any federation of 2 or more trade unions.

The word "workman" is defined in the Ordinance as meaning any person:

> who has entered into or works under a contract with an employer in any capacity, whether the contract is express or implied, oral or in writing, and whether it is a contract of service or of apprenticeship, or a contract personally to execute any work or labour and includes any person ordinarily employed under such contract, whether such person is or is not in employment at any particular time (Section 2).

The word "employers" is not defined in the Ordinance, but one could presume that the word should cover any persons, institutions, companies etc. who employ workers.

The definition of "trade union" refers to "trade disputes" and the Ordinance defines such a dispute as one between employers and workmen, or between workmen and workmen connected with the employment or non-employment or terms of employment or with the conditions of labour of any person.

A Registrar of Trade Unions is appointed under the Ordinance. The Commissioner of Labour presently functions as the Registrar of Trade Unions and the registration of trade unions is carried out by the Department of Labour. An application for registration of a trade union is made in a prescribed form and there should be at least 7 members for the purpose of registering a union. The registration may be refused if the Registrar is not satisfied that the trade union has

complied with the provisions of the Ordinance or regulations made thereunder, or if he is of the opinion that any of the objects or rules of the trade union is unlawful or in conflict with any provision of law (Section 14).

A certificate of registration may be withdrawn or cancelled by the Registrar under the following circumstances: at the request of the trade union; if the Registrar is satisfied that the certificate of registration was obtained by fraud or mistake; if any one of the objects or rules of the trade union is unlawful; if the constitution of the trade union or of its executive is unlawful; if the trade union has wilfully, or after notice from the Registrar, contravened any provision of the Ordinance or allowed any rule to continue in force which is inconsistent with such provision, or has rescinded any rule providing for any matter for which provision is required by Section 38 (Section 38 deals with the rules for registering trade unions and the exhibition and transmission thereof to the Registrar); if the funds of the trade union are expended in an unlawful manner or on an unlawful object or on an object not authorised by the rules of the union, or if the trade union has ceased to exist (Section 15(1)).

Except in the case of withdrawal of registration at the request of a trade union, the Registrar is obliged to give not less than 2 months' notice in writing specifying the grounds on which it is proposed to withdraw or cancel the certificate of registration. Provision is made for a trade union which has received such a notice to show cause in which event the Registrar may hold such inquiry as he may consider necessary in the circumstances (see 15(4)). Any order made by the Registrar withdrawing or cancelling the certificate has to be served on the trade union affected thereby. An appeal is possible against a refusal to register or a cancellation of registration, by petition of

appeal to a District Court within 30 days from the date of such refusal or order (Section 16). An appeal may be filed against the Order of the District Court (Section 17).

A trade union which functions without registration is an unlawful association and is not entitled to any of the immunities or privileges under the Trade Unions Ordinance (Section 18(a)).

No action or other legal proceeding is maintainable in any civil court against a registered trade union or officer or member thereof in respect of any act done in contemplation or in furtherance of a trade dispute to which the member of the trade union is a party, if such action or legal proceeding is only on the ground that such act induces some other person to break a contract of employment or is an interference with the trade, business or employment of some other person, or an interference with the right of some other person to dispose of his capital or of his labour as he wills (Section 26).

No action can be maintained against a trade union or its members or officers in respect of any tort committed by or on behalf of the trade union in contemplation of or in furtherance of a trade dispute (Section 27).

(c) the right of public servants to associate: the principles laid down by the ILO

The standards in Convention No.87 apply to all workers "without distinction whatsoever" and are therefore applicable to government employees. Workers in both the private and public sectors should have the same rights to defend their interests (181st Report Case No.865 para.205; 190th Report Cases No.672, 768, 802 etc. para.76,

Digest 3rd Edn., p.45). Provisions stipulating that different organisations must be established for each category of public servants are incompatible with the right of workers to establish and join organisations of their own choosing (Paras.125, 126 Freedom of Association and Collective Bargaining, Report III (Part 4B) 1983, p.42). Note: Sri Lanka is cited as an example of a country where the right to federate is restricted (para.245, p.76).

The Labour Relations (Public Service) Convention 1978 (No.151) was adopted, inter alia, due to the "considerable expansion of public-service activities in many countries and the need for sound labour relations between public authorities and organisations of employees in the public sector". The Convention does not intend to interfere with national laws in relation to police, armed forces and higher level employees whose functions are normally considered as policy-making and managerial, or with employees whose duties are of a highly confidential nature.

Particular classes of public servants are sometimes excluded from the normal right of association by reason of special functions or responsibilities. Sometimes they are restrained from associating with subordinates. The ILO finds this permissible where such persons are permitted to have an organisation of their own, but any restriction on joining an organisation with subordinates should be imposed only in the case of important managerial or policy making positions. In the case of supervisory staff such persons must genuinely represent the employer to be considered for exclusion (Para.131, p.43, Freedom of Association & Collective Bargaining, Report III (Part 4B)).

Article 9 of Convention No.87 specifically deals with the armed forces and police. It states that the rights of personnel employed in these

forces are governed by national laws and regulations. Consequently any restriction imposed would not be in conflict with the Convention (145th Report, Case No.778 paras.19 & 20; 207th Report Case No.971 para.52, p.46).

Protection is given against anti-union discrimination and, particularly, against dismissal or prejudice as a result of membership of public employees' organisations or of participating in activities of such organisations. Public employees' organisations should have complete independence from public authorities. Any control or support financially, or otherwise, given to such organisations for the placing of such organisation under the control of a public authority, would be a contravention of the Convention.

Articles 7 and 8 of the Convention set out procedures for determining terms and conditions of employment, encouraging free negotiations between the public authorities and the workers' organisations and also for the setting up of appropriate conciliation machinery in case of disputes regarding terms of employment.

(d) public servants in Sri Lanka

Sri Lanka has not ratified Convention No. 151 referred to above. Under Sri Lankan law special provisions are made in respect of trade unions of public servants. Under the Trade Unions Ordinance public servants are defined as including any person in the employment of the government whatever may be the duration of employment (Section 19). Every association or combination of public servants having as its object or among its objects one or more of the objects specified in the definition of "trade union" in Section 2, is a trade union for the purpose of the Ordinance (Section 20, as amended by Section 2 of Act

No.24 of 1970).

Any association or combination of the following persons is deemed not to be a trade union and the Trade Unions Ordinance does not apply to them: judicial officers; members of the armed forces; police officers; prison officers, and members of the Agricultural Corps established under the Agricultural Corps Ordinance (Section 20(2)).

The Registrar shall not register any trade union to which this part applies unless the rules of the union contain a provision restricting the eligibility for membership of the union, or for any office whatsoever, whether paid or honorary, solely to public servants who are employed in any one specified department of government, or in any one specified service of the government or who, having regard to the nature of the work upon which they are engaged, are of any specified class or category of public servants though employed in different departments. Provided however that such provision may permit 2 persons from outside to be elected to be members or to hold office, 1 of such 2 persons being the President or the Secretary of the union and the other being a member of the union.

In the case of a union of peace officers or government staff officers, in addition to the requirements above, provisions are required declaring that the union shall not be affiliated to, or amalgamated or federated with, any other trade union whether of public servants or otherwise, and declaring that the union shall not have any political object or political fund within the meaning of Section 47 of the Ordinance (Section 21 as amended by Act 24 of 1970).

Provision is made for the Attorney General to make applications to the District Court of Colombo directing the Registrar to withdraw or

cancel the certificate of registration of any public servants' trade union, if the provisions of the Trade Unions Ordinance have not been adhered to. A trade union of peace officers or government staff officers cannot amalgamate in terms of Section 34 of the Trade Unions Ordinance or have political objects and a political fund in terms of Section 47 (Section 22(2) as amended by Act 24 of 1970). There are in addition special provisions in relation to "essential public services" contained in the Essential Public Services Act, No.61 of 1979.

The special provisions regarding public servants and their freedom of association infringe the provisions of Articles 2 and 5 of ILO Convention No.87, and the Sri Lankan government has not ratified that Convention.

(e) collective bargaining

Collective bargaining is given statutory recognition in Sri Lanka through the Industrial Disputes Act (No.43 of 1950). Part III of the Act deals with the legal effect of Collective Agreements and Memoranda of Settlement registered under the Act. Collective bargaining, however, has not made much impact in Sri Lanka because of the problem of recognition of trade unions as bargaining agents. If an employer refuses to bargain, the workers and their union are forced to seek relief under the Industrial Disputes Act or resort to trade union action.

(vii) The right to strike

a) ILO principles

The right to strike is "one of the essential means available to workers

and their organisations for the promotion and protection of their economic and social interests" (Freedom of Association p.62/63; see also 4th Report Case No.5, para.27 etc; Freedom of Association Digest of Decisions 3rd Edn., para.362, p.73). The right to strike is recognised not only as a means to secure better terms in an individual worker's place of employment, but is also recognised as a means of obtaining changes of an economic and social nature at national level. However, the Committee on Freedom of Association has observed that:

> in order that trade unions may be sheltered from political vicissitudes, and in order that they may avoid being dependent on public authorities, it is desirable that, without prejudice to the freedom of opinion of their members, they should limit the field of their activities to the occupational and trade union fields... (6th Report Case No.2, para.1012; 10th Report Case No. 857 para. 266, para.351, Digest of Decisions, 3rd Edn., p.71),

> and that when trade unions decide to be politically aligned "such political relations should not be of such a nature as to compromise the continuance of the trade union movement" (6th Report Case No.40, para.563 etc., p.71, para.352.) So long as strike action is intended to express dissatisfaction with regard to matters affecting members in a socio-economic way, it would be justifiable. The element of socio-economic interests of members would be a necessary element to justify what would otherwise be regarded as a political strike (172nd Report Case No.885, para.385; 181st Report Case No.899 para.242, para.388).

Article 10 of Convention No.87 in defining an "organisation" embraces all organisations whether of employers or workers, united

and formed for the purpose of furthering and defending the interests of such groups. Any action taken by the organisation for this purpose would be protected by the Convention unless prohibited by a collective agreement voluntarily entered into. The protection extends as much to a "lock out" imposed by an employers' organisation as to a strike called by a trade union.

Strikes of a purely political nature and strikes decided systematically long before negotiations take place, do not fall within the scope of the principles of freedom of association (139th Report Cases No.277-744 para.124; 153rd Report Cases No.763, 786, 801 para.177, para.372). It has also been held that where the solution to a legal conflict, as a result of a difference in interpretation of a legal text, is left to the competent courts, the prohibition of a strike in such situation does not constitute a breach of the freedom of association principles (139th Report Cases No. 737-744, para.372, Digest of Decisions, Freedom of Association Committee, 3rd Edn.).

Since a boycott may often involve a trade union whose members are not directly involved in a dispute with the employer against whom it is imposed, the prohibition of boycotts by law does not necessarily involve an interference with trade union rights (87th Report Case No.408, para.253, para.376).

Legislation imposing recourse to compulsory conciliation and arbitration procedure in industrial disputes before calling a strike cannot be regarded as an infringement of freedom of association (119th Report Case No. 611, paras.97 & 98, p.75 para.374). Obligations to give prior notice to employers before calling a strike (87th Report, Case No.408, p.75 paras.253/376), and to take a strike decision by secret ballot (4th Report Case No.5, para.27 etc., para.

378, p.76) are not objectionable.

The exclusion from the right to strike of wage earners in the private sector who are on probation, is incompatible with the right to strike (160th Report Case No.851, para.197, p.76 para.381).

A restriction on the right to strike and the reference of a dispute to compulsory arbitration instead, can only be justified in respect of essential services in the strict sense of the term, i.e. those services which if interrupted would endanger life, personal safety and health of the public (217th Report Case No.1089 para.241, p.79 para.389).

The Freedom of Association Committee has held that the hospital sector is an essential service (199th Report Case No.910, paras.117 etc., 409, p.80). The supply of water is an essential service (234th Report Case No.1179, paras.295, 410, p.80), and air traffic controllers also perform an essential service (211th Report Case No.1074, paras.365, 412, p.80). It has however been held that teachers do not fall within the definition of essential services (221st Report Case No.1097, paras.84, 404, p.80), and also that transport (199th Report Case No.943, paras.172, 407, p.80) does not generally fall within this category.

The use of measures, such as the dismissal of workers for having participated in a strike and refusal to re-employ them, has been seen as a violation of the right of free association. If the dismissal is merely for the reason of participation in a strike, the presumption is that the workers were punished for participation in trade union activities and this would be in violation of Article 1 of the Right To Organise and Collective Bargaining Convention (214th Report Cases No.988 and 1003 para.507; 217th Report Case No.823 para.510, p.85

para.43).

A general prohibition on strikes seriously limits the means available to trade unions to defend the interests of their members. Such prohibition has been held by the Committee of Experts on the Application of Conventions and Recommendations, as not being in conformity with the generally recognised principles of freedom of association (149th Report Cases No.676 and 803 para.79 etc., p.81 para.416). Such a general prohibition can only be justified in the event of an acute national emergency and for a limited period of time (78th Report Case No.364, para.84 etc., p.82, para.423).

The ILO recognises the right to restrict trade union rights during wartime (17th Report Case No.73 para.72, p.82 para.421). The mobilisation or requisitioning of workers has been considered undesirable except for the purpose of maintaining essential services in circumstances of utmost gravity during an "acute national emergency" (236th Report Case No.1270 para.620, p.82, para.425). We find that the Committee of Experts has, whilst conceding that a stoppage of services in transport, railways, telecommunications and electricity would disturb the life of the community, concluded that it may be difficult to say that such stoppages could cause an "acute national emergency" (2nd Report Case No.33 para.113; 93rd Report Cases No.470 and 481 paras.274 and 275, p.82, para.426). The Committee of Experts has, however, accepted the right of a government to use the armed forces or other persons to maintain such services (13th Report Case No.82, para.1122; 30th Report Case No.177 para.83, p.82 para. 427).

Governments may require certain minimum services to be maintained which would prevent an acute "national crisis endangering the normal

living conditions of the population" (Para.415, p.81). Such minimum services should be confined to operations strictly necessary to 'avoid endangering the life, personal safety or health of the whole or part of the population" (204th Report Case No.252 para.162 etc., p.81, para. 415). The Committee recommends that in defining such services workers' organisations should also be involved along with employers and the public authorities.

The Committee has acknowledged that the right to strike can be restricted or even prohibited in the civil service or in essential services in so far as a strike could cause serious hardship to the national community and provided that the limitations are accompanied by "compensatory guarantees" (236th Report Case No.1140, paras.144, 387, p.77, see also Essential Services - Civil Service and other Undertakings, paras.393-412, p.78...). One example of a compensatory guarantee is a corresponding right of no lock-out.

(b) strikes in Sri Lanka: introduction

A "strike" can take place even in the absence of a dispute and only requires an acting in concert or combination or by common understanding (Section 2, Trade Union Ordinance, Ch.174 Vol.VII, Legislative Enactments). A strike is not illegal in Sri Lanka unless it is in violation of the Public Security Ordinance, the Industrial Disputes Act, or the Essential Public Services Act No.61 of 1979.

(c) strikes in Sri Lanka: The Public Security Ordinance

The President possesses the power, in a state of public emergency, and where he is of the opinion that it is expedient so to do in the interests of public security and the preservation of public order or for the

maintenance of supplies and services essential to the life of the community, to make such emergency regulations as are necessary or expedient in the interests of public security etc. (Sec.2 Ordinance 25 of 1947 as amended by Acts 22 of 1949, 34 of 1953, 8 of 1959 and Law 6 of 1978). Examples of the exercise of this power are:

(1) Emergency (Miscellaneous Provisions & Powers) Regulation No.5 of 1987 (Govt. Gazette 454/5 & 6 of 18.5.1987) whereby the President declared the following as essential services: services provided by the Central Bank; banking institutions; services of the Ministry of Health; services connected with the supply and distribution of fuel and petroleum products; electricity and rail services;

(2) The proscription of 18 trade unions on the ground of national security and maintenance of public order (Vide Regulation 5 of 1987);

(3) An Order made on 16 July 1980 (Section 41(1), Govt. Gazette No.97/7 of 16 July 1980) that certain specified services were essential and that anyone who failed to report for work after the lapse of one day from the day of the Order would be deemed to have vacated his/her post;

(4) Regulation 44(A)(1)(a) under the Public Security Ordinance (Govt. Gazette Extra. 563/7 of 20 June 1989) dealt with literature which held out bodily threats or death to any person for engaging in his lawful occupation, trade etc. Regulation 45 covered attempts, abetment or conspiracy to commit the above offence;

(5) Regulations in January 1990 (Govt. Gazette Extra. 591/20 of

6 Jan.1990, Regs.2-5) restricted political or other activity to prevent the due functioning of workplaces, unauthorised entry into such places and the holding of meetings, rallies and demonstrations. The regulations also prohibited posters, placards and paintings without prior permission;

(6) Exports and those performing services for this sector were covered by regulations of August 1992. The intention was to prevent any interruption or disruption of exports (Regs. 2-7,9 Govt. Gazette Extra.728.20 of 22 Aug.1992).

The President in the exercise of his powers under the Ordinance is entitled to amend or suspend any law or to modify the law. (Section 52(d)). No emergency regulations so made can be called in question in any court (Section 8).

(d) strikes in Sri Lanka: The Industrial Disputes Act

Section 32(2) of the Industrial Disputes Act (Act 43 of 1950) states that no workman shall commence, or continue or participate in or do, any act in furtherance of any strike in connection with any industrial dispute in any essential industry, unless written notice of the intention to commence a strike had, at least 21 days before the date of the commencement of the strike, been given in the prescribed manner and form by such workman or on his behalf to his employer.

An "essential industry" is defined as an industry declared by an Order made by the Minister and published in the Gazette to be an industry essential to the life of the community (Section 48). A breach of Section 32(2) constitutes an offence (Section 40(1)(d)).

The discontinuance of work or a strike or the incitement of workers to strike, or to discontinue work, to procure the alteration of terms and conditions of a collective agreement, a settlement or award (Section 48), and the taking part in a strike or discontinuance of employment or work to procure the alteration of an order of a Labour Tribunal are also offences (Section 40 (1)(f)). The commencement or continuance of a strike after an industrial dispute has been referred for settlement to an Industrial Court, Arbitrator or Labour Tribunal (Section 40(1)(m)), the inciting of a worker to commence, continue or participate in or do any act in furtherance of a strike in connection with any industrial dispute in an essential industry in contravention of Section 32(2), (Section 40(1)(n)) and the inciting of a workman to commence, continue or participate in or do any act in furtherance of a strike after the matter has been referred to an Industrial Court or Arbitrator or Labour Tribunal are offences (Section 40(1)(o)).

It is of interest to note that the Stay in Strikes Act (Act 12 of 1955), which was repealed in 1958, provided for the arrest and removal of persons taking part in a strike and remaining in the premises in furtherance of such strike. A person doing such act was guilty of an offence and was liable to a fine and/or imprisonment.

(e) strikes in Sri Lanka: essential public services

Where the President is of the opinion that any service provided by any category of persons employed in any government department, public corporation, local authority, or co-operative society, engaged in the provision of any of the services specified in the Schedule to the Act, is likely to be impeded or interrupted and the maintenance of the services provided by that category of persons is essential to the life of the community he may declare that service to be an essential public

service (Section 2, Essential Services Act.)

If a person covered by such order fails or refuses to attend at his/her place of work, or fails to perform such work as be directed by his/her superiors, or where any person impedes, obstructs etc., the carrying on of that service or incites and encourages any person to refrain from doing the work, or encourages any other person to commit any of the preceding acts, that person is guilty of an offence (Sec.2(2)(a),(b)).

Where any person is prosecuted for an offence under this Act, it shall not be a defence to prove that an act or omission constituting the offence was in furtherance of a strike commenced by a trade union (Sec.6). The Schedule to the Act includes the following services: the supply, preservation and distribution of articles of food or drink; the supply or distribution of fuel, including petroleum products and gas; the supply of electricity; public transport services for passengers or goods; water supply; postal, telephone, telegraph and broadcasting services; the services provided by all co-operative societies and unions, and all service, work or labour, of any description whatsoever, necessary or required to be done in connection with the discharge, carriage, landing, storage, delivery and removal of articles of food or drink, or of coal, oil or fuel, from vessels within any port as defined for the purposes of the Customs Ordinance, the maintenance, and the reception, care, feeding and treatment, of patients in hospitals, nursing homes, dispensaries and other similar institutions, any undertaking maintained by any local authority for water supply, electricity, drainage and sewerage, fire and ambulance services, conservancy and scavenging (including the removal and disposal of nightsoil), the provision and maintenance of facilities for transport services by road, rail or air, including roads, bridges, culverts, airports, ports and railway lines.

(viii) Trade unions and civil liberties

(a) ILO principles

The Committee on Freedom of Association of the Governing Body of the ILO is conscious of the need to protect the rights declared in the Universal Declaration of Human Rights if Trade Unions are to be free and independent (6th Report Case No.2, para.1012; 7th Report Case No.56, para.68, Digest of Cases 3rd Edn., p.19 para.68). Hence, in 1970, the International Labour Conference (Freedom of Association, ILO, p.93, Resolution concerning Trade Union Rights and their Relation to Civil Liberties, 54th Session) stated:

> the rights conferred upon workers and employers organisations must be based on respect for those civil liberties which have been enunciated in particular in the Universal Declaration of Human Rights and in the International Covenant on Civil and Political Rights and the absence of those civil liberties removes all meaning from the concept of trade union rights.

The Resolution places special emphasis on the following: the right to freedom and security of the person and freedom from arbitrary arrest and detention; freedom of opinion and expression and in particular freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers; freedom of assembly; the right to a fair trial by an independent and impartial tribunal, and the right to protection of the property of trade union organisations (Article 2 of Resolution).

The exercise of trade union rights or the holding of office does not provide immunity from the application of the ordinary criminal law

(Para.105, p.25, Digest of Decisions, Freedom of Association Committee, 3rd Edn.), but all detained persons should be brought without delay before a court. This right is recognised in the International Covenant on Civil and Political Rights which was ratified by the Sri Lankan government in 1980.

The Committee has emphasised that if a government believes that persons arrested have been involved in subversive activity, these persons should be rapidly tried by the courts with all the safeguards of a normal judicial procedure (Para.114, p.27), and that detention under conditions of a state of emergency must still be subject to normal judicial safeguards which must be applied within a reasonable period (Para.128, p.31).

Freedom from state interference in the holding of meetings is an essential ingredient in the exercise of trade union rights. However, this right must be exercised without disturbing public order or posing a threat thereto (Para.141, p.33). The right of trade unions to hold meetings freely in their own premises for the discussion of trade union matters without the need for prior authorisation and without interference, and the right of worker representatives to have access to workplaces for the exercise of their functions are considered of fundamental importance (Paras.142, 143, p.33).

The Committee on Freedom of Association has always drawn a distinction between demonstrations in pursuit of trade union objectives and those designed to achieve other ends (Para.154,p.35). Although the right to have May Day meetings has always been upheld, it has also been emphasised that respect should be shown to measures taken by the authorities to ensure public order. Trade unions must avoid disturbances in public places (Para.156-159, p.35). It is for the

government which is responsible for the maintenance of public order to decide, in the exercise of its powers in the sphere of security, whether meetings, including trade union meetings, would endanger public order and security, and to take any preventive action which it considers necessary (Para.161, p.36). This also includes the right of the state under emergency powers to restrict public meetings (Para. 165, p.36).

The right to express opinions through the press or otherwise is an essential aspect of trade union rights. Where the law imposes on trade union newspapers the obligation to have prior authorisation for publication, the question of whether there is an infringement of the right to freedom of expression would be dependent on the conditions governing the grant of such authorisation and the reasons for which it may be given or refused (Para.176, p.38). The imposition of a general censorship is primarily a matter that relates to civil liberties rather than to trade union rights, but it has been noted that press censorship during an industrial dispute may have a direct bearing on that dispute and may prejudice the parties by preventing them from making the facts known (Para.182, p.39).

The Committee on Freedom of Association has noted the difficulty in drawing a clear distinction between what is "political" and what is strictly "trade union" in character (Para.185, p.40).

Measures should not be taken against a trade union by a government where there is a state of emergency unless they are justifiable on the ground that the unions have defied the law and have deviated from their objectives which should be restricted to the socio-economic welfare of their members (Paras.192-195, p.41).

(b) offences against public tranquillity etc. in Sri Lanka

Certain restrictions on the freedom of trade unions to organise meetings and processions are contained in the Penal Code (Ordinance 2 of 1883, Section 138 etc.) and the Police Ordinance (Ordinance 16 of 1885, Sections 77 & 78).

(c) freedom of publication in Sri Lanka: the Press Council Law

The right to publish any material which a trade union has as an adjunct to the freedom of association, is subject to restrictions imposed by the Sri Lanka Press Council Law (Law No.5 of 1973). Every person who publishes or causes the publication in any newspaper of a profane matter or an otherwise defamatory statement within the meaning of Section 479 of the Penal Code, or who publishes an advertisement calculated to injure public morality, or any indecent or obscene statement or matter, is guilty of an offence (Section 15(1) of Law No.5 of 1973).

Where an offence is committed by means of a newspaper, the proprietor, publisher, printer, editor and journalist are all liable unless the person is able to prove that the offence was committed without his knowledge and that he exercised due diligence to prevent the commission of the offence (Section 14). The Act also specifies offences in relation to official documents and Cabinet decisions in the matter of publication (Section 16).

(d) Sri Lanka: special provisions regarding estates

An authorised representative of a trade union shall, on producing a certificate of identity if so required, have the right to enter an estate

at all reasonable times for the purpose of visiting members of the union who are resident on such estate, and for the purpose of holding or addressing meetings of members of such union who are employed on such estate.

However, entry into an estate for the second purpose cannot be demanded as of right by such authorised representative, unless not less than one week's notice in writing of the intended entry for that purpose has been given to the person in charge of the estate (Section 2, Trade Union Representatives Entry into Estates Act NO.25 of 1970). Any person who wilfully obstructs an authorised representative of a trade union in the exercise of any right under those provisions shall be guilty of an offence and shall on conviction after summary trial before a magistrate be liable to imprisonment of either description for a term not exceeding three months or a fine not exceeding Rs. 5,000/- or to both (Section 2(2)).

On the face of it, the law appears to grant a right to trade union officials to enter estates, but, in effect, the law introduces controls on entry into the estates and makes it obligatory to give one week's notice if the entry into the estate by the trade union official is for the purpose of holding a meeting.

(ix) International standards and Sri Lanka

It has already been observed that Sri Lanka has not ratified Convention No.87. We have observed that restrictions exist in the Trade Unions Ordinance regarding membership and the right to federate which would not be acceptable. The ILO has in fact publicly commented on this matter (Paras.125 and 126 Freedom of Association and Collective Bargaining - Report III (Part 4B) 1983 p.42; Note: Sri Lanka is cited

as an example of a country where the right to federate is restricted, para.245 p.76).

It must be noted, however, that despite the restriction on the federating of public servants, the Public Service Workers Trade Union Federation formed in 1954 functions openly and has quasi-official recognition (R. Kearney, Trade Unions & Politics in Sri Lanka, 1971, University of California Press, p.105). Provision is made in the Establishments Code for the release of government servants for full time Federation work. Salaries are paid to them by the government and they are provided with railway warrants or transport passes (see Ch.XXV, p.83, Establishment Code, FES Publication, 1989).

The right to join a trade union has been explicitly recognised by the Constitution itself. S.R. de Silva and E.F.G. Amerasinghe (Monograph No.10, Collective Bargaining by E.F.C. 1988, Ch.7, p.114...,citing G. Caire, Freedom of Association and Economic Development, ILO,1977, pp.18-20) write that freedom of association is an individual right as well as a collective right.

As a collective right it involves much more than being a member of an association, and involves the right to claim more power over the employment relationship. S.R. de Silva notes that the freedom of association is of little practical value unless there is a concomitant right to act collectively. The link between Conventions No.87 and No.98 is a substantial one. Sri Lanka has ratified Convention 98 and it could be said that the restrictions on the rights of public servants diminish the value of this ratification.

Since the Trade Unions Ordinance does not differentiate between federations and other unions - making it necessary for all such

organisations to register unless they wish to run the consequences for failure to register (Sec.18 of the Trade Unions Ordinance deems such unregistered organisations unlawful), one could argue that public servants do not have a full guarantee of the freedom to join a trade union as envisaged by the Constitution or that they suffer some inequality. The restrictions would also seem to have a bearing on the rights of the employee under Article 1(2) of Convention No.98 regarding adequate protection in respect of acts calculated to: "make the employment of a worker subject to the condition that he shall not join a union....".

Commenting on the right to join a trade union of one's choosing in *Gunaratne v. People's Bank* (S.C. Appeal 58/84, D.C.Colombo A/87/Z, 1986, 1 Sri L.R. 336), the Court attempted to provide an exception to this rule in the case of the state where good cause exists. However, we have noted that the ILO Committee on the Freedom of Association has clearly laid down that restrictions on the right should only be imposed in exceptional situations and has narrowed down their permissible scope to those in managerial positions and to the police and security forces.

With regard to the use of the Public Security Ordinance, the Essential Public Services Act and the Industrial Disputes Act, it is to be observed that the ILO has laid down the principles that:

(1) 'essential services' must be selected on the basis of what in fact is essential to maintain the life of the community, and

(2) emergency measures must be used only to overcome critical situations and be limited to the period when such measures are essential.

CHAPTER 4

THE NORTH-EAST WAR

I. THE CONDUCT OF THE WAR

(i) Introduction

1993 did not see the massacres of large numbers of civilians by the military and LTTE (Liberation Tigers of Tamil Eelam) which had occurred in 1992, and overall there were fewer casualties than had been the case in the previous year. (In 1992 more than 3000 combatants and civilians had lost their lives.) Nonetheless, both the government and the LTTE continue to pursue a military solution to the conflict, with resultant toll of both civilian and combatant lives, and with this toll increasing towards the end of the year. Those who are dying on the battlefield increasingly are younger and newer recruits.

The LTTE continued to ambush and attack military and security personnel and establishments. The government forces continued to respond with indiscriminate bombing and rampage type attacks. Throughout 1993 the army continued to bomb the North, and the navy to assail the coastal areas and the traffic in the Jaffna lagoon. The Jaffna peninsula received the brunt of the attacks.

(ii) Specific instances in the conflict

The army carried out several operations throughout the year: naval, air

and land forces were involved. An instance is given below:

> in October, the military launched a major offensive named operation "Yal Devi" in an attempt to advance towards Chavakachcheri. This operation had the heaviest casualties in 1993: soldiers, LTTE cadres and civilians. It is difficult to give the exact number since the numbers quoted by the army and the LTTE differ greatly. According to some sources 150 LTTEers and 91 security personnel were killed within three days of the operation. According to others, 350 LTTEers and 118 soldiers were killed. The London branch of the LTTE claimed that 135 soldiers, 84 LTTEers and 100 civilians were killed during the operation. (Inform,Oct)

The LTTE continued its tactic of ambushing check points and military and police personnel causing a number of casualties:

> on May 29th, 5 soldiers died in a clash between the LTTE and the army along the Batticaloa-Polonnaruwa border (Inform,May);
>
> two days later, 15 civilians died when the LTTE attacked the Nochchimottai check point near Vavuniya manned by the military and PLOTE (Inform,May);
>
> two major offensives were undertaken by the LTTE in April and November. In April the LTTE attack in Weli Oya in Mullaitivu resulted in the death of about 19 military personnel (Inform,Apr.)

The major military set back of the year occurred during the LTTE attack on Pooneryn. The security forces suffered enormous losses in terms of personnel and equipment. According to defence sources,

security forces lost 754 persons including 19 officers either killed or captured by the LTTE in the three day battle; 600 are said to have been injured. However, it is believed that the actual number killed or missing is much higher. The total strength at these camps before the attack is said to have been about 1800. Of the dead, 47 were reported to have been buried at Pooneryn itself and 147 cremated by the District Secretary at Kilinochchi (Inform, Nov.).

