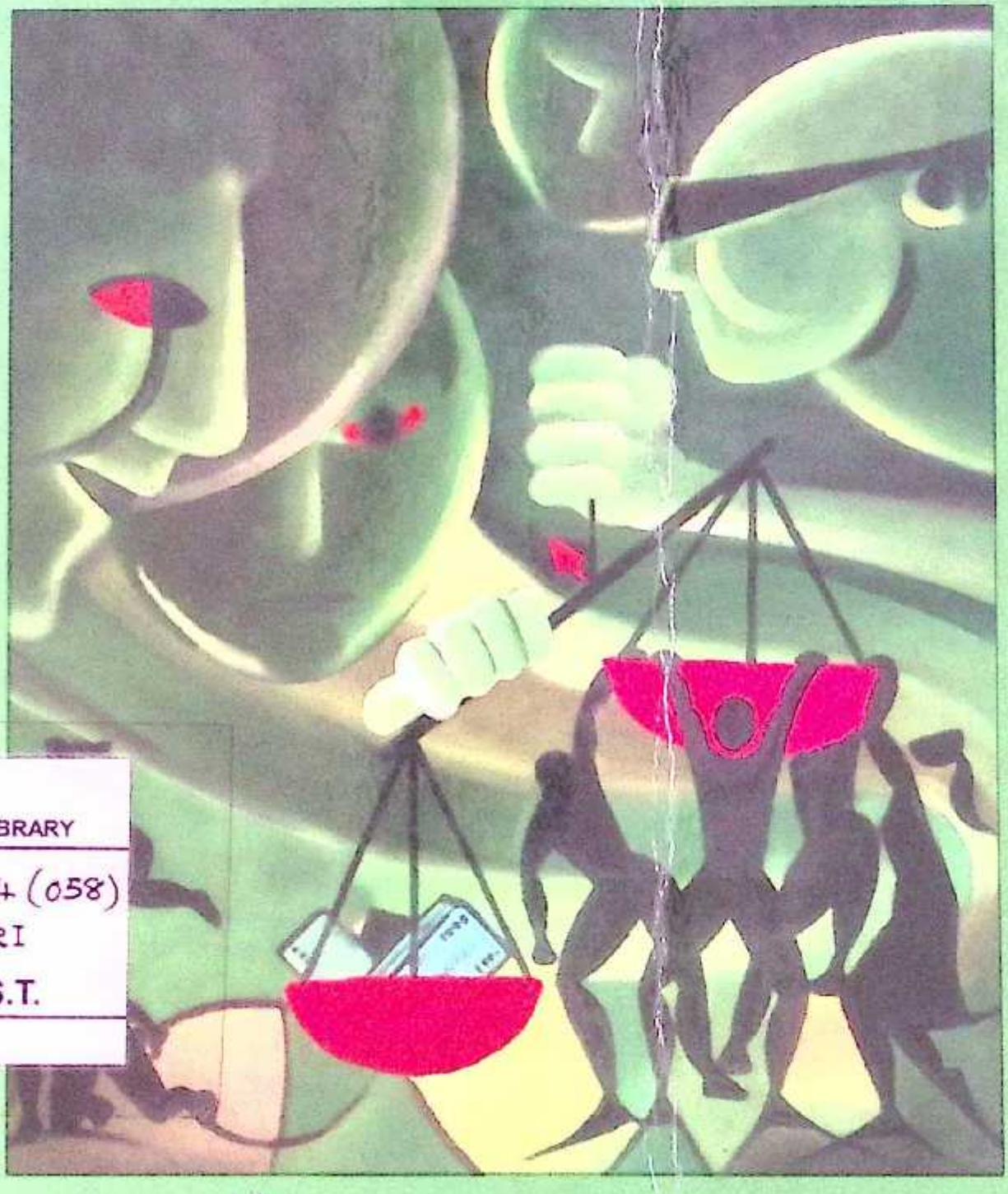
Sri Lanka: State of Human Rights 2004



Law & Society Trust

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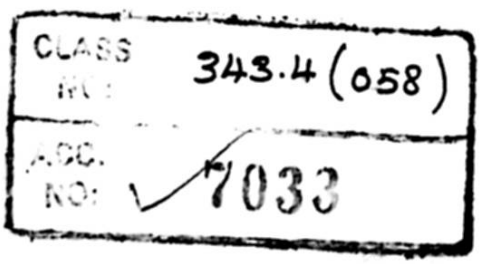

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ABBREVIATIONS

ACFFTU	All Ceylon Federation of Free Trade Unions
APNR	Alliance for the Protection of National Resources and Human Rights
ASNAHR	Alliance for Safeguarding National Assets & Human Rights
ASP	Assistant Superintendent of Police
BOI	Board of Investment
CEB	Ceylon Electricity Board
CID	Criminal Investigation Department
CMU	Ceylon Mercantile Industrial & General Workers Union
CPC	Ceylon Petroleum Corporation
CRC	Convention on the Rights of the Child
DIG	Deputy Inspector General of Police
EPF	Employees Provident Fund
ER	Emergency Regulations
ETF	Employees Trust Fund
EU	European Union
FTZ	Free Trade Zone
FTZWU	Free Trade Zone Workers Union
GMOA	Government Medical Officers' Association
GOSL	Government of Sri Lanka
HRC	Human Rights Committee

HQI	Headquarters Inspector
HSTUA	Health Services Trade Union Alliance
ICCPR	International Covenant on Civil & Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IED	Immigration & Emigration Department
IGP	Inspector General of Police
IFI	International Financial Institutions
ILO	International Labour Organisation
IOM	International Organisation for Migration
IPA	Intellectual Property Act
IPR	Intellectual Property Rights
ISGA	Interim Self Governing Authority
ITGLWF	International Textile, Garment and Leather Workers' Federation
JJPA	Juvenile Justice Procedure Act
JSC	Judicial Service Commission
JSS	Jathika Sevaka Sangamaya
JTUF	Jathika Teachers' Union Federation
JVP	Janatha Vimukthi Peramuna
LDC	Least Developed Country
LHRD	The Lawyers for Human Rights and Development
LJEWU	Lanka Jathika Estate Workers' Union

LTTE	Liberation Tigers of Tamil Eelam
NCPA	National Child Protection Authority
NERF	North-East Reconstruction Fund
NESU	National Estate Staff Union
NLAC	National Labour Advisory Council
NMC	National Monitoring Committee
NPC	National Police Commission
NTUF	National Trade Union Federation
NYSC	National Youth Services Council
OIC	Officer in Charge
PA	People's Alliance
PSNTUF	Public Service National Trade Union Federation
PTA	Prevention of Terrorism Act
SAARC	South Asian Association for Regional Cooperation
SDN	Sub-Committee on De-escalation and Normalization
SIHRN	Sub-Committee of Immediate Humanitarian and Rehabilitation Needs for the North and East
SLBFE	Sri Lanka Bureau of Foreign Employment
SLMM	Sri Lanka Monitoring Mission
SSP	Senior Superintendent of Police
TRO	Tamil Rehabilitation Organisation
TULF	Tamil United Liberation Front
UDHR	Universal Declaration of Human Rights

UGC	University Grants Commission
UN	United Nations
UNC	United Nations Charter
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
USGSP	United States Generalised System of Preferences
WHO	World Health Organisation
WPC	Woman Police Constable
WSI	Woman Sub Inspector

Foreword

This report seeks to describe the current status of human rights in Sri Lanka and to assess the extent to which Sri Lanka has fulfilled its obligation to protect the fundamental rights of its citizenry in conformity with its international obligations. Hence, the report represents an important watershed with regard to human rights in Sri Lanka. Constitutional guarantees, legislative enactments and the extent of the current implementation and enforcement of fundamental rights are examined and the impact of the restrictions they contain are discussed. The report covers Rights of the Child, Illegal Migration: Human Smuggling and Trafficking in Persons, Workers' Rights, Judicial Protection of Human Rights, The National Police Commission, Bindunuwewa: Justice Undone?, Human Rights & Intellectual Property Rights and Combating Money Laundering in Sri Lanka.

The report was co-ordinated by the Law & Society Trust. Specific chapters were assigned to individuals with special competence in the relevant areas. The drafts were subsequently reviewed for accuracy, objectivity and clarity of presentation. The report was then 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. The report also contains a list of international human rights conventions to which Sri Lanka is a signatory and a list of instruments, which are yet to be ratified by Sri Lanka. A list of the fundamental rights cases decided by the Supreme Court in 2003, is also attached as a schedule to the report.

It is hoped that this report would continue to facilitate dialogue between civil society institutions and the government in ensuring more effective protection and promotion of human rights within Sri Lanka.

Sri Lanka's Constitution mandates that "the fundamental rights which are declared and recognized by the Constitution shall be respected, secured and advanced by all the organs of government." Sri Lanka is also a signatory to several international human rights conventions 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 & Society Trust
Colombo

October 2004

I

Overview

*Elizabeth Nissan**

1. Introduction

This volume covers a broad range of human rights issues in Sri Lanka, including several chapters on issues that have not previously been discussed in a *Sri Lanka: State of Human Rights* volume. The new topics include aspects of illegal migration, intellectual property rights, the National Police Commission and money laundering. Also included are chapters on developments arising from the judicial protection of human rights, children's rights, workers' rights and impunity, through exploring issues arising from the investigations into the massacre at Bindunuwewa in October 2000 and the resulting convictions.

In last year's *Sri Lanka: State of Human Rights 2003* volume, it had been possible to report on a sense of cautious optimism during 2002 as the ceasefire held and peace talks between the Government of Sri Lanka and the Liberation Tigers of Tamil Eelam (LTTE) made progress

* Human Rights Consultant

in some important areas. In such a context, the human rights situation in the country, and in the North and East particularly, appeared to be gradually improving. Some of the improvements that were observed in 2002 did continue into 2003: the ceasefire agreement remained in place throughout the year, despite violations on both sides; the Sri Lanka Monitoring Mission (SLMM) – which had been established under the terms of the ceasefire to monitor its implementation – continued its monitoring function; communications between the North and the South through the Vanni improved further.

After the state of emergency had been allowed to lapse in 2001,[1] the number of arrests by the military declined, and people arrested by the military were more quickly transferred into police custody instead of being held in military camps.[2] People detained under emergency regulations were released, and by the end of the 2003, only 65 people remained in detention under the Prevention of Terrorism Act (PTA); over 1,000 other prisoners who had been held for prolonged periods under the PTA had been released since the signing of the ceasefire agreement in February 2002.[3] However, while the great reduction in the number of political detainees was welcome, even by the end of the year the government failed to take action to repeal or amend the PTA to bring it into line with international standards. There was, however, a significant Supreme Court decision in March 2003[4] that regulations

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1. Unable to resort to emergency powers any longer, the government instead resorted to alternative powers under the Public Security Ordinance and the Prevention of Terrorism Act that enabled it "to keep in force the substance of some of the emergency regulations." This is discussed in detail below, in an Addendum to the Overview written by Saliya Edirisinghe of the Nadesan Centre, Colombo.

2. "Sri Lanka", *Country Reports on Human Rights Practices – 2003*, U.S. Department of State. http://www.state.gov/g/drl/rls/hrrpt/2003/27951.htm

3. "Sri Lanka", Amnesty International Report 2004, accessible at http://web.amnesty.org/report2004/lka-summary-eng

4. SC No. 20/2002(FR), *Sothilingam Thavaneethan v. Dayananda Dissanayake, Commissioner of Elections and Others*, S.C. Minutes 25.03 2003.

made under the PTA cannot impose restrictions on fundamental rights. This was on the reasoning that the Constitution provides for the restriction of fundamental rights only by law (statute) and exceptionally by emergency regulations, and not by regulations under the PTA.

2. Human Rights in the North and East

The human rights situation in the North and East remained a particular concern during 2003. The impact of the conflict in the North and East has, not surprisingly, dominated human rights concerns in Sri Lanka over the many years of the conflict. One major concern – and one that dominated the peace talks until they were suspended by the LTTE in April 2003 – has been the impact of long-term displacement from their homes of large numbers of people, who have in effect been denied their rights to access decent housing, health care, education and employment. Plans for resettlement and rehabilitation of the displaced were developed through the peace process in the first months of the year. According to United Nations High Commissioner for Refugees (UNHCR) figures, some 311,202 internally displaced people had returned to their homes between January 2002 and June 2003. Among the displaced, women and children predominate and bear the brunt of this suffering. Intensive lobbying by women's groups in 2002 led to recognition that gender concerns should be incorporated into all aspects of the peace process, and in late 2002 a Sub-Committee on Gender Issues was established to develop policy on gender issues relevant to the peace process. This Sub-Committee met twice in 2003 before the peace talks were suspended.

In addition, grave concern mounted in 2003 over the manner in which the LTTE continued to use the terms of the ceasefire to further extend and exert its control over the population of the North and East, including over people living in areas that were ostensibly under the control of the military. Indeed, in a joint statement issued in August 2003, Amnesty

International and Human Rights Watch accused the LTTE of "taking advantage of the cease-fire with the Sri Lankan Government to murder political opponents."[5] The greater freedom of movement permitted to LTTE cadres within government-controlled areas of the North and East under the terms of the ceasefire agreement gave them more direct access to the populations living in these areas, and as the presence of the LTTE has spread, they have used intimidation, extortion and assassination to impose control and censorship. The aim appears to have been to silence potential critics and representatives of alternative viewpoints. Indeed, the situation deteriorated rapidly after April 2003, following the LTTE's decision to withdraw from the peace talks "for the time being."[6] Concern quickly mounted within both local and international human rights circles about the rise in political killings and abductions in the North and East, in which the LTTE targeted members of anti-LTTE Tamil parties and their relatives. Such killings were at their height between April and August 2003,[7] but also took place at other times during the year and extended to the killing of opponents in Colombo. According to the US State Department, the LTTE killed over 36 members of anti-LTTE Tami political groups and alleged informants during the year.[8] Another target of LTTE terror tactics during the year was the Muslim population in the East. University Teachers for Human Rights (Jaffna) reported on a series of incidents in the Mutur and Kinniya areas between October and

5. "Sri Lanka: Rights groups say LTTE-linked killings continue with impunity", Amnesty International Press Release, AI Index: ASA 37/003/2003 accessible at: http://web.amnesty.org/library/Index/ENGASA370032003?open&of=ENG-LKA

6. Letter from LTTE Headquarters to the Prime Minister of Sri Lanka dated 21.04.2003, the text of which is accessible on the LTTE Peace Secretariat website: http://www.lttepeacesecretariat.com/mainpages/releases/PR210403.pdf

7. "Sri Lanka", Amnesty International Report 2004, accessible at http://web.amnesty.org/report2004/lka-summary-eng

8. "Sri Lanka", Country Reports on Human Rights Practices – 2003, US Department of State, accessible at http://www.state.gov/g/drl/rls/hrrpt/2003/27951.htm

December 2003, for example, the LTTE manipulated land disputes between Muslim and Tamil communities to fuel violence, as it sought to expand its territorial and political hold on the East by forcing out Muslim civilians. As the peace negotiations developed, Muslim parties increased their call for greater autonomy for Muslims within certain areas of the country under LTTE control. In addition, despite its agreement in December 2002 to work with UNICEF on an action plan to restore normalcy to children's lives, the LTTE continued to recruit children.