The majority of those killed or missing in Pooneryn were raw recruits who had arrived in Pooneryn shortly before the eve of the attack (UTHR, Report No.12, p.10-13). The LTTE announced over its radio that it had lost 480 cadres. According to Sri Lankan defence sources, LTTE losses should have been around 700 (Inform, Nov.).

(iii) The impact on civilians

Civilians in both the North and East, but especially those in the North, continued to endure intolerable adversities throughout the year, being prey to air force bombs and army and navy guns.

In addition, their daily lives were plagued with severe hardship. The government has banned the transport of various goods to the North including: batteries; matches; cement; soap, and certain medicines to prevent the LTTE from using these for their benefit (Emergency Regulation Restriction on Transport of Items 3: 674/16, 9/8/91). In addition, the peninsula has no electricity, and civilians in the North are isolated from the rest of the country due to lack of telephone services, and the extreme hazards encountered in travelling to and from Jaffna.

Food supplies are controlled by the government. ICRC assists with the safe passage for the food shipments. A red cross is painted on the

government owned boats and ICRC accompanies the shipments to Jaffna handing over the shipment to the Government Agent at the pier in Point Pedro.

During 1993 food shipments to the North continued to encounter difficulties. Sometimes shipments disappear from the dock in Colombo. Ground transport is subject to profiteering, and the LTTE has been accused of taking large portions of food. In 1993 prices in Jaffna continued to soar, especially the prices of commodities not provided by the government (USCR, "People Want Peace", p.8).

Increasing the hardship, 90,000 fisher-families are reported to have lost their sole means of livelihood when the government barred civilian access to the coastal belt north of Mannar up to Trincomalee (Inform, Sept.). The Jaffna Medical Faculty conducted a survey of the nutritional standards of children in the Jaffna district and found over 44,000 children in the district to be suffering from malnutrition (Inform, Apr.).

Throughout 1993 access to medical services continued to be a serious problem in the North, with difficulties in the maintenance of medical facilities and the lack of essential drugs and equipment in hospitals and clinics. The number of hospitals functioning in Jaffna has declined over recent years. Moreover, there are fewer doctors per capita because many have fled the war torn peninsula.

As a result many people, especially those who live outside Jaffna city, face extreme difficulties in obtaining medical help. It is sometimes impossible, due to security or transportation problems, to travel to Jaffna in order to reach a hospital. Despite this the JOC denied permission to establish surgical facilities at the Kilinochchi hospital.

(Inform, July) Some people die because basic medicines are not available. The very sick are sometimes brought to Colombo by the ICRC. High incidence of typhoid and malaria have recently been reported in Jaffna. Malaria is particularly acute and 1,140 cases were reported within the span of a few months. (Inform, Apr.; HR Overview)

In addition civilians in these areas suffer from significant psychological problems. The apprehension of being bombed at any time coupled with the sound of approaching MIG bombers, Puccaro, Sia Machetti and F7s, with their track record of indiscriminate bombing, terrorizes the population. Children especially are reported to be affected. (USCR, p.8)

(iii) Travel to and from Jaffna

Travel to and from Jaffna is a serious problem for the average civilian. Many civilians who live in Jaffna need to come to Colombo for various things, and severely suffer at the hands of the military and LTTE while attempting to do so.

Before anyone can leave Jaffna permission must be obtained from the LTTE. Permission will not be granted unless approximately Rs.50,000 is pledged against return or a male child is left behind, although there is no consistency in these demands. (Inform, Jul.; Inform, Oct.; Interviews). Moreover, consent must be obtained from the LTTE before anyone can enter areas controlled by them (Inform, Oct.).

In order to come south from Jaffna the way lies either through Elephant Pass which is under military control, or by the Kilaly route,

which is manned by the LTTE. The military wants civilians to use the Elephant Pass route but the LTTE wishes civilians to use the Kilaly route. Civilians are left no choice since they live under LTTE control in Jaffna and since, after they travel through Elephant Pass, they once more encounter LTTE held territory. There is also fear that the route through Elephant Pass is mined (Inform, Jan./Feb.).

Despite the dangers of the Kilaly route hundreds of civilians attempt this crossing every day. A few instances are outlined briefly below:

> on 28th February thousands are reported to have undertaken the crossing at Kilaly despite hour long shelling earlier (Inform, March);
>
> on 25th September, over 3000 persons were stranded in Kilinochchi when the ferry service was suspended for a few days (Inform, Oct.);

On the 2 of January 1993, at least 50 people died when the Sri Lankan navy attacked a flotilla of boats crossing the lagoon from Kilaly. The number included some older women and children. In one instance a whole family was killed. Among others killed were Dr. Satyaseelan, DMO of Kilinochchi, and Mr. Dharmaraja, Regional Director of Education in Kilinochchi. After firing at the boats, naval personnel allegedly boarded them and mutilated some of the bodies. According to reports, some bodies bore marks of being cut and hacked (Inform, Jan.; UTHR Report No.12 p.5).

Following this incident, the battle in the lagoon seemed to be confined to a certain time frame. Firing between the parties would occur from about 7 p.m. to 10 p.m. The civilian transport boats would leave

between 10 p.m. and 12 midnight, completing the crossing by 5 a.m. (UTHR Report No.12, p.3). However, the pattern did not hold true at all times and civilian casualties continued. On March 23rd, a medical student was killed in the lagoon on his way to Vavuniya to receive his Mahapola scholarship (UTHR Report No.11, p.84).

Shelling of the Kilaly ferry route in April caused the death of 3 and injured several others. Those injured were hospitalised at Kilinochchi. By 19th April continued shelling of the route brought to a halt all transport to and from the North via the lagoon (Inform, Apr.). In May, due to a confrontation between LTTE and PLOTE at the Thandikulam checkpoint in Vavuniya and a complete blockade of the lagoon by the military, thousands of civilians were stranded at Kilinochchi (Inform, May).

The next major attack on civilians in the Jaffna lagoon took place on the night of 28th July. Due to engine trouble, two boats had left shortly after 2.30 a.m. Just before dawn, when the searchlight from Elephant Pass illuminated the boats for a brief second, the boat men jumped into the sea and swam away. A little later, screaming passengers were attacked by 5 naval gun boats which fired at them from different directions. By this time it was dawn and visibility was clear.

The civilians, men and women, shouted in English, Tamil and Sinhala that they were civilians. A 63 year old man named Sabananthan stood on the prow in an attempt to convince his attackers that they were civilians. He was shot in the head. His wife sustained injuries but survived. Subsequently, a member of the navy boarded the boat. One of the injured, a young woman, pleaded with him on her knees. After a brief exchange in Sinhalese with the naval boat, he hacked the

bottom of the boat several times until water began to leak into it. Before returning to his boat, he poured kerosene into the boat full of civilians. A fire ball was then thrown into the afflicted boat from the naval boat before it sped away taking one little boy and leaving behind the dead and the injured including 2 children who were lying face down in a pool of blood. Two passengers, one a 65 year old man and the other the young woman who had pleaded with the naval man, managed to throw the fireball out and douse the flames and keep the boat afloat until the LTTE, many hours after the navy had departed, towed the boats ashore. Altogether 8 civilians were killed, 6 injured, and 6 who had jumped into the sea were not immediately accounted for (UTHR Report No.12 p.2; Sp.Report No.5 p.15,16).

The guns of the navy and army are not the only hazards faced by civilians. On the 12th of August, 19 people, 9 from one family, died when a boat capsized in mid-sea (Inform, Aug.). Despite the large sums of money made by the LTTE through the operation of the civilian boat service in the lagoon, unseaworthy boats, coupled with unreliable engines and non-existent regulations and safety measures, increase the risks they face (UTHR Report No.12, p.6).

II. VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW PRINCIPLES

(i) Introduction

The four Geneva Conventions of 12 August 1949 and their Additional Protocols I and II set out the humanitarian rules which must be observed in times of war. The Geneva Conventions are founded on the principle that individual dignity must be respected and the

principles of humanity safeguarded even in times of war. Thus, the Conventions demand application of the rules in the treatment of the enemy as well. The rules primarily function to safeguard those who do not directly participate in armed hostilities, including wounded soldiers and those who have laid down arms. Sri Lanka is a party to the four Geneva Conventions of 12 August 1949 but not to the two Additional Protocols.

The application of the four Geneva Conventions is invoked immediately following the commencement of hostilities between parties. The Geneva Conventions prohibit the following under all circumstances: murder, torture, corporal punishment, mutilation, outrages upon personal dignity, the taking of hostages, collective punishments, arbitrary deprivation of life, reprisals against protected persons and properties, and cruel and degrading treatment (I-IV(3);I,II(12);III(13);IV(32-34);I(46);II(47)).

Moreover, Geneva Conventions I and II require all parties to a conflict to collect and care for the wounded, and without undue delay to provide medical care and attention. There should not be any attempt upon the lives of these people (I(12);II(12)). This requirement applies equally to the wounded, sick, or shipwrecked members of enemy armed forces (I(12,15);II(12,18)). All military and civilian medical personnel, units, and transports, displaying the emblem of the red cross or red crescent on a white back ground, should also be protected and aided in their work (I(19-37);II(22-40)).

Geneva Convention III prescribes humane treatment of prisoners of war. Geneva Convention IV enumerates the rules pertaining to the protection of civilian persons in time of war. Article 23 Convention IV requires parties to permit relief actions and consignments of food,

medicine and clothes etc. to the civilian population affected by the conflict.

The Geneva Conventions apply in the most part to international armed conflicts. As a party to the four Geneva Conventions, the Sri Lankan government has, along with the rest of the international community, subscribed to the principles of humanity enshrined in these Conventions, and thus can be expected to adhere to the rules of the Conventions during its participation in armed hostilities even of a non-international nature.

In relation to the present conflict in Sri Lanka, the government is, at the minimum, bound by Article 3 which is common to all four of the Conventions. Common Article 3 expressly applies to "armed conflicts not of an international character." Moreover, Article 3 applies to armed opposition groups as well as to state forces: "each party to the (non-international) conflict shall be bound...", and hence the LTTE also is bound by its provisions.

The provisions of Common Article 3 which bind both the Sri Lankan government and the LTTE are as follows:

> those taking no active part in the conflict are protected: civilians, armed forces personnel who have laid down their arms, the sick, the wounded and detainees. They are to be, without distinction, treated humanely;
>
> towards these persons the following acts are prohibited at all times: violence to life/person, murder, mutilation, cruel treatment and torture; the taking of hostages; outrages on personal dignity, in particular humiliating and degrading treatment; the passing of

sentences and the carrying out of executions without previous judgement by a regularly constituted court and a fair hearing;

the wounded, sick and shipwrecked are required to be cared for;

in addition the parties to the conflict are required to endeavour to bring into force through special agreements the other provisions of the four Conventions.

Protocol I of the Geneva Conventions deals with the protection of civilians during armed conflict. The Protocol prohibits indiscriminate attacks and requires careful distinction between civilians and combatants in order to avoid civilian casualties (PI Art.48,51). Reprisal attacks on civilians are also prohibited by Article 51(6). Articles 52 to 54 proscribe attacks on civilian objects, especially cultural objects and places of worship. Moreover, Articles 57 and 58 emphasize the need for precautions to ensure that civilian casualties are avoided. For example, military operations which inflict losses and/ or damage in disproportion to military advantages are prohibited. Even though Sri Lanka is not a party to Protocol I, it could be argued that the principles of Protocol I apply to Sri Lanka to the extent that this Protocol can be understood to define the prohibitions in Common Article 3 against "violence to life and person" (Art.3(1)(a)) and "outrages upon personal dignity" (Art.3(1)(d)).

Humanitarian instruments are not subject to derogations, except in the narrow context of Article 5 of Geneva Convention IV when a protected person is suspected of, or actually engages in, hostile activities, and in relation to Article 45(3) of Protocol I relating to spies. In addition, the principle of reciprocity does not apply to humanitarian law (Article 60(5) of the Vienna Convention on the Law

of Treaties).

(ii) Violation of humanitarian law principles by the government

(a) care for the wounded and sick

Common Article 3(2) requires all parties to the conflict to care for the wounded and sick, yet government restrictions on the transport of medicines to the North continue to result in the death of people needing essential drugs. The denial of permission to establish surgical facilities at the Kilinochchi hospital by the JOC is also resulting in unnecessary suffering and death to the sick and injured. On 13th March, the Nochchimoddai army camp refused to provide an ambulance to the ICRC to transport patients from Kilinochchi to Vavuniya during curfew hours. As a consequence a woman died (Inform, March).

(b) indiscriminate bombing and reprisal attacks

Random bombing and shelling of the Jaffna peninsula is a common occurrence. The random shelling from the Palaly and Mandaitivu army camps prove more dangerous to the civilian population than bombs since the people cannot be forewarned to seek shelter. Shells are regularly fired into civilian areas claiming many civilian victims (violation of Common Article 3 prohibition against violence to the life or person of civilians.) Shells have also fallen into the safety zone surrounding the Jaffna Teaching Hospital which is monitored by the ICRC.

The air force claims that they aim for LTTE targets during their

bombing raids. However, since they fly high in order to avoid LTTE guns they cannot accurately identify their targets. Frequently, ostensibly civilian edifices such as churches, schools, hospitals and market places have been hit (this is in violation of obligations owed by the government in international conflicts: (I(19-37); II(22-40). Such occurrences are more acute immediately following a military set-back such as the one at Pooneryn (again in violation of the obligations which would be owed in an international conflict: (I(46); II(47); III(13); IV(33).

Repeated assurances by the military and air force that civilian congested areas would be avoided in operations against LTTE targets have not been adhered to in practice (Inform, May; USCR; UTHR, generally).

(c) specific instances of indiscriminate attacks

On January 6th 9 civilians were killed and 13 injured in an aerial attack at Vadukoddai, Jaffna (Inform, Jan.)

In February, aerial bombardment of the Vavuniya area resulted in several civilian deaths. When the air force bombed suspected LTTE targets in Omanthai situated 16km from Vavuniya, 2 civilians were killed and 14 wounded. In late February, Iluppakadavi was attacked in mid morning, killing 3 civilians and injuring a large number of people (Inform, Feb.).

On 22nd April, Pandetharippu, Jaffna was subjected to air attack and shelling causing the death of one and injuries to several. In addition, several buildings were severely damaged (Inform, Apr.).

About 7.45 a.m. on the 27th of July, two Air force jets dropped several bombs on the Kalviankadu in the Kopay area. Four of them fell on residences off Rajah street. Three school children named Ajith (9), Gajendran (9), Selvakanthi (11), an elderly man named K. Shanmuganathan (65) and 2 unidentified persons, who were charred and mutilated beyond recognition, were killed by the bombs. (UTHR, Sp.Report No.5, p.15).

On 31st July, a student was among those killed when air force jets reappeared and bombed the Vadukkoddai-Sithankerni area (UTHR, Sp.Report No.5, p.15,16).

During the operation 'Yal Devi' drive towards Chavakachcheri in September, it is believed that up to 40 civilians were killed, 20 of whom died when a bomb hit a shelter housing civilians (UTHR unpublished).

The military responded to the Pooneryn affair by increasing its bombing operations in the North. Various areas described as LTTE strongholds were attacked from the air. Civilians suffered the brunt of these attacks. On 11th November, the Jaffna Kachcheri (government office) was hit by the air force and the government Agent was injured (Inform, Nov., Dec; UTHR, Report No.12, p.1).

In December several shops and houses were damaged in Kilinochchi and Jaffna districts due to heavy bombing. (Inform, Dec.) In Jaffna the bombing was aimed at houses supposedly occupied by the LTTE. They were amidst closely packed civilian residences and schools. The schools were sometimes hit whilst in full session (UTHR, Report No.12, p.1).

(d) specific instances of reprisal attacks (violation of I(46); II(47); III(13); IV(33))

In Pesalai, Mannar, on 22nd January, 2 policeman were killed in an attack by the LTTE. Following the attack, army personnel went on a rampage firing wildly. One civilian was killed and 5 others injured. The dead civilian was a Muslim who sold refreshments outside a refugee camp run by the UNHCR (UTHR, Report No.11, p.84).

On March 15th, following an LTTE attack on a police patrol in Pesalai, Mannar, where 3 policemen died, the army arrived on the scene, stopped vehicles, beat the passengers, and burned a brand new passenger van which had cost Rs.140,000. Civilians were forced to cut palmyrah trees and fortify the police post at Karisal (UTHR, Report No.11, p.84).

On April 13th the LTTE fired at a police sentry in the town of Mannar and fled. Soon afterwards heavy shelling of the town ensued from the Tallady camp. This continued until the next day. A boy injured by shrapnel who could not be taken to the hospital due to the firing bled to death. Other injured were later taken by helicopter to Anuradhapura hospital (UTHR, Report No.12, p.7).

On July 4th around 10 a.m. 5 policemen including a Sub-Inspector were killed in an LTTE ambush. Around midday following the attack, police stopped a bus at the Building Materials Corporation police check point on the edge of town. The bus was occupied by people returning to Pesalai. Passengers were beaten, and several people, including school children, were detained. Subsequently, the ICRC arrived and the children were released. However, 3 adults were not released. The following morning when the ICRC and UNHCR

inquired about the 3 at the Brigadier's office in Thallady army camp, the arrests were denied. The 3 are now among the disappeared (UTHR, Report No.12, p.7-9).

(e) specific instances of attacks on civilian and religious objects and institutions

An LTTE camp is situated next to St. Theresa's school near Kilinochchi. On the 12 February 1993, a jet bomber dropped a bomb a little after 8 a.m. when children were going to school and the street was crowded with pedestrians. The bomb missed the LTTE camp but injured several school children and civilians. The ICRC took 3 of the children to the Vavuniya hospital. The air force bombed the school again in July when the school was in session. The bomb landed in the compound about 25 yards from the class and did not explode. Six children died while they were walking to school in another incident, when the air force dropped a bomb near a school (UTHR, Report No.11, p.83; Report No.12, p.2; Inform, Feb.). The LTTE are mixed in with the civilian population and sometimes reside next to schools in order to use civilians and children as cover. Although aiming bombs at LTTE targets is not a violation of the Geneva Conventions, dropping bombs when schools are in session where missing the target and killing children and civilians instead is an extremely high probability, is a violation of the Geneva Conventions.

Jeevodhayam farm is run by the Wesleyan Mission. It is managed by an elderly minister and his wife. 3 miles north-east of the farm is a government animal breeding center which was once occupied by the IPKF. Subsequently the centre, but not the farm, was used by the LTTE for a short time. The farm was bombed 4 times during the course of 2 months. On 15th June, Sia Machetti trainers dropped 4

bombs and Pukhara jets another 5. All fell in the compound surrounding the buildings (UTHR, Report No.12, p.1).

On the 14th of July, Sia Machetti trainer aircraft dropped 4 bombs again on Jeevodhayam farm. These bombs fell barely missing the nursery and the hostel. Kilinochchi area experienced another dose of bombing on July 14th and 15th (UTHR, Report No.12, p.1; Inform, Jul.). The bombings continued despite the JOC being told by the church authorities of the "mistake."

Jeevodhayam farm was again attacked on 26th July when Pukhara jets dropped 4 bombs, 2 of which fell outside the farm and 2 inside just missing the chapel. Bombs were dropped again around 5 p.m. on the 29th of July with similar results. The bombs numbered around 17 altogether. They made huge craters in the ground and shock waves caused damage to the buildings. After each bombing, the JOC was verbally informed by the church spokesman with no result (UTHR, Report No.12, p.1).

On 13 November 1993 at about 7.15 a.m., 2 supersonic jets flew over the town, one dived suddenly above St. James Church, Gurunagar, Jaffna, and dropped 2 bombs on the church which stood prominently with its three huge domes of distinctive Iberian architecture. The bombs reduced the big structure to rubble and severely damaged the presbytery and the parish hall. Nine people died instantly. Altogether 29 people were hospitalized. All the victims were Catholic men, women and children who had come to pray. There were no LTTE camps or any suspicious activity anywhere near this church. St. Theresa's in Kilinochchi was also bombed again after the Pooneryn disaster. Altogether 26 people were killed and 71 injured in heavy bombing following Pooneryn (Letter to US Ambassador from Rev. Fr.

R.M.G. Nesanayagam, Parish Priest, St. James Church; Letter to the President from Rt. Rev. Dr. Savundaranayagam, Bishop of Jaffna; Inform, Dec.).

(iii) Abuses by non-state actors

The LTTE claimed in 1988 that it abided by the Geneva Conventions (AI, An Assessment of Human Rights in Sri Lanka), yet the LTTE and other militant groups continue to violate principles of international humanitarian law. Article 51 of the Fourth Geneva Convention forbids the occupying power to force "protected persons" to serve either in the armed forces or the auxiliary forces. The same Article also forbids the use of pressure or propaganda aimed at compelling voluntary enlistment. According to reliable sources the LTTE cadres consist of children as young as 13 and 14 (Inform, HR Overview).

The LTTE exerts psychological pressure through propaganda meetings which are sometimes taken to the class rooms interrupting sessions. It is reported that children are made to feel that only those who are anti-social, desire an education. In addition, the attitudes expressed by the government coupled with military actions against civilians act as further catalyst for voluntary enlistment of the very young.

As noted earlier, Common Article 3 of the Geneva Conventions is applicable not only to international conflicts and to states which are party to the Conventions but also to non-international armed conflicts and to armed rebel groups.

In 1993 several civilians were targeted and killed by the LTTE in violation of Common Article 3. There were reports of complaints regarding Tamil groups working in tandem with the military. These

groups were known to conduct their own operations, as well as to arrest and detain persons for questioning. The operations of these groups raised serious security concerns among citizens since they seemed to operate in an atmosphere of impunity (Inform, Jul.).

Common Article 3 prohibits violence to the life or person of civilians. The LTTE uses the civilian population as cover to carry out its activities and attacks in total disregard of the dangers to the same civilians they claim to represent and protect.

(a) specific instances of violations of Common Article 3 by the LTTE

Common Article 3(1) prohibits any attack on the sick or wounded. (Art. 24 of the First Geneva Convention states that "Medical personnel exclusively engaged in the search for, or the collection, transport or treatment of the wounded or sick, ... staff exclusively engaged in the administration of medical units and establishments,... shall be respected and protected in all circumstances.")

On the 4th of July at 10 A.M. the LTTE ambushed a police party in Mannar when a police Sub-Inspector was returning after taking an injured colleague to Thallady hospital. The Sub-Inspector and 4 constables were killed. A member of the hospital staff in the ambulance ahead sustained injuries (UTHR, Report No.12, p.7).

Common Article 3 prohibits violence to the life or person of civilians:

according to the Island of 6th April, 1993, the LTTE killed 2 bull-dozer operators named H.E. Ranaweera (45) and Vinnie Ranasinghe (19) at Suriyawewa, Welikanda (UTHR, Report

No.11, p.84);

in November the LTTE stormed the Aralaganwila village, Arunapura in the Mahaweli 'Zone B', Welikande, in the Polonnaruwa district, killing three and injuring another five (Inform, Nov.);

in December, the LTTE attacked a village near Maligatenna and 3 civilians were killed (Inform, Dec.);

on September 31st, the LTTE used civilians as cover to attack a check point in Nochchimottai located near Vavuniya. Several civilians were killed and several more injured during the assault (UTHR, Report No. 12, p.11).

CHAPTER 5

ECONOMIC AND SOCIAL RIGHTS

I. POVERTY AND NUTRITION

(i) Introduction

The Sri Lankan government ratified the International Covenant on Economic, Social and Cultural Rights in 1980, and so undertook to take steps, to the maximum of its available resources, to achieve progressively the full realisation of the rights recognised in the Covenant.

Those rights include rights studied in this chapter. Discussed here are the present status in Sri Lanka of: the right to an adequate standard of living including the right to freedom from hunger (Article 11); the right to enjoy the highest attainable standard of physical and mental health (Article 12); the right to education (the education is to enable all persons to participate effectively in a free society) (Article 13); the right to work (Article 6); and the right to enjoy just and favourable conditions of work (Article 7). (The right to form, and to join, trade unions and the right of those unions to function freely (Article 8) is covered in a separate chapter devoted to that topic.)

Ratifying states undertake to ensure the equality of men and women in regard to the enjoyment of these rights (Article 3), and to guarantee the exercise of the rights without discrimination of any kind (Art.2).

At the outset it must be noted that in writing a report on the present status of socio-economic rights in Sri Lanka one is faced with a lack of up to date information from the Northern and Eastern Provinces due to the on-going civil war in these areas. The non-availability of this data poses problems, and there is a need to set up a mechanism for this purpose if accurate assessment of the status of these rights is to be made. Due to this lack of information this report covers only the status of the social and economic rights selected for consideration in areas other than the Northern and Eastern Provinces.

The North and the East of the country are the areas in which living conditions have been affected most severely, not only for those people classified as "internally displaced", but for the rest of the population as well. Hence it should be kept in mind that, if the situation in the North and East were accurately documented and taken into account, the overall picture of the enjoyment of these rights in Sri Lanka would then be much worse than is indicated by the figures reported here. (Note there is some coverage of the situation of citizens in these areas in the chapter on the North-East conflict.)

It should be kept in mind also that Sri Lanka cannot hope to achieve satisfactory implementation of social and economic rights without a peaceful settlement to the conflict. Until that happens the economic and social rights of the people of the Northern and Eastern provinces (who constituted about 14% of Sri Lanka's population at the time of the 1981 Census) will not be met. This necessarily affects the status of these rights in Sri Lanka as a whole.

(ii) 'Poverty' and minimum standards

Poverty is an overall indicator of the denial of almost all social and

economic rights enshrined in the International Covenant on Economic, Social and Cultural Rights. It is a reflection of lack of adequate resources and power among people, and has a direct bearing on the denial of rights such as the rights to an adequate standard of living, health and education. Therefore understanding the "level of poverty" is an important indicator of how far policies followed by the Sri Lankan government enable it to meet its obligations under the Covenant.

There are many theoretical and methodological problems in measuring the "level of poverty", and especially in defining what are the minimum requirements that have to be fulfilled in order for a particular section of the population to be above the "poverty line". The most widespread method is to use a minimum nutritional standard as a cut off point. There are two main arguments put forward for using a nutritional standard to measure poverty lines. These are: (1) since adequate nutrition is a necessary condition for the fulfillment of other needs, it can be considered an essential need in itself; and (2) nutrition is a useful standard since it is possible to define a minimum.

Although the first assumption has been questioned on many grounds nutrition based poverty measurements have prevailed - mainly because they provide a so called minimum which is measurable. However what these measurements show in fact is the proportion of the population not enjoying a certain minimum nutritional standard. They cannot be equated with the overall condition of poverty.

On the basis of this minimum nutrition level method we can broadly identify two methods which have been used to determine the "poverty line". The first method is to arrive at an income or an expenditure level which corresponds to the minimum nutritional requirement. This

of course assumes a relationship between levels of monetary resources either earned or spent and the nutritional levels achieved. Such a relationship has been questioned by some writers. The second method does not assume this relationship. Instead it seeks to directly compare the necessary minimum with the actual consumption patterns converted into caloric terms. There are methodological difficulties of measurement, and there is also the difficulty of arriving at a minimum that can be used for national level determination since it is necessary to adjust this minimum on the basis of factors such as age, sex, activity rate etc.

These requirements lead to a fundamental questioning of this methodology, and the argument that it is difficult to speak conceptually about a minimum nutritional level without taking into account many social variables. What is minimum is socially constructed. Some writers have tried to overcome this difficulty by defining the amount of calories needed for a Basic Metabolic Rate (BMR) which is needed for the physiological mechanisms to function. However such a degree of biological reductionism questions the value of such concepts for understanding how a state fulfills its obligations towards its citizens in the area of social and economic rights.

The difficulties faced by the search for minimums in the nutritional standards multiply when we come to other areas covered by the International Covenant on Economic, Social and Cultural Rights such as education, health, and housing. Obviously what is a minimum in these areas is relative and depends very much on specificities of each society. These minimums cannot be determined for example by goals proclaimed by various UN agencies, who list particular goals from time to time in order to promote various programmes. For example, universal primary education has been proclaimed as a desirable goal

in education and states have been requested to report on this (this is one of the obligations undertaken by states on ratification of the Covenant). What this has meant in the actual policy making practices of some countries, is the adoption of an aim for minimal primary education for the poorer sections of the population, while others in the same society could have the best that the world can provide.

The notion of minimum norms introduces an ideology which assumes the possibility of incremental change in society for the benefit of the poor. It does not look at the underlying reasons for the conditions of the poor which often have to do with relationships and institutions in society. Without a shift in these relationships and institutions it is difficult to expect that benefits will flow to the poor.

We would argue that the attempts to ascertain whether developing countries are fulfilling their obligations in relation to social and economic rights by a search for certain minimums, and the attempts to make an assessment as to whether countries are progressing according to these standards has conceptual shortcomings. Due to these conceptual shortcomings this method is not a satisfactory way of monitoring the performance in a society.

We would argue that what it is important to look at are the indicators which reflect the disparities among different social groups. On one hand these disparities show standards that a particular society can actually provide, and at the same time they are a reflection of existing relationships and institutions which continue to deny to particular sections of the population their basic rights.

In this approach the term "poverty" is meant to describe a general condition in which people are denied both access to resources of

various types and access to power. This situation makes it difficult for them to obtain certain material benefits and to control their own lives. What underlies this condition are a continuing set of relationships or structures which maintain certain sections of the population in this condition. The disparities in society are a reflection of the operation of these relationships and structures.

Therefore, rather than looking for absolute minimums what is important is to focus on disparities, and on groups of people whose standards of living are significantly low, and then to discuss the impact of policies on these situations. Governments that desire to fulfil the demands of the International Covenant on Economic, Social and Cultural Rights should formulate specific policies to bring about changes in those conditions, relationships and structures which reproduce disparities and bring about pockets of relative deprivation.

(iii) Nutrition

As already mentioned nutritional adequacy is used for determination of the so-called "poverty line". These findings give us figures for the proportion of the population not receiving the minimum required nutritional level. In Sri Lanka these measurements are based on the analysis of Consumer Finance Survey data produced by the Central Bank (1953, 1963, 1973, 1978/79, 1981/82 and 1986/87) and the Labour Force and Socio-Economic survey conducted by the Department of Census and Statistics (1969/70, 1980/81 and 1985/86). Surveys carried out after 1990 did not cover Northern and Eastern Provinces and there are certain problems about using 1986/87 data.

Available studies give a range of figures for the population who do not receive adequate nutritional standards. Following are some of the

figures available.

Table 1

Proportion of the population not receiving the minimum nutritional level

	78/79	80/81	81/82	85/86
Gunaratne (1985)	22.3		23.6	
Anand & Harris (1985)	22.7		21.9	
Bhalla & Glewwe (1985)		24.1		
Khan (1989)	11.8	39.2	12.2	28.6
Gunaratne (1989)	19.5			
Nanayakkara & Premaratne (1989)		57.3		44.7

The varying figures for nutrition adequacy arise because of the different methodologies employed. The methodology that has used expenditure data has yielded the lowest figure for the proportion of people not getting an adequate nutrition, use of income data gives a slightly higher proportion, and direct measurement of consumption patterns gives the highest figures. These figures vary from a low of 11.8% to a high of 57.3%. If studies that use considerably higher minimum caloric levels are ignored, the data roughly shows that

approximately one fourth of the Sri Lankan population does not get an income sufficient to secure a minimum nutritional level.

The other debate on nutrition adequacy is linked to the impact of the development policies followed at present on nutrition level. Available studies on the early period of liberalised policies in Sri Lanka (i.e. up to the early 1980s) generally conclude that there has been a deterioration in the nutrition standards of the poorer section of the population.

For example, UNICEF in a study published in 1985 concluded that,

> the bottom 30% of the population has had an uninterrupted decline in calorie consumption since 1969/70. By 1981/82, the middle 20% achieved consumption levels close to those they had in 1969/70, after experiencing decline in the interim period. The top 50% after an initial set back in 1973, improved their intake rapidly between 1978/79 and 1981/82 to levels far higher than they had in 1969/70.

Similarly Jayawardena L. et al (Stabilisation and Adjustment Policies and Programmes : Sri Lanka, WIDER, Helsinki, 1987) came to similar conclusions regarding the poorest section of the population, concluding that,

> the analysis of data on calorie consumption reveals that: (1) the consumption levels declined for all expenditure categories immediately after 1978/79; (2) the decline continued into 1981/82 with the lower 30 per cent bearing the brunt of the decline; (3) urban and estate households suffered a higher degree of deprivation; (4) the estate sector was the worst affected; and

(5) the percentage of ultra poor (people who spend 80 percent or more on food, yet fulfil less than 80 percent of the average calories requirement) increased between 1978/79 and 1981/82.

However a World Bank study which covered the period up to 1985/86 using expenditure indicates a slight improvement between 1981/82 and 1985/86. According to these estimates it is only the first and second decile who have a consumption level below 2200 calories even in 1981/82. Of these two deciles the position of the second improves from 1981/82 to 1985/86. Similarly, as shown by the Table below, the approach adopted by the World Bank shows an improvement in categories defined as "Nutritionally at risk" and "Ultra-poor".

Table 2

Percentage of poor/ ultra-poor households

All Island

	1980/81	1985/86
Nutritionally at risk *	24	22
Ultra-poor **	5	3

* Households consuming less than 2000 calories per day per adult equivalent and spending less than 80% of their total expenditure on food.

** Households consuming less than 2000 calories per day per adult equivalent, but spending more than 80 per cent of their total expenditure on food.

The UNICEF study quoted above pointed out the regional differences with regard to nutrition adequacy. Districts were classified as follows according to nutritional status (Map 1, UNICEF study).

Table 3

Districts Very bad	Districts Bad	Districts Not so bad
Trincomalee	Moneragala	Jaffna
Batticaloa	Hambantota	Mullaitivu
Amparai	Matara	Mannar
Badulla	Galle	Vavuniya
Nuwara Eliya	Ratnapura	Anuradhapura
Kandy	Kegalle	Polonnaruwa
Matale	Kurunegala	Gampaha
	Puttalam	Colombo
		Kalutara

The most disturbing information on nutritional status has come from studies that have looked at problems of specific vulnerable groups. These studies were conducted towards the end of the eighties and show severe malnutrition problems among pregnant mothers, leading to low birth weights of the children of these mothers. In the words of a UNICEF study:

a low birth-weight child faces an up-hill battle for life from its first birthday. It has arrived without adequate resistance to infections and in the vast majority of such instances, into an environment teeming with disease causing agents, where personal and environment hygiene are poor.

Following are some of the highlights of such studies reported in a special UNICEF report on the situation of Children and Women in Sri Lanka (UNICEF 1991):

(1) An anaemic condition among 65% of the pregnant mothers surveyed in one study;

(2) Low weight gained by pregnant mothers. A study conducted in Gampaha District (1988/89) of 127 pregnant mothers revealed a mean energy intake of only 2050 kcal per day compared with the WHO recommended intake of 2550 kcal. Considering also poor quantitative and qualitative aspects of the diet and the poor health status of the majority of women prior to pregnancy, it came as no surprise that 22% of these mothers delivered low birth-weight babies (i.e. weighing less than 2,500g at birth):

(3) 46% of these mothers who delivered low birth-weight babies registered a weight gain during pregnancy of less than 6 kg.(i.e. less than half the weight gain observed in developed countries);

(4) Monitoring of low birth-weight babies born in 4 hospitals showed the following figures:

General Hospital Galle - 24.3% of 506 babies born in January/February 1989

General Hospital Anuradhapura - 28% of 454 babies born in June/August 1989

General Hospital Batticaloa - 20.5% of 487 babies born in April/June 1989

General Hospital Badulla - 25.2% of 441 babies born in October/December 1989;

(5) A nutritional status survey of primary school children of the Colombo District, from the age group of 7 to 10 years found that only less than 10% of both male and female children receive the "normal" level of nutrition. The survey was conducted in February 1988.

For obvious reasons these conditions affect the poorer sections of the population much more than the upper income groups. As stated in the UNICEF report (Children and Women in Sri Lanka - A Situation Analysis, UNICEF, Colombo, 1991), in the current situation in Sri Lanka, where a large population subsists:

> on low incomes and whose purchasing power is steadily declining, the entirety of the poor have become vulnerable. Indeed nutritional assessments indicate that they have been adversely affected. Such a situation places poor pregnant and lactating women, infants and pre-school children in specially vulnerable circumstances.

The consequence in terms of the Sri Lankan government's obligations under the Covenant is that these groups are being denied their right to begin their lives in a reasonably healthy condition.

(iv) A growing gap between the 'rich' and the 'poor'

In contrast to the difficulty of reaching definite conclusions about absolute levels of nutrition it is quite clear that the disparity between different social groups has widened. This is confirmed regardless of whether the computing is done on the basis of income groups or expenditure groups.

Table 4

Gap between the nutrition levels of highest and lowest decile (calories)

	69/70	78/79	80/81	81/82	85/86
Income groups	552	1961	2040	2035	
Expenditure groups		2030	2290	2339	2339

This growing disparity is further confirmed by data for income distribution given in different surveys. From this data:

> it can clearly be seen that the income share of the lowest 40 percent of income receivers declined from 15.1 per cent in 1973 to 12.1 per cent in 1978/79, to 11.8 per cent in 1981/82 and to 7.1 per cent in 1985/86. The income share of the highest decile on the other hand rose from 30 per cent 39.1 per cent, to 41.7 per cent and to 49.3 per cent respectively. It should be noted that in 1985/86, the top 10 per cent of income receivers had an income share nearly seven times higher than the bottom 40 per cent of

> income receivers, while in 1973 it was only double the amount. Furthermore, the share of income accruing to the bottom 40 per cent of spending units declined from 19.3 per cent in 1973 to 16.1 per cent in 1978/79 to 15.3 per cent in 1981/82 and to a still lower figure of 14.1 per cent in 1986/87. (Saman Kelegama - Distribution of income and ownership of assets: trends in Sri Lanka, Pravada, Vol.2 No.8, September/October 1993)

In discussing this data it should be remembered that post-1983 figures do not cover the North and East. If we take into account the destruction in these areas and the concomitant impact on people's income, the disparity will be even more significant.

The growing disparity in incomes is also accompanied by a drop in the real income of the poorer sections of the population. Once again available data shows that:

> the first five deciles have faced a continuous decline in real income during the 1978/79 - 1986/87 period while the upper groups have had a substantial improvement of the real income during 1981/82 and 1986/87. (Saman Kelegama, 1993).

According to income and expenditure data given in 1985/86 Labour Force and Socio-Economic Survey only just over 20% of households had a monthly income above Rs.2,500. Rs.2,500 was the cut-off point later applied for the Jansaviya programme. Data for the average monthly income also showed that almost 40 per cent of the monthly total goes to 11.3 per cent of the households.

The income levels of the vast majority of the population, as well as the drop in the real income of the poorer groups, means that a very large

section of Sri Lankans cannot obtain an adequate income for a decent living and thus are being denied their basic social and economic rights.

II. HEALTH

i. Introduction

In recent times the reliability of health statistics has been in question. In the first place most of the information on health comes from the records made by formal institutions. That means there are many aspects of the health situation that do not get recorded since all health problems do not necessarily get directed to formal health institutions. Secondly some recent health bulletins have pointed out the unreliability of the data recorded in formal institutions.

In addition conditions prevailing as a result of the conflict in the North and East would affect the health standards achieved, but it is not clear how far these situations are covered by present surveys.

ii. Present Situation

The Table on the following page summarises statistics for 1945 (before independence), for four decades beginning from 1950, and the Health Ministry targets for the year 2000.

Table 5

Health statistics

Year	Estimated mid-year population ('000)	Crude Birth Rate	Crude Death Rate	Maternal Mortality Rate	Infant Mortality Rate	Neonatal Mortality Rate
1945	6,650	36.6	21.9	16.5	140.0	75.5
1950	7,678	30.4	12.6	5.6	82.0	49.2
1960	9,896	36.6	8.6	3.0	57.0	34.2
1970	12,516	29.4	7.5	1.5	47.5	29.7
1980	14,747	28.4	6.2	0.6	34.4	22.7
1990	16,993	21.3*	6.2*	0.5**	17.5*	16.2***
2000		16		0.3	15	7.5

* 1989 ** 1986 *** 1985

(source: Ministry of Health)

These data show the significant improvement that Sri Lanka has achieved in these indicators since independence. This is a testimony to the welfare system. However at the same time it is also clear that the rate of improvement has slowed down in recent times. The notable exception is the improvement in Infant Mortality Rate and Neo-natal Mortality Rates in the eighties. This is mainly attributed to the improvements in the welfare facilities of the plantation sector.

It is also important to note the regional difference in these indicators.

The Table below has identified districts with standards below the national average in three indicators. It gives the figures and names of the district when the value is worse than the national average.

Table 6

Mortality rates in different districts

District	Maternal Mortality Rate	Infant Mortality Rate	Neo-natal Mortality Rate
Colombo	-	30.0	22.5
Kandy	0.8	31.7	25.0
Matale	0.6	-	-
N'Eliya	0.6	49.1	32.1
Vavuniya	1.7	-	-
Mullaitivu	1.0	-	-
Batticaloa	0.8	-	-
Trincomalee	1.1	-	-
Kurunegala	-	23.8	18.3
Anuradhapura	0.7	26.1	17.2
Polonnaruwa	0.9	-	-
Badulla	-	27.3	21.7
Ratnapura	-	29.0	22.8
Sri Lanka	23.5	23.2	16.2

(source: compiled from Ministry of Health data)

These figures allow us to make the following conclusions:

(1) There are 3 districts where all 3 indicators are worse than the national average - Nuwara Eliya, Kandy and Anuradhapura. The first 2 are districts where there is a concentration of plantation population and the third is a dry zone district with many people settled in newly irrigated areas;

(2) In all districts where the infant mortality is worse than the national average the same is true of neo-natal mortality as well. These districts could be divided into the following groups:

* Kandy, Nuwara Eliya, Badulla and Ratnapura - all districts with plantation population

* Kurunegala, Anuradhapura - dry zone districts, and

* Colombo.

In each of these areas there is a socio-economic group whose low standards account for the lowering of the indicator in the whole district. These are plantation workers in plantation districts, marginal farmers/agricultural workers in dry zone areas and slum dwellers in the Colombo district.

Another worrying social trend that can be identified from the health statistics is the significance of suicide and self-inflicted injuries as the cause of death in particular age groups. It needs to be observed that the data may have a large degree of under reporting when suicide is the cause of death. If we take the number of deaths per 100,000 population as an indicator, suicide is the most significant cause of

deaths for the male population. In the age groups 15-24 and 25-44 it is the most important reason for both males and females. There can be many underlying reasons for this trend and it requires the attention of both researchers and policy makers.

As in education the government expenditure on health has been stagnant for a long time. The following Table gives expenditure as a percentage of GDP.

Table 7

Expenditure as a % of GDP

	% GDP		% GDP
1978	1.7	1985	1.3
1979	2.0	1986	1.5
1980	2.2	1987	2.1
1981	1.2	1988	1.9
1982	1.2	1989	2.2
1983	1.5	1990	1.7
1984	1.1		

(source: Central Bank Reports)

III. EDUCATION

(i) Introduction

Education has been considered a success story in Sri Lanka, and there have been significant achievements in this area during the post-independence period. However, a major concern in education at present is the dwindling share of government resources currently being allocated to it. Although in absolute terms the amount of funds allocated has increased, the concern is whether it is keeping up with increased demand. As shown by the Table below, the proportion of GNP that Sri Lanka spent on education remains less than the proportion expended three decades ago and it has remained stagnant in the recent past.

(ii) The situation at present

As a consequence of the stagnation just described, despite the country's earlier justified reputation for achievements in education, in recent years many neighbouring countries have by-passed Sri Lanka in providing resources for education. The lack of provision of adequate resources has had an impact on the level of educational services being provided to the population and an impact on the consequent extent to which the state is meeting the educational needs.

Table 8
Expenditure in Education (% GDP)

1978	2.7	1985	2.8
1979	2.7	1986	2.9
1980	2.8	1987	2.7
1981	2.4	1988	2.9
1982	2.5	1989	3.3
1983	2.6	1991	3.1
1984	2.2		

(source: Central Bank Reports)

Table 9
Expenditure in Education (% GNP)

	1960	1986
Sri Lanka	3.8	3.6
Malaysia	2.9	7.9
Thailand	2.3	4.1
Singapore	2.8	5.2
South Korea	2.0	4.9
India	2.3	3.4
Pakistan	1.1	2.2

(source: Human Development Report, 1990)

As a result of this lack of expenditure there has been either a stagnation or reversal even in basic indicators such as - literacy, participation rates and educational levels.

Table 10

Literacy Rates

	Total	Male	Female
All Island	84.2	88.6	80.0
Urban	89.1	92.4	86.1
Rural	84.6	88.5	80.7
Estate	59.4	74.5	45.9

(source: Labour Force & Socio-Economic Survey, 1985/86 - Dept. Census and Statistics)

In 1985/86 the literacy rate was reported as 84.2%. This is a drop from the 87.2% figure recorded in 1981. This decrease in literacy is observed both for males (1981-91.1% to 88.6% in 1985/86) and females (1981-83.2% to 80.0% in 1985/86).

The gap in literacy in the estate sector is significant. After years of the so-called free education, slightly less than half the population in the estate sector cannot read and cannot write a short statement with understanding - the definition of literacy for the purpose of surveys. Generally in the case of Sri Lanka literacy increases from early ages to the twenties and then decreases as age advances. The expansion of

literacy takes place through education. However the lack of any serious attempts at adult education is shown by the lesser levels of literacy among the older age groups.

Referring to the educational levels the 1985/86 Labour Force & Socio-Economic Survey states:

> out of an estimated population of 13.7 million of age 5 years and over, 12.1% or 1.6 million had never attended school. More than one third of the population (34.8%) had only a primary education. 5.3 million or 39.1% have studied up to secondary education levels and about 11% had passed G.C.E.(O/L) or an equivalent examination. The proportion of the population who have obtained an educational qualification above G.C.E.(O/L) amounted to 4 million or 3% of the population aged 5 and over.

In the case of the estate population 43.8% of the females have not attended schools at all, and only a small proportion (9.6%) had progressed beyond grade 5 even in the mid 1980s.

Sri Lanka has shown certain progress in educating the population at primary and secondary levels. However, as the data for participation rates show, there is comparatively less progress at the intermediate and tertiary levels.

Table 11

Participation at different levels of education

	Gross Primary Enrolment Ratio		Gross Secondary Enrolment Ratio		Gross Tertiary Enrolment Ratio	
	M	F	M	F	M	F
	1986-88	1986-88	1986-88	1986-88	1986-88	1986-88
Sri Lanka	105	102	63	69	4.7	3.2
Malaysia	102	102	59	59	7.6	6.1
Singapore	118	113	70	73	13.3	10.3
India	113	81	50	27	12.3	5.2
Pakistan	51	25	26	11	6.8	3.1

(source: Human Development Report, 1990)

Another area of concern in education is the high level of drop out rates. As a result only a very small proportion of those who enter grade 1 complete the span of education which extends to 10 years in the Sri Lankan education system. The education system is characterised by a great degree of inequalities. There is a close relationship between this unequal structure and the state's failure to meet the educational needs of the majority of the population. The bulk of government expenditure in education is absorbed in running existing structures rather than in developing anything new. This means the better developed schools absorb a relatively larger share of educational resources to maintain them, leaving very little to improve

the less developed schools.

Available statistics point out these disparities on a district basis. However there can be even more gaps within a district. The gap between slum schools and well equipped schools in the city of Colombo is a case in point.

Some of the recent policies have tended to increase these disparities. Worsening income distribution levels are reflected within the school system as well. There is a spurt of growth of so-called 'international schools' catering primarily to the rich. Even within the state system access to monetary resources can make the education of the rich very different to that accessible to the poor.

IV. WORKERS' RIGHTS

(i) Labour force/ employment/ unemployment

Recent estimates of the labour force, employment and unemployment taken from the Quarterly Labour Force survey are given below.

Table 12

Estimates of the Labour Force

	1990 (quarters)				1991 (quarters)
	1st	2nd	3rd	4th	1st
Household pop. (10 yrs & mln.)	13.1	11.4	11.6	11.6	11.7
Labour Force Total mln.	7.0	6.0	6.1	5.9	6.0
Participation Rate (%)	53.3	52.5	52.3	50.7	51.1
Employed No. mln.	6.0	5.0	5.2	5.0	5.1
Employment Rate (%)	85.6	83.8	84.8	83.7	85.9
Unemployment No. mln.	1.0	1.0	0.9	1.0	0.8
Unemployment Rate (%)	14.4	16.2	15.2	16.3	14.1

(source: Quarterly Labour Force surveys - Dept. of Census and Statistics)

Data from the second quarter of 1990 onwards does not include the North and East. Without taking into account statistics from this part of the country, the labour force fluctuates from 5.9 to 6.0 milllion.

The most significant trend in the labour force is the increase in the participation rates of the female population. The 1981 census placed this figure at 17.6%. This had increased to 37.6% by 1990 as reported in the Sri Lanka Labour Force Quarterly Report. This means problem areas in relation to labour matters increasingly are issues with a gender dimension.

Reliable unemployment figures are much harder to come by. A study in 1987 which looked at unemployment figures concluded an unemployment figure of between 1.14 to 1.17 million of the work force, which amounted to 17.45% to 17.9%.

Generally it is agreed that unemployment declined to around 10 % in the early 1980s from a high of 25% in the 1970s. However, it rose to about 18% in the late 1980s. According to estimates of the Sri Lanka Labour Force Survey for the first quarter of 1991 the unemployment rate was 14.1% of the labour force which amounts to 0.8 million people out of work.

Sri Lanka's unemployment picture has consistently shown certain distinguishing characteristics. Geographically, unemployment is concentrated in the wet zone districts of Colombo, Gampaha, Kalutara, Kandy, Nuwara Eliya, Galle, Matara, Ratnapura and Kegalle. Close to 70% of the unemployment is concentrated in these districts. Unemployment is a much more significant problem among the relatively younger age groups, female unemployment rates are much higher than male unemployment rates and unemployment is higher

among the educated.

Unemployment is a particular problem of the young with a certain level of education who live in the densely populated wet zone areas. Due to the educational levels they have achieved and to the lack of opportunities in wet zone agriculture, this labour force is primarily in search of formal sector employment with a fixed income.

The Labour Force Survey of 1985/86 shows that 35% of the unemployed are in the age group of 20 to 25 years with secondary education or have qualified from the open span of education. The same survey shows that the female unemployment rate (20.8%) was double that of the male rate (10.8%).

The unemployment level of those with qualifications at the tertiary level has been a politically sensitive issue since the mid sixties when this phenomenon first emerged on a significant scale. In 1993 there were around 7000 unemployed graduates.

Some of the reforms undertaken recently have implications for unemployment in general and for graduate unemployment in particular. The most important of them are privatisation of the state corporations and the policy of reducing the government administrative structure by retrenchments. As a consequence of these measures, in the long run the capacity of the state sector to create new employment will be reduced.

The state sector has been the main source of new employment in the past. Its limited capacity to generate new employment in the future will have the greatest impact on those graduates educated in Sinhala for whom the state sector has traditionally been a big employer. It

will be difficult for these graduates to compete for private sector jobs due to their lack of proficiency in the English language. In turn this could lead to a high level of frustration and resulting social tensions which could be a major de-stabilising factor in the future.

There appears to be a disparity between the kind of education imparted in the state school system and that needed to enable the younger generation to compete in the emerging labour market at managerial and administrative levels. If measures are not undertaken to bridge this gap so that the fruits of economic growth under liberalised policies can be spread among a wider section of the population, conditions for social instability could arise.

(ii) Trade unions, labour unrest and industrial relations

(The reader is referred also to the chapter on Trade Union rights, and to the chapter on Emergency Regulations.) Despite the fact that the Sri Lankan working class enjoys the right to form trade unions and the right to bargain collectively, the government has enormous powers to clamp down on trade union activity whenever they regard this as necessary.

Two important legislative enactments enable the government to prevent strikes and other forms of work stoppages. Under the Prevention of Terrorism Act (PTA) and the Emergency Services Act of 1989 (ESA), the government can declare it illegal to strike in so called "essential services":

> All government services and over three-quarters of the country's industrial and agricultural enterprises have been declared essential services. Under the current state of emergency, workers

performing essential services who go on strike may be legally fired without any recourse by the workers (US State Department Report on Human Rights - 1992). These restrictions violate ILO Convention 29.

The National Labour Advisory Committee, a tripartite body (employers, employees and government representatives) created in 1990 recommended amending the ESA so that workers striking on legitimate labour complaints could not be terminated without recourse. This recommendation was referred to the Cabinet sub-committee on monetary affairs. (US Report for 1992). Despite this, as at the end of 1993, the situation remains unaltered.

There are just over 1000 trade unions, the majority of which have less than 100 members. About a quarter of the work force belongs to trade unions, and 86% of all union members belong to one of the 10 largest trade union federations (US Report for 1992).

The following table shows the number of trade unions existing in Sri Lanka from 1987 to 1991.

Table 13

Trade Unions

	1987	1988	1989	1990	1991
Registered	77	100	82	83	86
Cancelled	120	54	27	55	140
Functioning	903	949	1004	1032	1083

(source: Department of Labour)

The following table shows the number of strikes between 1987 and 1991:

Table 14

Strikes	1987	1988	1989	1990	1991
Number	68	64	52	116	133
Workers involved	22,648	20,206	42,843	65,937	63,630
Man days lost	44,826	36,501	838,888	193,666	48,696

(source: Department of Labour)

(iii) The expansion of the working class

The expansion of the proportion of the population which can be classified as the working class has been one of the most significant developments in recent times. The lack of protective organisations and the restrictions that the government can impose on wage labour thus have significant social implications. Two important trends have contributed to this: (a) the entry of a large number of women into the labour force (for eg. women in the expanding export oriented garment industry form close to 80% of the work force) and, (b) the expansion in the number of people who can be classified as agricultural labourers in the traditional small holder sector. If we add to this group of workers the plantation labour, agricultural workers form a significant section of Sri Lanka's population. The protection of wage labour is an important task for the promotion of human rights in Sri Lanka.

In addition to the strictures outlined above which are imposed by the PTA and ESA the protection that workers enjoy in Sri Lanka has come under threat due to demands, by multilateral lending agencies like the World Bank, to relax labour legislation which in their view overprotects labour. This is a part of the package of policies aiming to promote private investment both local and foreign. The main target of these demands is the Termination of Employment of Workmen Act of 1971. This Act makes it difficult for employers to carry out a 'hire and fire' policy with regard to their work force. It is applicable to any employer employing more than 15 workers. The Act was amended in 1976 to include termination arising from closures. The World Bank wants this Act repealed. In addition there is a general demand to "rationalise" the 40 odd pieces of labour legislation that Sri Lanka has.

The government has been keen to prevent the emergence of a

unionised and organised working class in the export oriented industries. Formation of trade unions in the Export Promotion Zones is actively discouraged. Established trade unions find it difficult to carry out legitimate trade union activities in these zones and individual workers who try to get involved in such activities face difficulties. In addition the workers in non-plantation agriculture and in various types of small businesses are not unionised, and the expanding NGO sector is another area where there are no trade unions.

Occupational health is an area where existing provisions are weak. Existing legislation does not stipulate a national minimum wage. However,

> 38 wage boards, covering 100 occupations in industry, commerce, services and agriculture (plantation) set minimum wages and working conditions. (US Report for 1992)

These workers are also entitled to Employees Provident Fund benefits, plus a social security payment that they are entitled to on retirement.

> Most permanent full-time workers in firms employing more than 15 or more people are covered by laws that technically prohibit them from working more than 45 hours per week (5 1/2 day work-week). Such workers by law also receive 14 days of annual leave and 14 to 21 days of medical leave. Maternity leave is available for female workers. (US Report for 1992, Shop and Offices Act)

Most of these benefits have been won by workers through long years of struggle and strike action. Their proper implementation depends on two factors: (a) the organised strength of the workers and (b) the

strength of the Labour Department machinery. In the current situation, where the overall policies of the government are aimed at relaxing the protection provided to workers in order to attract investment, the implementation of workers' rights depends overwhelmingly on the bargaining power of the workers.

CHAPTER 6

WOMEN'S RIGHTS

(i) Introduction

Women's rights receive substantial protection by the law in Sri Lanka. The 1978 Constitution guarantees fundamental human rights including freedom from discrimination on grounds of sex and gender equality (Art.27(2)(h)).

In 1981 Sri Lanka ratified the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) and in 1989 the UN Convention on the Rights of the Child, thus undertaking obligations to bring Sri Lankan law and practice into conformity with the provisions of these Conventions which encompass all areas of life including political rights, right to education, health care, employment, family relations and protection against violence and abuse. In 1993 the government adopted a Women's Charter. The Women's Charter however has no enforcement mechanism.

(ii) Social and economic rights

(The reader is also referred to the chapter on Social and Economic Rights) In the Sri Lankan context, universal franchise introduced in 1931, and positive social policies implemented since the 1940s, rather than legislative enactments, have had a strong impact on promoting gender equality in access to general education and health care and

political participation.

(a) literacy and education

Article 10 of CEDAW requires the states party to the Convention to "take all appropriate measures to eliminate discrimination against women in order to ensure them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women..".

While the Education Ordinance of 1939 provided for enabling regulations to enforce compulsory education, these regulations are being formulated only now - in 1994. Nevertheless, the introduction of free primary, secondary and tertiary (including university) education in 1945, the change to the national languages as the media of instruction, the provision of scholarships, free textbooks, free meals and recently free uniforms, and the development of an island-wide network of schools, of which 96% are co-educational, have facilitated the equal access of boys and girls, and women and men to general education.

By 1963, there was equal representation of girls and boys in schools. As Table 1 indicates, at the 1981 Census, 83.7% of boys and 83.6% of girls between the ages of 5 and 14, and 41.2% boys and 42.7% girls in the 15-19 age group were in educational institutions. Gender disparities in enrolment in primary and secondary schools are minimal in both urban and rural sectors except in the Muslim community, particularly in the East.

TABLE 1

Educational Participation Rates - Urban, Rural (1981)

Age	Total			Urban			Rural		
	Total	M	F	Total	M	F	Total	M	F
05-09	84.4	84.5	84.2	86.6	86.4	86.9	83.8	84.1	83.6
10-14	82.4	82.9	81.8	85.2	86.4	84.4	81.6	82.1	81.1
05-14	83.7	83.7	83.6	85.9	86.4	85.6	82.7	83.1	82.4
15-19	41.9	41.2	42.7	46.7	44.9	48.0	40.6	40.02	41.3
20-24	8.9	8.7	9.0	9.7	9.4	10.2	8.7	9.1	8.7
05-24	55.8	56.0	55.6	56.6	55.3	57.3	55.7	56.3	55.1

(source: based on Census Report, 1981)

There was little change in the situation in 1991. According to the School Census (Table 2), 88.3% boys and 87.5% girls in the 5-14 age group and 37.5% and 42.6% respectively in the 15-19 age group were in schools.

TABLE 2

Age Specific Enrolment Rates in Schools by Gender, 1991
(excluding North and part of Eastern province and
based on population projections)

Age Group	Male	Female	Total
5- 9 years	90.1	87.3	88.7
10-14 years	86.6	87.5	87.1
5-14 years	88.3	87.4	87.9
15-19 years	37.5	42.6	39.9
20-22 years	3.1	4.6	3.8
5-22 years	62.1	63.4	62.8

(source: School Census 1991, Ministry of Education, Statistics Division)

In fact, around 58% of the school population in the two highest grades leading to the GCE (A/L) examination are girls - a trend that has continued for over a decade. School drop-out rates have been slightly higher for boys in macro data. The plantation or estate sector was the most disadvantaged in access to education, as this enclave was isolated from mainstream educational developments until the 1980s. Recent studies indicate that gender disparities are declining rapidly in enrolment in estate schools (S. Jayaweera, 1990, Quality Development of Primary Education: Badulla Integrated Rural Development Programme, SIDA, Colombo; S. Jayaweera, 1993, Education of the Girl Child, in Shadows Vistas: On being a Girl Child in Sri Lanka, CENWOR, 1990, 1994).

Nonetheless Sri Lanka has yet to achieve universal primary education. The highest incidences of out-of-school children are to be found in low income urban neighbourhoods (including street children), remote villages and plantations. While non-formal literacy centres have been organised for out-of-school children, these facilities reach less than 5% of those who are disadvantaged. Around 52% of the children in these centres are girls.

At the tertiary level, the main avenue is the university sector: the 8 universities, the Open University and the new Affiliated University Colleges. The percentage of women students in the 8 universities has fluctuated between 40% and 44% since 1970 (Table 3).

TABLE 3

Student Enrolment In Universities

Year	Total	Male	Female	% Female
1942	904	813	91	10.1%
1950	2,036	1,655	381	18.7%
1960	4,723	3,587	1,136	24.1%
1970	11,813	6,570	5,423	44.4%
1980	17,494	10,544	6,950	39.7%
1990 *	31,447	17,926	13,521	42.9%

* Numbers enrolled are large as they include the backlog created by the closure of the universities during the period of unrest and violence in 1987-89.

source: University Council Reports
University of Sri Lanka
University Grants Commission

Women students are well represented in the arts, law, management, agriculture and medical related courses (42%-52%), but are severely under-represented in the engineering faculty (12%) (Table 4).

TABLE 4

Facultywise Distribution of University Students

Faculties	1985/86			1990/91		
	Total	Female	% F	Total	Female	% F
Medicine	2,345	1,009	43.02	3,615	1,523	42.1
Dentistry	289	161	55.7	398	192	48.2
Veterinary Science	170	73	42.9	261	118	45.2
Agriculture	775	279	36.0	1,502	624	41.5
Engineering	1,762	264	14.9	3,054	365	11.9
Architecture	108	49	45.4	281	100	35.6
Science	3,125	1,306	41.8	5,795	2,410	41.6
Management Studies	3,367	1,426	42.3	5,905	2,626	44.5
Law	461	219	47.5	967	512	52.9
Social Science/ Humanities	6,511	3,377	51.9	9,666	5,051	52.3
Total	18,913	8,160	43.1	31,447	13,521	42.9
Total - Prof. Science based courses	5,449	1,835	33.7	9,111	2,922	32.1
Total - Science courses	3,125	1,306	41.8	5,795	2,410	41.6
Total - Arts based courses	10,339	5,019	48.5	16,538	8,189	49.5

(source: Statistical Handbook, 1985,1990, University Grants Commission, Planning Division)

While the percentage of women in vocational training institutions at secondary and tertiary levels has increased in recent years, gender imbalances are wide. Women are concentrated in training programmes in the services sector and in dress making, weaving and handicrafts, and men in technology related courses.

An immediate impact of the expansion of educational opportunities since the 1950s has been the rising levels of literacy in the general population. In particular, gender disparities in literacy rates declined from 30 percentage points to 8 percentage points from the 1946 Census to the last Census in 1981 - male literacy increasing from 76.5% in 1946 to 90.5% in 1981 and female literacy from 46.2% to 82.8% over the same period (Table 5).

TABLE 5

Literacy by Sector and Sex

	Census 1946	Census 1953	Census 1963	Census 1971 .	CF &*[1] SE Survey 1978/79	CF * SE Survey 1981/82	Census 1981	LF & SE Survey 1985/86
All Island								
Total	62.8	69.0	76.8	78.5	86.2	85.4	86.5	84.2
Male	76.5	80.7	85.6	85.6	90.0	89.9	90.5	88.6
Female	46.2	55.5	67.1	70.9	81.9	81.1	82.8	80.0
Urban								
Total	76.2	82.6	87.7	66.2	90.7	89.7	93.3	89.1
Male	84.5	88.5	91.8	90.3	92.9	92.9	95.3	92.4
Female	65.7	74.1	82.7	81.6	88.7	89.8	91.0	86.1
Rural[2]								
Total	60.1	66.4	70.1	76.2	87.8	86.0	84.5	84.6
Male	74.7	79.0	83.9	84.1	91.6	90.1	89.0	88.5
Female	41.0	52.4	63.6	67.9	83.2	82.1	79.9	80.7
Estate								
Total					65.6	64.8		59.4
Male					79.3	78.0		74.5
Female					52.1	52.6		45.9

. Population 5+ years. 2. Estate sector included in Rural Census

CF & SE Survey - Consumer Finances and Socio-economic survey, Central Bank of Ceylon.