By the beginning of 2003, increasing tensions were already evident between LTTE and government negotiators over the status of high security zones in Jaffna, particularly, and the LTTE's desire that the army vacate these areas to allow civilians to resettle there. The military refused, saying that it would only vacate such areas if the LTTE disarmed. This, in turn, was refused and at the fourth session of peace talks, held in Thailand in January 2003, the work of the Sub-Committee on De-Escalation and Normalization was halted as no agreement on its future could be reached. Incidents at sea in February and March, involving the Sri Lanka Navy and LTTE vessels, exacerbated tensions further.

During 2002, it had also been possible to foresee potential obstacles to the peace process arising from another source: the lack of consensus between the government and opposition parties in the South, and particularly the opposition of the Executive President, to the direction that the peace talks were taking. With the Prime Minister and the Executive President representing opposing political parties, the potential for tension between them was great. During 2003 it escalated to the point where the Executive President, Chandrika Kumaratunga, prorogued Parliament on November 4th and dismissed three Cabinet Ministers, assuming their portfolios herself. This move by the President

came just days after the LTTE had put forward its own proposals for the creation of an Interim Self Governing Authority (ISGA), which opposition parties asserted would become a stepping-stone to a separate Tamil state. The ISGA would have plenary power for the governance of the North and East, including powers in relation to resettlement, rehabilitation, reconstruction and development, raising revenue, law and order, and over land.[9] It would remain in place until such time as a final settlement to the ethnic conflict is implemented. In effect, the ISGA would establish the LTTE as the recognised authority over the North and East, formalising its rule without recourse to any electoral process.

By the end of 2003, then, the future of the peace talks was most uncertain. Elections would not take place until well into 2004, and there was a history of deep mutual distrust between President Kumaratunga and the LTTE, based on their experiences of the earlier period of People's Alliance (PA) rule. Questions were also being asked about whether the peace process as currently constituted could ever arrive at a solution that would provide democracy, justice and equality for all. With the talks involving only LTTE and government representatives, and at times with Muslim representatives invited to defend their community's interests, there was little space for the airing or debating of alternative viewpoints. Furthermore, with the LTTE continuing to impose its will on the population of the North and East through fear tactics, and attempting to suppress any expression of opposition to its rule, prospects for human rights in the North and East remained bleak in practice, whatever the formal statements of the parties to the talks with regard to human rights may have been during the year.

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9. The full text of the proposal for the ISGA is available at : http://www.lttepeacesecretariat.com/mainpages/releases/proposal.pdf

3. Peace Talks in 2003 and the Withdrawal of the LTTE from Peace Negotiations

By the time that the LTTE announced that it was "suspending its participation" in peace talks in April, there had been six sessions in the first round of peace talks, three of which were held in 2003.[10] The main focus of these discussions was the urgent need to implement humanitarian programmes of resettlement and rehabilitation on behalf of the hundreds of thousands of people who had been displaced from their homes by the conflict.

The fourth session was held in Thailand in January 2004. This meeting concentrated on urgent humanitarian priorities, and in particular on the need to provide for the resettlement and rehabilitation of internally displaced persons. To this end, an Action Plan for an Accelerated Resettlement Programme for the Jaffna District was agreed. As already discussed above, no agreement could be reached on the future work of the Sub-Committee on De-escalation and Normalization (SDN) and this Sub-Committee did not meet again. It had been established to facilitate dialogue between the parties on matters relating to high security zones and other areas that the public could not access, in order to facilitate the resettlement of displaced persons. At the fourth session, it was agreed that the Accelerated Resettlement Programme would begin in areas that did not include high security zones, and it was also stated that "the particular needs of the displaced Muslim population will be duly accommodated in the resettlement process." It was further agreed that donor funds for resettlement and rehabilitation of the North and East would be administered through a North East Reconstruction Fund (NERF), with the Sub-Committee of Immediate Humanitarian and Rehabilitation Needs for the North and East (SIHRN) serving as

10. The main concerns discussed in the first three round of talks in 2002 are summarised in "Overview", *Sri Lanka: State of Human Rights 2003* (Law & Society Trust, Colombo, 2003). For more detailed accounts of all sessions and of the meetings of the various Sub-Committees see, http://peaceinsrilanka.com

the main decision-making body for such work. The World Bank would act as the custodian for the NERF. Also discussed at the fourth session were issues arising from the reports of the SLMM relating to child recruitment by the LTTE and human rights, and there was agreement that "human rights will constitute an important element of a Final Declaration."[11]

At the fifth session, held in Germany in February, humanitarian and rehabilitation needs were again at the forefront of the discussion. The Accelerated Resettlement Programme for Jaffna was reported to be ahead of schedule in its planning, and with regard to fears of the Muslim population in the East regarding their security and lands, committees comprising an equal number of Muslim and LTTE representatives would be established to address such issues. The fifth session saw further signs of progress, too, on an explicit human rights framework being incorporated into the peace process. It was agreed at this meeting that Ian Martin, who was acting as adviser on human rights to both parties in the peace process, would draw up a human rights "road map" for discussion at the sixth session which would include: human rights activities and commitments to be implemented during the peace process; effective mechanisms for monitoring human rights; training both government and LTTE officials in human rights and humanitarian law and training police and prison officials. In addition, there was recognition by both parties that children had suffered most from the effects of the conflict, and a further commitment was made by the LTTE to halt child recruitment. Further reference was also made to the development of the action plan for children affected by armed conflict in the North and East, which had been agreed in principle by the LTTE and United Nations Children's Fund (UNICEF) in December 2002.[12]

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11. Statement of the Royal Norwegian Government, Royal Ministry of Foreign Affairs, 9th January 2003.

12. See "Overview", *Sri Lanka: State of Human Rights, 2003* (Law & Society Trust, Colombo, 2003).

By the time of the sixth session of talks in Japan in March, the security situation in the North and East had deteriorated, and the LTTE had threatened to pull out of the talks after a naval vessel had sunk an LTTE ship. Considerable controversy surrounded the sinking of the vessel, but in the event the talks went ahead and modalities for preventing further such incidents were discussed, including strengthening the role of the SLMM. There was further discussion of the federalist principles of any future settlement to the conflict, based on internal self-determination within a united Sri Lanka, and the LTTE reported on its creation of a Political Affairs Committee to study federal systems comparatively and engage in wide-ranging consultations, "to prepare the ground for the process of establishing internal self-determination within a united, federal Sri Lanka."[13] Meetings between LTTE and Muslim representatives in the East were again discussed, and human rights advisor Ian Martin was asked to further develop three aspects of the road map for human rights. These were: to draft a Declaration of Human Rights and Humanitarian Principles to be adopted by both parties until human rights were entrenched in a final constitutional arrangement; to plan programmes of human rights training; and to propose ways to strengthen the role of the National Human Rights Commission's monitoring functions. These talks were the last to be held in 2003, as in the following month the LTTE "suspended its participation" in the process.

In announcing its decision to withdraw from the talks, the LTTE stressed its continuing "commitment to seek a negotiated political solution to the ethnic question," and for the most part, the ceasefire remained in place for the rest of the year. The LTTE's decision was based – according to its statement – on two key, and interlinked, factors: the exclusion of the LTTE from a preliminary donor's meeting in Washington in April 2003, and the perceived failure of the government to implement the

13. Press Release, Royal Norwegian Ministry of Foreign Affairs, 21st March 2003.

aspects of the ceasefire agreement which aimed to "restore normalcy" to the North and East, and in particular to facilitate the swift resettlement of the displaced. The peace negotiations so far had not yet discussed any possible political solutions to the conflict in any detail (apart from agreeing to a federal principle as the basis of a future agreement); many highly contentious issues remained to be broached. Instead the emphasis had been on efforts to "restore normalcy" to the war-affected people of the North and East. Thus, in the LTTE view, whilst undeniable progress had been made through the talks, the government's "refusal to implement the normalisation aspects of the Ceasefire Agreement" had led to the perception that the peace process was not alleviating the suffering of the Tamil people of the North and East, and particularly of the displaced. In addition, the government's poverty alleviation policies, in the LTTE view, failed to take account of the specific conditions prevailing in the North and East as a result of decades of conflict, and instead treated the whole country within one undifferentiated framework.

4. Developments Relating to Children's Rights

In April 2003, UNICEF facilitated a workshop in Kilinochchi attended by representatives from the LTTE, the Sri Lanka Government and local and international organisations to develop an Action Plan to address the needs of children affected by war, as agreed in principle in late 2002. The Action Plan covered child rights training for the LTTE, government forces and at community level; a mechanism to monitor the rights of children affected by war in the North and East, administered by UNICEF; the provision of transit centres for the release and reintegration of child soldiers, managed by the Tamil Rehabilitation Organisation and UNICEF; development of micro-credit facilities and income-generating activities; vocational training; non-formal education and literacy provision; health care and nutrition services and provision

of psychosocial care. It was agreed that a Steering Committee would monitor the implementation of the Action Plan and provide updates on its progress to the Sub-Committee on Immediate Humanitarian and Rehabilitation Needs.[14]

The first transit centre for released child soldiers was opened in early October in Kilinochchi, with two further centres planned for Batticaloa and Trincomalee. Forty nine former child soldiers were taken into the Kilinochchi centre when it opened, 27 of whom were girls. Children would be able to stay at the centre for up to three months and their progress after being returned to their families would be monitored by Save The Children social workers.[15]

Despite these developments, the situation of child recruits to the LTTE remained of serious concern during the year, as discussed in the chapter on the rights of the child. Concerns were raised about the administration of these centres, as well as about the fact that the LTTE was reported to have continued recruiting children, despite its protestations to the contrary. Indeed, according to Amnesty International, on the day after the first transit centre opened, "There were reports that ... the LTTE forcibly recruited up to 23 children."[16] Reports of child recruitment continued later in the year, too, but on a smaller scale. UNICEF was reported as saying that of 1,155 children known to be with the LTTE, 385 had been released.[17]

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14. "Government and LTTE agree on action plan for children", UNICEF News Note, 11th April 2003, accessible at, http://www.unicef.org/media/media-_7159.html

15. "UNICEF opens transit centre for released child soldiers in Sri Lanka", News Item, 6th October 2003, accessible at, http://www.unicef.org.uk/press/news_detail.asp?news_id=185

16. "Sri Lanka", *Amnesty International Report 2004*, accessible at http://web.amnesty.org/report2004/lka-summary-eng

17. *Ibid.*

More generally, the chapter on the rights of the child also discusses a range of other concerns and developments relating to child rights. The review by the UN Committee on the Rights of the Child of the Government's second periodic report, submitted under the UN Convention on the Rights of the Child, provided the opportunity for a review of Sri Lankan law relating to children and its consistency with international norms. The issues arising, relating to both criminal and civil law and the treatment of children by the justice system, are summarised in the chapter on child rights, as are the important recommendations for reform in this area made by the UN Committee on the Rights of the Child. In addition, the chapter raises concerns about the continuing prevalence of child labour in Sri Lanka, and developments intended to prevent both the trafficking of children and the exploitation of children by paedophiles through use of the internet.

5. Crime, Human Rights and Impunity

Two areas of criminal activity are discussed in this volume: illegal migration and money laundering. The discussion of money laundering is included at a time when draft legislation to combat this phenomenon is under preparation. The chapter discusses various methods of money laundering and its impact as well as the means by which it could be combated. Money laundering is seen to threaten the financial integrity of the country, and deny the principle of equality of the law to all. Its impact on the financial system is seen as potentially undermining the country's capacity for development.

While the rights of migrant labourers from Sri Lanka have been discussed in several previous volumes of *Sri Lanka: State of Human Rights*, the rights of illegal migrants have not previously been addressed. In this volume, the chapter on illegal migration tackles the overlapping issues of human smuggling and trafficking in persons, the two most prevalent forms of illegal migration from and within Sri Lanka. The

phenomena are defined, examined in relation to Sri Lankan and international law and placed in a human rights framework. While human smuggling and trafficking in persons are clearly criminal acts with international dimensions which are important for a state to tackle, the emphasis in this chapter is emphatically on humanitarian and human rights aspects of these crimes, and on how human rights protection for such migrants can be improved. In his conclusion, the author argues that it is possible to use international law enforcement instruments – the UN Convention against Transnational Organized Crime and the Trafficking and Smuggling Protocols – as empowering documents for the advancement of human rights.

An element that is linked to the prevalence of the crimes discussed in these two chapters, as well as to other violations of human rights, is official corruption, including the politicisation and corruption of the police. A significant reform in police administration was implemented in November 2002, when the National Police Commission (NPC) was created. There has long been a call for the creation of an independent police commission, and the chapter on the NPC discusses the background to its creation, its powers and performance during its first year in operation. It concludes with a series of recommendations for making the NPC more effective and independent.

One of the first acts of the NPC was to start to tackle the long-standing and corrupting issue of political transfers in the police. In December 2002, it rejected the transfer orders of 60 Assistant Superintendents of Police and Officers-in-Charge, which the Police Department had recommended under direction from the Minister of Interior. The impact of the NPC on the performance of the police will take longer than a year to assess. If it is able to transform the political culture of policing that has become endemic and to alter public perceptions of corruption in the police service, then it will certainly have a major role to play in enhancing human rights protection in Sri Lanka.

Impunity for committing human rights violations remains a serious issue in Sri Lanka, despite prosecutions in a small number of cases. In July 2003, five people, two of whom were police officers, were convicted for the killings in October 2000 of 27 Tamil men and boys who were detainees in a "rehabilitation centre" at Bindunuwewa. In the wake of the Bindunuwewa massacre, and the resulting national and international outcry, the government announced a series of investigations. A Commission of Inquiry was established, and the CID and Attorney General's Department conducted their own investigations. On 25th March 2002, 41 suspects were indicted, ten of whom were police officers. On 1st July, five of the accused, including two police officers, were convicted and sentenced to death. By the end of the year the convictions were under appeal.

Reactions to the convictions were divided: some welcomed them as justice done; others saw them as an outrage. The Bindunuwewa case, culminating in the High Court trial, provides an important opportunity for reflections on the nature of justice and impunity in Sri Lanka, crucial issues for the future of human rights. Through a detailed examination of the investigative procedures and the evidence and its ambiguities, drawn from published and unpublished material as well as interviews, the author raises a series of important questions of fact, as well as questions of law, procedure and fairness. He concludes that,

> "The basic ambiguity of the judgment, and the widely held feeling that the extreme sentences, and even the verdicts themselves, were unfair, suggests the political risks involved in demanding human rights prosecutions without having the investigative, judicial, or civil society mechanisms in place to guarantee a full and accurate airing of all available evidence."

Furthermore, and even more worrying, he argues that,

> "... the unclear message [the case] sends about impunity – that for political reasons some people must be held accountable, but that, for political reasons of a different sort, those people won't be the big guys – actually undermines whatever positive message it was hoped to send about ethnic justice. If the Bindunuwewa case proves anything, it is that simply having a trial for trial's sake is not only inadequate, but can actually be dangerous."

This chapter will raise feelings of discomfort amongst many in the human rights community, both locally and internationally, who call for Commissions of Inquiry and prosecutions, if evidence permits, as a matter of course in the wake of grave human rights violations. Such a course of action, the author argues, requires certain conditions to be met if it is to be effective:

> "Indeed, the Bindunuwewa case has revealed in particularly sharp relief the continuing weakness of Sri Lankan and international civil society: mechanisms for sustained and effective follow up in cases like Bindunuwewa still need to be developed. The initial outrage generates calls for independent commissions, full investigations, and trials if justified. Yet there were no organized efforts by the media, political parties, civil society organizations, or the "international community" to maintain the pressure for full disclosure and to make sure that the case was being handled well, that the right leads were investigated, the proper people indicted, the full evidence presented, and the victims treated with respect."

Doubtless, a similar story could be told in other such high profile cases, too.

6. New Legislation and Other Human Rights Issues

The chapter on intellectual property rights places this issue firmly within a human rights framework, providing a succinct discussion of a range of human rights issues arising from the development of intellectual property rights. This chapter concentrates in particular on the impact of intellectual property rights on various socio-economic rights in developing countries and examines Sri Lanka's intellectual property regime. Of particular concern are: the impact of pharmaceutical companies' claims to intellectual property rights in the form of drugs patents on the right to health; the conflict between claims to copyright of both print and electronic material and the rights to education and development; and the impact of biotechnology patents on the right to be free from hunger. The author argues that while intellectual property law is an essential piece of legislation in any country, "the challenging task is to ensure at least a basic level of harmonisation with the human rights that are imperilled by these laws," a task that she argues can be achieved through mitigatory provisions and recourse to the fundamental treaty obligations imposed on governments such as Sri Lanka which have ratified the International Covenant on Social, Economic and Cultural Rights.

In an important legislative development relating to citizenship,[18] which is not discussed elsewhere in this volume, persons of Indian origin became entitled to Sri Lankan citizenship if they have been permanently resident in the island since 30th October 1964 or are a resident descendant of such a person. This legislation should help end the long-standing problem of statelessness among Tamil people of Indian origin. Further changes to citizenship law were made under the Citizenship (Amendment) Act, No. 16 of 2003, which recognizes the competence of mothers who are Sri Lankan citizens to pass down citizenship to their children. This amending Act thus removes the discriminatory

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18. Grant of Citizenship to Persons of Indian Origin Act, No. 35 of 2003.

provision which prevailed previously, that Sri Lankan citizenship could only be passed down through the father. The amending Act applies retrospectively.

While the changes to citizenship law were positive from a human rights perspective, the new legislation passed during 2003 relating to workers' rights was deleterious, as discussed in the chapter on workers' rights. The Industrial Disputes (Amendment) Act, No. 11 Of 2003, the Termination of Employment of Workmen (Special Provisions) (Amendment) Act, No. 12 Of 2003 and the Industrial Disputes (Hearing and Determination of Proceedings) (Special Provisions) Act, No. 13 of 2003 introduced changes in line with the recommendations of international financial institutions, and clearly sought to implement changes that would erode worker rights and employment security. Against this background, however, some positive developments relating to freedom of association within the Free Trade Zones are also discussed in this chapter.

7. International Developments

In May 2003, the Sri Lanka Government submitted its second periodic Report to the United Nations Committee on the Rights of the Child, in terms of Article 44 of the Convention on the Rights of the Child. The report was overdue and covered the period 1994 – 1998, but the Sri Lanka delegation appeared to provide updates during the dialogue stage. The findings of the Committee are discussed in full in the chapter on the rights of the child.

The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families entered into force on 1st July 2003. The Convention seeks to prevent the exploitation of migrant workers through the whole of the migration process, to end illegal recruitment and trafficking of migrant workers and to discourage

the employment of migrant workers in irregular situations. As a party to the Convention, Sri Lanka is obliged to report on the steps it has taken to implement the Convention within a year of its coming into force, and thereafter every five years. Its compliance with the Convention will be monitored by the Committee formed under the terms of the Convention, the first meeting of which is scheduled for July 2005.[19]

In October and November 2003, the Human Rights Committee (HRC) examined Sri Lanka's combined fourth and fifth periodic reports submitted under Article 40 of the International Covenant on Civil and Political Rights (ICCPR). In its concluding observations, the HRC noted six positive aspects arising from its review, but noted 14 principal subjects of concern and recommendations. On the positive side, it welcomed the ceasefire agreement of February 2002 between the Sri Lanka Government and the LTTE, the establishment of the National Human Rights Commission in March 1997, the steps taken to improve human rights awareness among public officials and members of the armed forces together with the creation of the National Police Commission, and the ratification in October 1997 of the Optional Protocol to the ICCPR. The principal subjects of concern are summarised below.

- The HRC called for the government to ensure that its legislation gives full effect to the rights recognised under the Covenant. At present, Sri Lanka's legal system still does not contain provisions covering all the substantive rights set out in the ICCPR, nor the safeguards required to prevent the restriction of rights beyond the limits set out in the Covenant. In particular, the right to life is not expressly mentioned as a

19. "Convention on Protection of Rights of Migrant Workers to Enter into Force Next July", United Nations Press Release, 19.03.2003, accessible at, http://www.unhchr.ch

fundamental right in the Constitution; some Covenant rights are denied to non-citizens; the existing laws remain valid notwithstanding their incompatibility with constitutional provisions for fundamental rights; legislation incompatible with the Covenant cannot be challenged and a one month limitation on challenges to the validity of "administrative or executive action" jeopardizes the enforcement of human rights.

- The Constitution contains provisions which permit restrictions on the exercise of fundamental rights beyond the restrictions permissible under the Covenant. Such provisions should be brought into conformity with the Covenant.

- Noting the continuance of persistent reports of torture, the HRC recommended a range of legislative and other measures to prevent continuing torture and other cruel, inhuman or degrading treatment or punishment of detainees by law enforcement officials and members of the armed forces.

- The HRC remained concerned about the large number of unclarified cases of disappearance of persons during the armed conflict, which it felt contributed to a culture of impunity. It recommended the full implementation of the rights to life and physical integrity of all persons, and the implementation of the relevant recommendations previously made by the UN Working Group on Enforced or Involuntary Disappearances and by the Presidential Commissions for Investigation into Enforced or Involuntary Disappearances.

- With regard to corporal punishment, the HRC urged the government to abolish all forms of corporal punishment as

a matter of law, and to enforce this prohibition in all schools and in prisons.

- Expressing concern about the high number of abortions conducted in unsafe condition because abortion remains a criminal offence (except when performed to save the life of the mother), the HRC urged that legal provisions criminalizing abortion be repealed.

- Provisions of the PTA that are incompatible with the Covenant were noted, and the HRC urged that all legislation and other measures used to fight terrorism be compatible with the provisions of the Covenant. Specifically, it said that provisions of the PTA should not be incorporated into the draft Prevention of Organized Crime Bill to the extent that they are incompatible with the Covenant.

- The HRC urged the government to do all it can to combat trafficking in children for exploitative employment and sexual exploitation.

- The HRC urged appropriate steps to be taken to reduce prison overcrowding, including through use of alternative forms of punishment.

- With the regard to the independence of the judiciary, the HRC considered that this needed to be strengthened by providing for judicial supervision and discipline of judicial conduct, instead of the parliamentary supervision which currently prevails.

- Welcoming the repeal of statutory provisions relating to criminal defamation, the HRC remained concerned that the

State media remain dominant and urged that media pluralism be protected and that measures be taken to ensure the impartiality of the Press Complaints Commission.

- The HRC urged that harassment of media personnel and journalists be prevented, and the prompt and thorough investigation of such cases leading where appropriate to the prosecution of those responsible.

- The HRC recommended that personal laws discriminating against women should be brought into conformity with the relevant provisions of the Covenant.

- Deploring the high incidence of violence against women, including domestic violence and marital rape, the HRC recommended that appropriate legislation in conformity with the Covenant be enacted, which would include criminalization of marital rape.

In addition, the HRC expressed concern that the State party's reports had not provided full information on the follow-up to the Committee's concluding observations on Sri Lanka's previous report. It stated that in the next periodic report, due for submission by 1st November 2007, particular attention should be paid to providing information on the follow-up to these concluding observations.

Sri Lanka remained late in submitting under several other treaties. The Treaties Database held on the United Nations High Commissioner for Human Rights website lists five periodic reports for Sri Lanka which were overdue by the end of 2003. Neither its fifth or sixth periodic report under the Convention on the Elimination of All Forms of Discrimination against Women had been submitted by the end of

2003; the sixth report was due by 4th November 2002. Similarly, its third periodic report under the International Covenant on Economic, Social and Cultural Rights was due on 30th June 2000, but had not been submitted by the end of 2003. Also overdue were Sri Lanka's reports under the International Convention on the Elimination of All Forms of Racial Discrimination, due in March 2003 and the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, due by 1st February 2003.

Addendum

Lapse of emergency rule and resort to other measures

(Saliya Edirisinghe, Legal Officer, The Nadesan Centre for Human Rights through Law, Colombo).

With the exception of a few short breaks, Sri Lanka had been subjected to emergency rule (the President exercising legislative power by-passing Parliament) for over a quarter century. However, this situation came to an end in July 2001 when emergency was allowed to lapse, and there was wide speculation that this was a result of the government's inability to muster a majority in Parliament to get emergency rule[20] approved.

With the lapsing of emergency in July 2001, the government resorted to powers provided in Part III[21] of the Public Security Ordinance No. 25 of 1947 (PSO), and the regulation making power in section 27[22] in the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 (PTA), to keep in force the substance of some of the emergency regulations that had been made in the exercise of emergency powers (under Part II of the PSO).

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20. The exercise of regulation making power by the President vide Public Security Ordinance No. 25 of 1947 (PSO) is subject to a subsisting proclamation made by the president bringing Part II of the PSO into operation (which enables the making of regulations), and the proclamation would continue to be in force only if it is made every month and approved by Parliament.

21. This Part of the PSO empowers the President to make certain orders (including calling out the armed forces for the maintenance of public order, imposition of curfew, declaration of certain services to be essential services), which are not dependent on the existence of a proclamation declaring a state of emergency.

22. Section 27 of the PTA provides: "The Minister may make regulations under this Act for the purpose of carrying out or giving effect to the principles and provisions of this Act".

The attempt to keep alive the substance of emergency regulations that provided for the detention of persons by a regulation made under the PTA on 6th July 2001[23] makes curious reading. This regulation dealt with two categories of persons deprived of their liberty. Firstly, it dealt with those remanded by a Magistrate in connection with an offence other than the PTA, which offence also fell within the definition of "unlawful activity"[24] in the PTA, and stated that such persons are deemed to have been remanded under the provisions of the PTA[25]. Secondly, the regulation provided that a detainee (other than those in judicial custody) detained under a lapsed emergency regulation shall not be released until the expiry of 15 days from the lapsing of such emergency regulation, and that during this period, a detainee could be subjected to a detention order under the PTA[26] or be produced before a Magistrate and remanded under Part II[27] of the PTA or any other law.

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23. Prevention of Terrorism Regulations No. 2 of 2001.

24. Some examples of these offences include: Robbery of the property of government, public corporation, bank, co-operative society, etc, mischief to government or public property, erasing, mutilating etc of words appearing on boards in public places.

25. Persons remanded under the PTA (as distinguished from those arrested and remanded under the PTA) are denied bail until the conclusion of the trial.

26. Section 9 of the PTA empowers the Minister to make detention orders in respect of persons suspected of being concerned in any unlawful activity for a period of three months at a time, the aggregate of which cannot exceed 18 months.