LF & SE Survey - Labour Finance and Socio-economic Survey, Department of Census and Statistics.

(source - Department of Census and Statistics, Central Bank of Ceylon)

Literacy rates among the population below 30 years are the same for both men and women. Literacy rates were relatively low among women in the Sri Lankan Moor and Indian Tamil communities at the 1981 Census. It has to be noted also that both male and female literacy rates have been stagnant in the 1980s. Macro level data with respect to both enrolment and literacy, however, conceal significant regional and class disparities.

(b) health

Article 12 of CEDAW not only requires elimination of discrimination in access to health care and family planning services, but also requires the assurance of "appropriate services in connection with pregnancy, confinement and post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation".

The provision of free health services, and food subsidies (until 1978), resulted in a significant improvement in the health status of women.

Life expectancy was computed to be 67.7 years for men and 72.1 years for women in 1981 and to have increased to 70.1 years for men and 74.8 years for women in 1991 (Annual Health Bulletin, 1991). Mortality rates have declined and the female population appears to

have better indicators than the male population. Infant mortality rates were 31.2 per 1,000 for males and 18.8 for females, under 5 mortality rates were 40.6 per 1,000 and 27.8 for males and females respectively during the period 1982-1987 (Demograph and Health Survey, 1987). Maternal mortality has been around 0.6 per 1,000 in the 1980s and 1990s. As in the case of educational statistics, these macro level figures need to be interpreted with caution, as wide regional and class differences exist. The highest infant mortality rates, for instance, are found in low income urban neighbourhoods and in the plantation sector.

Population control methods have been used extensively since the 1960s and contraceptive prevalence is around 60%. The preference for female .and not male sterilization indicates that large numbers of women are unable to exercise their reproductive rights in a patriarchal social structure. Reproductive technologies are not used widely but the dumping of out of date drugs and use of depo-provera, for instance, exposes women to danger in the absence of effective regulatory measures. Legal restrictions on abortion further increase the vulnerability of women in a context of unequal gender relations. On the other hand, family size has declined largely because women have had longer years of education and tend to seek to enter the labour market in larger numbers. The age of marriage of women has been around 25 years for almost two decades.

(c) labour force participation

(The reader is referred both to the chapter on Economic and Social Rights [section on Workers' Rights], and the chapter on Freedom of Association.)

According to Article 11 access to equal opportunities in employment include among others, the "...application of the same criteria for selection in matters of employment; (d) the right to equal remuneration....; (f) the right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction".

Official labour force data under-estimate the participation of women, as classification systems of gainful employment transferred from industrial societies exclude many women in home-based economic activities and in the informal sector in agriculture. Hence, the economic activity rates in the labour force survey reports - 68.6% for men and 32.5% for women in 1985/86 - do not reflect the reality of women's economic participation. The female labour force has, in fact, increased at a more rapid rate than the male labour force since the 1960s.

Although the Constitution guarantees freedom from discrimination, the access of women and men to employment is unequal. The unemployment rates of women have been at least double those of men since the massive increase in unemployment in the country from the end of the 1960s. Male and female unemployment rates have been 11.4% and 21.2% in 1969, 7.8% and 21.3% in 1981/82 and 9.1% and 23.5% in 1990 (Table 6).

TABLE 6

Unemployment Rates

Year	Total	Male	Female
1963[1]	7.3	8.9	7.6
1969/70[2]	13.9	11.4	21.2
1971[3]	18.7	14.3	31.1
1973[4]	24.0	18.9	36.3
1973[5]	17.4	13.7	26.8
1975[6]	19.9	14.3	32.9
1978/79[7]	14.7	9.2	24.9
1980/81[8]	15.8	12.4	23.0
1981[9]	17.8	13.2	31.8
1981/82[10]	11.7	7.8	21.3
1985/86[11]	14.1	10.8	20.8
1990[12]	14.0	9.1	23.4

sources:
1. Census of Ceylon 1963
2. Socio-economic Survey of Ceylon, Dept. of Census and Statistics 1969/70
3. Census of Ceylon 1971
4. Consumer Finances and Socio-economic Survey 1973, Central Bank, Colombo.
5. The Determinants of Labour Force Participation Rates in Sri Lanka 1973, Central Bank of Ceylon, Colombo, 1975.
6. Land and Labour Utilization Survey 1975, Central Bank of Ceylon, Colombo.
7. Consumer Finances and Socio-economic Survey 1978/79, Central Bank of Ceylon.
8. Labour Force and Socio-economic Survey, Dept. of Census and Statistics 1982.
9. Census of Ceylon 1981.
10. Consumer Finances and Socio-economic Survey 1981/82, Central Bank of Ceylon.
11. Labour Force and Socio-economic Survey 1985/86, Dept. of Census and Statistics.
12. Labour Force Survey, 1990 (First Quarter), Dept. of Census and Statistics.

In 1990, urban male and female unemployment rates (including the estate sector) were 8.6% and 21.8% respectively (Labour Force Survey 1990, 1st quarter). The worst affected groups were male and female secondary school leavers, but again, women were more vulnerable than men to unemployment.

Within the official labour force, the employment status of women (and men) has deteriorated in the 1980s. While 79.4% of the female labour force had been in regular paid employment in 1981, only 55.6% were in this category by 1990. Women have also been more disadvantaged than men - the percentage of unpaid family labour was 2.8% (men) and 6.5% (women) in 1981 and 7.5% (men) and 25.1% (women) in 1990 (Table 7).

TABLE 7

Employment Status

Employment Status	1981		1985/86		1990		1992[1]	
	M	F	M	F	M	F	M	F
Employer	2.4	1.2	3.0	0.9	4.4	1.2	1.6	0.8
Paid Employees	62.3	79.4	58.2[2]	58.4[2]	59.5	55.6	58.7	61.2
Own account workers	32.5	12.9	29.6	17.7	28.4	18.1	31.6	14.2
Unpaid family workers	2.8	6.5	9.2	23.0	7.7	25.1	8.2	23.8
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0

1 Excluding Northern Province

2 Regular employees M 28.5 F 29.6
Casual Employees M 34.7 F 28.9

source: Census of Ceylon 1981
Labour Force and Socio-Economic Survey 1985/86, 1990
Labour Force Survey 1992 4th Quarter, excluding Northern and Eastern Provinces
Department of Census and Statistics.

Also, despite the visibility of a minority of women in professional employment and in entrepreneurship, the majority of women have continued to be concentrated in low status, low skill jobs in the agriculture, industry and service sectors. Occupational crowding and the gender division in the labour market have also continued with women concentrated in peasant and plantation agriculture, traditional industries and modern assembly line industries, and in the education, health and domestic services.

(d) violation of women's labour rights

Women's economic rights tend to be violated in all sectors of the economy as the enforcement of labour laws is weak and in any case large numbers of women in the unorganised or informal sector are outside the ambit of labour legislation.

Article 14 of CEDAW gives special attention to women in rural areas and requires governments to acknowledge the contributions of these women to the economy and society and to address the particular problems faced by them. In Sri Lanka, however, women in the agriculture sector, have been discriminated against both with respect to equal remuneration and with respect to access to land. The Land Development Ordinance of 1935 deprived women in agricultural settlements of land rights. Lack of control of land resources has also had the effect of denying women access to credit, training and technology and such other instruments of economic advancement. Plantation women gained equality in wages in 1984 but work longer hours than men.

Industrialization has been largely dependent on the cheap labour of women. In the Export Processing Zones, the international division of

labour confines women to semi-skilled, labour intensive jobs on relatively low wages without the opportunity for upward occupational mobility. In the interests of 'industrial peace' labour laws (in relation to: terms of employment; wages; working hours; protection from occupational health hazards, and the protection assured to women workers when night work is permitted) are soft pedalled in the zones and trade unions are prohibited, leaving women vulnerable to the cost cutting strategies of entrepreneurs and industrialists searching for low cost labour.

Sub-contracting in industry has been proliferating in the 1980s and 1990s. Women are even less protected in these home-based industries and are at the bottom of a vertical process of sub-contracting that depresses their wages and results in the inequitable distribution of benefits.

In the services sector, the majority of women are in low paid jobs. They have been traditionally unprotected in domestic service. Their marginality and their lack of awareness of the nineteenth century Service Contracts Ordinance (which enforces one month's notice and wages and access to Labour Tribunals) has denied them protection (S. Goonesekere, 1993, Women and Law, in Status of Women, Sri Lanka, Ministry of Health and Women's Affairs).

Migrant workers seeking employment as housemaids in response to the demand in prosperous countries for cheap domestic labour have been exposed to unscrupulous recruitment practices of employment agencies. The absence of legal employment contracts as well as bilateral agreements between Sri Lanka and labour receiving countries have resulted in the exploitation of women's labour and in sexual abuse. While women have been empowered as primary income

earners, and there has been some reversal in gender roles within the family, exploitative gender relations have led to family disruption and to the erosion of their accumulated savings and therefore have limited their opportunities for advancement.

There is no clarity with regard to the minimum age of employment in the numerous ordinances, and the current prohibition of employment below the age of 12 years does not apply to domestic service, the agricultural sector or to the urban informal sector. Child labour is widespread and girls are the chief victims of child abuse in domestic service, although there is only one reported case of prosecution by the Department of Labour (Goonesekere, Savitri, Women and Law, in Status of Women, Sri Lanka, Ministry of Health and Women's Affairs, 1993). (See also the chapter on Children's Rights.) There is currently a campaign against child labour and the Department of Probation and Child Care is engaged in formulating new regulations.

In conclusion, notwithstanding constitutional guarantees of human rights and gender equality, most women workers are denied protection as they tend to be concentrated in areas of employment in which labour laws are not strictly enforced or are not deemed to be applicable. Monitoring mechanisms are weak, and women lack both awareness of their rights, and adequate access to legal counselling and legal aid to seek redress and equity.

(e) international norms protecting women's labour rights

Sri Lanka has ratified the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) which safeguards the rights of women employed in all sectors, public, private and informal. The Women's Charter, adopted in 1993, includes the

CEDAW provisions with regard to employment, and one of the functions of the Commission which has been created under the Charter is to receive and act on complaints of violation of rights and discrimination. The Charter, however, has no legislative force.

There has been considerable delay in ratifying ILO Conventions. The Radiation Protection Convention (No.115) was ratified in 1986. Three more Conventions relevant to the rights of women workers were ratified in April 1993: the Convention on Equal Remuneration for Men and Women for Work of Equal Value (No.100); the Convention on Maternity Protection (which requires 12 weeks' leave, maternity benefits and nursing breaks) (No.103); and the Convention on Labour Statistics (No.160). Convention No.111 which pertains to discrimination in respect of employment and occupation has not been ratified.

In 1984, Sri Lanka withdrew from the ILO Conventions prohibiting night work for women which it had ratified earlier (Nos.4, 41 and 89) in response to pressures from entrepreneurs in the Export Processing Zones.

(f) Sri Lankan legislation relevant to women's labour rights

Despite this withdrawal, Sri Lanka does have a long history of labour legislation which conforms to international standards. These laws include: the Maternity Benefits Ordinance; the Factories Ordinance; the Shop and Office Employee Act; the Employment of Women, Young Persons and Children's Act; the Employees' Provident Fund Act; the Mines and Minerals Act; the Wages Board Ordinances, and the Workman's Compensation Ordinance.

These laws seek to ensure reasonable hours of work, working conditions, benefits and occupational safety. Employment issues come within the jurisdiction of special courts called Labour Tribunals, which can be used to seek redress in case of violations. Their use depends, however, on the awareness of women of their rights and their access to information regarding the functions of Labour Tribunals, and to legal counselling and aid to pursue action.

There have been some positive developments in recent years with regard to the rights of women workers. In 1984, equal wages for equal work in the plantation sector was accepted as government policy and enforced through the Wages Board Ordinance. Of the 18 industries that come within the ambit of the Wages Board Ordinance, gender equality in wages has been enforced in 16 and steps are being taken to introduce the principle in the remaining industries.

Maternity leave was extended from 6 weeks to 12 weeks or 3 months for the first 2 pregnancies in 1987 in the private sector and in 1988 in the public sector. Nursing intervals are provided, but the provision that regulations can be introduced for employees to ensure child care services for children of workers under 5 years of age has yet to be enforced.

Recent amendments have entitled working women in the private sector to 3 months paid maternity leave from work for the first 2 pregnancies, and 6 weeks paid maternity leave for other pregnancies, or if the child dies. Private sector manual workers receive a maternity allowance in addition during their period of leave. Women workers in the public sector now enjoy similar benefits. Furthermore, the public sector makes provision for women in the last months of pregnancy to report for work later, and leave work earlier. There is

no indication that this provision has had a negative impact on the employment of women.

The facilities provided through the Employees' Provident Fund have been extended to women workers. The Women's Compensation Ordinance was amended in 1980 to facilitate direct and more reasonable compensation for injuries.

Although the Sri Lankan Constitution guarantees equal protection to women, and although the last 2 decades have seen significant organised campaigns to safeguard women's rights, as yet not a single case pleading gender-biased discrimination has come before the courts under equal protection claims. There have, however, been instances where women have invoked the fundamental rights provision in the Constitution to safeguard their employment rights. The Constitution does make provision for preferential treatment to women to improve their status, but this has not effectively influenced the gender-biased social attitudes nor has it stemmed the increasing incidence of violence against women that take place at all social levels.

(iii) Political rights: political participation by women

Articles 7 and 8 of CEDAW require the guarantee, promotion, and protection of women's right to participate in the election of governments, in formulating government policy, to hold government office, etc.

Since universal franchise was introduced in 1931, men and women have participated actively in general elections as voters. Political consciousness has always been high among the general population and the percentage of voters (18 years and over) has been over 80% except

in 1988 when it declined to 55.8% in a climate of civil unrest and violence. Gender disaggregated data of voters are not available, but women have been as visible as men in voting.

There have been no legal barriers to the participation of women in political bodies, but their representation in the legislature at central (Parliament) and local levels has been low. Sri Lanka had the world's first woman Prime Minister, but the number of women candidates of all those contesting seats has been only between 2% and 3% at all times: 1.9% in the 1977 elections and 3.2% at the 1989 elections.

In both years, the percentage of women elected was higher than among men, and women were elected from disadvantaged districts such as Moneragala, Vavuniya and Puttalam. Hence, there appears to be no reluctance on the part of voters to accept women as their representatives. Currently 5.8% of members of Parliament are women (Table 8).

Low female representation prevails also in the 8 Provincial Councils created in 1988, in the old Municipal and Urban Councils and in the Divisional Councils (i.e. Pradeshiya Sabhas) established in 1987 (Table 9).

TABLE 8

Participation in Legislative Bodies

Legislative Bodies	No. of Candidates				No. Elected				M % Elected	F% Elected
	(1) Tot	(2) M	(3) F	(4) %F	(5) Tot	(6) M	(7) F	(8) %F	(6) of (2)	(7) of (3)
1. Parliament										
1977	756	742	14	1.9	168	164	4	2.3	22.1	28.6
1989	1764	1707	57	3.2	206	194	12	5.8	11.4	21.1
2. Provincial Councils										
1989	1327	1289	38	2.9	437	424	13	2.97	32.9	34.2
3. Local Government										
(i) Municipal Councils										
1983	1068	1041	27	2.5	233	230	3	1.3	22.1	11.1
1987	641	619	22	3.4	*					
1991	1152	1110	42	3.6	207	201	6	2.9	18.1	14.3
(ii) Urban Councils										
1983	1396	1363	33	2.4	347	341	6	1.7	25.01	18.2
1987	984	953	31	3.2	*					
1991	1453	1413	40	2.8	241	235	6	2.5	16.6	15.0
(iii) District Devt. Councils										
1981	470	459	11	2.3	161	158	3	1.9	34.4	27.3
Pradeshiya Sabhas (Divisional Councils)										
1987	7198	7065	133	1.8	*					
1991	13385	13060	325	2.4	2674	2632	42	1.6	20.2	12.9

* Elections postponed

Source: Department of Elections

TABLE 9

Ministers/Chairpersons in Legislative Bodies

	Total	M	F	%F	Tot	M	F	%F
1. Parliament	(1977 Parliament as in Dec.1988)				(1989 Parliament as in Dec. 1991)			
Cabinet Ministers	28	26	2	7.1	24	23	1	4.2
Other Ministers	69	66	3	4.3	52	47	5	9.6
All Ministers	97	92	5	5.2	76	70	6	7.9
2. Provincial Councils	(1989 Councils as in Dec. 1991)							
Ministers	35	32	3	8.6				
3. Local Government		(1983)				(1991)		
(i) Municipal Council								
Mayor *	12	12	-	-	12	12	-	-
Deputy Manager	12	11	1	8.3	12	12	-	-
(ii) Urban Council								
Chairperson	39	39	-		39	39	-	-
Vice Chairperson	39	38	1	2.6	39	39	-	-
(iii) Pradeshiya Sabhas								
Chairperson					257	256	2	0.8
Vice Chairperson					257	256	1	0.4
(iv) +Gramodaya Mandala (1987)	4193	4152	41	0.97				

* One Municipal Council had a woman mayor in 1987-1989

+ Gramodaya Mandalas are nominated bodies to represent a cluster of villages.

source: Department of Elections,
Ministry of Local Government, Housing and Construction

Impediments to greater representation in legislatures appear to stem from the gender blind policies of political parties in the way they nominate candidates and in the low priority they give to gender issues. There is also a lack of motivation among women in seeking a more visible role in the political arena, as well as the time constraints caused by the unequal gender dimension of labour within households. This reluctance by women has further increased during the violence of the last decade, while the tradition of male leadership in community organisations may also be a dampening factor.

Most women enter Parliament initially through relationship to a male member, but have been able to retain their position on their own performance.

The representation of women among Ministers in Parliament and Provincial Councils and among Mayors and 'Chairpersons' of local government bodies has also been minimal. While 6 of the 76 Ministers of all ranks (7.9%) are women, only one of these is a Cabinet Minister - for Health and Women's Affairs (4.2% of Cabinet Ministers). Except for the Office of Prime Minister from 1960-1965 and again from 1970-1977, women Ministers have been appointed to a limited range of welfare-oriented Ministries: Health, Social Services, and Rural Development. Provincial Councils have one Chief Minister currently and there have been rare instances of a woman Chairperson, Mayor or Deputy Mayor.

It is interesting to note that women have been more active in politics outside the mainstream parties, for example in the LTTE and JVP organisations, but here too they are not visible in leadership roles.

(iv) Women and family

Article 16 of CEDAW requires States to ensure that women have the same rights as men in relation to marriage and family relations.

The multi-ethnic, multi-religious society of Sri Lanka reflects its pluralism in its many personal laws such as the Kandyan law, Thesavalamai law (Tamil system of customary law applicable to the Tamil inhabitants of the North) and the Muslim law, which govern the family sphere. A majority of the citizens, however, are governed by the general law which overall has an egalitarian approach, although it has embraced some concepts that strengthen the negative impact on women, for example: the concept of the male head of household; the mother's sole parental responsibility in the case of an illegitimate child; the citizenship of a legitimate child following that of the father, and the domicile of the wife being dependant upon that of her husband. (See also the chapter on Children's Rights.)

The present trend of the average age of marriage for women is around 25 years, however, the Marriages Ordinance lays down 12 years as the age of capacity for marriage, and this is also followed by the Kandyan law. The Muslim law does not lay down an age of capacity to marry and could leave room for child marriages.

The consent of the parties to the marriage contract is a requirement under the law, except that under the Muslim law, which reflects very strong patriarchal values, it is not required that the bride express her consent to the marriage, instead, her father gives consent on her behalf.

In the context of arranged marriages there have been some cases of

forced marriages where the consent of the bride is not sought.

Contrary to the provisions of the general or the Kandyan law, under the Muslim law polygamy is recognised and a man may contract up to 4 marriages. In practice polygamy is extremely unusual. The man may also unilaterally repudiate his wife. Under the Kandyan law, there have been instances where polyandry was practiced.

In the case of divorce, the Muslim law and the Kandyan law recognise the concept of 'irretrievable breakdown of marriage' while the Roman-Dutch principle of 'matrimonial fault' is still the basis for divorce under the Marriages Ordinance.

Under the provisions of the general law (Married Women's Property Ordinance of 1923) women as well as men have equal rights with regard to property. Both male and female children can inherit equally from a parent who dies intestate. The widow will inherit only half of the deceased husband's property if there have been no children of the marriage. In such instances, the balance of half of the estate is inherited by the husband's family. The indigenous Kandyan law and the Thesavalamai law recognise the independent property rights of women.

Legislation dating back to 1935, relating to alienation and allocation of land in state lands and land settlement areas discriminate against women although some amendments were introduced in 1981.

(v) Violence against women

(a) violence against women: the general situation

Complaints of incidents of violence against women are increasing, and they appear to take place at all levels. In offices, and out of office hours, sexual harassment does not seem an unusual occurrence. At times if women do not fall in line with the undue advances of their male superiors, they are harassed and even face the threat of losing their jobs.

The lack of literature, substantive and empirical data (the exception being a few studies done on the working conditions of women in the Free Trade Zone) on the subject-matter reflects a lack of awareness and concern.

The women who work in the Free Trade Zone fall into a special category. Most of them have left their homes for the first time and are in a very vulnerable situation, not knowing exactly how to handle their new-found independence and emotional isolation. The incidence of rape reported from the Katunayake and Ja-ela areas stands witness to the sexual abuse occurring there.

The women who migrate abroad for employment are also vulnerable to sexual harassment in the absence of any counselling as to their rights or support structure to uphold appeals against violation of rights. Sexual harassment is prevalent even in educational institutions:

> It is a small school in a remote village in the Mahiyangana District. The schoolmaster, who is married, ordered a teenage female student to come to an empty classroom in the afternoon

session and attempted to harass her sexually. (Divaina, 29 June 1992)

The above news report is one of the few which reached the mass media. Most of such incidents are shielded from publicity due to the damaging impact on the victim's educational opportunities and reputation. In many instances the students must choose between their academic career or complying with the sexual demands of their teachers.

Students also complain of the lack of grievance settlement, and of counselling mechanisms within the university system.

(b) domestic violence

Women-In-Need(WIN), a crisis intervention centre, conducted a study with a group of 200 women of mixed ethnic groups from a low income community in an urban area. WIN discovered that:

> 60% of the respondents had been victims of domestic violence, 24% of the victims had an independent means of livelihood, 33% of the women who were subjected to violence lived in houses belonging to them, while 36% of the women lived in houses owned by the husband/his family. In the case of 5% of the women, the houses were owned jointly by the spouses, 26% lived in rented dwellings ... 98% of the victims were mothers, 42% of these women were beaten while they were pregnant. It was also revealed by 29% of the battered women that their spouses beat their children as well. (K. Wijetillake, Domestic Violence - A Silent Cry, CENWOR, paper presented at the 3rd Convention of CENWOR in 1992)

Some additional factors emerged in the study. Regardless of financial independence, domestic violence continued, and all 38% of the women who left their matrimonial homes as a result of domestic violence, came back to their husbands and to unending harassment. According to them, leaving the matrimonial home was only a temporary solution to the problem. In other words, they preferred to bear the pain of violence than face the consequences of being a single woman, which is often fraught with even more complex social and personal difficulties.

Women who are abused most often suffer physical abuses within their homes. A very high percentage of these remain unreported and, therefore, invisible. Domestic violence takes many forms. Women become victims of abuse in their roles as wife, mother, sister, daughter, daughter-in-law, sister-in-law or even as domestic servants. The wife is the most common target of domestic violence.

There have been instances of domestic violence against women with other women as the prime instigators of the violence. There are many reported and unreported occasions where the mother-in-law motivated and encouraged the violent activities of the son against a daughter-in-law who happened to be out of favour. At times the motivation may come from outside women/woman.

There are also occasions where unprotected and defenseless single women become prime targets of domestic violence. They could be either domestic servants or single women such as spinsters, widows or divorcees living with other family members. This category becomes the most vulnerable group in the absence of family and social support.

(c) crisis situations

Whenever the social network breaks down and the existing infrastructure is not adequate to meet basic demands, women and children become most vulnerable. During the last 2 decades, the civil war situation in the North and East of Sri Lanka, and the armed insurrection in other parts of the island have left thousands of people homeless and vulnerable to various kinds of deprivation of human rights.

Thousands of women have been raped, assaulted or brutally murdered. Some families and communities perceive the raping of their women as a crime worse than the killing of their women. These sentiments are based on social concepts of 'honour', 'chastity', 'ownership' and 'dependency'.

(d) rape as a crime

Under Section 363 of the Penal Code, a man is said to commit rape if he has sexual intercourse with a woman against her will or without her consent, or with consent obtained by deception, blackmail, fear of death or injury, or where the victim is under 12 years of age. Rape is an offence punishable with imprisonment not exceeding a period of 20 years and a fine (Section 364). Carnal intercourse with girls between 12 and 14 years is also made an offence punishable with imprisonment (Section 364A). Marital rape is excluded from the legal framework.

In spite of this legislation, the national newspapers carry reports of rape cases almost daily.

In 1990 369 rape cases were reported to the police. For the first 9 months of 1991 the cases of reported rape numbered 286. The actual number of rape cases, however, may be much higher. This view is supported by the police officers interviewed. Even where the victim has support in initiating a prosecution, the emotional and mental trauma which the victim invariably suffers during and after the act of rape usually prevents her from seeking legal redress.

According to the police, rape complaints are very rarely made from urban areas. About one-fifth of the complaints of rape made to the police do not end up in the courts as the police, for various reasons, advise against prosecution (K. Wijetillake, Fortnightly Review, Issue No. 9, pp.3-6, Law and Society Trust, Jan. 1, 1991). This occurs, for example, where there has been delay in reporting the offence, where there has been a relationship between the victim and the alleged suspect, where there is insufficient evidence to corroborate the alleged offence of rape, where the victim has refused to submit herself to a medical examination etc.

(e) statutory rape

Under Section 363, if the victim is under 12 years of age, her consent becomes immaterial and any act of sexual intercourse then amounts to the offence of statutory rape. Although special measures have been introduced to protect young children, statutory rape is increasingly becoming a common occurrence. Most of these cases are not reported as a consequence of factors such as shame, humiliation and family honour.

In these incidents, the young children are commonly raped either by friends or relatives of the family.

(f) custodial rape and incest

Against the popular assumption that rape is committed in lonely places and dark corners away from the public, there is evidence that it is happening within the protective enclosures of homes, hospitals, prisons, mental asylums and schools far more commonly than one would think. Although incest is not at all uncommon, it is generally not reported. From 1988-1991, only 8 cases of incest were reported. Even of those, the majority of the cases first reached the police not as complaints of rape but as complaints of homicide.

In the absence of statistical data, it is difficult to determine the exact number of females who are subjected to custodial violence.

(g) effectiveness of the law in addressing the issues

Although the Constitution prohibits discrimination against women, the lack of effective protection results in women being treated unequally.

An examination of laws on some major areas such as sexual harassment, domestic violence and rape, reveals the inadequacies of the legislative provisions to deal with such problems.

There are some useful provisions which could be utilised. For example, Sections 341-345 of the Penal Code could be used on occasions of sexual harassment. Section 345 is designed in particular to deal with assault or use of criminal force on a woman with intent to outrage her modesty.

Generally, if sexual harassment does not take a physical form, the law provides very limited safeguards. There is no legal redress at all for

subtle intimidation by the superiors at places of work or education or in institutions.

Access is a major component in determining the equity and effectiveness of a legal system. Even if there are favourable legislative provisions, if certain segments of society are deprived of real access to the institutions, personnel and the enforcement machinery, then that system does not deliver justice to society. Many women victims of violence have very limited access to the legal process.

Lack of awareness, financial limitations, and the introduction of emotions of guilt and shame through gender-biased social concepts constrain victims from seeking legal redress.

A human reaction to violence against women is inhibited by popular social values. The most fundamental of these are power dynamics and the concept of family privacy. There is no explicit law to deal with wife assault, and the attitude of police and the judiciary continues to manifest reluctance to perceive wife abuse as a criminal issue, except in extreme cases such as murder. The arrest, prosecution and conviction of the husband for marital assault short of murder is thus unlikely.

One of the main causes for the lack of empathy by the law enforcement officers is their lack of understanding of the issues. It is of utmost importance to raise their awareness and public awareness generally.

In Sri Lanka, there is no support network for the victims of gender-based violence.

Another major problem is the lack of awareness among the women who are victims of violence about their rights, and about where to go and to whom to go. Although the concept of legal aid is beginning to gain ground, in Sri Lanka it is still mostly considered as a charity rather than as a right. Competent legal personnel who are able to assist victims of violence are small in number and lack commitment.

When complaints finally reach the judicial process, the victims' experiences are usually frustrating. The rape victims may have to spend years going through court cases. A research project conducted in the district of the North Central Province indicates that an action instituted against rape in 1980 is still incomplete.

A study of rape cases during 1991-1992 indicates that in recent times police officers have begun to act promptly and in a more responsive manner where rape is concerned.

The judiciary is often reluctant to find an accused guilty of rape. The critical issue is that rape is on almost all occasions committed without eye witnesses. The laws of Sri Lanka do not require corroborative evidence. But it has been the practice of the judiciary to warn the jury of the danger of convicting an accused on uncorroborated evidence (*King v. Ana Sheriff*, 42 NLR 169 at 171).

The dearth of lawyers who are committed to defend the rights of victims in cases where financial benefits are not guaranteed is another major difficulty the victims face when resorting to the judicial process.

The combination of these factors means that very few cases reach the stage of prosecution, and of the instances where rape charges are framed, only a few charges are successfully established.

CHAPTER 7

CHILDREN'S RIGHTS

(i) Introduction

Although the nomenclature of "Children's Rights" is new to Sri Lanka, Sri Lanka has a long tradition of child protection. The customary laws recognised the concept of child protection through institutions like guardianship, adoption and the obligation of support. The Roman-Dutch Law which was introduced during the Dutch period, and which continues to be applicable as the residuary general law, had the concept of "upper guardianship" of minors which gave the state and the courts a protective role in relation to minor children. In British times welfare legislation was introduced dealing with health, education, juvenile justice and with children who were deprived of proper parental care either because they were orphans or because the parents were incapable of exercising proper care. More recently the Constitution sets out as a directive principle of state policy that the interests of children and youth must be promoted with special care (Article 27(2)(c)).

Hence considerable legal protection for children has existed for some time in Sri Lanka. Nonetheless, with the ratification of the Convention on the Rights of the Child children's rights assume a new dimension. Under the terms of the Convention its provisions must now be incorporated into domestic law. In this review Sri Lankan law will be examined in the light of the principles enshrined in the

Convention.

(ii) A profile of the Sri Lankan child

(a) health

Infant mortality in Sri Lanka remains fairly high and is estimated to be at about 19.3% per 1,000 births (Annual Health Bulletin, 1992). Higher levels of infant mortality are recorded in the tea plantations, among the urban poor, and in the poorer Assistant Government Agent's divisions (A Plan of Action for the Children of Sri Lanka (1991) p.3). Maternal mortality is estimated to be 0.5 per 1,000 live births (Ibid p.2).