27. Section 7(2) in Part II provides for the remanding of a person until the conclusion of the trial in a situation where a person suspected of being concerned in the commission of any offence under the PTA appears or is produced before Court other than when a person is arrested under the PTA and produced in Court.

Several legal issues emanate from the above PTA regulation. These include: the validity of the saving clause in the PSO i.e. section 4[28]; the legal capacity of PTA regulations to override or revoke the operation of the provisions of other laws (while noting that section 28 of the PTA provides for the provisions of the PTA to prevail in the event of conflict or inconsistency with other laws); and the legal authority of PTA regulations to impose restrictions on fundamental rights. In regard to the last issue, the Supreme Court in a fundamental rights application[29] decided in March 2003 took the view that **regulations made under the PTA cannot impose restrictions on fundamental rights**. This was on the reasoning that the Constitution provides for the restriction of fundamental rights only by law (statute) and exceptionally by emergency regulations, and NOT by regulations under the PTA.

PTA regulations that were in force in 2003 that purported to impose restrictions on fundamental rights include: High Security Zone regulation[30] (affecting freedom of movement[31] & freedom to engage in a lawful occupation or business[32] (occupation as driver, business of providing lorry transport); Outboard Motors regulation[33] **rescinded**

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28. Section 4 provides: "The expiry or revocation of any Proclamation...shall not affect or deemed to have affected.... (b) any offence committed, or any right, liberty or penalty acquired or incurred while that that Part [Part II] was in operation; (c) the institution, maintenance or enforcement of any action, proceeding or remedy under that Part [Part II] in respect of any such offence, right, liberty or penalty."

29. SC No. 20/2002(FR), *Sothilingam Thavaneethan vs Dayananda Dissanayake, Commissioner of Elections and Others*, SC Minutes 25 March 2003.

30. PTA regulation No.3 of 2001 declaring Colombo a HSZ and prohibiting lorries and trailers entering or parking in the HSZ without a permit.

31. Article 14(1)(h).

32. Article 14(1)(g).

33. PTA regulation No. 6 of 2001prohibits inter alia the use of Outboard Motors having certain horsepower.

on 13 May 2003 (affecting freedom to engage in lawful occupation/ business[34]); Restricted Zones regulation[35] (affecting freedom to engage in a lawful occupation/business eg fishing); Prohibited Zones regulation[36] (affecting freedom to engage in a lawful occupation/ business eg fishing); Restricted Articles regulation[37] (affecting equality[38] and freedom to engage in a lawful business/enterprise); Custody of Persons who Surrender regulation[39] (affecting freedom from arbitrary detention)[40]. It will be noted that the purported restrictions on fundamental rights sought to be placed by PTA regulations that did not possess the legal power to do so also infringe the equality clause guaranteed by Article 12(1) of the Constitution.

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34. Article 14(1)(g).

35. PTA regulation No. 7 of 2001(applicable to certain areas).

36. PTA regulation No. 8 of 2001(applicable to certain areas).

37. PTA regulation No. 9 of 2001(restricts the carriage of articles such as diesel, petrol, cement to into certain parts of the country).

38. Article 12(1) &12(2).

39 PTA regulation No. 11 of 2001.

40. Article 13(2).

II

Rights of the Child

Ruana Rajepakse[*]

1. Introduction – UN CRC Committee observations

This chapter focuses on developments in the year 2003 in the sphere of child rights.

In May 2003 the Sri Lanka Government submitted its second periodic Report to the United Nations Committee on the Rights of the Child, in terms of Article 44 of the Convention on the Rights of the Child (CRC). This Report, which was overdue, covered the period 1994 – 1998, but updates appear to have been provided by the Sri Lanka delegation during the dialogue stage. The UN Committee made a number of favourable comments but still expressed concern with regard to many areas.

The Committee welcomed the ongoing peace process and the consequent removal of the state of emergency and the suspension of

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the operation of the Prevention of Terrorism Act (PTA). It also welcomed the inclusion of human rights issues in the peace talks.[1]

Sri Lanka was also praised for ratifying the Optional Protocol to the CRC on the involvement of children in armed conflict (in 2000).

However continuing areas of concern included the following:

1.1 Lack of a comprehensive and systematic review of existing laws including personal laws in order to bring them into conformity with the CRC.

1.2 Failure of the law to reflect certain important general principles set out in the CRC including the right to life, general principles of non-discrimination, best interests of the child, and respect for the views of the child.

1.3 Failure to harmonize differences in the legal description of a child for the purposes of different laws, which should cover anyone under 18 years in terms of the CRC.

1.4 Lack of effective coordination between the National Monitoring Committee (NMC), the National Child Protection Authority (NCPA) and the Department of Probation and Child Care Services, in the implementation of the CRC.

1.5 Setting the age of criminal responsibility at 8 years, which the Committee considered too low by international standards.

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1. Although the Ceasefire Agreement or Memorandum of Understanding signed between the government of Sri Lanka and the LTTE does not expressly mention human rights of adults or children.

1.6 Lack of adequate standards of juvenile justice.

1.7 Failure to abolish corporal punishment.

1.8 Failure to provide adequately for the care of children of migrant workers.

1.9 Insufficient resource allocations for socio-economic needs of children including education, health, nutrition, safe drinking water and sanitation. Taking note of the unsatisfactory child rights situation prevailing at present, the State together with United Nations Children's Fund (UNICEF) has initiated the formulation of a second National Plan of Action for Children.[2] The Plan is to run from 2004-2008, and the ground work for the Plan was laid in 2003 with each sector that has a bearing on child rights being required to formulate an action plan and budget.[3]

2. Inconsistency of civil law with CRC requirements

The UN Committee expressed concern "at the lack of a comprehensive and systematic review of existing laws, including the different sets of personal laws, with the aim of bringing them into conformity with the Convention". The Committee recommended that "the State party undertake a systematic review of all existing laws in order to bring them into conformity with the Convention and to consult with the

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2. The first Plan was from 1991-1995.

3. The sectors included Justice, Protection (taking in the work of the Ministry of Social Welfare), Education, Health, Labour and Water Supply and Sanitation.

different ethnic communities regarding the inclusion of their personal laws in this process of reform."

While the Committee, elsewhere in its Report, went on to express concern about certain areas of the criminal law, the main thrust of the above observation appears to be directed at civil and constitutional law. Particular reference is made to the personal laws governing the different ethnic communities.

The area of law that has caused most concern in this regard relates to the laws of the Muslim community under which there is no prescribed minimum age of marriage. Section 23 of the Muslim Marriage and Divorce Act No.13 of 1951 as amended merely states that "a marriage contracted by a Muslim girl who has not attained the age of twelve years shall not be registered under this Act unless the Quazi for the area in which the girl resides has, after such inquiry as he may deem necessary, authorized the registration of the marriage."

By contrast the minimum age of marriage under the Marriage Registration (Amendment) Act No.18 of 1995 and the Kandyan Marriage and Divorce (Amendment) Act No.19 of 1995 is 18 years. In addition, under Muslim law, children born out of wedlock do not inherit from their father or mother (in contrast to the general law under which such children inherit from their mother) and adopted children do not have rights of inheritance, again in contrast to the general law.

These measures came in for adverse criticism in the NGO Report to the UN Committee that was submitted parallel to the Government's Report.[4]

It should also be mentioned that the Legitimacy Act No.3 of 1970 that legitimizes children born out of wedlock if their parents subsequently

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4. Page 6 of the NGO report dated 23.01.2003 prepared by Save the Children.

marry (whether or not such child was procreated in adultery) does not apply to those bound by Muslim or Kandyan law.[5]

However, as this is a matter concerning the laws governing the different ethnic communities, it is a politically sensitive subject and any reform will require agreement from within the affected community if it is to stand a chance of being implemented. This was recognized by the UN Committee which called upon the State to "consult with the different ethnic communities regarding the inclusion of their personal laws in this process of reform."[6]

The duty of the State towards children is made clear by the Directive Principles of State Policy set out in Chapter VI of the 1978 Constitution. Article 27(13) declares that "the State shall promote with special care the interests of children and youth, so as to ensure their full development, mental, moral, religious and social, and to protect them from exploitation and discrimination." The Directive Principles, while being non-justiciable, are supposed to "guide Parliament, the President and the Cabinet of Ministers in the enactment of laws and the governance of Sri Lanka."[7]

The fundamental rights and language rights set out in Chapters III and IV of the 1978 Constitution are applicable to children as well as adults.[8] In addition, Article 12(4) makes provision for special measures to be

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5. These two communities are expressly excluded by Section 2 of the Act.

6. Paragraph 12 of the Report.

7. Article 27(1).

8. Fundamental rights applications on behalf of children have been instituted by an Attorney-at-law acting on a child's behalf as per Art. 126(2) of the Constitution and also by parents of children suing as the child's "next friend" as per the civil law.

taken by way of law, subordinate legislation or executive action for the advancement of "women, children or disabled persons" without infringing Article 12(1). Read together with Article 27(13) set out above, this provision appears to make affirmative action for the better protection of children not only permissible but mandatory.

Nevertheless, outside of the sphere of criminal law, little appears to have been done. The UN Committee expressed particular concern that Articles 2, 3, 6 and 12 of the CRC were not sufficiently integrated into all relevant legislation concerning children. These four CRC Articles require, respectively, that the State ensure protection of children from any form of discrimination and take positive action to protect their rights; that all actions concerning the child should take full account of the child's best interest and that the State should provide adequate care when the child's normal care-givers have failed to do so; that every child has an inherent right to life and that the State has an obligation to ensure the child's survival and development; and that the child has the right to have his or her opinion taken into account in any matter or procedure affecting the child.

In this context it should be mentioned that a significant success was achieved in the year under review by the passing of the Citizenship (Amendment) Act No.16 of 2003. This Act gives children equal right to inherit citizenship from their mother as well as their father. Formerly citizenship by descent was only through the paternal line. In the event of the parents being citizens of different countries, the child upon attaining majority will have to elect which citizenship to keep.

Meanwhile, the Human Rights Commission established by the Human Rights Commission of Sri Lanka Act No.21 of 1996 is also mandated to "make recommendations to the government regarding measures that should be taken to ensure that national laws and administrative practices

are in accordance with international human rights norms and standards."[9] The HRC is presently engaged in this task, which, though not child-specific, may be of benefit to children.

3. Treatment of the Child within the Justice System

Despite the considerable number of reforms that have been carried out for the better protection of the child within the justice system since 1995, there is a general consensus that the situation of the child remains unsatisfactory. Stringent penalties introduced for crimes against children in 1995 do not appear to have had a deterrent effect. According to Prof. Harendra De Silva, Chairman NCPA, 276 child abuse cases were reported to the NCPA in 2001. This figure increased to 366 in 2002, while a further 179 cases were reported in the first six months of 2003 alone.[10] However these cases reported to the NCPA form only a small portion of the overall crime rate against children. According to figures released by the police, there was a total of 1579 offences against children reported island-wide from January to June 2003. The highest number of reported incidents per police division was 120 from Ratnapura, followed by 116 from Matara and 94 from Nugegoda. The least number of incidents was reported from Kantale with 9 and Hatton with 10.

On a breakdown of offences by category, Matara topped the list for murders (7), sexual harassment (34) and rape (49). Overall the highest incidence of reported crime Island-wide involved rape (458 cases), followed by sexual harassment (308), grave sexual abuse (300) and kidnapping / abduction (253). There were 80 reported cases of child labour.

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9. Section 10(d) of the Act.

10. Interview with *Sunday Observer*, 28th September 2003.

There is also continuing concern about the manner in which the justice system itself treats children. Particular concerns have been expressed regarding the criteria on which custodial measures are prescribed for children, the conditions under which they are detained, the lack of any serious educational or vocational training during detention, and the manner in which they are transported to and from court.

4. Insufficient allocation of human and material resources

The unsatisfactory nature of the treatment meted out to children who come into contact with the justice system is to a large extent attributable to lack of human and material resources. The overcrowding in State-run child care institutions, the lack of such institutions in many parts of the country, and the lack of separate vehicles for the transport of children to and from court are some of these aspects. While seeking additional resources from government, international organisations and non-governmental sources, attention is also being focused on initiating legal and procedural reforms that would divert children out of the court system as far as practicable, and minimize the number of appearances a child has to make in court, and the time spent in the court house, when legal proceedings are unavoidable. However, it should be noted that diverting children in conflict with the law out of the legal system also requires commitment of human and material resources towards further developing out of court correctional or supervisory schemes like community service and child probation. A major resource requirement is for funds for the construction of juvenile courts throughout the island.[11] These courts are for the purpose of hearing

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11. Presently there is only one Juvenile Court which is located in Colombo.

cases against children and young persons[12] in conflict with the law. Parallel with this there is a resource allocation required for the introduction of child-friendly measures into adult court houses hearing cases where children have been the victims of crime and are often the main witnesses. These would include closed circuit television or video recording facilities for the taking of children's evidence and the construction or allocation of separate waiting rooms with suitable facilities for children who are brought to court.

The other major resource allocation required is for the establishment of State-run child care institutions in all parts of the Island. At present nearly all these institutions are located in the Western and Southern Provinces. As a result they are often overcrowded and the inmates who are not from those provinces have to make inordinately long journeys whenever they have to attend court. Provincial Council authorities are also increasingly reluctant to bear the cost of housing children from other provinces, and there is no provision in law to require any cost-sharing between provinces in this regard.

5. Legal Reforms within the Criminal Justice Sector

In 2002 the NCPA established a Legal Consultative Committee comprising representatives from the Ministry of Justice, Attorney-General's Department and Legal Draftsman's Department as well as the Commissioner of Probation and Child Care and independent legal consultants to undertake a series of law reform initiatives. This

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12. While all persons under 18 are considered children and are entitled to certain overriding safeguards, the law also makes a sub-classification into children aged under 14 and young persons aged between 14 and 18 (originally 16) for the purpose of treatment and care, as the needs of these two age groups would differ in certain respects.

Committee worked through 2003. It drafted legislation on obscene publications and amendments to the Evidence Ordinance as well as a Juvenile Justice Procedure Act (JJPA) to replace the provisions of the Children and Young Persons Ordinance that deal with juveniles who come into contact with the justice system, either as persons in conflict with the law or those in need of care and protection. This draft JJPA seeks to address some of the concerns voiced by the UN Committee on the Rights of the Child in respect of the treatment of children within the justice system.

The framers of the draft JJPA were of the view that one of the principal drawbacks of the existing laws was the lack of a clear set of principles to guide all participants in the system. Section 21 of the Children and Young Persons Ordinance sets out three basic guidelines to be followed in dealing with children coming under its purview, namely:

(1) that the court should have regard to the welfare of the juvenile;

(2) that the court should, wherever appropriate, remove the juvenile from undesirable surroundings; and

(3) that the court should ensure that proper provision is made for the juvenile's education and training.

However, the placement of this section, in the middle rather than at the beginning of the Ordinance, tends to take away its force as a statement of principles. In any event it would be considered inadequate in the light of CRC. Therefore NCPA Legal Consultative Committee considered that any major legislative initiative should begin with a clear statement of principles, taking into account Sri Lanka's obligations as a signatory to this Convention. Hence the proposed draft starts with a comprehensive statement of principles taken from the CRC:

"All courts and other institutions and authorities dealing with a child who is in conflict with the law or in need of care and protection shall ensure, as far as it is within their power to do so, that the treatment accorded to such child shall be in accordance with the following principles:

(a) The welfare of the child shall be the paramount concern.

(b) A child shall not be separated from his parents against his will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.

(c) Judicial proceedings and institutional placements in respect of a child shall be avoided wherever possible.

(d) A child who is placed by the State in an institution for reasons of care, protection or treatment shall be entitled to have that placement evaluated regularly.

(e) In the case of a child in conflict with the law, the treatment accorded to such child shall be calculated to promote his or her sense of dignity and facilitate his or her re-integration into society.

(f) In all cases, proper provision shall be made for the education or training of the child.

(g) A child shall not be subjected to torture and other cruel, inhuman or degrading treatment or punishment including corporal punishment.

(h) A child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so.

(i) A child who is detained shall be entitled to legal assistance as well as contact with his family."[13]

The UN Committee called for the raising of the minimum age of criminal responsibility from the present level of 8 years to "an internationally acceptable level." However, neither the Committee nor the CRC (Article 40) specifies what the minimum age should be. In any event, following a wider stakeholder consultation it was decided to propose raising the minimum age of criminal responsibility from 8 to 10 years, while giving the court a discretion in the case of children between 10 and 14 years. The draft section reads as follows:

"**11.** (1) No criminal proceedings shall be instituted against any child under the age of ten years.

(2) No Court shall institute criminal proceedings against a child between the ages of ten and fourteen years unless the Court is satisfied that such child has attained sufficient maturity of understanding to judge the nature and consequences of his conduct on that occasion."

Amongst the other provisions in the proposed JJPA is the imposition of a time limit for the furnishing of probation reports (presently one of the main causes of delay in legal proceedings involving children) and the express provision of a range of non-custodial measures that a judge can impose on a child in conflict with the law. Imprisonment of a child

13. Section 3 of the 2003 draft.

under 14 years is strictly forbidden,[14] and no child or young person may be sentenced to imprisonment for default in the payment of a fine. In fact a court will be not be empowered to impose a fine unless there is an adult present who will take personal responsibility for its payment. Requirements contained in the Prisons Ordinance regarding the separation males from females, children from adults and convicted persons from non-convicts have been brought into the JJPA.

However it should be noted that this draft, though widely made available for discussion, is yet to receive Cabinet approval.

6. Monitoring Authorities

As the UN Report observed, there are two main coordinating bodies for monitoring child rights, namely, the National Monitoring Committee (NMC) and the National Child Protection Authority (NCPA).

The NMC is the older body, having been established under the Children's Charter of 1992 which is the Sri Lankan policy document most closely corresponding to the CRC.[15] It comprises six persons appointed by the President together with ten ex-officio members representing relevant Ministries and the Commissioner of Probation and Child Care. Its functions are –

(a) To render advice on any matter referred to it;

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14. A young person may be sent to a custodial institution other than a child care institution only in exceptional circumstances based on his/her violent or unruly behaviour or the gravity of the crime.

15. The Children's Charter is not an Act of Parliament and therefore does not have the force of law, but it was formally adopted by the Cabinet of Ministers and placed before Parliament, thus making it an authoritative statement of government policy.

(b) To create an awareness as regards the provisions of the Charter;

(c) To promote legislative reforms and to make recommendations as regards any matter set out in the Charter;

(d) To monitor the progress of the implementation of the provisions of the Charter.

According to sources on the NMC, this Committee was originally intended to be the apex body for monitoring child rights. Thereafter, in 1996, a multi-disciplinary Presidential Task Force for the prevention of child abuse was established, some of whose members were also on the NMC. This created some ambiguity as to functions. One of the principal recommendations of the Task Force was for the establishment of the NCPA as the apex body charged with coordinating action against child abuse and exploitation. Its mandate includes[16] –

- Advising government on national policy and measures for prevention of child abuse and protection of child victims of abuse.

- Creating awareness of the rights of the child to be protected from abuse and methods of abuse prevention.

- Consultations with, and recommendations to, relevant Ministries, Provincial Councils and other public authorities as well as private sector organizations for prevention of abuse and protection of child victims.

- Recommending legal and administrative reforms.

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16. Summary of main provisions of Section 14 of NCPA Act.

- Monitoring implementation of laws relating to all forms of child abuse.

- Recommending measures to address humanitarian concerns relating to children affected by armed conflict.

- Assisting relevant authorities and organizations to coordinate campaigns against child abuse.

- Maintaining a national data base on child abuse. The NCPA since its inception has strongly concentrated on protection and enforcement, and even its law reform initiatives tend to be focussed on these objectives. Its activities are therefore very much bound up with the criminal law.

Hence, according to NMC sources, the NMC has largely been content to leave these areas to the NCPA and concentrate its own attention of the law affecting children such as education and civil matters.

Thus, to address another of the concerns expressed by the UN Committee, namely possible duplication of functions between the NMC and the NCPA, the NMC would appear to be the most appropriate body to be given the task of carrying out a systematic review of the civil law in order to ensure that it is in conformity with CRC requirements.

7. NCPA activities

According to the NCPA Report for 2002/2003, the Authority has established and coordinates 12 District Child Protection Committees which are multi-disciplinary bodies inclusive of local officials,

paediatricians, police officers, representatives of the national and provincial child care services, and NGOs and community leaders. These Committees are charged with receiving child abuse complaints and referring the victims to the relevant institutions, as well as conduct of awareness campaigns.

The NCPA has also continued its own awareness-raising programmes that included major poster campaigns against child abuse and child labour, funded respectively by UNICEF and ILO/IPEC. A booklet is under preparation for judicial officers, in order to better acquaint them with the custodial and non-custodial options when making orders for the care or treatment of children.

According to the NCPA Report, a special NCPA Police Unit has been established, raising from 2 to 16 the number of police officers at the disposal of the Authority. The NCPA, in keeping with its mandate, claims to monitor the progress of all investigations and criminal proceedings relating to child abuse cases. In addition to receiving complaints directly from the public, this Police Unit also liases with Interpol and relevant embassies in cases involving child abuse by foreign nationals.

Meanwhile the Police Department states that the establishment of special "Women's and Children's Desks" begun in the 1990s has now been extended island-wide. According to senior police sources,[17] this facility is operational at 354 police stations including Jaffna. At Headquarter Stations such desks are in the charge of a Woman Sub-Inspector (WSI) and at other stations they are in charge of a Woman Police Constable (WPC) under the supervision of the Officer-in-Charge (OIC). According to the Police, the personnel at these desks have been through training programmes where they have been given lectures by senior personnel from the Attorney-General's Department and other

[17] Interviewed by this writer in 2003.

relevant agencies. A genetic fingerprinting unit has been established at the Faculty of Medicine, Ragama, funded by USA, which performs free genetic tests in child abuse cases.

8. Child Labour

The use of children for domestic labour continues to be widespread.[18] A survey of the prevalence of child labour in selected areas of the country carried out by the NCPA indicated that the estate sector provided the largest number of child domestics. Other areas surveyed were conflict-affected areas, rural areas and inner city slums. Houses in the Western Province appear to be the largest beneficiaries of child domestic labour. The NCPA and major trade unions on the estates[19] are agreed that there is a well-organized network for trafficking between the source areas and the demand areas.

A practice had developed of bringing adult users of child domestic labour before the Juvenile Court in Colombo (strictly meant only for children in conflict with the law). The presiding judge had no jurisdiction to impose punishment on the adult offender but was frequently able to persuade the adult offender to pay compensation to the child victim. This practice was considered unsatisfactory from the point of view of law enforcement, although the provision of compensation was a popular measure.

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18. According to Prof. Harendra De Silva, Chairman of the NCPA, 222 girls and 154 boys below the age of 16 were detected in domestic labour during 2002. The actual number is believed to be considerably higher.

19. Ceylon Workers Congress, National Workers Congress and Lanka Jathika Estate Workers Union are collaborating with ILO/IPEC to find ways of combating this problem.

This problem has now been addressed by the Employment of Women, Young Persons and Children (Amendment) Act No.8 of 2003. This Amendment enhances the penal measures that may be imposed on the errant employer by prescribing a fine of up to Rs.10,000 or a term of imprisonment not exceeding 12 months, or both. In addition, the same (adult court) Magistrate is given the power to order payment of compensation in favour of the victim in such amount as the Court thinks fit.

Under ILO Convention 182 ratified by Sri Lanka in 2001, the State is required to take "immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency." Article 3 of this Convention defines the worst forms of child labour as being –

(a) All forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment for use in armed conflict;

(b) The use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;

(c) The use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;

(d) Work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.

Several of the matters referred to in sub-paragraphs (a), (b) and (c) above are already illegal under Sri Lankan law. The Justice Ministry, in its National Plan of Action 2004 – 2008 has undertaken to frame necessary amendments to the Penal Code to deal with matters not presently covered by these sub-paragraphs. This will have to include a more comprehensive definition of "trafficking" than is contained in Section 360C of the Penal Code (Amendment) Act No.22 of 1995, which appears to be directed principally at trafficking for purpose of adoption. The international law on trafficking is set out in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, that supplements the United Nations Convention against Trans-national Organized Crimes ("Palermo Convention") of 2000. Article 3 of the Protocol defines "trafficking" as follows:

> "Trafficking in persons shall mean the recruitment, transportation, transfer, harbouring or receipt of persons by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of abuse of power or of a position of vulnerability, or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation."

However, it must be said that pending the streamlining of the law in this regard, a number of anti-trafficking steps are being implemented at ground level. In collaboration with ILO/IPEC a National Task Force was established, comprising government and non-government personnel active on child rights issues, to create a National Policy and Plan of Action to combat trafficking in children for exploitative employment. This ten-year plan involves legal reform and law enforcement, institutional strengthening and research, prevention, and rescue, rehabilitation and re-integration. The Justice Ministry has committed itself in its National Plan of Action to introduce provisions into the Penal Code to deal with trafficking. An Anti-Trafficking and

Surveillance Unit has been established by the NCPA with funding from the ILO. This is a multi-disciplinary team dedicated to reducing incidents of trafficking in children, in collaboration with other law enforcement agencies. Amongst its activities is a "Cyberwatch" programme to monitor websites patronized by paedophiles, with a view to preventing the use of Sri Lankan children for illicit purposes via the Internet. This Unit, funded by Save the Children (Norway) is said to have received 465 complaints in 2002.

Meanwhile, the types of work referred to under 3(d) of Convention 182 ("hazardous forms of child labour") are required to be determined by national laws or regulations after consultation with the organizations of employers and workers concerned, taking into consideration relevant international standards.

In 2001, the IPEC National Steering Committee appointed a Committee for this purpose. This Committee on 22.08.2003 submitted a list of approximately 50 such hazardous occupations together with its recommendations on how each one should be dealt with. These recommendations have been adopted by the National Labour Advisory Committee (NLAC), a tripartite body comprising representatives of Government, Employers and Trade Unions.

It now remains to give effect to these recommendations. The method presently favoured by the Labour Department[20] is by way of Regulations framed under the Employment of Women, Young Persons and Children Act.

20. Assistant Commissioner A.D.L.C.Chandrasiri interviewed by this writer.

9. Abduction / Recruitment of Children for Armed Conflict

While the ongoing ceasefire agreement has undoubtedly brought many benefits to the children of the war-affected areas, including some measure of resettlement of the displaced and a gradual rehabilitation of destroyed or damaged schools, there is considerable evidence that abduction of children and recruitment of children for military purposes by the LTTE still continues.

The continued recruitment of children for armed conflict by the LTTE, despite their frequent pledges to the international community to desist from this practice, has been one of the most intractable problems of Sri Lanka's internal conflict.

With the signing of the ceasefire agreement two years ago and the hopes for a permanent peace, attention initially turned from the question of recruitment to that of demobilisation and rehabilitation of the child soldiers already under LTTE command.

In a controversial move, UNICEF struck a deal with the Tamil Rehabilitation Organization (TRO) (widely believed to be affiliated to the LTTE) to establish transit centres to house demobilised child soldiers for a period of three months before they are returned to their families. A sum of US Dollars 1.15 million (Rs.1.8 billion) was allocated to this project, to be disbursed between August 2003 and April 2005. The construction cost for each centre was estimated at Rs.9 million by TRO with a separate requirement for food.[21] The first such centres was opened at Killinochchi in October 2003 and UNICEF sources confirm that money has been given and staff recruited for two more homes at Trincomalee and Batticaloa respectively.

21. *Sunday Leader*, 17th August 2003.

Defending the proposal as a matter agreed to between the Government of Sri Lanka and the LTTE, UNICEF representative Ted Chaiban said it provided an unprecedented opportunity to secure the release of child soldiers and return them to their families. He emphasized that three months was the maximum period for which these children would be kept at the centres, and that many would be returned more quickly.[22] The transition period was intended to give an opportunity to assess the needs of each child and provide the child with a break from military environment prior to going home.