Whilst there are no accurate statistics on the percentage of children who live below the poverty line, a rough estimate is that 45% of Sri Lankan children are in this situation. Integrally linked with poverty is the percentage of children who are malnourished. A recent report quoting 1988/1989 statistics states that malnutrition resulting in stunting was at 36.4%, and that malnutrition resulting in wasting was at 18.4% (Report on the Implementation of the Convention on the Rights of the Child (1994) Marga Institute, Table 1 p.4). Poor nutrition in children is associated with certain traditional beliefs which can hinder child development. Traditionally pregnant mothers are deprived of certain foods. This results in maternal malnourishment and low weight babies. Delays in weaning retards development. The girl child on attaining puberty is not given certain types of food and is isolated which also affects her development. Certain common place illnesses traditionally are treated as having a divine origin and the proteins necessary to combat the disease are treated as taboo. This too could have long term effects (Interview, Dr. Abeygunawardena,

UNICEF). (See the chapter on the North East War for information on child malnutrition in the North).

Universal child immunization with BCG, DPT, Polio and Measles have been achieved. However, a resurgence of malaria and encephalitis has taken place and Dengue haemorrhagic fever is now prevalent (Plan of Action (1991) p.3).

(See also the section on health in the chapter on Social and Economic Rights)

(b) education

Children in Sri Lanka have access to free education. The average annual benefit which a child obtains from the state for education is approximately Rs.1780 (Report on the Implementation of the Convention on the Rights of the Child (1994), Table 2 p.6). A matter of concern is the finding that at any given time nearly 14% of the children aged between 5 and 14 are out of school (Plan of Action (1991) p.3). There are wide disparities in attainment levels between the larger, better funded schools and small remote schools or estate schools (Idem). Contrary to common belief, no regulations have been passed in Sri Lanka making education compulsory for children below a certain age (M. Gomez, Compulsory Education and the Law (1989), Vol.12, Sri Lanka Journal of Social Sciences, p.43). The high literacy levels achieved in the country have therefore not been a result of compulsory education but due to the availability of free education, and more recently, a package of benefits, for example, the mid-day meal, textbooks and uniforms. Rs.1500 million was spent in 1992 on the mid-day meals, and Rs.600 million on the school uniform scheme (Report on the Implementation of the Convention of Rights of the

Child (1994) Marga, Table 2 p.6).

Whilst undoubtedly free education and the package of benefits available have contributed in no small measure to wide scale education in the country, compulsory education regulations and a monitoring mechanism would probably result in increased attendance. Pre-school education facilities are lacking in the country (Plan of Action (1991) p.3). For the older child there is a serious deficiency of vocational schools. Special schools for children with learning disabilities are also scarce. Disabled children also appear to be inadequately catered for. It would appear that only 1.6 per cent of disabled children are catered for by the government and the NGO's (Plan of Action (1991), p.3).

The Convention on the Rights of the Child places an obligation on the state to make available special education and training for the disabled child to help him/her achieve self reliance and social integration (Article 23).

(iii) Children in difficult circumstances

(a) children involved in armed conflict

In 1991 it was estimated that about 487,000 children in Sri Lanka were affected by armed conflict (Plan of Action (1991) p.4). A more recent report suggests that about 400,000 children are affected. Children affected by armed conflicts fall into various categories:

(1) orphaned and abandoned children;
(2) children with one parent;
(3) children suffering from under nutrition;
(4) children suffering from emotional and psychological problems

as a consequence of being exposed to armed violence;
(5) disabled children;
(6) children deprived of schooling.

The magnitude and complexities of the situation engulfing these children defy quick or easy solutions. A large number of camps or welfare centres have been set up but it would seem that only very basic amenities are available in these centres. Regular supply of absolutely essential goods is maintained but for security reasons, fuel is restricted and electricity is not available (Report on the Convention on the Rights of the Child, p.60).

Rehabilitation of children and families traumatised by conflict requires certain essential components. These include: provision of basic survival needs; facilitation for the re-structuring of the lives of these families; facilitation of healthy development; assistance with the children's and adolescents' powers of coping with the conflict situation, and help for those who are physically handicapped or emotionally traumatised (A Profile of the Sri Lankan Child in Crisis and Conflict, UNICEF, 1990).

Whilst the resources of the government are clearly being utilised to provide basic survival needs, the emotional needs of children who are traumatised need to be urgently addressed. Whilst some programmes have been initiated to deal with this problem (Report on the Convention of the Rights of the Child (Marga) 1994, p.61), much remains to be done in this area. The problem is clearly one that is relatively new in Sri Lanka and the resources needed to deal with the problem are extensive. Expertise also is necessary and is not available readily.

(b) children in broken homes

There is little available data on children in broken or single parent homes. It is conceivable that some of the children of one parent families are in the state run homes and in the 150 approved homes run by voluntary organisations. The stigma attached to illegitimacy acts as a disincentive to bringing up the child within the family environment. The legal system still differentiates between the legitimate and the illegitimate child thereby entrenching a value system which stigmatises those who are illegitimate.

(c) street children

The estimated figure is about 10,000 (Interview, Mr. Gamage, Western Province Probation Department). Day care centres and playgroups are run for these children by foreign funded NGOs. Recently 2 resident homes have been commenced for street children. The advantage of this scheme according to the probation authorities is that the child is removed from the undesirable environment of the street. The counter argument is that day care centres, playgroups etc. provide the child with certain basic requirements, namely: safety; health; nutrition; emotional development; vocational training and medical assistance without institutionalisation (Street Children Project - An Overview [Save the Children Fund (UK)]).

(d) child labour

It is estimated that there are about 500,000 children employed. Poverty is the main reason for this (Plan of Action (1991), p.4). Seventy-five percent of the children in employment are from the plantation and urban areas. The children work in the informal sector

and are unprotected by any law. A considerable number of these children appear to be employed in domestic service (Idem).

Different minimum ages of employment - depending on the nature of the work and the time during which the child is to engage in such work - is a feature of Sri Lankan labour law. This is not incompatible with the relevant article in the Convention (Article 32). Unpaid family work is a component of the child labour force. As a recent report observes, the complex social structures which sustain child labour in the country are not easily amenable to straightforward law enforcement (Report on the Convention of the Rights of the Child, p.55). The topic of children in employment is dealt with in more detail below in Section (viii).

(iv) Children in conflict with the law

Fairly adequate legal provisions exist safeguarding the interests of children and those who have breached the penal laws of the country. There are numbers of sentencing options, nevertheless, there is a tendency to resort to institutionalising juvenile delinquents.

Specially constituted remand homes, certified schools, and approved schools are found in the country. In 1992 there were 73 children in the 4 remand homes where children are housed prior to trial. The certified schools in Hikkaduwa, Keppitipola and Ranmuthugala housed 153 children. In addition to these there is an approved school for Catholic children in Maggona. Youthful offenders over 16 years are sent to a special school in Wathupitiwela (Interview, Mrs. Padma Ranasinghe, Commissioner of Probation and Child Care). Admissions to certified schools have decreased in recent times. In 1979, 308 admissions were made. In 1990 by contrast there were only 92

admissions. A report of 1991 suggests that this does not necessarily mean that juvenile delinquency is on the decrease but rather that low priority is afforded to such detections (Plan of Action (1991), p.4).

Sri Lankan law recognises that children below a certain age do not have the capacity to commit crimes. Thus the Penal Code denotes that children below the age of 8 lack criminal capacity ((Penal Code, No.2 of 1883 [as amended] Section 76). Those above the age of 8 and under 12, who have not attained sufficient maturity of understanding to judge the nature and consequences of their acts, are also not criminally responsible. Those above the age of 12 have full criminal responsibility.

What the Convention demands is that children who have breached the criminal law are treated differently from adults and that some concessions be made because the wrong doer is a child.

The Sri Lankan provisions dealing with children who have infringed the penal laws of the country are in the main in keeping with Article 40 of the Convention. Thus, specially constituted Juvenile Courts are required to hear and determine any case in which a young person is charged with an offence other than scheduled offences (Children and Young Persons Ordinance No.48 of 1939, Section 4(1)). A child, i.e. a person under 14, cannot be imprisoned. Young persons, defined as between the age of 14 and 16, cannot be imprisoned unless the court certifies that they are so unruly that they cannot be detained in a remand house or certified school, and that they are so depraved that they cannot be detained (Ibid, Section 23(1) and 23(2)). Alternatives to traditional punishments are found in the existing law. Of serious concern, and not in keeping with the Convention, is the retention of whipping as a punishment for certain offences (Section 29(1)).

Certain procedural requirements found in the Sri Lanka law are in keeping with the principles embodied in the Convention. Thus, young offenders must be kept separate from adults in police stations (Section 13). The law casts upon the court the duty to explain, in simple language, the substance of the alleged offence to the child. Proceedings in court are in camera and only the parties to the case, their attorneys and their witnesses may be present (Section 7(3)). However, there are aspects which cause concern, amongst them delays in adjudication and a sentencing policy that appears to favour institutionalisation.

(v) Constitutional rights of the Sri Lankan child

Children in Sri Lanka, like their adult counterparts, are accorded certain rights under the Constitution. The more fundamental rights are applicable to 'persons' and would therefore be applicable to all children. The rights under the Constitution which are universally applicable to all children are:

(1) the right to freedom of thought, conscience, and religion (Article 10);
(2) the right not to be subjected to torture, or to cruel, inhuman or degrading treatment, or punishment (Article 11);
(3) the right to equality and equal protection under the law and non-discrimination on the ground of race, religion, language, caste, sex, political opinion and place of birth (Arts.12(1),(2));
(4) the right not to be arrested except according to procedure established by law and only upon being informed of the reason for the arrest. A child who is charged is entitled to be heard in person or by an attorney at law at a fair trial by a competent court. Punishment can only be in accordance with

> procedures established by the law and a child, like any other person, will be presumed innocent but may be called upon to prove certain facts. A child moreover cannot be held guilty of an offence if at the time of the commission of the offence the act was not a criminal one unless such an act was a criminal one according to the general principles of law recognised by the community of nations (Art.10).

These Constitutional rights apply to all children irrespective of their citizenship. It should be noted, however, that the rights guaranteed in the Constitution are subject to Article 15(7) restrictions. (See also the chapter on Legal Background).

The provisions in the Convention, dealing as they do specifically with children, qualify and amplify these rights in some measure. Thus Article 14 of the Convention, while recognising that children have the right to freedom of thought, conscience, and religion, recognises that parents have a role to play in directing the child in the exercise of these rights. The Convention recognises the value of parental direction, provided that such direction is exercised in a manner consistent with the evolving capacity of the child. Article 30 of the Convention articulates the important principle that children of minority communities should have the right to enjoy their own religion and language. (See also UN Declaration on Minorities).

In relation to violations by children of a country's penal laws and in relation to punishments the Convention incorporates the premise that no child shall be subjected to torture, cruel treatment and punishment. Furthermore, capital punishment and life imprisonment without the possibility of release is not countenanced by the Convention (Article 37). Arrest, detention and imprisonment must be in conformity with

the law, and in terms of the Convention be used only as a measure of last resort. Children deprived of their liberty must, except when it is not in accordance with their best interest, be kept separate from adults and must also be permitted to maintain contact with their families except in exceptional circumstances.

Quite apart from the rights accorded in the Sri Lankan Constitution to all 'persons' certain other rights are available only to 'citizens'. Children who are citizens then additionally have the right:

(1) to freedom of speech and expression (Art.14(1)(a));
(2) to freedom of peaceful assembly (Art.14(1)(b));
(3) to freedom of association (Art.14(1)(c));
(4) to freedom to practice their religion in public and private ((Art.14(1)(e));
(5) to freedom to enjoy and practice their culture and to use their own language(Art.14(1)(f))

These rights also find expression in the Articles in the Convention. As in relation to the 'core' rights identified earlier the Articles in the Convention are more explicit. Thus, freedom of expression in terms of the Convention includes the freedom to seek, receive and impart information and ideas regardless of frontiers, either orally or in writing or in print, in the form of art or any other media of the child's choice (Article 13). In relation to cultural rights, children of minority communities find special mention in the Convention. The state is expected to allow those who belong to minority, ethnic, religious or linguistic groups to enjoy such rights in community with other members of such groups (Article 30).

Distinguishing between children who are citizens and children who are

not citizens, and according greater rights to those who are citizens, is a feature of the Sri Lankan Constitution. This type of classification of children into two groups based on citizenship is not in keeping with the Convention. Article 2 of the Convention specifically states that all rights in the Convention should apply to all children within the jurisdiction of the state without discrimination of any kind including discrimination based on birth and status.

(vi) Rights in family law

In this section the rights a child has in family law are discussed, in particular children's rights vis à vis parents when the latter fail to discharge the responsibility which attaches to parenthood.

(a) concept of joint responsibility

Under the terms of Article 18 of the Convention parents have common responsibilities for the upbringing and development of the child. Where appropriate, the state is required to render assistance to parents and legal guardians in the performance of their child-rearing responsibilities. The state, moreover, is required to take all appropriate measures to ensure that working parents have the right to benefit from child care services and facilities (Article 18).

The concept of joint parental responsibility is inadequately developed in Sri Lankan law. Under the general law, in the case of a legitimate child, it is the father who has the decisive say in all matters relating to the child. As natural guardian of the child, it is he who decides on the religious and secular education of the child and who the child may associate with. The father administers the property of the child and assists the child to contract and litigate. The mother's responsibilities

by contrast come into being only when the father is dead or incapacitated.

The illegitimate child under the general law stands in sharp contrast to the legitimate child. It is the child's mother who is recognised by the law as the natural guardian, and all those rights exercised by the father in relation to the legitimate child are vested in the mother in the case of the illegitimate child. The legal system does not recognise the father as having any role to play in relation to the illegitimate child. Where questions relating to access and custody arise, recent interpretations of the common law principles reveal that a father of an illegitimate child must adduce strong and compelling reasons for custody and access (B V. P 1991(4) SA 113 (T); B V. S 1993(2) SA 211(W); S V. S 1993(2) SA 200(W)).

Thus the concept of joint parental responsibility is not reflected in the general law. Nor are there clear principles in the indigenous laws to this effect (in Sri Lanka special laws relating to family matters for particular groups prevail in addition to the general law of the land (on this see further the chapter on Women's Rights). Sri Lanka then, if it is to honour its international commitments needs to introduce legislation to encourage joint parenting.

(b) the evolving capacity of the child

The Convention stresses the need to take cognisance of the evolving capacity of the child in relation to decisions affecting her/him. This concept of the participation of the child in the process of decision making is inadequately developed in the law of Sri Lanka. The general law recognises that majority can be accelerated in certain circumstances. The notion of providing direction in a manner

consistent with the evolving capacity of the child is conceptually different.

The indigenous laws have rudimentary concepts of differing ages of majority for different purposes and to that extent the seeds of this concept are to be found in domestic jurisprudence. Nevertheless, legislative changes will be necessary if this concept is to become meaningful.

(c) support

The parental duty of support, and a child's right to receive support, is firmly entrenched in both the general law and in the special laws of the country. The Convention recognises that, whilst the primary obligation of support is on the parents, the state also may be obliged to take measures to assist parents and others responsible for the child to discharge this obligation (Article 27).

One unsatisfactory feature of Sri Lankan law is that it reflects the premise that the primary obligation of support is on the father. This is contrary to the Convention which clearly imposes the duty of support on both parents (Article 27).

Another unsatisfactory feature of Sri Lankan Law is the vesting of magistrate's courts, which mainly exercise a criminal jurisdiction, with the function of enforcing maintenance obligations. The justification appears to be that of the speedy disposal of such claims. Nevertheless, there is much to be said for the view that litigation of this nature should not take place in a court which has predominantly criminal functions.

(d) interference with privacy

The Convention gives children the right to protection from interference with privacy (Article 16). Whilst the general law may give the child redress in terms of an action under the actio injuriarum, the lack of locus standi in a court would prevent her/him from seeking redress unless the right of privacy is infringed by someone other than a parent or legal guardian. The parent or guardian can then come to the assistance of the child as next friend or guardian.

The more likely situation - that of infringement of privacy by a parent - is not adequately catered for. Sri Lankan law does not have a system of providing legal representation for a child, or of conferring locus standi in these circumstances.

(e) adoption

Adoption was unknown to the Roman-Dutch Law. The general law of adoption is entirely statutory. Two of the special laws: the Tesavalamai and the Kandyan Law, recognised adoption as a means of augmenting the family. The provisions in the Tesavalamai Code (No.18 of 1806) relating to adoption appear to have fallen into disuse. On the other hand, the principles underlying the Kandyan Law of adoption have found statutory recognition. The modern statute attempts to equate the adopted child with the natural child (Kandyan Law Declaration and Amendment Ordinance No.39 of 1938, Section 7).

The general principle governing all adoptions, whether under the special laws or the general law is that an adoption, if made, must be for the welfare of the child (Adoption of Children Ordinance No.24

of 1941, Section 4(b)). This principle is fundamental and is in keeping with Article 21 of the Convention.

The Convention spells out that inter-country adoptions should enjoy the same safeguards and standards equivalent to those existing in relation to local adoptions. Sri Lanka's recent legislative efforts concentrate on inter-country adoptions, and the tendency has been to regulate foreign adoptions fairly stringently, whilst not perhaps updating the laws relating to local adoptions.

In the realm of family law, the Sri Lankan law is most developed in what one would loosely call the traditional areas of family law, namely: custody; support; representing the child in court, and the administration of property. The concepts of joint parental responsibility, the evolving capacity of the child and the right of privacy are inadequately developed. Sri Lanka's ratification of the Convention brings a new focus into family law. New concepts and idealogies will have to find their way into the domestic law even though they may be culturally alien, or perceived of as being culturally alien, to Sri Lankans.

(vii) Rights of the abused child

Under section 34 of the Children and Young Persons Ordinance (No.48 of 1939) a magistrate is empowered to deal with a child 'in need of care and protection' where the child has no parent or guardian, or a parent or guardian unfit to exercise care and guardianship. Furthermore, if the child is to be declared to be in 'need of care', s/he must be falling into bad associations, or exposed to moral danger, or beyond control.

Children in respect of whom specific offences have been committed, and those who live in the same household as a child against whom such an offence has been committed, also fall into the category of children in need of care (Ibid, section 34(1)(b)). Other children falling into this category are female children who live in a household where there has been cohabitation between 2 members of the household in breach of the prohibitions imposed by the Marriage Registration Ordinance in relation to cohabitation between persons too closely related (Ibid).

Section 77 of the Ordinance imposes a fine on a person who habitually wanders from place to place with a child (note: this section has not been brought into operation). The Ordinance also envisages a child against whom an offence has been committed under section 77 as a child in need of care or protection. Once a child has been found to be in need of care and protection, a magistrate may order her/him to be sent to an approved or certified school or, if the child has reached the age of 12 years, commit him to the care of any fit person whether such a person be a relative or not. A magistrate may also order a parent to enter into recognisance to exercise proper care, and place the child under the supervision of a probation officer for a specified period, not exceeding 3 years, either in conjunction with, or without, any other order (Section 35(1)).

There is also a more general provision which makes it an offence for any custodian to abuse or ill treat a child (Section 71). This section however, has not been brought into operation despite the many years that have elapsed since its enactment.

More serious forms of child abuse and sexual offences are dealt with in the Penal Code (No.2 of 1883). The significant offences are: rape

(Section 363); carnal intercourse with young girls (Section 364(a)); unnatural offences (Section 365); assault (Section 345); grievous hurt (Section 311), and procuring a child for prostitution (Section 360A).

A recent report of the Technical Committee appointed to examine child abuse points out that retaining and expanding the sexual offences in the Penal Code will assist law enforcement and will also ensure that priority is given to the subject of sexual violence. The Committee points out that offences under other statutes are perceived of as less important statutory offences (Technical Committee, Report on Child Employment, p.1).

The present thinking is to redefine some of the existing offences and to introduce new offences into the Penal Code. The focus it seems will be on the offender rather than the child. It is important not to lose sight of the fact that a child against whom such an offence has been committed needs special follow up care. It is also clearly an area where preventive measures assume importance.

(viii) Rights of the illegally employed child

Sri Lanka has an array of laws relating to child labour. These stipulate varying minimum ages of employment depending on the nature of the work and the time during which a child can engage in such work. The Technical Committee in its recent report recommended a uniform minimum age irrespective of the nature of employment. They suggest the age of 15 years, which age is in keeping with ILO standards and those standards set out by international covenants (Technical Committee, Report on Child Employment, p.2). The raised minimum age of employment in the Committees' view should not apply in regard to recruitment for

vocational training and skills development.

Clearly the key to combating child labour lies in increasing awareness in society about the effects of child labour, and also in taking steps to eradicate the causes of child labour. Both these measures are long term measures. Sri Lanka should also make the enforcement of the existing law a priority. The Committee found that the Labour Department in general, and its Women's and Children's Bureau in particular, are under-staffed and lack the resources for monitoring and inspection. One of the recommendations made by the Committee is the establishment of a monitoring committee at the provincial level. Another is that not only the Commissioner of Labour as at present, but also the Department of Probation and Child Welfare and the police, should be empowered to inspect premises and to prosecute for violation of child employment regulations (Ibid, at p.4).

A valuable suggestion made by the Committee is that the law should focus on the victims of child employment and treat the child as the one who requires protection (at p.7). The Committee then recommends that the Children and Young Person's Ordinance should be amended to encompass protected persons. Here the emphasis should be on endeavouring to ensure that the child is returned to the parents, or placed in foster care or, as a last resort, institutionalised. The Committee stressed that institutionalisation in this instance should not be conceived of as similar to a placement of a child who is in conflict with the law (Idem).

Sri Lanka's ratification of the Convention on the Rights of the Child obligates a recognition in domestic law and practice that children have a right to be protected from work that threatens their health, education or physical, mental, spiritual, moral and social development (Article

32). The estimated figure of half a million children currently in employment in Sri Lanka requires a sustained and positive effort on the part of the government if it is to fulfil its international commitments.

(ix) Conclusion

Whilst Sri Lanka has a basic framework for the protection of children's rights, the institutions require strengthening if they are to be able to cope with new demands occasioned both by changed perceptions in child development and the current crisis in which Sri Lanka finds itself in terms of the numbers of children involved in armed conflicts and labour. Implementation of the existing law, and a conscious and sustained initiative in law reform appears imperative if the rights embodied in the Convention are to become a reality for the Sri Lankan child.

CHAPTER 8

DISPLACEMENT AND THE RIGHT TO REMAIN

I. THE INTERNALLY DISPLACED

(i) Introduction

The displacement and dislocation of large groups of Sri Lankans has been one of the most acute humanitarian and human rights problems of this decade. In a phenomenon mirrored globally, thousands of Sri Lankans have been uprooted and forced to flee their homes. Some have fled to other countries, others have moved within Sri Lanka. The first section of this chapter discusses the internally displaced, those fleeing overseas are discussed in the second section. The major cause of flight, whether internal or external, has been the conflict between the Sri Lankan government and Tamil guerrillas fighting for an independent Tamil homeland in the northern and eastern parts of the country.

(a) visits and reports by external bodies

Two international non-governmental teams visited Sri Lanka in 1993 to investigate and report on the internally displaced and refugees: Asia Watch and the US Committee for Refugees (USCR). These groups met with government and NGO representatives and also visited welfare centres and interviewed some of the displaced.

Asia Watch released its report on 11 August 1993, entitled: Halt Repatriation of Sri Lankan Tamils (Asia Watch, Vol. 5, Issue 11). The USCR report, People Want Peace: Repatriation and Reintegration in War Torn Sri Lanka, was released in early 1994. It is a sequel to the earlier USCR report on Sri Lanka, Sri Lanka: Island of Refugees, released in October 1991.

These reports, together with interviews with involved NGO representatives, and other NGO reports, are relied on for much of the information in this chapter. As well as other sources, UN and governmental are used extensively.

One of the most important sources has been the work of Dr. Francis Deng, UN Special Representative on Internally Displaced Persons, who visited Sri Lanka in November 1993 (10-17 Nov.) at the invitation of the Sri Lankan government, following a refusal by the government earlier in the year to invite the Special Representative in his official capacity.

Dr. Deng visited refugee camps in the Colombo, Puttalam, Anuradhapura, Trincomalee, Amparai and Batticaloa districts. He also met with NGO and government officials. A statement issued by the UN Information Centre after the visit (a statement that none of the mainstream newspapers carried) stated:

> Dr. Deng told the ministers that during his field visits he had been impressed by the commitment of the Sri Lankan government in providing food and other facilities to the displaced persons, despite limited resources and other logistical difficulties. However the continuing conflict was a major impediment to this process. He also noted that for some of the displaced, there appeared to be

> limited prospects of them returning home while the conflict continued. Dr. Deng said that his understanding was that the problems of the internally displaced could only finally be solved with the elimination of the root causes of displacement...In the absence of a political settlement, however, Dr. Deng observed that resettlement of displaced persons was a very delicate process, requiring sensitivity on the part of all concerned; it was not a process that could be forced or hurried.

The Special Representative's Report on Sri Lanka was released as an annexure to his report submitted to the 50th Session of the Commission on Human Rights held in Geneva in February and March 1994 (E/CN.4/1994/44/Add.1 25/1/1994, F. Deng, Profiles in Displacement: Sri Lanka, submitted pursuant to the Commission on Human Rights Resolution 1993/94, hereinafter referred to as the Deng Sri Lanka Report). In it he observed:

> From the point of view of protection of human rights, the Representative was able to establish that, at least in Sri Lanka, the displaced are more vulnerable than the rest of the population in certain ways: they may be forcibly resettled; more readily subjected to round ups, arbitrary detentions or arrests; deprived of their dry rations or more frequently unable to get jobs. Those not displaced have been identified as being more self-reliant and more resilient to the destructive impacts of the conflict (para.135).

The Representative concluded:

> Unless a political solution to the conflict is found, there can be little hope either of ending the conflict or of solving the problem of internal displacement...it is time that the parties to the conflict

should balance carefully their considerations for continuing the war and for jeopardising the welfare of the people of Sri Lanka (para.146).

(b) the numbers of displaced persons

The exact number of those displaced is not clear. Not very long ago it was estimated that over 1.1 million people were displaced as a result of the conflict (USCR Report, 1991, pp.2,18), a huge figure for a country with a population of approximately 17 million. However the figure has now dropped somewhat. Sri Lankan government statistics released in November 1993 put the number at a little under 600,000 (Deng, Profiles Sri Lanka Report).

The state bases its statistics on those receiving assistance. All those displaced may not be receiving government assistance and it is also likely that some of those who are receiving assistance do not fall within the government's criteria of displaced. Further, as government assistance is provided on the basis of figures provided by local government officials, questions have been raised as to the accuracy of these figures for the LTTE controlled areas, since it is in the LTTE's interests to maximize the amount of commodities flowing into areas that they control.

A large number of the displaced are living with friends or relatives. Others are living in state supported camps referred to as welfare centres. Almost the entire displaced population is dependent on the state for basic rations and other essential services. This includes the 300,000 odd persons in the LTTE controlled areas of the country.

(c) definition of "displaced persons"

In his report the Special Representative observes that in the Sri Lankan context it is very hard to reach a satisfactory and accurate definition of displaced persons, but notes that a large proportion of the internally displaced here can be easily identified by virtue of the fact that they are housed in special camps and that they have special needs for assistance and protection. He adds that while most of the people involved have fled the violent incidents of 1983 or 1990, others have left their homes 'less suddenly' but for equally compelling reasons (eg. military operations in a particular area, mines, etc.) (para.134).

In his 1993 report to the United Nations Commission on Human Rights he defined internally displaced persons as:

> persons who have been forced to flee their homes suddenly or unexpectedly in large numbers, as a result of armed conflict, internal strife, systematic violations of human rights or natural or man-made disasters; and who are within the territory of their own country (Deng Sri Lanka Report, para.132).

This definition however would not cover those persons 'constructively' displaced; that is those who may not be physically or geographically displaced, but who share the characteristics of the displaced. For example, people in the North who wish to flee the violence but are not allowed by the LTTE to leave would fall into the definition of 'constructively' displaced persons.

The internally displaced in Sri Lanka consist of five broad categories: (1) those displaced and living in camps; (2) those displaced and living outside camps; (3) those who are said to have been 'resettled' by the

state, but yet remain in camps; (4) those who have been resettled and are outside camps; and (5) those repatriated from India.

(ii) Rations

In a document dated 20 January 1994, giving figures as of 30 November 1993, the Ministry of Reconstruction, Rehabilitation and Social Welfare, one of the many state agencies involved with displaced persons, claimed that rations were being provided to 573,372 persons (145,241 families) located both within and outside welfare centres. According to Ministry statistics, 71,877 families (236,542 persons) live in the 493 welfare centres (often referred to as refugee camps), and 73,364 families (336,830 persons) live outside these centres.

The displaced are provided with coupons which enable them to purchase dry rations at the local co-operative shop on a sliding scale depending on family size. Rations usually consist of rice, dhal (lentils), green gram, coconut oil and sugar. Those living outside the camps obtain their coupons from the Additional Government Agents (local officials) (Deng Sri Lanka Report, para.55).

The World Food Programme (WFP) is also involved in the provision of food assistance in 6 of the country's 25 administrative districts. WFP assistance is provided to approximately 55,000 persons in 162 centres in the districts of Colombo, Puttalam, Anuradhapura, Kurunegala, Polonnaruwa and Matale (WFP document).

The government also provides food to the LTTE controlled areas. The ICRC, other international organisations, and local NGOs assist with its transportation and distribution. People sometimes sell the rations they receive from the state in order to purchase other items

such as vegetables. In an interview, a relief official noted that in terms of calories the food provided is clearly insufficient, but he observed that there does not appear to be a serious malnutrition problem among the displaced. He was of the view that most of the displaced appear to be supplementing their rations through other means. These views were collaborated by a representative of another NGO working with displaced persons. Francis Deng observes that in practice the local Commanders have a great deal of discretionary power over the relief which is actually provided (para.66).

(iii) Camp conditions

Most social workers and other observers acknowledge that the state is doing a commendable job with regard to the distribution of food rations, but they all agree that camp conditions could be improved. The UN Special Representative commented that the living conditions in many of the welfare centres "left something to be desired", although he noted that he did appreciate the paucity of resources and lack of space (press statement released by the UN Information Centre after Deng's departure and see also Sri Lanka Report, paras.57-59).

Some camps - like the Clappenburg camp in Trincomalee - have become notorious for their sub-human conditions (see USCR, People Want Peace, p.11-12).

Inadequate facilities and a scarcity of drinking water have been identified as particular problems in camps (Deng Sri Lanka Report, para.60). Camp conditions vary. Returnees from South India, for example, who are often initially moved into transit camps, have access to better conditions. So do some internally displaced persons. However, returnees who are housed in the Clappenburg camp in

Trincomalee suffer the same abominable conditions as the internally displaced in those camps. In the Puttalam district some of the camps are relatively better off and certainly better than some of the Colombo camps.

In one particular camp, thanks to the philanthropy of a local benefactor, land has been granted for housing Muslim persons displaced from the district of Mannar. These people have constructed small huts, some even own televisions and motor cycles. Many of the camps in the Puttalam district are reported to be relatively spacious. The UNHCR administered camps including the Open Relief Centres (ORCs) are also relatively better off.

(iv) The cost of relief

The state provides relief to internally displaced persons and refugees who have returned. The provision of relief and rehabilitation is co-ordinated by the Ministry of Reconstruction, Rehabilitation and Social Welfare. The Ministry reports that up to the end of 1992 a sum of approximately US$319 million had been spent by the government on resettlement, reconstruction and relief for the displaced.

In 1992 the state spent Rs.1,953 million (approx. US $40.7 million) on relief. Of that sum Rs.1,844 million (US $34.8 million) went towards the cost of food, including the costs of transporting and distributing it (USCR, p.11).

A sum of Rs.1,669 million (US $34.8 million) was spent on what is referred to as 'rehabilitation and reconstruction'. This includes the allowances paid to the internally displaced persons to return and 're-settle' in their home areas. In 1992 the government spent in total a

sum of Rs.3,623 million (US $75.5 million) on the 'relief and rehabilitation' of internally displaced persons and returnees. Figures for 1993 were not available at the time this report was being written.

The disbursement of payments has been complicated by the confusion that exists in the local government structure. The local government system underwent something of an overhaul with the replacement of the Government Agent system with the system of Divisional Secretaries. However there is still confusion about the exact limits and functions of these officials. The state also is in the throes of a severe liquidity crisis. While funds have been allocated government agencies have had difficulties in physically procuring the money from the Treasury (Deng Sri Lanka Report, para.68).