Critics of the scheme claim that the best interests of the children would be better served by returning them directly to their families, and also question the accountability of the TRO in this process and the lack of involvement of any other child care organization. Neither the UNICEF representative nor the spokesman of Sri Lankan Government quoted in the media were able to guarantee that the children would not end up back with the LTTE.[23] On the other hand, it has been pointed out that no such guarantee could be made even if the children were returned straight to their families. In May 2003, Amnesty International accused the LTTE of continuing to recruit child soldiers, some allegedly as young as 10 years old. Scandinavian truce monitors have reported more than 300 new conscriptions by the LTTE from February 2002 up to September 2003.[24] UNICEF has stated that it holds a list of over 700 children still said to be under conscription with the LTTE, despite the release by the LTTE of about 350 child soldiers at the beginning of the peace process.[25]

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22. Letter from Ted Chaiban to *Sunday Leader*, 28th September 2003.

23. Ted Chaiban and John Gunaratne interviewed in the *Sunday Leader*, 17th August 2003.

24. AFP Report carried in *Daily News*, 30th September 2003.

25. *Ibid.*

It has been argued that the freedom presently enjoyed by the LTTE to travel in government-controlled areas has in fact increased the population base from which they can recruit. Periodic reports of escapes by abducted children and sporadic acts of resistance by parents indicate the unpopularity of this child recruitment among the ordinary population.

There appears to be a lacuna in terms of responsibility for the safety of these children.

10. Conclusion – views of the children

It could be argued that the best judges of how a system is working are those at the receiving end of the system. In this context, during 2003, as part of the groundwork for the National Plan of Action for Children, UNICEF together with Save the Children and Sarvodaya organized a series of consultations with children from different parts of the country. These sessions culminated with a workshop in Colombo on 18.08.2003 where representatives from the children's groups from various parts of the country[26] had an active dialogue with the different Ministry officials and consultants working on the Sectoral Chapters of the NCPA. What follows is a summary of the main concerns expressed by them on child rights issues.

In respect of the rights of child victims of crime, the children expressed concern about the length of time taken to conclude cases, the presence of outsiders in court when child abuse cases were heard,[27] and the lack of security for child victims when the accused is out on bail. Some

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26. The children at this consultation came from Jaffna, Mannar, Mullaitivu, Puttalam, Anuradhapura, Welioya, Kandy, Nuwara Eliya and Ampara.

27. The court has power to exclude outsiders from the court room in such cases.

also pointed to the anomaly of child victims being kept in a custodial institution while the accused is out on bail. There was also a general discontent with what they perceived as the injustice of the legal system where, in their view, the guilty can go free if they have enough money.

Hence the requests of children from the system were for speedy court proceedings so that a child victim would not grow up with the case hanging over him/her; better law enforcement; child-friendly court procedures; and better protection for victims of offences, especially in relation to the grant of bail to the accused.[28] They also wanted children's courts in all 9 provinces, but appeared to be unclear whether these were to be courts for dealing with children in conflict with the law or those for dealing with offences against child victims.

Another matter that agitated the children was the fact that, while education is compulsory up to the age of 14, the law cannot compel parents to send their child to school after the age of 14 years even if the child wants to continue schooling. A salient feature of this discussion was that the children appeared to have little or no idea where to seek relief and redress. The NCPA apparently has no visibility among the children of the districts represented.[29]

It will be seen that the matters highlighted by the children are matters on which there is already concern among the relevant authorities in the Sector. However the extent of dissatisfaction and insecurity appeared to indicate that there will be a serious loss of confidence in

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28. Under the Bail Act No.30 of 1997, while the granting of bail is required to be the rule rather than the exception, the court is empowered to refuse bail if there is reason to believe that the accused would not appear at the trial, or would obstruct the course of justice, or commit an offence while on bail, or that the gravity of the offence and public reaction to it would give rise to public disquiet if bail were granted.

29. See footnote 26 for the list of Districts from which these children came.

the entire system on the part of the younger generation (especially those in the remoter areas) unless remedial measures are implemented.[30] There is an urgent need for the justice system to reach out to children in the remoter areas through child friendly courts and court procedures. With regard to the need to speed up criminal proceedings, it may be noted that the law has already been amended to do away with time consuming and inconclusive "non-summary" proceedings in the Magistrates Court in respect of child rape cases. The Attorney-General also has a discretion to indict directly in the High Court in other cases. Concerns about the operation of the Bail Act led, in 2003, to the appointment of a Committee to review its provisions and suggest amendments that will make it more difficult to obtain bail. While this initiative is not child-specific, it will catch up perpetrators of child abuse. However, it is also necessary to make children aware that even accused persons have human rights including the presumption of innocence and the right to a fair trial. In this context, it is relevant to note a suggestion made by the children themselves, to the effect that some basic knowledge of the law be imparted to them through the education system. This should be done in a balanced way that focuses not only on child rights but also on the rights and duties of all sections of the community. NGO personnel should also be advised on this issue.[31]

Another target of criticism from the children was the mass media for the way it handles child abuse issues. Children observed that whatever may be the legal position, the identity of child victims is often disclosed in news reporting, either directly or indirectly through circumstantial

30. These observations are based on the assumption that the children's reactions were spontaneous and not "coached" in any way.

31. Demonstrations held in certain parts of the country in recent times calling on lawyers not to appear for accused persons in child abuse cases are an example of behaviour that gives the wrong signals to children.

detail. A case of child suicide following such disclosure was cited by one of the child representatives.

The children also voiced reservations about certain TV programs that reconstruct real-life crimes, while there was also some less specific criticism about the use of children in advertising and the lack of children's programs.[32]

In fact during 2003 UNICEF and other child-rights NGOs conducted a number of workshops with the mass media and the advertising industry to achieve an agreed set of standards on matters relating to children. There appears to be general consensus that a system of self-regulation will be more effective than imposed censorship that could run into legal problems. Models in other countries should be studied, particularly those under which an agreed set of standards is enforced by an impartial body.[33]

However in respect of child victims of abuse the bottom line is Section 365C of the Penal Code Amendment Act No.22 of 1995 which makes it an offence, punishable with fine or imprisonment of up to two years, to print or publish the name or any matter which may make known the identity of any persons against whom one of the specified offences is committed. Under the same section it is also an offence to publish any matter in relation to court proceedings in respect of any of the specified offences (other than a judgment of the Court of Appeal or Supreme Court) without the prior permission of court. Ultimately, if these provisions are not enforced they will lose credibility. Therefore there

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32. A recent survey conducted by UNDA Sri Lanka and the Department of Mass Communication of the University of Kelaniya, reported in the *Sunday Observer* of 20.07.2003, found that at the times when most children actually watch TV it is adult fare that is shown.

33. Example, The Advertising Standards Authority in the United Kingdom.

should be a structured warning system followed by prosecution if the warnings are disregarded.

During mid 2003 a separate survey was conducted by officers of the Department of Probation and Child Care in consultation with the Justice Ministry, to ascertain the conditions of children in custodial or quasi-custodial institutions. This survey took the form of a questionnaire administered verbally to the children by child-welfare officers who recorded their answers. A total of 541 children and young persons in State-run and registered non-State institutions were questioned. The majority of these children were in the 12 – 15 year age group although there were also about 170 in the 15 – 18 age group and over 50 children under 12. The male / female ratio was roughly even.

The great majority of these children had been in their respective institutions either less than one year or between 1 – 3 years. Most were institutionalized on court orders. The categories of children included victims of crimes, children with no other place to go, and children in conflict with the law. Most were unclear about how much longer they would have to remain in institutional care.

Two hundred and ninety-four children said they were not going to school. However a considerable number appeared to be receiving some other kind of training, because over 400 answered "yes" to the question "Are you happy with the schooling / training you are receiving?" Over 200 said they were taught some kind of game or sport, and over 80% stated that they got the chance to play with other children. (This still left over 50 who said they did not.) A significant number stated that they were taken to a doctor when sick, but again there was a small minority who answered in the negative.

Nearly 450 of the children had been in the care of a parent or other relative before they were institutionalized. Over 260 stated that the person who had previously looked after them never came to see them after they were institutionalized. Nearly 450 children stated that they had travelled in the same vehicle as adults when taken to and from court and about half of them stated that they were frightened on these journeys.

When asked whether anyone had spoken badly to them when in court, only 69 out of the 497 who had travelled to courts replied in the affirmative. Prison and police officers headed the list of those whom the children felt had spoken badly to them.

Statistics alone can never convey a full picture. However two particularly troubling features emerged from the survey. Firstly, there was the fact that over half the children said they were not receiving any schooling. The rudimentary training in trades such as carpentry and mason work that is known to take place at such institutions is no substitute for schooling. If the right of these children to education is to be rendered meaningful, this finding should receive further attention as a matter of urgency.

The second matter for concern is that a large majority of the children had previously been in the care of a parent or other relative prior to institutionalization, together with the fact that over half this number apparently received no visits from such persons after institutionalization. While there may be situations where it is desirable to sever connections between the child and his/her former environment, care should be taken to ensure that parents or other care-givers do not use state institutions merely to avoid their own responsibilities. It should be emphasized that not only the State but all persons have a duty to safeguard and promote the rights of the child.

III

Illegal Migration: Human Smuggling and Trafficking in Persons

Tommy Gelbman[*]

1. Introduction

Migration affects a large proportion of Sri Lankans for a host of reasons. First, Sri Lanka has a large number of visitors each year: in 2003, just over half a million tourists came to Sri Lanka.[1] It is widely believed that the ceasefire agreement signed by the Liberation Tigers of Tamil Eelam (LTTE) and Government of Sri Lanka (GOSL) has enhanced economic growth, and has led to a substantial increase in the number of returnees, tourists and business people arriving in Sri Lanka. Second, Sri Lanka is a labour exporting country. Every year, more than 150,000

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1. Hussein, Alladin; "Year 2003: the best year in tourist arrivals," in the LACNet 31st December 2003. Available online at: <http://www.theacademic.org>.

Sri Lankan labour migrants leave their homes in Sri Lanka to work overseas. There are approximately 970,000 Sri Lankans working overseas, mostly unskilled women working as domestic labourers in West Asia. Third, the ethnic conflict in Sri Lanka has created a large number of migrants: refugees fleeing ethnic repression, conflict and poverty; and emigrants seeking a better future for themselves and their families. Many Sri Lankans also migrate temporarily for education and family reasons.

Migration is commonly defined as the movement of people from one place to another in order to take up employment, establish residence, or seek refuge from persecution. Illegal migration involves migrants who do not have a legal status in the receiving country as a result of illegal entry or overstay. These migrants do not have the appropriate documentation (valid visa or passport) authorizing their stay in the country. It is important to note that this is distinct from 'irregular migrants', such as refugees, who are forced to migrate for reasons beyond their control. Worldwide, it is widely believed that illegal migration has been on the rise for two specific reasons: restrictive admission policies in some receiving countries and relaxed emigration controls in the years following the Cold War.[2] Illegal migration involves both human smuggling and trafficking in persons, but each phenomenon must be understood individually. In both cases, a complex of social, economic, legal and enforcement issues are brought to bear that require scrutiny from a human rights perspective.

This chapter is divided into two main sections: human smuggling and trafficking in persons. Each issue will be defined, examined in terms of its implications for Sri Lanka, international norms, Sri Lankan

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2. Department of Economic and Social Affairs, Population Division, "International Migration Report 2002," ST/ESA/SER.A/220, New York, 2002, page 28 [hereinafter 2002 UN Migration Report]. Available online at: <www.un.org/esa/population/publications/ittmig2002/2002ITTMIGTEXT22-11.pdf>.

legislation, trends during the year 2003 and international implications. Each section will conclude with recommendations on how the government and civil society can act to improve human rights protection for migrants. The conclusion examines the areas of overlap between trafficking in persons and human smuggling, and anticipate the human rights challenges which will face Sri Lanka as it moves to address migration issues in 2004 and thereafter.

Since this is the first time that the topic of illegal migration has been addressed in a *Sri Lanka: State of Human Rights* volume, additional background on the issues is also provided. As far as possible, websites have been referenced in the footnotes to encourage readers to take advantage of the great number of high-quality resources related to human smuggling and trafficking in persons available on the Internet.

2. Human Smuggling

2.1 Definition

According to the *Protocol against the Smuggling of Migrants by Land, Sea and Air*,[3] supplementing the United Nations Convention against Transnational Organized Crime, the 'smuggling of migrants' is defined as:

> *"the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person*

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3. The *Smuggling Protocol* (UN Doc. A/55/383) was adopted by resolution A/RES/55/25 of 15th November 2000 at the fifty-fifth session of the General Assembly of the United Nations. It entered into force on 28th January 2004, in accordance with Article 22. There are presently 40 Parties and 112 Signatories to the *Smuggling Protocol*. [Hereinafter *Smuggling Protocol*]. Available online at: <http://www.unodc.org/unodc/en/crime_cicp_signatures.html>.

> *into a State Party of which the person is not a national or a permanent resident."*[4]

Article 3(b) states that 'illegal entry' means "crossing borders without complying with the necessary requirements for legal entry into the receiving State." Since 'crossing borders' requires a) departing one country and b) entering another, human smuggling begins before the physical entry of an individual into the receiving country.

There are at least two parties involved in an act of human smuggling: the human smuggler and the migrant. Human smugglers are the individuals involved in arranging and coordinating the illegal entry of the migrant. Smugglers employ a range of methods to facilitate illegal travel, including: manufacturing or procuring counterfeit or forged documentation; counselling the misuse of travel documentation; and facilitating the use of unauthorised ports, including arranging the transport for, and transporting, individuals by air or sea. The migrant, on the other hand, is the individual being smuggled. Typically, the migrant voluntarily engages the smuggler, for a fee, to help her or him illegally enter a given country. While some migrants might not realise the hardships entailed in being smuggled, they do generally understand it to be an illegal and covert process.

2.2 Consequences of Smuggling

States generally and primarily perceive human smuggling to be a threat to State security. That an individual can enter or exit a State without the knowledge of that government is an indication that a government is not in complete control of its borders, and that criminal elements are able to operate undetected. Smuggling operations are a major part of international criminal syndicates, and they are undertaken for

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4. *Smuggling Protocol*, Article 3(a).

criminal purposes, including trafficking in persons and terrorism. Thus, smuggling contributes to criminal activities both within and outside a State, and can threaten national security and the health and safety of a States' citizens. In the Sri Lankan context, there is evidence that trafficking is linked to the 'criminal underworld', corruption of government officials and security challenges related to controlling human traffic in and out of the country. Human smuggling also means that State resources must be invested in law enforcement and prevention.

No less important from the humanitarian perspective, human smuggling can inflict undue hardship and even death to migrants. Individuals who are smuggled by sea often endure long, treacherous journeys on overcrowded vessels, without proper sanitation, nutrition or medical attention. An unknown number of these migrants lose their lives at sea. In many cases, individuals who are smuggled are not aware of the conditions of travel. Smuggled migrants are often transported in inhumane conditions, both on land and at sea. For example, in November 2003, the Criminal Investigation Department (CID) intercepted a group of young illegal migrants as they were being transported in an operational refrigeration unit.[5] Putting individuals in such peril contravenes their basic human rights – to life and security – even if the migrant consents to and pays for the service.

2.3 International Norms and Laws

The entry-into-force of the *Smuggling Protocol* represented an acknowledgement by the international community of the extent and gravity of the problems related to smuggling, and recognition that any solution to these problems will require a comprehensive and coordinated international effort. If human smuggling is a threat to

5. Sujith Hewajulige and W. Hubert Fernando, "Italy-bound Youths Nearly Frozen to Death," *Daily Mirror*, 25th November 2003.

human rights and the security of States, then the *Smuggling Protocol* is an attempt to balance the security interests of States and the human rights of migrants, and to promote cooperation as a solution to a common international problem. As stated in Article 2 of the *Smuggling Protocol*, its purpose is:

> *"to prevent and combat the smuggling of migrants, as well as to promote cooperation among States Parties to that end, while protecting the rights of smuggled migrants."*[6]

The text of the *Smuggling Protocol* can be distilled into three essential components: legislative and law enforcement measures; procedural steps to combat human smuggling, internally and in coordination with other States; and the protection of the rights of migrants. With respect to legislative measures, the *Smuggling Protocol* requires States Parties to adopt national legislation to criminalize human smuggling "when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit."[7] This includes the commission or the attempted commission of a number of acts related to smuggling, including: producing, providing or possessing fraudulent travel or identity documents with the objective of smuggling migrants; and enabling non-nationals or non-residents to remain in a State without complying with legal requirements of that State. According to the *Smuggling Protocol*, States must also make it an offence to assist in the commission of these crimes. Significantly, States are also required to adopt legislative measures that take into account aggravating circumstances in the commission of crimes related to smuggling. Such factors include the endangerment of human lives or safety and cruel or degrading treatment of migrants.[8]

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6. *Smuggling Protocol*, Article 2.

7. *Ibid.* Article 6.

8. *Ibid.* Article 6(3).

In the areas of procedural steps to combat human smuggling, the *Smuggling Protocol* obliges States to undertake measures including, *inter alia*, augmenting border security efforts; enhancing security features for travel documentation; raising awareness of the risks of smuggling among the public; and undertaking efforts to work in socially and economically deprived areas with a view to tackling the root problems of illegal migration. With a view to promoting cooperation and coordination among States, the *Smuggling Protocol* encourages States to undertake such efforts as information sharing related to legislation and law enforcement, and cooperation in areas such as intelligence gathering, training and enforcement. Thus, rather than merely legislating the problem, the *Smuggling Protocol* requires and encourages States to undertake preventative activities that will help to address the root causes of human smuggling.

With regard to protecting the rights of migrants, the *Smuggling Protocol* expressly stipulates that:

> *"Migrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object of conduct set forth in article 6 of this Protocol [i.e. human smuggling]."*[9]

This is a significant element to the *Smuggling Protocol* in that it sets an international norm that effectively identifies the smuggler as the principle offender, and absolves the migrant from criminal liability in cases of human smuggling. While it does not label the migrant a victim, it attempts to prevent him or her from being defined as a criminal.

Other protections are listed in Article 16 of the *Protocol*. States Parties are required to take 'all appropriate measures' to protect those individuals who are objects of smuggling, with a particular emphasis

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[9] *Ibid.* Article 5.

on those whose rights have been violated. Article 16 specifically highlights the right to life and the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment.[10] States are also required to protect these individuals from violence and other threats to their safety, with particular recognition of the special needs of women and children.[11] In other words, the *Smuggling Protocol* makes clear that a State is not entitled to mistreat a migrant on the basis of having been the object of smuggling.

Sri Lanka signed the United Nations Convention Against Transnational Crime and the *Smuggling Protocol* in December 2000, but has not yet ratified them.

2.4 Sri Lankan Legislation

In Sri Lanka, human smuggling is not explicitly considered a criminal offence. Offences related to human smuggling are addressed in the Immigrants and Emigrants Act No. 28 of 1948 (as amended) - hereinafter referred to as *'The Immigrants and Emigrants Act'*,[12] which seeks primarily to control an individual's entry to and departure from Sri Lanka. As such, it specifies that individuals – specifically non-citizens of Sri Lanka – must enter or depart the country at an approved port of entry[13] with specific documentation, including a valid passport

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10. *Ibid.* Article 16(1).

11. *Ibid.* Article 16(2), (3) and (4).

12. The long title to the Act states: An Act To Make Provision For Controlling The Entry Into Sri Lanka Of Persons Other Than Citizens Of Sri Lanka, For Regulating The Departure From Sri Lanka Of Citizens And Persons Other Than Citizens Of Sri Lanka, For Removing From Sri Lanka Undesirable Persons Who Are Not Citizens Of Sri Lanka, And For Other Matters Incidental To Or Connected With The Matters Aforesaid.

13. *Immigrants and Emigrants Act,* Section 9.

and, if necessary a visa for entry.[14] The attached Schedule lists the approved ports of entry and departure as the Ports of Colombo, Galle and Trincomalee, the Talimannar Pier and the Air Ports of Ratmalana, Negombo, Kankesanturai and Koggala. Thus, in Sri Lanka, it is an offence for a non-citizen to enter or depart from Sri Lanka without proper documentation and through a non-designated port. Similarly, for Sri Lankans, in order to enter or depart from Sri Lanka, a citizen must possess a valid passport[15] and travel through an approved port of entry.[16]

With regard to travel documentation, Section 45 of the *Immigrants and Emigrants Act* makes an offence the commission, the preparatory acts and the aiding and abetting of the commission, of the following:

- forging, altering or tampering with any passport or visa endorsement, regardless of where it was issued;[17]
- forging, altering or tampering with any certificate;[18] and
- using or possessing a forged, altered or irregular passport, visa endorsement or certificate.[19]

It is important to note that the prime offender under the current legislation is the migrant. This stands in stark contrast to the norm set out in the *Smuggling Protocol*, which requires States Parties to identify the smuggler as the prime offender. A human smuggler arrested in Sri

14. *Ibid.*, Section 10.
15. *Ibid.*, Section 35.
16. *Ibid.*, Section 34.
17. *Ibid.*, Section 45(d).
18. *Ibid.*, Section 45(e).
19. *Ibid.*, Section 45 (f), (g).

Lanka would be defined, by default, as the individual who aided or abetted the migrant to contravene the law. The smuggler can be charged under the legislation, but it would be peripheral to the charge against the migrant, and his or her conviction would be contingent on the corroboration of the migrant that, that person did in fact assist him. This is particularly problematic, as the migrant would legitimately fear reprisals from smugglers, who are often connected to criminal syndicates. For both the migrant and the smuggler, the offence is categorised as non-bailable,[20] which indicates the seriousness of the offence in the eyes of the GOSL and raises serious questions about the justification of the limits to freedom imposed on the accused, particularly the migrant. The *Immigrants and Emigrants Act* comes close to criminalizing human smuggling under section 45A (1), which prohibits bringing into Sri Lanka a non-citizen by any means, and concealing and harbouring that person for any purpose; however, the legislation is still inadequate in part because it does not deal with the outward smuggling of humans from Sri Lanka.

The government is aware of the inadequacies of the current legislation in dealing with the problem of human smuggling and in terms of its failure to comply with international legal norms. A revised *Immigrants and Emigrants Act* has been drafted and will be submitted to Parliament by the Committee to Review Legislation on Immigration and Emigration. This Committee was appointed by the Ministry of Defence in 2000, primarily to address the issue of human smuggling. The new draft legislation – which is pending introduction to Parliament – takes into account the *Smuggling Protocol* of 2000.[21] The proposed draft defines a smuggler and makes an offence the act of smuggling an individual for material benefit, as per the *Smuggling Protocol*. Furthermore, with a view to eliminating corruption, specific provisions

20. *Ibid.*, Section. 47.

21. Interview with G.S.A. de Silva, Senior Legal Draftsman, 26th January 2004.

are proposed to punish public officials involved in facilitating smuggling. In effect, the new legislation is intended to shift the focus of the crime of smuggling from the migrant to the smuggler and individuals in authority involved in facilitating and organising the smuggling. Should the changes come into effect, they would bring Sri Lankan legislation on smuggling much closer to the provisions of the *Smuggling Protocol*.[22] Parliamentarians and civil society groups will then have to ensure that the legislation upholds the human rights of all migrants. Although legislative changes were on the horizon in 2003, migrants continued to be arrested and prosecuted under the current legislation, and it remained inordinately difficult to arrest and prosecute the smugglers involved.

2.5 Human Smuggling from and through Sri Lanka in 2003

In 2003, ships and fishing boats continued to depart Sri Lankan shores with illegal human cargo on board. It is estimated that fifty Sri Lankans every month are smuggled by sea into Italy alone.[23] Many other illegal migrants attempt to make the journey by air, using forged or altered travel documentation. The year 2003 witnessed five major trends in border control issues related to smuggling: implementation of enhanced security measures; tougher enforcement of existing laws; discovery of official involvement in smuggling operations; the emergence of Sri Lanka as a transit point for onward travel foreign illegal migrants; and the advent of the collection of biometric data as a security measure. Each will be discussed briefly in turn.

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22. It would be inappropriate here to critique the proposed new legislation, as it has not been translated and presented to Parliament. Once presented, a thorough review of the proposed legislation must be conducted with respect to the human rights of the migrant.

23. Jayasinghe, Jayampathy, "Human Contraband Via Sri Lanka," *Sunday Observer*, 6th July 2003.

Enhanced Security Measures

The government took steps to enhance border control measures with a view to combating illegal migration. These enhancements were informed by the notion that illegal migration is an international problem, and thus Sri Lanka is responsible to other States to ensure that it is fulfilling its responsibilities in preventing illegal migration. A more cynical argument is that the Sri Lankan authorities have been under serious international pressure to prevent illegal departures from the island. There may be an element of truth in both interpretations. Whichever interpretation one accepts, in 2003, the government drafted new legislation to deal with smuggling (as discussed above), and took steps to enhance documentation, procedures and equipment, independently and in cooperation with other States.

With respect to documentation, the Ministry of Interior instituted a monthly dialogue with the diplomatic corps and airlines to help prevent illegal migration and document forgery. This allowed for coordinated efforts, information sharing and a systematic effort to counter the misuse of travel documentation. In a major development, from 1st August, the Immigration and Emigration Department (IED) began issuing the new "N series" passports, with added security features to help prevent forgeries and fraud.[24] The new passport, developed by foreign companies at great expense, contains digital and personalised security features.

The IED also took measures to prevent its officials from cooperating with criminal elements by installing new electronic security equipment and instituting more accountability checks in immigration and emigration procedures. Officials also received advanced training in

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24. Malalasekera, Sarath, "New Passport to Eliminate Forgery, Fraud," *Daily News*, 29th July 2003; Wijedasa, Namini, "Big Bucks and Crooked Officials Oil People Smuggling Industry," *Sunday Island*, 27th July 2003.

how to detect forged documentation and improved immigration and emigration procedures.

In terms of cooperation, the GOSL and the Government of Australia made a Joint Ministerial Statement on illegal migration in July 2003. The statement reaffirmed the two countries' commitment to cooperate in combating illegal migration and undertook a number of preventative measures in that regard.[25] At a more technical level, the IED worked closely with the International Organization for Migration (IOM) on a number of initiatives to help bolster its capacity in migration management, including the purchase and installation of new equipment and the opening of a state-of-the-art training centre for immigration officials. The government also engaged in talks with the UK and Pakistan to cooperate to eliminate and prevent illegal migration.[26] In the latter case, the GOSL signed a memorandum of understanding with the Government of Pakistan.

Sri Lanka as a Regional Transit Point

In 2003, it became clear that Sri Lanka had become a major transit point for foreign nationals seeking to travel onwards to Europe and Australia. As of November 2003, the number of arrests of foreign nationals reached 695, and the arrests garnered considerable media attention. Rather than return them to their home countries immediately, the government decided to detain and prosecute them in Sri Lanka.

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25 "Australia Minister in Lanka to Discuss Human Smuggling," *Sunday Leader*, 20th July 2003; "Australian Minister and Interior Minister Discuss Human Smuggling and Refugee Problem," *Daily News*, 24th July 2003.

26. Malalasekera, Sarath, "Sri Lanka-Pakistan Pact to Combat Human Smuggling," *Daily News*, 2nd August 2003. "Pakistan, Lanka Interior Ministers to find means to curb human smuggling," *Island*, 31st July 2003; Shums, Shezna, "Measures to Curb Human Freight," *Sunday Leader*, 17th August 2003.