Francis Deng observes that so long as the displacement persists, assistance to the displaced population, food rations being the absolute minimum, will continue to be urgently needed. He notes also that other services, such as the quality of shelter need to be improved (para. 147).

(v) Corruption

People make money out of all wars and Sri Lanka's ethnic conflict is no exception. One of the strong incentives for prolonging the conflict is the monetary benefit that such conflicts bring. Relief workers observe that corruption exists at all levels. A particularly lucrative point is the distribution of food. Food meant for the displaced can fail to reach those who need it, in certain instances it is siphoned off even before it leaves Colombo.

The US Committee for Refugees in its report observes that corruption

is rampant. Further, stories of corruption are supported by the Jaffna University Teachers for Human Rights in their reports. Yet charges of corruption are hard to prove.

In August 1993 the Ministry of Rehabilitation, Reconstruction and Social Welfare detected a major fraud with regard to the transport of food items to the North. The first estimates said the amount defrauded could be more than Rs.100 million. The state had been paying for food that never left warehouses in Colombo. Investigations by the Criminal Investigation Department (CID) revealed that the fraud may have been going on for as long as 2 years (Inform Situation Report, August 1993). The results of the investigations launched have yet to be made public. The delay has led to speculation that there is involvement at very senior levels.

The Northern Peninsula has been subject to an economic blockade by the Sri Lankan government for some time. Several items have been declared as 'banned' items on the ground that they could be used by the LTTE in their battle with the state. These include some medical supplies, fuel and lubricants with the exception of kerosene.

Food and other basic necessities are sent in by the government either by road convoy or by sea. The ICRC has been involved in escorting food convoys to the North, by both road and sea. (For a discussion of conditions in the North and East see also the chapter on the North-East war).

There are considerable inefficiencies in the current system. Flour which is milled in Trincomalee on Sri Lanka's eastern coast, is transported to Colombo on the western coast, and re-shipped to Jaffna in the north past Trincomalee. Such arrangements serve to increase

the costs of providing relief with large profits often going to business people.

The government would no doubt do well to introduce an audit in relation to the funds allocated and spent on displaced persons. While this would involve a significant input of financial and human resources, it would identify loopholes in the existing system and assist in establishing accountability. A corresponding impact assessment of the funds spent would also be invaluable.

(vi) Women

The flight to refugee camps and the indefinite sojourn in these makeshift aboards has special impacts on women. The primary burden of ensuring that 'life goes on' has fallen on the women (S. Abeysekere, Displacement as Women Experience It: The Sri Lankan Case, paper presented at 'Displacement & Democracy', a meeting organised by the Legal Aid Centre, University of Colombo, August 1993, Colombo; and USCR Report). The woman's mental and physical health is severely affected as a result of fleeing her home; living and rearing her family in crowded refugee camps where mere survival is at the cost of a great deal of effort. Moreover, women specially suffer due to the lack of privacy and personal security in these camps. The only privacy each family can claim is what is created with old sarees and bed sheets.

Another consequence of the conflict has been the huge number of widows (USCR Report, p.12). A social worker from the Eastern Province recently noted that there were over 8000 widows in his district alone. While this may be an exaggeration, the number clearly is high. The USCR reports the Head of a women's NGO to estimate

that, as of 1990, before the fresh wave of violence erupted, there were over 4000 widows, and to estimate the figure to be much higher now. INFORM, in a report of August 1993, estimated that there are about 18,000 widows in the Batticaloa district alone.

Women have lost not only their husbands, but often their sons as well. Sometimes they do not even know whether their spouses or children are alive. They have simply disappeared (Deng Sri Lanka Report, para.64). Such women are specially vulnerable in refugee camps in terms of livelihood and personal security.

The government has in place a compensation programme for women who have lost their husbands or the sons who were supporting them. Women who have lost their spouse are paid Rs.50,000 (Approx. $1,040) and those who have lost a son are given Rs.25,000. However the application process is extremely complex, and a significant proportion of the women have opted not to apply (Ministry document and USCR Report collaborated by an NGO representative). It is reported that even if the women do apply, many are not successful in obtaining compensation.

For single parent families life is difficult. They need to secure an income while also coping with the responsibilities of raising children in a refugee camp where leaving children unattended poses numerous dangers (Deng Sri Lanka Report, para.64).

(vii) Rights to life, liberty and physical security

Mass arrests, disappearances, interrogation and physical attacks continued to occur in Sri Lanka in 1993. (See the section on personal integrity in the chapter on Civil and Political Rights.) The displaced

are particularly vulnerable to round ups, arbitrary detentions and arrests (Deng Sri Lanka Report paras.77, 135). Some women have also complained of rape (Ibid). Asia Watch reports that returnees in the Trincomalee district have complained of arbitrary arrests, abusive language, beatings, harassment and frequent round ups. The organisation provided examples of harassment and intimidation in Part V of the Asia Watch Report of 11 August 1993 hereinafter Asia Watch Report.

Returnees who wish to leave for villages in the LTTE controlled areas face the possibility of military attack. The army, air force and navy launch periodic and unpredictable attacks on LTTE controlled areas. These include aerial bombardment, shelling by the navy and sometimes armoured support by ground troops (Asia Watch Report, p.9).

The Working Group on Enforced or Involuntary Disappearances set up by the UN Commission on Human Rights, in its report presented before the 50th Session of the Commission (1994), reports that the displaced continue to be vulnerable 'to detention and disappearance' (UN Doc.E/CN.4/1994/26, para.440). The Working Group observes that it had received reports regarding the detention of 'hundreds of young Tamils' and that some have disappeared.

Displaced persons also face harassment from some pro-government Tamil groups. Asia Watch reported that many people had complained of harassment from groups such as Tamil Eelam Liberation Organisation (TELO), Eelam People's Democratic Party (EPDP) and (People's Liberation Organisation of Tamil Eelam) PLOTE. Any person who is suspected by these groups of being an LTTE sympathiser is liable to be harassed. Relief workers have also been

harassed by these groups (Asia Watch Report, p.10).

There have been frequent round ups of Tamils over the past few years (on this also see the chapter on Civil and Political Rights, section on personal integrity). Displaced persons in Colombo and the South have been frequently subjected to these.

In 1993 there were 2 major round ups. The first was in June following the assassinations of President Ranasinghe Premadasa and opposition political leader Lalith Athulathmudali. The second was in October. As a result, over 15,000 Tamils were arrested in Colombo area during the second half of 1993 (Sri Lanka: Balancing Human Rights and Security, Amnesty International, Feb. 1994). Groups of unidentified men went around in unmarked vehicles during the early hours of the morning in Colombo, picking up Tamil youth and sometimes even elderly Tamils. Most of those arrested were detained for about 3 days and then released. The detention was usually in a police station with dozens often packed into small rooms. Toilet and sanitary facilities were often atrocious.

These round ups, especially the ones in October, are disturbing since they show that several of the structures, such as the para-military groups, which existed during the JVP time of 1989/90 still do exist or can be called up at short notice.

Displaced persons in Colombo are subject to appalling camp conditions and also to the strong possibility of being harassed by the police and the security forces. Displaced persons were also subject to harassment from the EPDP who exercised control of camp security by authority of the government (see further, Asia Watch Report, pp.8-12).

Displaced persons have also been subject to abuses by the LTTE (Ibid, p.12). Asia Watch reports that in every district visited by the organisation there was a 'palpable' fear of being overheard complaining of LTTE abuses (Ibid, p.12-13). Asia Watch also documents instances of people disappearing as a result of not obeying LTTE "orders".

(viii) UNHCR and the Open Relief Centres

(a) how the ORCs came to be established

Despite the existence of over 25 million internally displaced persons globally, there is yet to be established a global agency to address the plight of these people.

The Statute of the UNHCR does not explicitly grant the office a mandate to deal with internally displaced persons. However, in Sri Lanka, the local UNHCR office has addressed some of their concerns. One of its responses has been the establishment of Open Relief Centres (ORCs). ORCs have been established at Madhu and Mannar Island and have been functioning from around September 1991 (USCR Report, 1991). Originally the Centres were conceived of as temporary shelters, and as an alternative to flight to India, but they have become home to a long staying displaced population.

UNHCR considers its ORCs as unique responses to a grave humanitarian problem, an example of preventive protection, offering a safe haven to the displaced so that they are not forced to flee the country (W.D. Clarence, Open Relief Centres: A Pragmatic Approach to Emergency Relief and Monitoring During Conflict in a Country of Origin, (1991) 3 International Journal of Refugee Law, p.322).

ORCs are neutral areas where both parties to the conflict have tacitly agreed to certain ground rules, including the rule that armed persons will not enter. They are viewed as temporary places of shelter where displaced persons on the move can freely enter or leave and obtain essential relief assistance in a relatively safe environment.

The ground rules, however, have been violated several times. The US Committee for Refugees in its recent report 'People want Peace' notes that in February 1993 the security forces fired at the Madhu ORC following an LTTE attack near the camp. In September 1992 the LTTE cadres openly carried arms within the Centre. The US Committee also refers to an incident where 3 people from the Pesalai camp were arrested by the local police and are still reported missing. The police have denied arresting them (p.13).

(b) the ORC at Madhu

The Open Relief Centre at Madhu is located on the sprawling ground of a Catholic Church, earlier known for frequent pilgrimages by the Catholics and members of other religious denominations. It is located in the Mannar District, west of Vavuniya, and is currently part of LTTE controlled territory. There are 2 camps, 1 at the Madhu shrine and another at Palampiddi about 10 km north of the Madhu shrine. The ORC has a population of a little over 30,000. This includes returnees from India as well as the internally displaced. The Madhu camp often serves as a base for the displaced. Several of the displaced shuttle between their villages north of the ORC and the Madhu Camp.

The security forces have, by and large, respected the neutrality of the ORC. Though there has been bombing in the vicinity, the ORC itself has not been bombed. Similarly, until 1992 the LTTE had respected

this neutrality. However, beginning around September 1992, the LTTE attitude began to change - LTTE members began entering the camp in uniform, they set up an information centre and flew the LTTE flag. Towards the end of 1992 the UNHCR threatened to pull out of Madhu. The LTTE then agreed to bide by the ground rules, which included the prohibition of any armed presence in the camp. One of the factors which induced the LTTE to agree was that the LTTE was negotiating with the state to re-open the Sangupiddy Causeway and needed the UNHCR to mediate (Asia Watch Report, collaborated by UNHCR).

The Sri Lankan government and the LTTE engaged in a duel of sorts at the ORC in Madhu in 1993. In August 1993 the State cut off rations to about 5,700 persons who originated from the government controlled part of the district of Vavuniya, in the Madhu ORC. The government's argument was that these people should resettle. Earlier, several displaced persons from Vavuniya had asked the UNHCR to assist them move to government controlled parts of the district, but the LTTE had refused to allow people to move even though the government had already allowed some displaced persons to return to LTTE controlled areas (see eg. USCR Report, p.13).

The residents of the Madhu ORC staged 6 demonstrations between mid-August and the end of October, culminating in a demonstration on 30 October when a UNHCR vehicle was damaged. Observers acknowledge that such demonstrations would not have been possible without LTTE approval and some even say LTTE instigation (USCR Report p.13). On 4th November, the UNHCR suspended operations at Madhu observing that the organisation was no longer able to carry out its humanitarian mandate without putting the security of its staff at risk (UNHCR Press Statement, 10 Nov. 1993).

The government continued to supply food to the residents, although sanitary and other conditions deteriorated sharply. (Negotiations conducted in the early part of 1994 between the UNHCR and LTTE however paved the way for a resumption of UNHCR work at Madhu and on 20 February 1994 the UNHCR recommenced its activities there).

(ix) Resettlement

The resettlement of displaced persons is intrinsic to any response to displacement. As in the case of refugees, there are 3 possible solutions: (1) return to the original place of residence; (2) integration with the local community in the area to which they have fled; or (3) resettlement in a third area.

Spontaneous resettlement of the displaced person in his or her original place of residence is the best indication that a state of normalcy has returned.

Resettlement promoted by third parties should take place only in conditions which favour return, the factors which originally motivated persons to flee should have been removed, and the displaced persons should be able to return to a secure environment in which they are able to restart life in an undisturbed manner.

The government's approach to resettlement is disconcerting. The government has been intensifying efforts at resettlement since 1992 in an endeavour to project a picture of normalcy, and resettlement efforts have intensified despite continued conflict and conditions not conducive to resettlement. There has been enormous pressure on the displaced to resettle (see, eg. Deng Sri Lanka Report, pp.21-23).

The government approach has been to declare certain areas as 'cleared areas'. The Ministry determines whether an area is appropriate for resettlement. The determination is made on receiving an assurance from the security forces that the area has been 'cleared' (Deng Sri Lanka Report, p.21). However most NGO workers are of the view that although many of the areas are labelled as 'cleared' by the state most of them are not fit for resettlement.

The Sri Lankan forces have been actively encouraging resettlement into these 'cleared' areas, and displaced people are often told that it is safe for them to go home. Asia Watch reported conversations it had with Sri Lankan government officials who stated that, although they could not force people to go back, they are attempting to 'persuade' as many people as possible to return.

Asia Watch in its report observes that both the Sri Lankan armed forces and the LTTE have evinced great interest in the resettlement process. Civilian populations provide a possible bulwark against large scale assaults by the opposite side and both sides favour large scale resettlement. Francis Deng observes that there have been allegations that the army is using civilian villages as human shields (para.73).

Camp life can only be a transitory or temporary phase. It tends, over a period of time, to breed a sense of dependency. The value of moving people back to their homes cannot be denied, but it needs to be done in a way which enables the displaced to rebuild their lives and to reintegrate with their communities. It should not be motivated by narrow and parochial political objectives.

A vital aspect of any programme of resettlement is the participation of the refugees in the process. However, the resettlement process

initiated by the Sri Lankan government has been carried out in some places despite opposition from NGOs (Inform Reports, and Deng Sri Lanka Report).

The government's resettlement programme (known officially as the Unified Assistance Scheme (UAS)) aims, through the provision of direct monetary grants and other indirect assistance, to assist internally displaced persons to re-establish their lives in their home areas.

Under the Unified Assistance Scheme grants are made for the following purposes:

> Rs.2,000 per family for resettlement;
> Rs.4,000 per family with a monthly income below 2,500 for recommencement of economic activities;
> Rs.15,000 per family with a monthly income of 1,500 for the repair/reconstruction of damaged shelter (those with an income of between Rs.700 and 1,500 are entitled to a further loan of Rs.15,000).

Loans up to Rs.250,000 at concessionary interest rates are also available in certain circumstances - to repair damaged houses and for 'economic enterprises'.

According to government statistics the state allocated a sum of Rs.2,361 million (approx. US $47 million) in 1993 for resettlement and reconstruction. In 1994 a sum of Rs.1,887 million (approx. US $38 million) has been allocated.

Food rations are given by the state for 3 months to those families who resettle. This may be extended to 6 months. Dr. Deng observed that

a 'consistent grievance' was that the financial assistance that was promised, was not provided. While food rations continued to be provided, the settling in allowance, the fund for reconstructing houses, and the productive enterprise grant was frequently not forthcoming (para.91, p.23). The Special Representative also records that, in the Trincomalee district, although 32,062 families were eligible for settling in assistance, 21,627 were yet to receive this grant (Ibid).

Funds for resettlement assistance come from the Treasury, and the money is channelled through local officials known as Divisional Secretaries. Other government agencies are also involved in the programme. For example, the National Housing Authority is involved in matters related to housing. The involvement of several state agencies, together with acute cash flow problems in the Treasury, has not infrequently resulted in grants and allowances being delayed.

In 1993 the Ministry of Reconstruction, Rehabilitation, and Social Welfare, issued a set of resettlement guide-lines. These were drafted in consultation with NGOs and other organisations working with displaced persons.

The guide-lines note that resettlement involves not merely the relocation of people to their original places of residence, but also requires the creation of a congenial environment to live without fear and the provision of necessary social and economic infrastructure for the resettlers to recommence their normal life with confidence.

The guide-lines also mention, as a key principle of the programme, the voluntary nature of return. Unfortunately, these goals have not been pursued with any degree of commitment and the resettlement programme of the state has gone ahead in blatant disregard of its

laudable re-settlement guide-lines. Francis Deng documents several interviews where the displaced expressed a 'clear reluctance' to go back (para.88). Yet he also observes that there were others who wished to return on being provided with financial assistance to do so (para.93).

(x) Closure of Colombo camps

In 1993 the government embarked on an accelerated mission to close the Colombo camps housing displaced persons and 3 of them were closed during the year. As of December 1993, 7 camps existed in Colombo.

Two major factors motivated the closures. The first was the desire to project an environment of normalcy. The second was the concern that the camps were a security risk, especially after the assassination of President Ranasinghe Premadasa and suspected LTTE involvement. There was an added dimension as well. Emergency regulations had been used to requisition buildings to house displaced persons. These regulations were not renewed in 1993 and thus it became possible for the owners of some of these buildings to take the government to court to re-take possession.

In early June residents of the Vivekananda Camp in Kotahena, who had been there since 1991, were told by the Department of Social Service that the camp was to be closed on 16th June and that they were to leave by that date. People from the Batticaloa area would be provided with transport to enable them to return to their home towns. The residents protested. An attempt to close the camp on 16th June failed. However at 3 a.m. on 30th June buses escorted by security forces arrived. Families who were not from Batticaloa were sent to

other welfare centres in Colombo. Those from Batticaloa were placed on the buses, often forcibly.

On 30th July, another camp located in Colombo, the Mannikar Pillayar Kovil Camp, was closed. Residents who were not from Batticaloa were transferred to other welfare centres in Colombo. The camp was located within the premises of a Hindu temple and the reason given for the closure was that the Temple Trustees wanted the premises back so they could conduct the annual 'Vel' festival (a Hindu religious festival).

The US Committee for Refugees notes in its report that it visited another camp in Colombo at Modera and spoke to some former residents from the Mannikar Pillayar camp who had gone to Batticaloa, but then returned to Colombo. INFORM corroborates this information. Several residents of the Modera camp told the USCR that they feared to go back to Batticaloa.

The Modera camp was closed in October. Prior to its closure the camp was visited by police who took into custody about 90 men between the ages of 18 and 40 on the grounds that they had links with the LTTE, 4 were detained but the rest were released the next day. This was viewed by some as a method of pressurising the refugees to leave (Inform Reports). Officials from the Department of Social Services visited the camp several times to inform the residents of the imminent closure and to make initial payments of Rs.2000 per family. Most of the 148 families refused to accept the payments and indicated to the officials that they were not prepared to leave (Inform Reports).

(xi) Closure of Colombo camps: one specific instance

This section details at some length the processes leading to the closure of one of the Colombo camps in 1993. The detail shows the vulnerability of displaced persons and their lack of participation in decisions which affect their lives. These accounts are based almost entirely, though not exclusively, on reports prepared by the human rights group INFORM (Inform Special Reports on the Closure of the Camps) and supplemented by information from the Asia Watch Report of 11 August 1993, especially on the military operations in the East.

On 10th June officials from the Department of Social Services informed residents of the Vivekananda camp that the camp would be closed on 16th June and that the residents would be relocated in Batticaloa, which was declared a safe and 'cleared' area. Yet, on the same day (10th June) the Sri Lankan security forces launched a massive 'search and destroy' operation against the LTTE, code named 'Muhudu Sulang' (Sea Breeze). The operation involved 3,000 ground troops assisted by the air force and Sri Lankan navy (Asia Watch).

At this point there were 348 persons from 109 families registered as residents of the camp. It had been in operation since late 1991 and was administered by the Department of Social Services in Colombo. Many of the families housed in the Vivekananda Hall felt extremely insecure about returning to Batticaloa, and on 11th June 46 heads of household signed a letter to the Director of Social Services asking for a reconsideration of the government decision.

On the evening of 15th June an official of the Social Services Department informed the residents that there would be buses arriving on the morning of the 16th to take them away. He also informed the

residents that the Department would discontinue the supply of food and the provision of all other facilities to the camp from the morning of the 16th. The residents in the camp reported that the official had told them that 'the premises would be sealed'.

On 16th June at 6 a.m., 15 buses came to the camp to take the people back to Batticaloa. The residents refused to go. A police truck was parked near the camp. So was an army truck. Some members of the army entered the camp.

Representatives from several NGOs were present and talked with the army officer. The member of the Eelam People's Democratic Party (EPDP) who had been in charge of the security and discipline in the camp, also came to the camp. (The EPDP used to be one of the groups waging war against the state. After the 1987 Indo-Lanka Accord this group, together with some other militant groups, entered the mainstream. Later on they were co-opted by the state in its battle against the LTTE. The EPDP had been put in charge of security at the Colombo camps.) This EPDP member asked the refugees whether they wanted to leave. According to some observers, those who indicated a willingness to go were supporters of the EPDP.

On seeing that there was dissent in the camp regarding the trip, the officials from the Department of Social Services sent the buses back to the Department, and left themselves.

There was now an atmosphere of tension and uncertainty within the camp. The people had not received any food during the day. Some unknown people arrived and distributed packets of lunch to the residents. By this time, the residents had announced they would launch a fast until their problems were resolved so they did not accept

the food. Only the smaller children and sick or elderly persons were permitted to accept the food parcels. Part of the reason for this reluctance to accept food was that it was suspected to be from the EPDP. Later it transpired that the donation of food had been from some well-wishers in the Kotahena area.

On 17th June, several members of the EPDP came to the camp. They promised to arrange for the supply of food and brought lunch for the camp residents but only a few adults and the children ate it. People continued to be suspicious of these food donations, feeling that they may be from the EPDP, or the Department of Social Services, and that it may be some form of a trick to get them to agree to return to Batticaloa.

During this time, several confrontations broke out between EPDP supporters and others in the camp. This situation led to the formation of small groups. Those who were openly opposing the EPDP refused the food that was being brought into the camp and cooked their own food. On the night of 17th June, a pregnant woman fainted and had to be hospitalised. A decision was then taken to call off the hunger strike. By 18th June the number of families who had volunteered to go to Batticaloa remained low, about 15 or 20 families.

On 20th June, the army had announced to the press that it had cleared the main centres of Batticaloa of LTTE elements. It called upon all Tamils and Muslims who had fled the Batticaloa area, especially those from the Batticaloa and Amparai districts to return and set up home in those areas. On 24th June the Department of Social Services announced that the camp would be closed on 30th June.

At 3 a.m. on the morning of 30th June, buses were once more brought

to the camp. Members of the security forces, both army and police, members of the EPDP and officials of the Department of Social Services were present on this occasion.

38 families who had indicated their willingness to be re-settled in Batticaloa were first put on the buses. At this stage 7 families consisting of 21 persons who were from Districts other than Batticaloa, were sent to the Modera camp, also in Colombo. A further 40 families, who were from Batticaloa District but who maintained that they did not want to go back, were then asked to get on to the buses. They were told that they would be taken to the Crow Island camp, but did not believe this, thinking it was said to get them on to the buses to be forcibly sent back to Batticaloa.

The police seized the bags belonging to these people and threw them onto the buses. Some people got into the buses to collect their belongings, others who had remained outside were pushed into the buses. Some people were assaulted in the process. The Director of Social Services is reported to have said "You can't say anything. Just get on to the bus" (Inform Report).

At 6.30 a.m. the buses left Kotahena. The people who had not wanted to go to Batticaloa were not taken to the Crow Island camp, nor were they taken to the Modera camp. When a check was made at the Modera camp at about 8.30 a.m. on 30th June, only 21 persons from the Vivekananda camp who were from outside Batticaloa had been brought there.

On 1st July, officials at the Department of Social Services reported that 6 families from the Vavuniya District who had been resident at Vivekananda camp had been sent back to Vavuniya on the afternoon

train of 30th June. 27 persons were reported to have been relocated at the Modera camp. 23 families were reported 'missing'.

The Veerakesari (a Tamil daily newspaper) of 30th June reported that, at a meeting held at the Divisional Secretariat in Batticaloa, parties active in the Batticaloa District had requested that the resettlement process should commence only when the safety and security of the persons involved could be guaranteed. The report also said that accommodation for the resettlers had been constructed at Navalady, near Batticaloa town.

On the 1st July, reports came in from Batticaloa to the effect that the buses containing the people from the Vivekananda camp had reached there at 10.30 p.m. on the 30th June. The people were all taken to Navalady transit camp. There were 6 toilets, 1 well and no kitchen facilities for the 75 families, who were informed that they would be supplied with cooked food for the first 3 days.

On 5th July, several relief workers who had travelled from Colombo to investigate the situation reported that 195 persons from 59 families were crammed into 2 long huts built out of cadjan, with sand for the floor and a roof that did not keep out the slightest drizzle. The conditions were cramped and intolerable even to those who had survived 3 years of camp conditions at Vivekananda.

The well was situated about half a mile away from the camp. The main road is a 4 mile walk away and so is the local co-operative shop from which these people were asked to collect their rations.

The supply of cooked food was suspended on Friday 2nd July and each person was issued with a ration card worth Rs.11 per day with

which only rice, sugar and flour could be purchased. The cards were valid for 15 days. On Saturday 3rd July when the people from Navalady camp went to the ration shop, they were told that no instructions had been given for the issue of rations on these cards. It remained to well-wishers to provide the camp people with food for the 2 days of the week-end.

There was no school anywhere in the vicinity of the camp, which meant that students - even the youngest of them - would have a 6 mile walk each way, every day, if they were interested in continuing with their education.

The reason given for the decision to close the camp was that the Vivekananda Mission Society, which owned the premises on which the camp was located, was pressing the government to return its premises. NGO members involved in working in the camps in Colombo, however, were of the view that the closure was prompted by the government's desire to project an impression of normalcy.

On 5th July, officials of the Department of Social Services informed the residents of 2 more camps (situated at the Saraswathy Hall and the Pillayar Kovil in Bambalapitiya, Colombo 4) that they were to be closed and that all those from Batticaloa District would be sent back to Batticaloa between the 15th and 20th July 1993. The Manikkar Pillayar Kovil camp closed at the end of July. The camp at Saraswathi Hall however was not closed. Successful lobbying by NGOs, Tamil parliamentarians and others halted the closure. Another Colombo camp, the Modera camp, was closed in October. It was reported that most of these people were taken to Navalady transit camp in the Batticaloa district.

(xii) Resettlement in the Eastern Province

The Eastern province consists of 3 districts: Trincomalee; Batticaloa and Amparai. The government position is that much of the Eastern Province is in the hands of the state and that life has almost reached a state of normalcy here. The fact that local government elections were conducted reasonably smoothly have buoyed government claims. However not everyone agrees with this assessment.

Trincomalee town is a hive of activity during the day (Deng Sri Lanka Report, para.70) and the road from Colombo is open during daylight hours. There is frequent traffic from Colombo. North of Trincomalee, at the resort of Nilaveli, a hotel has reopened and has attracted tourists and other visitors.

In parts of the Batticaloa district there is frequent LTTE activity and the conditions in these areas are not fit for resettlement (USCR pp.6,7). The district once had a strong population of Muslims. Almost all of them left when battles broke out between the Tamils and Muslims in 1990. In August 1990 the LTTE attacked a mosque in the Batticaloa district. Many Muslims fled. They have been reluctant to return without convincing assurances of their safety.

The Amparai district is reported to be almost totally back in government control, and a large portion of the population which had been displaced has resettled there.

(xiii) Resettlement on Mannar Island

Mannar Island, on Sri Lanka's north western coast was declared a 'cleared' area in 1992 and fit for resettlement, despite its proximity to

LTTE controlled areas. The government promoted resettlement there through newspaper announcements and invited people to return. A free boat service was provided and some of the displaced began to go back.

However, on 13 April 1993 violence erupted on Mannar Island when the LTTE launched 4 separate attacks on police and army posts. The army retaliated by shelling the island for most of the night, there were several casualties.

(xiv) The resettlement of Muslims

Close to 100,000 Muslims have been evicted by the LTTE from the Northern Province. They were forced to flee in October 1990 when the LTTE 'ordered' them to vacate (Sri Lanka: Island of Refugees, USCR, pp. 25,28).

They have found refuge in camps in Puttalam, Colombo and other areas. In 1993 the state went ahead with a programme of resettling these Muslims in Panadura, a suburb south of Colombo. However the land earmarked for this purpose was found to be marshy and needed to be filled before any proper resettlement could begin. At the end of 1993 it was reported that some Muslims had been settled on this land.

(xv) Colonisation

The state resettlement programme has raised fears about colonisation. The fight for land, especially in the Northern and Eastern areas of the country, has been central to the ethnic conflict. Since independence successive governments have been accused of settling Sinhalese in the East with a view to altering the demographic balance. In response it

has been contended that the pressure for land in the South would inevitably lead to both state aided and voluntary migration of Sinhalese to undeveloped areas in the East. However, the issue has been a deeply contentious one which has bedeviled the relations between Sinhalese and Tamils.

There is now concern that the 'colonisation programme' is being continued under the guise of resettlement. This concern was articulated by the Jaffna University Teachers for Human Rights in their report of April 1993 entitled 'Land, Human Rights and the Eastern Predicament'. The Jaffna UTHR noted that:

> Under the guise of re-settlement the administration and the military are working fast to settle Sinhalese in a manner that would trap Tamils into insecure pockets. In the absence of Tamil representation, the laws of the land concerning property ownership, distribution of crown land and places of worship are being broken with impunity. Most of the activity is shrouded with secrecy. ... Lands vacated by Tamils owing to insecurity have been suddenly christened with Sinhalese names unknown to the general public (at pp.13,14).

The report goes on to document a number of cases of 'colonisation' and the 'renaming' of areas with Sinhalese names.

(xvi) The displaced and the right to work

This section is based on empirical studies carried out by law students and presented in 'The Internally Displaced: Their Right to Work', Legal Aid Centre, University of Colombo, December 1993.

Like education for children, employment is crucial for the displaced. Apart from generating much needed income, it introduces a semblance of normalcy into their lives, and assists in a creating a sense of independence.

Most of the displaced are unemployed and employment opportunities are limited. Some of the people, especially those from camps in Colombo, have found jobs as casual labourers and domestics. The unemployment rate among the displaced in the rural areas was higher. There is some indication that more women than men have found employment and that women are more willing to seek work than the men. It is also reported that city business people come to the camps in search of cheap labour. This was reported from the Crow Island camp in Colombo (Inform Reports). In one particular camp in Puttalam the displaced were said to be offering their labour at a cheaper rate than the local residents. This had caused some friction in the area (Deng, para.63).

In the Puttalam area a few NGOs have been providing training to displaced persons and the displaced have been involved in the manufacture of coir products, and have been working on onion, chillie and gherkin cultivations, poultry and prawn farms, and as domestics. Men are paid more than women.

Some of the displaced who had been serving as teachers have obtained employment at state run schools in the vicinity of the camp.

It is reported that displaced people have been required to provide free labour to the police (see Part V, Asia Watch report).

In his Report on Sri Lanka, Francis Deng observes that, given the

paucity of resources available to the state, income generation projects and the provision of employment opportunities should be placed high on the government's agenda (para.148). Many grievances revolve around the question of employment and there is a general lack of employment opportunities (para.63).

(xvii) Displaced people and rights to health and education

Medical facilities in most of the camps are almost non-existent. However the displaced do have access to government facilities in the vicinity and health care appears to be generally available (Deng, para. 61). Camp committees are generally not aware of available facilities nor how they could be accessed.

Organisations such as the Sri Lanka Red Cross are involved in providing mobile health clinics. Other groups like UNICEF and Rotary assist displaced persons with regard to health and education. Medecins Sans Frontiers, Oxfam, and Save the Children are also involved in the delivery of health care to the displaced.

UNICEF initiated a health consortium in 1990 and raised funds to provide health assistance to the displaced. Although donor support tapered off at the end of 1992, the consortium continued to function in 1993.

Some of the camps in Colombo have been visited by officials of the Family Planning Association on several occasions and some of the camp residents displayed awareness about both AIDS prevention and contraception.

Access to educational facilities is slightly better than access to health

facilities. Most displaced children do appear to have access to government schools. Dr. Deng notes that the current level of the provision of education is laudable and needs to be maintained (paras. 62,149).

Some of the camps have pre-schools, sometimes run by people from the camp. NGOs have also assisted with pre-schools and other educational facilities. UNICEF also assists with education and is involved in the provision of school kits to displaced children (Deng, para.117).

Some schools have afternoon classes especially for children from the camps. However tensions between the displaced children and the local children have been reported. In the Puttalam district, for example, tensions have developed because local people feel that too many resources are being spent on the displaced (The Internally Displaced: Their Right to Work, p.41).

Predictable activities, such as schooling, have been regarded as one of the most effective methods of helping children cope with the psycho-social traumas of displacement (Deng, para.117).

(xviii) The resettlement guide-lines

There are no international standards against which to evaluate the state policy on resettlement. However, as in the area of refugee law it could be assumed that a basic principle should be that the person should voluntarily agree to return to his or her hometown. It should also be a basic principle of any resettlement process that the factors which initially induced people to flee should have been removed. These principles are embodied in the state's own resettlement guide-

lines which were drawn up in consultation with NGOs working in the area.

However the current programme of resettlement is being carried out in disregard of these guide-lines. They call, for example, for consultation with the people concerned, as well as for guarantees of safety and security, and the provision of basic infrastructure and other facilities before resettlement begins.

As well (see next sub-section) government insistence on resettlement in conditions of conflict infringes a number of rights to which the government is committed under international law: the rights to freedom of movement and to choose a place of residence (Article 12 of the International Covenant on Civil and Political Rights (ICCPR) ratified by Sri Lanka in 1980). This insistence infringes also on principles of international humanitarian law, especially the right to protection that parties taking no active part in the hostilities have against violence to life and person (Common Article 3, the 4 Geneva Conventions of 12 August 1949).

Several NGOs, both local and international, have expressed concern about the current process of resettlement.

In interviews with the UN Special Representative government officials conceded that the potential for violence could not be excluded altogether in any area (Deng Sri Lanka Report, p.24 para.97). Noting that the resumption of hostilities may result in the displacement of those who have resettled, Francis Deng observes:

> The tragedy of any instance of sudden and violent displacement is so overwhelming that all measures should always be taken in order

> to exclude the possibility that it might occur. Therefore, it would seem that unless peace is restored, the process of return to one's home area is doomed to be precarious (Deng Sri Lanka Report, p.30, para.125).

Francis Deng lists several factors which should form a part of resettlement policy. These include: not allowing camp conditions to become so perilous or dehumanising that the displaced prefer the fear of being persecuted or victimised to remaining in the camps; the provision of adequate information on the conditions relating to security and welfare in the places of original residence; avoiding giving the displaced misleading information about the assistance and benefits they are likely to receive on being resettled; allowing time and flexibility in carrying out resettlement and avoiding the use of rigid time-frames.

He makes the following observation:

> From a factual point of view, this person will frequently have fled because of a well-founded fear of being targeted and victimised in the course of an armed conflict or systematic violations of human rights... Even if it is argued that the government is not at all responsible for...the resulting violence, sending the displaced back to a dangerous situation amounts effectively to the same type of targeting and victimisation. In such a situation it can be argued that the internally displaced person can no longer count on the protection of his/her own country...para.138).

(xix) International standards

There are currently no international standards directly applicable to displaced persons as a specific category of protection. However

principles of international human rights law would be applicable to displaced persons as they would to other Sri Lankans. Some provisions which are of immediate relevance (in addition to the right to freedom of movement and the freedom to choose one's residence mentioned above) are: the right to life (Art.6, ICCPR) and the corresponding right to live with human dignity; the right to an adequate standard of living, including adequate food, clothing and housing and to the continuous improvement of living conditions (Art.11, Covenant on Economic, Social and Cultural Rights).

Other international instruments contain principles applicable to the protection of the internally displaced. Among these are the UN General Assembly Resolution (45/153) on Human Rights and Mass Exoduses (1991) and the UN Sub-Commission Resolution on Forced Evictions (1991).

The UNGA Resolution urges all governments to ensure the effective implementation of relevant international instruments, especially human rights instruments, as this would contribute to averting massive flows of refugees and displaced persons. It also urges the Commission on Human Rights to keep the question of human rights and mass exodus under review and to assist in the development of an early warning system.

The Sub-Commission Resolution recognises forced evictions as a human rights violation and urges governments to eliminate this practice. It also recognises that the practice of forced evictions involves the involuntary removal of persons, families and groups from their homes and communities, resulting in the destruction of the lives and identities of people throughout the world, as well as increasing homelessness.

It is possible to deduce from these international instruments more specific standards, including a right not to be displaced or, as the United Nations High Commissioner for Refugees has chosen to express it, the right to remain.

If a situation in a country is characterised by continued and organised armed clashes, principles of international humanitarian law come into play. These principles impose obligations on the belligerent parties, both state and non-state actors, and are applicable in cases of conflicts both of an international and non-international nature (see also the chapter on the North-East war).

The principles are contained in the four Geneva Conventions of August 1949 and their two Additional Protocols of 1977. The major objective of humanitarian principles is to limit violence and to protect people from abuses of power by the combatants. Sri Lanka is a party to the Geneva Conventions but not to the two Additional Protocols.

Common Article 3 of the four Geneva Conventions is directly applicable in cases of conflict of a non-international nature such as that being waged in Sri Lanka at present. It lays down a basic standard of human rights protection which parties to the conflict are bound to observe in relation to those not taking part in the conflict.

The Geneva Conventions impose other relevant obligations: prohibitions on attacks causing disproportionate losses among the civilian population, or the use of weapons causing superfluous injury or those having indiscriminate effect.

There are also other emerging principles which would be helpful in forging an appropriate legal regime (see for example, Jovica Parnogic,

'The evolution of the right to assistance - concluding statement', Institute of International Humanitarian Law, report on XVIIth Round Table on problems of humanitarian law, San Remo, 24/9/1992).

There have been several attempts at developing international standards applicable in situations of internal conflict. Theodor Meron compiled a 'Draft Model Declaration on Internal Strife' which sought to lay down an 'irreducible and non-derogable core of human and humanitarian norms that must be applied in situations of internal strife and violence' ((1988) 262 ICRC Review, p.9).

Another attempt was made by Hans-Peter Gasser in a paper entitled 'A measure of humanity in internal disturbance and tensions: proposal for a Code of Conduct' (262 ICRC Review, p.38). Subsequent to this there was the Turku 'Declaration of Minimum Humanitarian Standards' (85 American Journal of International Law (1991) p.375). This codified certain basic rules which must be respected as a minimum in times of internal strife or public emergency. It drew from many sources including human rights law and humanitarian law.

There are other developments taking place globally which are aimed at developing standards in relation to internally displaced persons. The question of forced migration, mass exoduses and involuntary displacement has begun to emerge as a major global issue and we are witnessing for the first time a collective global response to these questions.

At its 48th Session the UN Commission on Human Rights requested the Secretary General to appoint a Special Representative (Francis Deng has since been appointed) to study and report on the question of internally displaced persons. The Commission was 'deeply disturbed

by the serious problem that the large number of internally displaced persons throughout the world and their suffering is creating for the international community' and recognized 'that internally displaced persons are in need of relief assistance and protection' ((1993) 5 International Journal of Refugee Law, p.257).

At the 49th session of the Commission held in 1993 the UN Human Rights Commission adopted one resolution on internally displaced persons and another on human rights and mass exoduses.

The Commission's resolution on internally displaced persons extended the mandate of the Special Representative for 2 more years and requested him 'to continue his work aimed at a better understanding of the general problems faced by internally displaced persons and their possible long term solutions, with a view to identify, where required, ways and means for improved protection for and assistance to internally displaced persons'. The resolution also called upon governments, where appropriate, to extend invitations to the Representative to visit and requested the UNHCR to cooperate with the Representative.

Currently there is no single organisation within the UN system responsible for the protection and assistance of the internally displaced. The Special Representative has recommended that the United Nations needs a mechanism for this purpose. He suggested two alternatives: either the extension of the mandate of an existing UN body or the creation of a separate body.

In his report the Special Representative noted that existing human rights, humanitarian and refugee regimes established a basis for international concern with the problems faced by the internally

displaced, but observed that most of the United Nations action had been ad hoc and uncoordinated.

He has recommended the compilation of relevant international instruments and standards into comprehensive documents focusing on the human rights and humanitarian aspects of internal displacement. He recommended also the creation of a specific legal instrument focusing on internal displacement. However in the final analysis he observed that it is not so much the inadequacies of the law, but rather the lack of political will on the part of both the perpetrators of violations and the international community.

Indeed, almost all of the people discussed in this chapter are citizens of Sri Lanka and come within the domestic jurisdiction of this country. They are thus entitled to the fundamental rights guaranteed under Chapter III of the Constitution: the responsibility of ensuring the minimum standards of human existence and dignity - physical protection, shelter, food, clothing, basic health and the integrity of the person and the family as the most fundamental social unit, rests with national governments. They are the bodies required by existing principles of international law to guarantee humane treatment and provide these basic necessities of life (Deng Report, conclusions).

II. REFUGEES AND REPATRIATION

(i) Introduction

During the last decade thousands of Sri Lankans have fled abroad. 1993 saw the resumption of repatriation activities after almost a year. Numbers of people who had fled to South India were sent back in the

months of August and September. Discussions were also going on in Europe throughout 1993 regarding repatriation of Tamil refugees and asylum seekers; these repatriations may commence in 1994; concern has been expressed by non-governmental organisations regarding the appropriateness of these repatriations. Sufficient information was not available at the time of writing this report to comment on repatriation from Europe further. This section focuses on the repatriations which took place from South India during 1993.

The Indian government has been providing assistance since 1983 when the first batch of Sri Lankan refugees fled there after the ethnic violence of July that year. Rations, a stipend and shelter had been provided by the Indian government. As of April 1993 there were 132 refugee camps in Tamil Nadu (Asia Watch Report).

Indian government statistics given to UNHCR indicate that there were a total of 106,400 Sri Lankan refugees living in Tamil Nadu, 76,400 in camps and 30,000 outside camps. USCR cites reports that the figure residing outside camps may be as high as 98,000 (USCR, p.22).

The assassination of Indian Prime Minister Rajiv Gandhi in May 1991, allegedly by an LTTE suicide bomber, triggered off a process which has seen several thousand Sri Lankans repatriated from India. In early January 1992 the Indian government announced that it had reached an agreement with the Sri Lankan government to begin repatriating the first batch of refugees on 20th January of that year. The repatriation was funded entirely by the Indian government.

The UNHCR was not allowed to participate in this process despite protests by NGOs and international relief agencies. By May 1992 about 23,000 refugees had been repatriated and housed in temporary

transit camps in Sri Lanka. A total of 29,102 refugees were repatriated before the programme was suspended in October 1992 due to the monsoon and rough seas.

In May 1992 the United Nations High Commissioner for Refugees wrote to the Indian government raising several concerns about the repatriation process. In July that year the Indian government agreed to give limited access to the UNHCR and to allow the international agency a restricted role in the monitoring of the repatriation process.

(ii) Forced or voluntary repatriation?

The repatriation process began in a global context that very much favours this 'most preferred solution'. Global refugee policy has been infused with the perception that there is 'need to ensure that refugees do not disturb the peace of the developed world or invite financial allocations which, we are told, they can ill afford.' (B.S. Chimni, The Meaning of Words and the Role of UNHCR in Voluntary Repatriation, (1993) 5 International Journal of Refugee Law 442,459).

When UNHCR was allowed to open an office in Madras it was given the opportunity to interview refugees at the point of departure in the transit camps. However UNHCR was not allowed access to the camps. Thus the voluntary nature of the repatriation process had to be ascertained by UNHCR only through interviews conducted at the point of departure and after the refugee had registered for repatriation.

In August 1992, 48 families from the Mandapam camp told UNHCR that they had been forced to the repatriation transit point. An Indian court held that the refugees were being repatriated forcibly and ordered a halt to the repatriation. However the Tamil Nadu

government subsequently argued that UNHCR's involvement would ensure that the process was voluntary. The court lifted the injunction and the repatriation process recommenced. It was reported that these 48 families were kept in very poor conditions for weeks before being sent back to their original camps, where government officials made life particularly difficult (USCR, p.26).

1993 saw a resumption of the repatriation of Sri Lankan refugees from Tamil Nadu after a lull of almost a year. Most of these returning refugees had been in Tamil Nadu since 1990. Prior to the repatriation, the Indian government had initiated a series of activities aimed at inducing return. While there was criticism from Indian and Sri Lankan groups as well as international groups, the criticism was less than that which had been raised against the 1992 repatriation process.

Asia Watch in a statement issued just before the commencement of the repatriation process, requested the Indian and Sri Lankan governments to call it off unless it could be established that the refugees were returning voluntarily. Based on interviews it had conducted in Madras, the organisation had come to the conclusion that the process was not voluntary (Asia Watch, August 1993 report). UNHCR, however, came to the conclusion that the refugees were returning of their own free will. The US Committee for Refugees was also of the view that a large majority of the refugees who repatriated did so voluntarily (USCR, 1994 report).

The difference of views seems to flow from differing conceptions of 'voluntariness'. Asia Watch and the US Committee expressed concern that the refugees were not provided with sufficient information to make a rational and intelligent decision on whether to return.

The repatriation process was influenced by some of the actions of the Indian and Tamil Nadu governments which made life more difficult for the refugees and induced their return. This included action to prevent NGOs from having access to the refugee camps. On 27 May 1993, acting on instructions given from New Delhi, the Tamil Nadu state government prevented NGOs hitherto working with the refugees from having access to the camps.

These Indian NGOs had played a key role in providing relief and assistance to the Sri Lankan refugees. They were involved in maintaining camp facilities, assisting with the pregnant, and lactating mothers and the elderly, assisting with the provision of education and health care, and also in the creation of income generating projects. Conditions in the camps began to deteriorate.

The Tamil Nadu government also imposed restrictions on the refugees themselves, allegedly on the grounds of security, restricting refugee mobility severely. These restrictions included the times at which they could leave the refugee camp (for example, to seek work) and the times by which they should return to the camp. These restrictions were criticised strongly by several international and local NGOs.

The conditions in at least 2 of the transit camps (Asikulam and Cheddikulam) are reported to be better than the conditions in India and this may induce refugees to return, not with the intention of going back to their homes, but rather with the intention of remaining in the transit camp.

The repatriation began on 13th August and culminated on 7 September 1993. Seven ships transported 6,927 refugees from Tamil Nadu to Trincomalee, on Sri Lanka's eastern coast. The majority were Tamils,

but there were also 125 Muslims and 5 Sinhalese.

UNHCR in a report published soon after the repatriation stated that it had been voluntary but noted that 'a small number of refugees' had been subjected to pressure to sign their voluntary repatriation papers. This was based on interviews conducted by UNHCR field staff in Madras. The organisation reported that such incidents were rare.

UNHCR recorded that there were 19 families, consisting of 68 persons, who claimed that they were repatriated under duress. They were returned to camps following UNHCR intervention. Some were also transferred to alternative camps if they feared harassment from camp officials in their original camps. Another group of 156 persons also claimed that they were coerced into returning. Their repatriation was postponed but they subsequently informed the international organisation that they wished to return and were repatriated.

UNHCR reported that of the 6,927 returnees, 3,308 or 47.8 per cent have gone back to their homes or were staying with friends or relatives. The organisation reported interviewing the returnees who landed in Trincomalee, that most of them exhibited a positive outlook and were anxious to rejoin friends and family and that none of those interviewed at Trincomalee stated to UNHCR that they had been coerced.

Of the 6,927 refugees who arrived in 7 shiploads, 4,609 of them came from Killinochchi, Mullativu, Jaffna, Mannar and the uncleared area of Vavuniya. Those from the uncleared areas were sent to a transit camp in Vavuniya, which was under government control.

The UNHCR role extends to assisting returnees to reintegrate and

assisting them while they remain at transit camps (those unable to return to their villages). It does not extend to monitoring returnees who have gone back to their homes.

The US Committee reports that of the 4,972 returnees from the 5 districts of Vavuniya, Killinochchi, Mullaitivu, Jaffna and Mannar, 1,626 had moved to their homes by mid September 1993. Another 2,971 had moved to the Asikulam and Veppamkulam transit camps in Vavuniya.

Asia Watch concluded that the repatriation was not voluntary. This conclusion was determined primarily by the fact that the refugees lacked information to make a rational and intelligent decision (report of 11 August 1993). With regard to this necessary information, UNHCR reported that the letters from friends and relatives in Sri Lanka sufficed to keep the refugees informed about conditions back home.

Asia Watch disputed this saying that numerous complaints had been received regarding a curtailment of mail between the two countries, and that the refugees had no reliable means of getting accurate information on the conditions back home. The organisation noted that there were strong reasons for suspecting that the refugees were being induced to return. It drew attention to the fact that some of them had been subject to arbitrary arrest, that their food rations had been withdrawn and there had been pressure on them to sign forms indicating their desire to return, without their really realising what they were signing.

Asia Watch also drew attention to the fact that no international organisation had been permitted access to the refugee camps.

Asia Watch stated:

> Sri Lankan refugees in Tamil Nadu face implicit, and sometimes explicit, coercion to return. That pressure, which includes keeping the camps in a deliberate state of disrepair and withholding stipends and food rations, makes repatriation more attractive. If the refugees knew that they would returning to the kind of camps described in this report, providing free labour for police, threatened by the LTTE and pro government paramilitary organisations, fleeing from bombing and shelling, many would decide not to go (Asia Watch Report, 11/8/1993, p.18).

USCR came to the conclusion that the repatriation was voluntary. This conclusion was based on interviews it conducted with Tamil families who returned. The report states:

> A large majority of those interviewed said that they had made their decision to repatriate voluntarily, largely free of external pressure. Most cited personal reasons such as family reunion or an illness in the family, for repatriating. Others said that relatives or friends had told them it was safe to return; still others said they wanted to return home even if conditions were less than ideal. Some families mentioned varying degrees of pressure in India - including threats of rations being cut off, or not being allowed to continue working - as contributing to their decision, but only one family cited those pressures as the primary reason for their return (p.26).

However the organisation also notes that in May 1993 the Indian government introduced certain measures aimed at pressuring the refugees to return (p.23). The report cites S.C. Chandrahasan of the

Organisation for Eelam Refugee Rehabilitation (OFFER), a refugee run NGO that assists refugees in Tamil Nadu, who argues that not more than a third of those who repatriated were doing so voluntarily. The others he said either lacked sufficient information on conditions back home, or were misled by a UNHCR leaflet distributed in the camps which painted a 'rosy' picture of the assistance refugees would receive when they returned home (USCR, p.25).

(iii) Assistance to returnees

UNHCR funds 6 camps for returnees in Sri Lanka: 3 in the Mannar District, 2 in Vavuniya and 1 in Trincomalee, and has been assisting returnees reintegrate.

Those returning to government controlled areas are entitled to receive the same assistance as that given by the government to those who re-settle. This includes a productive enterprise grant for the resumption of economic activity, a settling in allowance, housing grant and food rations for 3 months (extendible up to 6 months) (USCR).

Those returning to LTTE controlled areas are given a pre-settlement housing allowance of Rs.5,000 (approx. US $100) and are also eligible for government food rations. UNHCR also assists with small scale 'micro projects' or quick impact projects. Those returning to LTTE controlled areas remain in transit camps for at least 2 weeks while the 'implications of their return' are considered (USCR).

(iv) International norms

The principle of non-refoulement lies at the core of international refugee law. This principle (see Article 33, Convention Relating to

the Status of Refugees and its 1967 Protocol) prohibits the repatriation of refugees to countries where their life or fundamental freedoms would be endangered. Neither the Indian nor the Sri Lankan governments have ratified the 1951 Convention. However the principle of non-refoulement is widely accepted as being a part of international customary law.

Pressure exerted on refugees to return violates this protection of international law. Whether that pressure is explicit, as in the case of threats, or intimidation, or whether it is subtle, as where camp conditions are allowed to deteriorate, rations cut, access to camps made difficult, work outside the camp restricted or prohibited etc. As the Lawyers Committee for Human Rights argued in a briefing paper released in 1992:

> The logic is straightforward: presumably a refugee would genuinely volunteer to return only if he or she would not face persecution after returning. It is thus essential that refugees are able to exercise their free and unconstrained will. To be voluntary, the decision to return must be intelligent and informed. (General Principles Relating to the Promotion of Refugee Repatriation: A briefing paper issued by the Lawyers Committee for Human Rights (LCHR) May 1992, p.6).

CHAPTER 9

GROUP RIGHTS

I. MINORITY RIGHTS

(i) Relevant international instruments

The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (UN General Assembly Resolution 47/135 of 18 December 1992; hereinafter UN Declaration on Minorities) enumerated rights include the following: the right to,

* enjoy their own culture (Art.2(1))
* practice their own religion (Art.2(1))
* use their own language in private and in public with adequate opportunities to learn their mother tongue or to have instruction in their mother tongue (Art.2(2) & 4(3))
* participate effectively in cultural, religious, social, economic and public life (Art.2(2))
* to participate fully in the economic progress and development in their country (Art.4(5))

Being a Declaration and not a Covenant, the UN Declaration on Minorities is aspirational and does not have the binding force of an international covenant. The ICCPR however is binding on the states party to it. Article 27 of the (ICCPR) states "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."

The Human Rights Committee in its 50th session adopted a General Comment of Article 27 of the Covenant on Civil and Political Rights (CCPR/C/50/CRP.1/Rev.1 (28 March 1994). In it the Committee established that rights guaranteed by Article 27 are distinct and separate from the protection afforded by the other articles of the ICCPR. The Committee envisions positive acts as necessary on the part of the state "... to protect the identity of a minority and to develop their culture and language and to practice their religion ..." and goes on to say " .. as long as those measures are aimed at correcting conditions which prevent or impair the enjoyment of the rights guaranteed under Article 27, they may constitute legitimate differentiation under the Covenant, provided that they are based on reasonable and objective criteria." The Committee concluded that,

> The protection of this right ensures the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole. Accordingly, the Committee observes that these rights must be protected as such and should not be confused with other personal rights conferred[sic] on one and all under the covenant. State parties, therefore have an obligation to ensure that the exercise of these rights is fully protected and they should indicate in their reports the measures they have adopted to this end.

The Charter of the United Nations, which is binding on all members of the United Nations, states in Article 55 that "The United Nations shall promote: ... universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion", and in Article 56 "All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55." As a signatory to the International Covenant on Economic Social and Cultural Rights (ICESCR), Sri Lanka has undertaken to "guarantee that the rights enunciated in the (ICESCR) will be exercised without discrimination of any kind as to race, colour,...

language, religion, ... national or social origin,... birth or other status (Art.2(2))

The Vienna Declaration and Programme of Action exhorts governments to take measures which would include "facilitation of their [Persons belonging to national or ethnic, religious and linguistic minorities] full participation in all aspects of the political, economic, social, religious and cultural life of society and in the economic progress and development in their country." (Part II(27)). Moreover, the World Conference also urged all governments "to take immediate measures and to develop strong policies to prevent and combat all forms and manifestations of racism, xenophobia or related intolerance where necessary by enactment of appropriate legislation, including penal measures, and by the establishment of national institutions to combat such phenomena." (Part II(20)).

(ii) Legal protection in Sri Lanka

The Constitution in Chapter III enumerates the fundamental rights and freedoms to which all persons and citizens are entitled to in Sri Lanka. Article 12(2) states that "No citizen shall be discriminated against on the grounds of race, religion, language, caste, ... place of birth or any one of such grounds." Article 12(3) prohibits even private acts of discrimination: "No person shall, on the grounds of race, religion, language, caste, sex or any one of such grounds, be subject to any disability, liability, restrictions or condition with regard to access to shops, public restaurants, hotels, places of public entertainment and places of public worship of his own religion." In 1986 the Commission on the Elimination of Discrimination and Monitoring of Fundamental Rights was established.

Moreover, the Thirteenth and Sixteenth Amendments to the Constitution establish Tamil also as an official language and thus the language of administration and of the courts along with Sinhala. These Amendments entitle anyone, other than officials in their official

capacity, to communicate and receive communications in either Sinhala or Tamil.

The Directive Principles of State Policy and Fundamental Duties in the Constitution in Article 27 states "(10) The State shall assist the development of the cultures and the languages of the People, (11) The State shall create the necessary economic and social environment to enable people of all religious faiths to make a reality of their religious principles." Sri Lanka is however not a secular state. Article 9 accords to Buddhism 'the foremost place' and mandates the state to protect and foster the Buddha Sasana. All other religions have, however, been assured the freedom of religion and the right to practise and to propagate their beliefs.

The ability to exercise one's language rights as guaranteed by the Constitution remains extremely difficult. First of all, semantics of constitutional language accords Tamil a subordinate status while purporting to equate it to Sinhala as an official language. The Constitution accepts a hierarchy between Sinhala and Tamil, and most legislation now provides that in the event of conflict between the two texts, the Sinhala text shall prevail. Besides, the Constitution appears to recognise three linguistic regions. Firstly, 'the north and east' where Tamil shall be the language of administration and the language of the courts; secondly, the rest of the country where Sinhala shall be the language of administration and the language of the courts; and thirdly, bilingual regions where there is a substantial concentration of Sinhala and Tamil speaking people where both official languages may be used. However, this is the situation in many of the Assistant Government Agent Divisions in the Western Province, Central Province, and the Sabaragamuwa and Uva Provinces. To activate the dual language policy in bilingual regions, the President is required to issue an administrative order which he has failed to do.

Sri Lanka is a party to the International Convention on the Elimination of All Forms of Racial Discrimination. Moreover, as a member of the

United Nations, it has, with the rest of the international community, subscribed to the principles enshrined in the UN Declaration on Minorities. Sri Lanka as a party to the Economic, Social and Cultural Rights Covenant is bound to incorporate the provisions of that Convention into national law and undertake measures to implement such laws. The Charter of the United Nations is also binding on all member countries.

(iii) General conditions in the country

The backdrop to the playing out of minority rights in 1993 was the continuation of the 10 year old civil war between the armed forces of the Sri Lankan government and the Liberation Tigers of Tamil Eelam. Although most Tamils do not actively participate in the armed conflict, if you are a young male and a Tamil from Jaffna, you are likely to be taken in for questioning, arrested and detained. (Please see the section on Civil and Political Rights for a detailed discussion on the arrest and detention of Tamil youth in the South).

The Indo-Sri Lanka Accord recognized that Sri Lanka was a plural, multi-ethnic and multi-religious society. President Premadasa appeared to foster an inclusive concept of national identity by speaking in all 3 languages at public functions and by worshipping in churches, mosques, and kovils. Since his assassination in May '93, the minorities have felt that there has been a set back to the concept of a plural society. The new regime under President D.B. Wijetunga gave the impression of creating a climate of greater tolerance and democratic space at the outset with its intimations of constitutional reform and the disbanding of internal security groups set up by President Premadasa. However, the new President's desire to signal a break from his predecessor has had an unfortunate effect on the minorities.

Fundamental to this strategy is his definition of the northeast conflict as terrorist and his denial of an ethnic problem in Sri Lanka.

President Wijetunga has made repeated pronouncements on the minorities clearly indicating his belief that they are making unreasonable demands of the majority community. Although the government subsequently claimed that the President was misunderstood, minorities remain apprehensive of the State's commitment to a pluralistic and multi-ethnic polity.

(a) discrimination

The Commission for the Elimination of Discrimination and Monitoring of Fundamental Rights was established in 1986, and "charged with the elimination of discrimination on the grounds of race, religion, language, caste, sex, political opinion or place of birth by the government, public corporations, local bodies, Business Undertakings owned by the government or by public companies in which the government holds 50% of the shareholding[sic]" (Commission For The Elimination Of Discrimination And Monitoring Fundamental Rights - Sri Lanka, Annual Report 1992). It is also required to monitor the observance of fundamental rights.

In its 1992 Report, the Commission noted that in the majority of cases that came before it "there was evidence of injustice, or unfair treatment rather than proven discrimination on the grounds of race, religion, language, caste, sex, political opinion or place of birth".

In the 1992 Report, the Commission reiterated its previous conclusion that its powers were limited and pointed out that this could be remedied by amending the Regulations by which it was established in 1986. It also noted that its activities were hampered by lack of staff and support facilities. This applies in the area of research into discrimination. The Commission's failure has been conspicuous in its inability to undertake any studies of systemic discriminatory practices.

(b) education

Apart from the issues directly related to the conflict and the consequences of the emergency regulations, the issue of minority rights arose predominantly in the fields of education and language. Discrimination in these fields can be identified in practice and in the implementation of the law and political commitment.

It was raised in the issue of admissions to the University of Jaffna for the academic year 1992/3. Whilst proposing that 5 more students than could be accommodated be taken into the medical faculties of the Universities of Peradeniya, Sri Jayawardenepura, Kelaniya and Ruhuna, the University Grants Commission (UGC) proposed to admit only 408 students to the University of Jaffna. The University of Jaffna had calculated that it could accommodate 1180 to its various faculties.

The Commission's figure constituted a reduction of over 50% for the academic year 1992/3. The controversy highlighted the questions of cut-off marks in the admissions criteria and of the vastly different circumstances that prevailed in the north-east and the rest of the country. The Senate of the University of Jaffna pointed out that the minimum marks for admission into the University of Colombo for medicine is 266 while for Jaffna it is 261. It argued that this figure did not take account of the conditions in the north-east where students have to labour under the most trying circumstances, including military operations and aerial bombardment.

Prof A. Shanmugadas, President of the Jaffna University Teachers Association, wrote to the Minister of Higher Education on this matter. Professor Shanmugadas, citing the debilitating conditions prevailing in the north as the reason for relatively poor student performance in the April 1992 GCE A/L examination, requested that a concession be made to the students. The Association recommended that students be admitted on the basis of the average admitted over the last five years.

The issue of a different standard of marking was raised in a fundamental rights case before the Supreme Court. The petitioner, Rajadurai Surendran, claimed that his fundamental right to equality before the law had been infringed by the University Grants Commission in its failure to admit him to a university to follow a course in Engineering.

Mr. Surendran obtained an aggregate of 276 marks at this exam and having thus satisfied the minimum requirements for admission applied for admission to a university identifying Engineering 1, Engineering 11 , Quantity Surveying and Law as the subjects he wanted to do in order of preference. His contention was that in coming to its decision not to admit him, the University Grants Commission had failed to observe its own 'Rules Relating to Admission to Undergraduate Courses in the Universities'. Rules 2 and 29 specifically were not observed.

Rule 2 lays out the Merit Quota and District Quota schemes and Rule 29 states that:

> ...admission... is.... on the results of the GCE (A/L) Examination. Where more than one examination has been held in a particular year, the results of all the examinations held in that year, will be jointly considered for this purpose.

Mr. Surendran showed that whether admission was on the basis of merit or merit and the district quota, he should have gained admission. Justice Mark Fernando put aside submissions made by the Deputy Solicitor General relating to the greater amount of time available to candidates sitting in April as against those sitting in August, as a basis for departing from the Rules. He also found that documents submitted by the respondents did not support their position. The Court found in Surendran's favour.

(c) language

The combined effect of the Thirteenth and Sixteenth Amendments to the Constitution is to make Tamil an official language and English the link language. The Thirteenth Amendment amends Article 18 of the Constitution by adding after the paragraph which says that Sinhalese shall be the official language "(2) Tamil shall also be an official language, (3) English shall be the link language, (4) Parliament shall by law provide for the implementation of the provisions of the Chapter".

However, Tamils are frustrated by their inability to 'transact business' with the state in the official language of their choice. Tamils have great difficulty in receiving official letters in the Tamil language, in transacting business in post offices and various government departments or in filing a statement at a police station. Facilities for bilingual communication are inadequate. There is a severe shortage of Tamil police officers. Recently, due to the intervention of the Official Languages Commission, the police department is considering a review of its policy. However, implementation of the reversed policy is not expected to take place for another few years. The facilities for the use of Tamil in the courts are also woefully inadequate.

Although Amendments 13 and 16 were enacted in 1988 they were not implemented until the end of December 1991. The Official languages Commission was set up under Act No.18 of 1991 which enumerates the mandate and objectives of the Commission. The Act was certified on March 27, 1991 and the Commission went in to operation at the end of 1991. The Commission is comprised of 6 members including a retired judge of the appellate court, all of whom function part-time. Complaints are addressed to the chairman who presents them to the Commission. Most complaints are resolved informally without a formal inquiry. The Commissioner received 240 complaints during 1993, out of which all except 8 complaints were resolved informally.

The chairman receives complaints from individuals, Ministers of Parliament, government officials, political organisations, etc. When a complaint is received, the Chairman contacts the directors of the departments or organizations, and in certain instances the Minister of the relevant industry, and resolves the matter through them. The Commission also has the right to inspect the work of government departments and organisations to ensure compliance (interview with Desmond Fernando, Chairman of the Official Languages Commission). In 1993, Mr. Fernando sent 600 questionnaires to government departments and organisations inquiring whether they were complying with the laws pertaining to the use of the official languages, and what difficulties faced them in the implementation.

Despite these initiatives, minorities continue to face difficulties in attempting to transact business in the language of their choice. This is due to a lack of a systemic plan to implement Articles 13 and 16. Act No.18 which set up the Commission gives the Commission significant powers which enables it to plan and implement the government's language policy including the power to punish public officials for non-compliance. Thus the Act envisions an "activist" Commission. However, the Commission has been more passive, depending rather on dealing with what is brought to their attention. One non-governmental organisation drafted a suggested phased programme of implementation of the Official Languages provision which prioritised areas of mixed populations and departments and institutions having the most public contact such as the police department, courts, post offices etc. to be targeted for compliance by setting dead lines. The Commission is yet to act upon the suggested plan or to draw up its own plan of implementation, or to issue an annual report. There is also a lack of awareness among the general public as to the Commission's accessibility, function and mandate.

(d) cultural and religious identity

Article 1(1) of the Minorities Declaration states: "States shall protect

the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories, and shall encourage conditions for the promotion of that identity."

The government has established 2 Ministries under the Ministry of Socio-Cultural Integration for the development of Hindu and Muslim religious and cultural affairs. These ministries have been able to function relatively independently in interpreting government policy relating to their mandates and carrying out programmes to the extent permitted within the budget allocated by the government.

The mandate of the State Ministry of Hindu Religious and Cultural Affairs also includes the development of Tamil language, literature and the fine arts. To this end the Ministry is generally involved in encouraging Tamil writers through annual literary awards, reform of the Tamil script, the development of technical words in Tamil in co-oporation with countries in the region such as Singapore, Malaysia and India, publication of books on Hindu and Tamil subjects, restoration of temples, establishment of temple based schools, etc. The ministry has organised, sponsored and encouraged several international, national and district-wise cultural activities.

(iv) Resolving the ethnic conflict

1993 saw many proposals to seek an end to the more than a decade old ethnic conflict. Despite the immeasurable suffering engendered by the war, the government and the political elite were not receptive to fresh approaches to resolve the conflict. In August 1993, an international non-governmental organisation presented a proposal to the Secretary General of the United Nations and to the Sri Lankan government. The proposal provided for a UN monitored cease fire, creation of buffer zones, and conduct of elections in the North and the East. President Wijetunga and Prime Minister Wickremasinghe expressed strong antagonism to the proposal and were echoed by the media and Sinhala nationalist groups (Inform, Situation Report [August

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1993] p.4). Reports of peace plans of local origin such as Minister Thondaman's initiatives fizzled out during the year. There were several initiatives by the clergy such as the delegation led by the Anglican bishop Rt. Reverend Kenneth Fernando and also the delegation of Buddhist priests to Jaffna. These initiatives were ignored by the government, and failed to receive any official backing.

The Parliamentary Select Committee on the Ethnic Conflict was constituted in August 1991 to recommend ways and means of achieving peace and political stability in the country. On the 12 November 1993 the Committee representing the United National Party, the Sri Lanka Freedom Party, and several other Members of Parliament recommended "the establishment of two separate units of administration for the Northern and the Eastern Provinces: to adopt a scheme of devolution similar to the Indian Constitution; to devolve more subjects that are in List III (Concurrent List) or to dispense with the List; and to prepare to hold local elections in the Eastern Province wherever the security situation permitted". Significantly, the Tamil parties were not part of this consensus. The Sri Lanka Muslim Congress leader M.H.M Ashroff was also not a signatory to the majority report. The Tamil parties withdrew from the Select Committee at the beginning of 1993. The majority decision on a de-merger of the north-east and as a precondition for greater devolution of power is at variance with the Tamil view that the merger of the two provinces is a basic *sine qua non* for an end to the conflict.

II. INDIGENOUS RIGHTS: THE VEDDAS OF SRI LANKA

(i) Introduction

The Veddas are commonly considered by the country's dominant ethnic groups to be Sri Lanka's original inhabitants, primitive peoples and aborigines. Today, like most indigenous forest dwelling peoples who have either remained on the margins of the modernisation process or assimilated with other ethnic groups, the Veddas are perceived to be on the verge of cultural extinction, if not already extinct.

The Veddas are commonly believed to be descendants of the Yakkas and Nagas who were, according to the founding text of Sinhala history (the "Mahavamsa"), the original residents of the island. These original inhabitants are believed to have been later subjugated and pushed into the forest by Indo-Aryan Sinhala immigrants who became dominant.

The status of original inhabitants accorded to, and claimed by, the Veddas in the Sri Lankan national imagination and in Sinhala history has not entailed recognition of the Veddas' rights to their traditional homelands. Rather, since the 1950s with the clearing of forest land for cultivation under successive government sponsored development schemes, the Veddas' homelands have been increasingly encroached.

While some Vedda groups have been willing participants in the development process to which they have conceded their traditional homelands and life ways, others have actively resisted the process. The Veddas' resistance has taken both tacit and active forms - from refusal to assimilate with dominant local populations (which participation in the development process has until recently entailed), to political activism and the articulation of demands for collective rights to land.

In the 1980s some groups of the Vedda community have undergone a

process of "cultural revival" connected to the struggle to retain their lands. These groups have become visible as a political lobby at the national level. They argue that Vedda culture has been eroded and endangered by the forced relocation from its forest homelands. Several of their traditional villages have become show cases for tourists in search of authentic "ethnics". In turn, the tourist trade has contributed to the Vedda cultural revival.

Simultaneously, other Vedda groups or individuals have assimilated into locally dominant ethnic populations near their settlements and are erasing their Vedda identities, with the associated pejorative connotations of "primitive" and "uncivilised". This dual process of Vedda ethnic revivalism and assimilation has resulted in the fragmentation of the forest dwelling Vedda communities.

Many who doubt the existence of authentic Veddas today argue that the recent ethnic revivalism of Veddas is a cynical attempt to manipulate Vedda cultural identity in order to legitimate a few individuals' claims to land and to market their culture for tourists. It is also argued that international discourses on indigenous peoples' rights - which accord marginalised indigenous groups collective rights to their traditional homelands on the basis that the unity of people and territory is a necessary aspect of the preservation of diversity (see the Statement of the International Alliance of the Indigenous-Tribal Peoples of the Tropical Forests, Penang 1992, quoted in M. Fernando, The Veddas of Sri Lanka: A Socio Legal Study, Legal Aid Centre, University of Colombo, 1993) has facilitated the process of cultural and ethnic revivalism among the Veddas. And to some extent this might well be the case.

Nonetheless, the merits of the Vedda's claims to their traditional homelands cannot be determined on the basis of assumptions that they, as indigenous peoples, must be pure, pristine and untouched by national and/or international development processes and market economies. Rather, changes in the Vedda community challenge both

the Veddas' claims to authenticity on the one hand, and the idea that "indigenous" peoples and cultures are unchanging. Also they raise the issue of how historically marginal cultural groups might participate in national decision making concerning their life ways.

This section starts by tracing a history of perceptions and construction of the Veddas in the Sri Lankan national imagination and outlines some of the government's attempts to "develop" and assimilate them. It examines the conflict between the Veddas and the Sri Lankan government, and sketches the environmentalist arguments put forward by the present government against Vedda use of forest lands which they once used. Some of these lands now lie within the purview of the Forestry and Wildlife Conservation Departments.

At the same time the paper argues for a notion of Vedda identity as an evolving, dialectical process, rather than as a fixed and static entity. It places the transformations undergone by various Vedda communities in the wider context of national development, as well as in the recent international context of discourses on human rights, the collective rights of indigenous peoples and the discourse of cultural and biodiversity.

(ii) Who are the Veddas?

The term "Vedda" in common Sinhala usage and in folklore implies "uncivilised" or "under-civilised", with concomitant social Darwinian connotations of racial inferiority. Today Vedda ethnic revivalists call themselves "Vannialatto" or people of the forest. Others prefer to erase their Veddaness and adopt the language, customs and mores of dominant local ethnic groups. Since "Vedda" remains the commonly agreed-upon term to refer to these people, this report continues to use the term albeit with some reservations.

Vedda communities are scattered over 3 geographic regions in Sri Lanka. The first of these communities is located in the south-east of

the island, interior to the coast, in the Moneragalla, Badulla, Amparai and Batticaloa districts. This group of Veddas practises little or no cultivation (C.G. and B.Z. Seligman's "The Veddas", 1911, Cambridge University Press, is one of the earliest anthropological studies of this group of Veddas). They live in remote rock shelters deep in the forest or in small villages. Because of their relative isolation this group of Veddas has preserved its cultural traditions better than any other Vedda community, and not surprisingly it has been the target of much of the research done on the Veddas.

The second group of Veddas are to be found in the Anuradhapura district (James Brow's The Vedda Villages of Anuradhapura: the Historical Anthropology of a Community in Sri Lanka (1978) is one of the earliest studies of this population). The Anuradhapura Veddas practise wet rice agriculture supplemented with chena or swidden cultivation. They are a largely endogamous group and have few ties with Veddas of other regions.

The third major group of Veddas is found along the eastern coast of Sri Lanka between Valaichenai and Trincomalee. They are generally known as coast Veddas. Unlike the other two groups they speak Tamil and are normally Hindu. They appear to be marginally incorporated into the local economy and subsist largely by fishing and chena cultivation, supplemented by occasional wage labour. These coastal Veddas have no ties with the Veddas of the interior, though there is some speculation that they originally came to the coast from the interior.

Popular and academic perception amongst most urban Sri Lankans is that the Veddas are an endangered species on the "brink of disappearance" (See Dharmadasa, K.N.O, and S.W.R. De A. Samarasinghe, The Vanishing Aborigines: Sri Lanka's Veddas in Transition, International Centre for Ethnic Studies in association with NORAD, Vikas Publishing House, 1990; J. Senaratne, Of Veddas, Development and the State, in the Thatched Patio No.6, 1986).

By and large this perception appears to be based on census figures. The 1911 census computed the Veddas at a total of 5342 in the whole country. Ten years later, in 1921 there were estimated to be 4510 Veddas in the whole country. By 1963 the census estimated that the Veddas numbered 400. Since 1963 there has not been a separate classification for Veddas in national census forms. Rather, Veddas have been included within the category "other races" in national census forms. It should be noted that, contrary to the picture of Veddas as an endangered cultural group which emerges through the national census figures, the anthropologist, James Brow, has reported that he counted 5800 Veddas in the Anuradhapura district alone in 1970.

Figures on the number of Veddas which constitute the basis of theories of Vedda "cultural extinction" or survival, vary according to who counts the Veddas, and according to how they are defined. The concept of the Vedda which influenced the 1911 census classification - as a forest dwelling aboriginal hunter-gatherer people who espouse different religious beliefs, customs and mores to those of the Sinhalese and Tamils - still remains the most salient element of Veddaness. This conception of cultural identity has influenced enumerators of Veddas who do not count the coast Veddas as Veddas.

Such enumerations of the Veddas ignore the cultural transformations and processes of assimilation that Vedda communities have undergone and are undergoing. Other enumerators have adopted the view that such a functionalist definition of cultural identity is inadequate. They take self-identification and definition as adequate criteria for determining who is, or is not, a Vedda.

Arguably, the cultural assimilation of Veddas has occurred over hundreds of years and continues in the present. The fact that the Veddas have figured in ancient Sinhala texts and popular rituals such as the Kohomba Kankariya is indicative of the extent of their mingling with the dominant cultural group. The high level of religious and

ritual syncretism that is evident both in popular Sinhala and in Vedda ritual practices which has been documented in various anthropological studies (Dharmadasa, K.N.O., The Vanishing Aborigines, 1990; G. Obeysekere, The Cult of the Goddess Pattini, Delhi, Motilal Banarsidass, 1984) attests to a long history of assimilation between Veddas and other local communities.

(iii) Socio-economic profile of the Veddas

Several recent anthropological studies (J. Brow, The Vedda Villages of Anuradhapura: the Historical Anthropology of a Community in Sri Lanka, Seattle, University of Washington Press, 1978; J. Dart, The Coast Veddas: Dimensions of Marginality In The Vanishing Aborigines, edited by K.N.O. Dharmadasa and S.W.R. de A. Samarasinghe, Vikas Publishing House, 1990) of the Veddas have argued that the common feature of today's diverse Vedda communities might well be their position of social and political marginality within the modern nation.

John Dart, who studied the coastal Veddas, writes:

> the marginal position rather than any specific cultural, racial, occupational or linguistic features, may be in fact the most defining characteristic of Veddas, as well as the aspect of their identity most likely to endure over time (Dart, 1990, p.77).

The Veddas' economic marginality has several different dimensions. One of these is simply the physical location of their settlements which are removed from urban centres in relatively remote, sparsely settled and economically unproductive regions. Lack of capital and, in many cases, lack of skills to engage in more productive or large scale enterprises, such as rice cultivation, as well as lack of access to good educational facilities have also limited the access of the Veddas to avenues of social mobility.

On the other hand, the fact that the Veddas practise chena cultivation has allowed them a degree of independence and autonomy that Sinhala villagers, tied into the reciprocal labour and exchange relationship of the caste system, lack. While in some cases the Veddas have been assimilated within the local caste hierarchies, the pattern of shifting cultivation which they practise has allowed them to remain outside the local level power structures where access to land has traditionally been controlled by dominant castes and elite groups.

Thus the Veddas have tended to retain a greater degree of autonomy, even as they have also remained outside the market economy and arguably its cultural logic which privileges individual property ownership and rights rather than collective rights.

At the same time pressures from outside the Vedda community, such as direct and indirect state interventions and resettlement schemes, have greatly speeded up the integration of other Vedda groups into local Sinhala and/or Tamil communities. This integration might have facilitated a different type of economic marginalisation among the Veddas and facilitated a loss of their autonomy.

Additionally, there is today a generational aspect to the extent, and desire, of Veddas to integrate into mainstream society. While the Vedda community's elderly folk tend to hold on to their old ways, the younger generation appears to wish to integrate into mainstream local populations - a process that has been going on through inter-marriage with local populations.

(iv) Background to recent land disputes

The opening up of new lands in post-independence Sri Lanka has jeopardized the hunter-gatherer-chena cultivation lifestyle of many of the forest dwelling Veddas. In the post-independence era with the clearing of forest lands under vast new irrigations schemes such as the Gal-Oya and the Accelerated Mahaweli Development project, the

frontier has crept up on the forest tracts which sustained the Vedda community's way of life.

This transformation is manifest in drastic changes in the numbers of Veddas enumerated in the census, as well as in changes in the economic and social organisation of the Veddas which have been reported in several recent anthropological studies. The process of transformation which started in the 1930s and 1940s has continued with the influx of Sinhalese and Tamil colonists into the newly opened area. The other major factor for the transformation of the Vedda way of life has been the reduction of the forest lands which was their homeland.

(v) Government policy towards the Veddas

Sri Lankan government intervention in Vedda communities dates back to the early 1950s when a policy aimed specifically at assimilating and integrating marginal groups into the national development process was formulated. At the time, a Vedda welfare scheme, with a Vedda welfare officer and welfare committee, was set up to devise a strategy to combat malnutrition, poverty and disease affecting these people. In 1951 a Backward Communities Development Board was created to take special measures to improve the living conditions of the Veddas. Also within the Board's purview were other disadvantaged groups such as the Rodi and the Kinnarayas. The Board was chaired by a representative of the Ministry for Rural Development and was made up by government officials of the various provinces and two independent anthropologists.

One of the Board's functions was to oversee the fall out of the Gal Oya Development Scheme which had denied the Veddas access to their ancestral homelands and their means of livelihood. With the completion of this scheme in the early 1950s a large section of the former Vedda itinerant area was either inundated by the Senanayake Samudra reservoir or retained as natural reserves. (The Vedda

itinerant area used to consist of a long stretch of jungle, extending down from Anuradhapura along the forest covered interior of the country, running roughly parallel to the east coast and curving inland to Hambantota in the south.) One of the new settlements built to accommodate these displaced Veddas was Kandeganwila in the vicinity of Dambana. This settlement, which was opened in 1955, had 27 newly built houses which were allocated to the relocated families. The families also received 2 acres of paddy land and 2 acres of high-land for cultivation. The new settlement was designed to facilitate the assimilation of the Veddas into the local Sinhala and Tamil communities.

Until recently assimilation and conversion of the forest dwelling Veddas into settled agriculturalists was regarded by the Sri Lankan government as the only means to improve the situation and status of the Veddas. The goal has been to bring them into the national mainstream.

(vi) The Accelerated Mahaweli project and the Maduru-Oya dispute

In 1983 the Maduru-Oya National Park was created within the framework of the Accelerated Mahaweli Development Scheme (a large irrigation cum settlement scheme). The park was meant to provide a habitat for wildlife displaced by the project and to protect the catchment areas. The project also necessitated the shifting of 5 Vedda settlements from within the newly demarcated park. Among them were the Dambana and Kandeganwila Veddas. About 206 Vedda families were removed from their traditional homelands and resettled in other areas administered under the Mahaweli Project. Only Tissahamy, an old clan chief, and 7 families who define themselves as Vedda Wannietto refused to leave.

The newly designated park lands were subsumed and regulated by the Wildlife Department under the 1938 Fauna and Flora Protection

Ordinance. The park, the government argued, was necessary to preserve residuary forest cover which is essential to the balance of the eco-system. It claimed further that the need to take such steps had assumed greater significance consequent to the destruction of large areas of forest to accommodate various development projects such as the Mahaweli scheme.

Soon conflicts between the Veddas who remained on the land and claimed customary (traditional) rights over their homelands and the Wildlife Department developed. Under the 1938 Fauna and Flora Ordinance, no person could "enter any national park except for the purpose of observing the fauna and flora therein" and "no animal could be hunted, killed or taken". Likewise no "plant shall be damaged, collected or destroyed in a National Park". Thus the Ordinance under which the lands were administered excluded the Veddas from the park. It also denied them their livelihood and the means of subsistence, since hunting, food gathering and shifting agriculture were their principal sources of income.

To overcome the friction between the Veddas and the Wildlife Authorities a Cabinet decision in June 1990 decreed the setting up of a sanctuary of 1,500 acres apart from the Maduru Oya National Park. The sanctuary was said to include the 5 displaced Vedda villages. Unlike the regulations governing National Parks, the Fauna and Flora Ordinance under which sanctuaries are regulated recognises the rights of people who subsisted on those lands prior to the creation of the sanctuary. Permits to catch fish for those who by law or custom or usage had done so were issued. Yet, while the Veddas were allowed to stay, restrictions were imposed on methods of resource utilisation. Only traditional hunting and food gathering practices for subsistence purposes are permitted. Firearms, chain saws or any other sophisticated devices are forbidden.

The Cabinet decision also established the Wannietto Trust under the Chairmanship of the Director of Wildlife Conservation. This has

representation from the Ministry of Cultural Affairs, other concerned state agencies, and 2 NGOs, including Cultural Survival. The task of the Trust is to promote the protection of the Vedda culture and to look after the interests of the Vedda Wannietto. For this purpose the creation of a Cultural Centre within the sanctuary was recommended.

Sometime later a number of Veddas decided to leave the area where they had been resettled under the Accelerated Mahaweli Development Scheme. They returned to their traditional villages, but were asked to abandon the village (Kandeganvilla) by the Wild Life Department. The sanctuary, they were told only covered part of the 5 Vedda villages. The Veddas claimed they had been told that their 5 traditional villages had been returned to them. Further they said that they did not know the meaning of the word "acre" which the government had used to describe the area allotted to them.

The attempts of another 28 Veddas who were unhappy with their new mode of life, to return to their traditional villages were blocked by the Ministry of Mahaweli Lands, and Land Development. In an interview with a national newspaper the Ministry stated that national policy was to safeguard the forests and that it was unthinkable that the Veddas should return to practise their traditional modes of life in the forest.

In the ensuing conflict 2 Veddas were arrested. As a sign of protest, Tissahamy went on a hunger strike which was abandoned in May 1992 when the government agreed to meet him and promised to look into all the Vedda problems. On that occasion the government was requested to grant the Veddas another 10,000 acres of land within the limits of the National Park on the grounds that the sanctuary was not sufficiently large to meet their subsistence needs. This request was met by protests from the Wild Life Department and a number of environmental NGOs who charged that the Veddas no longer practised their traditional customs since they used firearms for hunting and tried to earn money from tourists who visit the area.

No solution has so far been worked out. The Wannietto Trust has proved inoperational. Given the continuing frictions between the Wild Life Department and the Veddas and Cultural Survival (one of the NGOs represented on the Wannietto Trust), the NGO member of the Trust asked the President to intervene. The President has now given Cultural Survival the responsibility for the design of the plan for the cultural preservation of the Veddas. Subsequently Cultural Survival asked the International Labor Organization, among other inter-governmental agencies, to provide technical guidance. A report with a list of recommendations was drawn up (Tomei, Manuela, "A plan for the Cultural Preservation and Development of the Veddhas", LST, Fortnightly Review, Vol.IV Issue No.69, 1993).

At the same time, the politicisation of the Veddas in the course of the dispute has resulted in what K.N.O Dharmadasa (1990, p.149) has termed the phenomenon of "professional" Veddas who are marketing their "ethnicity" for tourists, and are arguably semi-integrated into the cash economy. These Veddas are found in and around Dambana in the Maduru Oya area which came under the 1977 Accelerated Mahaweli Development Scheme. Dambana has become a centre of Vedda political activism as well as being projected as the most "authentic" Vedda village. Parallel to the politicisation of some Veddas an ethnic revivalism of sorts has take place which has resulted in the retention of the creolised speech of the older Dambana Veddas.

(vii) From assimilation to the preservation of ecological diversity?

In the last few years there has been an increased acceptance among the conservation community that a new approach to conservation which reconciles environmental concerns with the interests of local communities is needed. The media has played a central role in drawing attention to the disputes and difficulties facing the Veddas. Some of the issues raised were: the problem of physical and psychological adjustment to the new environment; apprehensions about the loss of Vedda identity once the younger generation is integrated

into the larger society through education and employment, and fear and antipathy to settlers from other areas where there is a history of exploitation and ill-treatment of the Veddas.

The findings of a Colombo University research team which visited the new settlement in 1992 were that the government had made many unfulfilled promises to the Veddas. These included: an offer of land for each household; another piece of land for each child at marriage, and the provision of health, education and family planning services. The Veddas alleged that they had been given a mere Rs.1,500 per family to build their own homes.

Nevertheless there does appear to have been a shift in government policy: in the 1950s the emphasis was on assimilation and integration, it has now altered to encompass acceptance of the Vedda demand for self-determination and preservation of traditional life ways.

This shift has occurred as a consequence of Tissahamy and his group's activism and because of pressure from the international community and various development funding institutions such as the World Bank, the Asian Development Bank and the International Labor Organisation. These bodied have become sensitized to, and have emphasised the need for, development along with the preservation of cultural and ecological diversity.

The ILO Convention No.169, adopted in 1989, stresses the need for national governments to recognize that they are dealing with societies which have distinct collective identities, that these groups should be consulted with regard to their own development priorities and treated with respect and dignity, and that they should participate in the formulation, implementation and evaluation of plans and programs for national and regional development which may affect them directly.

Additionally, the 1989 ILO Convention recognises the special relationship of indigenous peoples with their lands and territories.

Hence it requires that only in exceptional circumstances, and then only with their free and informed consent, or through appropriate procedures established by national laws and regulations, might indigenous and tribal peoples be moved. Any relocation of these peoples as may be necessary in exceptional circumstances, must be temporary, if possible, failing which the peoples must receive adequate compensation.

More recently, the Statement of the International Alliance of the Indigenous - Tribal Peoples of the Tropical Forests, signed in Penang in 1992, has emphasised the unity of indigenous or tribal peoples and territory.

Similar emphasis with regard to the role of indigenous people in the development process is enshrined in the World Bank's 1991 Operational Directive No 4.40 entitled "Indigenous Peoples". The directive states that:

> the objective...is to ensure that indigenous people dò not suffer adverse effects during the development process, particularly from Bank-financed projects. The Bank's policy is that the strategy for addressing the issues pertaining to indigenous peoples must be based on the informed participation of the indigenous peoples themselves.

There appears to be increased recognition by the Sri Lankan government that the Veddas should be informed as to how their communities will be affected in development programmes, and that they should be willing participants in those projects. Nonetheless there remain significant discrepancies between government statements and actions. Thus far, compensation to the Veddas who have been relocated has been inadequate. Taken together with the broken promises of assistance and the ineffectiveness of the Trust the government might be seen to be simply paying lip service to the ILO Convention No.169 and its exhortations. In addition the absence of

a conception in Sri Lanka of collective (ethnic) ownership at the government level has posed a problem of defining, and assuring the "collective rights" of the Veddas.

(viii) Conclusion: indigenous peoples and the issue of identity

Many indigenous forest-dwelling peoples are in conflict with state governments over exploitative and extractive commercial enterprises which have been destroying their lands and resources - for example, in many South American and South East Asian nations.

The Veddas' claim to be descendants of the original inhabitants of Sri Lanka is hardly contested in national life. What is debatable is the claim made for and by some Veddas that they and their life-style constitute an authentic and historically unchanging cultural identity. This is particularly the case with regard to the group of Veddas led by Tissahamy who are demanding their traditional homelands back even as their village is becoming a minor tourist attraction. To many, this integration into the tourist trade and local market economy appears to contradict their claimed dependence on traditional forest lands for sustenance.

The Veddas are in the paradoxical position of claiming that they have a distinctive and unchanging cultural identity even as their lands, the purported source of their culture and identity have been removed, and they are increasingly participating in the market economy. This paradox is arguably an aspect of the contest between the Veddas and the government wherein the question of Vedda identity has come to be defined in functional terms: as a question of land rights.

Given the fragmented character of the Vedda community no uniform policy will be adequate to address the issue of Vedda rights. The definition of "collective identity" must take into account the fact that even indigenous communities and collectives might change, fragment and be transformed. There is little doubt that the Wannietto Veddas'

claim that the loss of their land has entailed a loss of their traditional way of life and thus led to a loss of their livelihood is valid.

The paradox noted above simply points to the fact that collective identities are not necessarily physically rooted to places, be they forests or an urban neighbourhood, any more than they are fixed and unchanging. Rather, it points to inadequacies in conceptualisation of how cultural identities are formed and transformed, and finally to the limitations of the idea of cultural preservation, if cultural preservation means the denial of social change. The fact that some Veddas have willingly left their homelands and are engaged in the development and assimilation process, does not negate the claim of other Veddas to their lands, culture or to collective identity.

This report has stressed the difficulties of defining Vedda identity because current arguments over the "collective rights" of Veddas cannot be sorted out without an adequate understanding of the changes that Vedda communities have experienced. The issue of identity definition is pressing given the Veddas' generally marginalised and underprivileged status within the national community, and complicated by the implications which recognition of separate collective land rights for any ethnic group might pose to a government already engaged in an ethnic conflict with a segment of the population which is claiming separate territorial rights in the North-East of the country.

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APPENDIX I

UN HUMAN RIGHTS INSTRUMENTS RATIFIED BY SRI LANKA (as of 4 Jan 1994) :

1. *International Covenant on Economic, Social and Cultural Rights*
2. *International Covenant on Civil and Political Rights*
3. *Declaration regarding Article 41 of the above*
4. *Convention on the Prevention and Punishment of the Crime of Genocide*
5. *Slavery Convention as amended*
6. *Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery*
7. *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*
8. *ILO Convention (no. 29) concerning Forced Labour*
9. *ILO Convention (no. 98) concerning the Application of the Principles of the Right to Organize and Bargain Collectively*
10. *ILO Convention (no. 135) concerning Protection and Facilities to be Afforded to Workers' Representatives in the Undertaking*
11. *Convention on the Nationality of Married Women*
12. *Convention on the Rights of the Child*
13. *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces in the Field*
14. *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea*
15. *Geneva Convention relative to the Treatment of Prisoners of War*
16. *Geneva Convention relative to the Protection of Civilian Persons in Time of War*
17. *International Convention on the Elimination of All Forms of Racial*

Discrimination

18. *International Convention on the Suppression and Punishment of the Crime of Apartheid*

19. *Convention on the Elimination of All Forms of Discrimination against Women*

20. *UNESCO Convention against Discrimination in Education*

21. *ILO Convention (no. 100) concerning Equal Remuneration for Men and Women Workers for Work of Equal Value*

22. *ILO Convention on Maternity Protection (no. 103)*

23. *ILO Convention on Labour Statistics (no. 160)*

APPENDIX II

UN HUMAN RIGHTS INSTRUMENTS NOT RATIFIED BY SRI LANKA

1. *Optional Protocol to the International Covenant on Civil and Political Rights*
2. *Second Optional Protocol to the above aiming at the abolition of the death penalty*
3. *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity*
4. *ILO Convention (no. 105) concerning the Abolition of Forced Labour*
5. *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*
6. *Declaration regarding Article 21 of the above (relating to the entertainment of complaints by one State Party against another)*
7. *Declaration regarding Article 22 of the above (relating to the entertainment of complaints by individuals)*
8. *Convention on the International Right of Correction*
9. *ILO Convention (no. 102) concerning Minimum Standards of Social Security*
10. *Convention relating to the Status of Refugees*
11. *Protocol relating to the Status of Refugees*
12. *Convention on the Reduction of Statelessness*
13. *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*
14. *ILO Convention (no. 97) concerning Migrant Workers*
15. *ILO Convention (no. 143) concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers*
16. *ILO Convention (no. 87) concerning Freedom of Association and Protection of the Right to Organize*

17. *ILO Convention (no. 122) concerning Employment Policy*

18. *ILO Convention (no. 141) concerning Organisations of Rural Workers and Their Role in Economic and Social Development*

19. *ILO Convention (no. 151) concerning Protection of the Right to Organize and Procedures for Determining Conditions of Employment in the Public Service*

20. *Convention on the Political Rights of Women*

21. *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages*

22. *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*

23. *Protocol Additional to the Geneva Convention of 12 August 1949, and relating to the Protection of Victims of Non-international Armed Conflicts (Protocol II)*

24. *Declaration regarding Article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination*

25. *International Convention against Apartheid in Sports*

26. *Protocol Instituting a Conciliation and Good Offices Commission to the UNESCO Convention against Discrimination in Education*

27. *ILO Convention (no.111) concerning Discrimination in respect of Employment and Occupation*

SRI LANKA

STATE OF HUMAN RIGHTS 1993

This report contains a detailed account of the state of human rights in Sri Lanka focusing on events which occurred in the country in 1993.

The report deals with questions relating to civil and political rights, economic, social and cultural rights, women's rights, children's rights, minority rights, indigenous people, displaced persons and refugees, the north east war, emergency regulations and the constitutional protection of human rights.

The report represents an important milestone for the human rights movement in Sri Lanka and has been published by the Law & Society Trust on behalf of a group of academics, social scientists and human rights activists.

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