Those who use Sri Lanka as a regional transit point come from the South Asian Association for Regional Cooperation (SAARC) countries. They arrive by air, and as they are entitled to a visa 'upon arrival' in Sri Lanka, they can enter Sri Lanka legally for the purposes of business or leisure. Once in Sri Lanka, local facilitators coordinate their onward travel to Europe and, occasionally, Australia. After a short waiting period, these individuals are loaded on to fishing boats, which take them out to sea, generally to rendezvous with a larger ship that takes them closer to their final destination. Often, there is another transit point on the way, where migrants are put onto smaller boats and covertly brought to shore in the destination country. The migrants smuggled into Sri Lanka for this purpose included Bangladeshi, Indian and Pakistani nationals; while the smugglers and facilitators were Sri Lankan and foreign – including Indians, Russians and Ukrainians – forming an international network of sorts. Foreign facilitators work mostly outside the country, but have been known to work within Sri Lanka as well. It has been argued that the 'visa on arrival' policy has contributed to this trend.

In response, in addition to cooperating with foreign governments, the government has taken additional enforcement measures at home. In July, the Immigration and Emigration Controller ordered immigration officials to more closely scrutinise South Asians arriving in Sri Lanka, as the government believed that the Sri Lankan visa system, which is meant to promote tourism and business travel, was being abused.[27] Intelligence operations at BIA were enhanced to further prevent illegal migrants from entering the country.

Concerns have been raised that migrants caught attempting to travel illegally are served with exceedingly harsh penalties. For example,

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27. "Easy Visas Abused: Immigration to Get Tough," *Times*, 20th July 2003; Deepal V Perera and Gagani Weerakoon, "Intelligence Beefed Up at BIA," The *Daily Mirror*, 20th July 2003.

the Pakistani migrants caught off the coast of Tangalle were sentenced to one year of rigorous imprisonment and a Rs. 50,000 fine.[28] Those unable to pay the fine were to serve an additional two months in prison. Given the amount of money lost and the hardship these migrants undergo, it is argued that additional punishment is excessive. It not only contravenes Article 5 of the *Smuggling Protocol*, but it is unlikely to stop smugglers from plying their trade; it only punishes the vulnerable party.

There is also concern about the conditions faced by migrants in Sri Lankan prisons, and the treatment of foreign detainees. In 2003, faced with a larger than usual number of foreigners in Sri Lanka's already overcrowded prisons, the government decided to deport a large number of foreign detainees. These individuals were perceived to be a burden on the prison system. Upon arrival to their home countries – mostly India, Pakistan and Bangladesh – these migrants face prosecution.[29]

Major Arrests

In 2003, the CID had unprecedented success in its law enforcement activities aimed at combating smuggling. Most arrests took place on the South and West coasts, while a few were made off the coast of Trincomalee.[30] The media reported on a large number of these arrests, particularly those involving foreign migrants.

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28. *Lankadeepa*, 14th August 2003.

29. Ferdinando, Shamindra, "Government to Deport Foreign Prisoners," *Sunday Island*, 7th September 2003; Warnakulasuriya, Asanga, "Prisons Face Crisis: More Immigrants Nabbed," *Daily News*, 2nd August 2003. It is not known how these individuals are dealt with by authorities upon return to their home countries, as this would be a matter of the receiving countries' domestic legislation, which would vary from country to country.

30. "Illegal Immigrants Arrested in Trincomalee," *Daily News*, 16th August 2003.

The Ministry of Interior has declared itself steadfast in its efforts to prevent the use of Sri Lanka as a transit point for illegal smuggling.[31] While enforcement used to be the responsibility of the IED, in 2002 it was transferred to the CID, which is better able to deal with these responsibilities. Part of the government's strategy to crack down on smuggling is to target the international criminal syndicates involved in smuggling, which falls in line with the approach encouraged in the *Smuggling Protocol*. In July, the CID arrested three Sri Lankan nationals who were believed to be 'kingpins' of Sri Lanka's 'number one' human smuggling ring.[32] Also in July, an Indian national was arrested for his role in human smuggling; the individual was believed to be the second in command of a large human smuggling operation.[33]

Official Involvement

In 2003, it became increasingly evident that government and military officials were involved in smuggling activities in Sri Lanka. The IED and CID both had some success in uncovering the complicity of these officials in smuggling operations.

In January, twelve navy personnel were charged with aiding and abetting a ship – the Nilanka 11 – to enter Italy illegally.[34] In June, six Sri Lankan nationals were arrested for using fraudulent passports, allegedly with the complicity of immigration officials.[35] It is also alleged

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31. "Sri Lanka: Moves to crackdown people smuggling syndicates," on the Australian Broadcasting Corporation, Asia Pacific Programs, 28th July 2003, 20:43:59.

32. "Police Bust Human Smuggling Ring," *Sunday Observer*, 20th July 2003.

33. Senaka de Silva and Kurulu Kariyakarawana, "Indian Human Smuggler Arrested," *Daily Mirror*, 30th July 2003; Malalasekera, Sarath, "CID Nabs Human Smuggling Mastermind," *Daily News*, 1st August 2003.

34. Beekmeyer, Leary, "Navy Personnel Allowed Bail," *Daily Mirror*, 6th March 2003.

35. Wijedasa, Namini, "Big Passport Fraud Under Investigation," *Island*, 23rd June 2003.

that there was official involvement in the smuggling ring arrested off Tangalle in July.[36] Also in July, an immigration officer was removed for involvement in a human smuggling case in which a Sri Lankan man was allowed to leave the country carrying an invalid foreign passport. The man was arrested in Abu Dhabi and returned to Sri Lanka, where he was also detained.[37] In September, six officers of the IED were indicted for helping smugglers to forge passports.[38] Nine other individuals were arrested in October for a large-scale passport forgery operation; the accused included a Justice of the Peace, an official of the Department of Registration of Persons and an official from the Passport Office.[39]

Finally, a major scandal was brought to light in 2003, as US officials in the diplomatic corps were found to be complicit in corruption and illegal migration. A total of nine people, including two American personnel from the US Embassy in Sri Lanka, were arrested for selling US entry visas.[40]

Collection of Biometric Data

In their efforts to step up security, combat terrorism and reduce illegal migration, foreign governments have taken steps to enhance border controls. Perhaps most significant to Sri Lankans was the move by the

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36. Ferdinando, Shamindra, "Visa on Arrival Helps 'illegals' to use Sri Lanka as Transit Point,' *Island*, 3rd July 2003.

37. Wijedasa, Namini, "Another Immigration Officer Removed for Human Smuggling," *Sunday Island*, 27th July 2003.

38. "Passport Officers Interdicted," *Daily Mirror*, 12th September 2003; Wijedesa, Namini, "Six Immigration Officers Arrested," *Island*, 15th September 2003.

39. Weerakkody, Kalinga, "JP Among 9 Arrested Over Passport Racket," *Island*, 11th October 2003.

40. "Visa Scandal Rocks US Embassy," *Daily Mirror*, 3rd May 2003.

UK to require Sri Lankan visa applicants to be fingerprinted.[41] The fingerprints collected are placed in a database, which is shared with enforcement agencies in the UK. According to the British Government, the goal of this highly controversial measure was to reduce the 'significant number' of Sri Lankans making fraudulent asylum and immigration applications, including using false identities. In particular, the procedures were a means of identifying individuals who destroy their travel documents upon arrival in Britain and try to claim asylum under false names. It has been reported that Amnesty International will be contesting the measures as a violation of human rights.[42]

The fingerprinting issue has received much hysterical press attention in Sri Lanka, and many are particularly upset that Sri Lankans were targeted. It must be stated that the gathering of biometric data for the purposes of travel is not an unusual measure. Many countries, including Brazil, France and the United States have introduced similar measures.[43] The EURODAC system, operating in Europe for years, is part of a European Union policy to fingerprint all applicants for asylum. It is intended to expand this system to include other non-nationals.[44] Other countries are preparing to take similar measures. There are indications that Sri Lanka will, in the medium term, begin to employ identity cards that include biometric data.[45] The extent to which such measures may

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41. "UK Tightens Checks on Sri Lankans," *Daily Mirror*, 10th July 2003; Ferdinando, Shamindra, "Fingerprinting of all UK Visa Applicants from Colombo," *Island*, 10th July 2003.

42. Perera, Shelani, "Amnesty to query Brits about fingerprinting Lankans," *Sunday Times*, 27th July 2003, p. 4.

43. *The Economist*, "Prepare to be Scanned," December 6th-12th 2003, Special Reports, pp. 15-17.

44. 2002 UN Migration Report, p. 29.

45. Wijewardena, Sajeewan, "Government considers fingerprints for ID cards," *Daily Mirror*, 14th November 2003.

violate rights to privacy needs careful examination, and is beyond the scope of this paper. It is clear, however, that the future trend in travel documentation and security will be to include biometric data, and thus measures must be taken to protect the rights of all migrants and regular business or leisure travellers alike.

2.6 Conclusions on Smuggling

The government made serious headway in combating human smuggling in 2003, even winning praise from the Australian and US Governments for its efforts. As the discussion above highlights, the government has taken a 'security approach' to improve its ability to detect, arrest and prosecute the individuals and organisations involved in smuggling. While these developments improve upon previous measures, and are likely lead to a decrease in human smuggling, it is also important for the government to pay attention to the humanitarian aspects of tackling smuggling. The following six recommendations outline some of the steps necessary to improve human rights protections for all migrants, which are not incompatible with the tough stance the government has taken on human smuggling.

First, official involvement in smuggling operations must be stopped. The IED has made some progress in preventing its own officers from being involved, but there are problems government-wide, both in complicity and in flagrant abuses of the system. The current legislation makes it difficult to charge negligent customs officials unless the illegal migrant implicates the official.[46] The proposed new draft legislation, if passed, should help to eliminate this problem. The government must take additional measures to increase transparency and accountability

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46. Wijedasa, Namini, "Big Bucks and Crooked Officials Oil People Smuggling Industry," *Sunday Island*, 27th July 2003.

checks, and limit the discretion given to individual immigration officials.

Second, there appears to be a trend for the media to highlight the foreigners involved in smuggling – both the migrants and the smugglers. It is important for the government and the media to publicise the fact that ordinary Sri Lankans are equally involved as smugglers, traffickers and facilitators, as well as victims and migrants. Such information will help inform potential migrants of the risks of illegal migration, thus helping to safeguard their rights, and possibly their physical safety.

Third, the human rights of all migrants must be respected. Security efforts geared towards combating illegal migration are commendable; however, human rights protections, prevention measures and awareness raising efforts cannot be neglected. This also means that in the administration of the law, in particular the meting out of severe punishments, the rights of migrants must be respected. When dealing with migrants, it is important to ensure that they are not punished disproportionately, taking into account their personal situations. Furthermore, victims must not be punished under any circumstances; they must be protected, as per international norms and general principles of humanity. The current strict penalties and the labelling of illegal departure as a non-bailable offence is a disproportionate punishment for a migrant who has already lost so much.

Fourth, with respect to foreign nationals arrested in Sri Lanka, it is vital that their rights are respected in all their interactions with officials, including the provision of translators, adequate detention facilities and care in deportation procedures. Moreover, in its efforts to scrutinise travellers more intently, it is crucial that the IED respect the rights of migrants at all times. Rather than arresting and prosecuting foreign

nationals accused of illegal migration (as opposed to smuggling), it would be best to send them home as soon as practicable.

Fifth, it is vital that advocates and civil society groups keep an eye on the new *Immigrants and Emigrants Act* as it navigates the legislative process. This legislation must conform to international norms; even more importantly, it must protect victims and should not punish them disproportionately for their transgressions. The legislation will affect a large number of Sri Lankans; far more than foreign nationals. International migration is of considerable importance to Sri Lankans and it is vital that any new legislation adequately reflects the country's needs. As it is easier to change a proposed draft before it becomes law, this is a crucial period for ensuring that the new legislation meets these aspirations.

Finally, Sri Lanka must ratify the *Smuggling Protocol*, implement more attentively the measures meant to support victims of smuggling and address the root causes of illegal migration. While it will be impossible to eradicate human smuggling in the short-term, care can be taken to address the problems that cause desperate individuals to choose to be smuggled at great risk and cost. It is more humane, and probably less expensive, to *prevent* these problems than to take reactive measures requiring law enforcement and security measures.

3. Trafficking

3.1 Definition

There is some debate as to the exact meaning of the term 'trafficking', and the approach necessary to tackle it. Trafficking relates to a wide range of issues – health, migration, criminal justice, human rights,

labour and prostitution, to name a few.[47] This is problematic with respect to devising policy responses to trafficking, determining the number of people involved and facilitating international cooperation to combat it.[48] Despite differing approaches, the international community was able to agree on the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*,[49] supplementing the United Nations Convention against Transnational Organized Crime. The *Protocol*, which is the focus of international efforts to combat trafficking, develops a working definition of "trafficking in persons":

> *"Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.*[50]

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47. Derks, Annuska, Combating Trafficking in South-East Asia: A Review of Policy and Programme Reponses, International Organization for Migration, Geneva, 2000, p.10. Available online at: <http://www.imadr.org/project/petw/combattingtrafficking_southeastasia.pdf>.

48. *Ibid.*, p. 9.

49. Hereinafter *Trafficking Protocol*. The *Trafficking Protocol* (UN Doc.A/55/383) was adopted by resolution A/RES/55/25 of 15th November 2000 at the fifty-fifth session of the General Assembly of the United Nations. It entered into force on 25th December 2003, in accordance with Article 17. There are presently 45 Parties and 117 Signatories to the *Trafficking Protocol*. The text of the *Trafficking Protocol* is available online at: <http://www.unodc.org/unodc/en/crime_cicp_signatures.html>.

50. *Trafficking Protocol*, Article 3(a).

This somewhat complex definition can be distilled into its constituent parts. The first element involves recruitment, transportation, transfer, harbouring or the receipt of persons. This essentially describes all the acts involved in moving a person from one place to another. The second element is the way in which this act is carried out – that is, how control is exercised over the victim of trafficking. Thus, when moving a person, a trafficker uses or threatens to use force, coercion, abduction, fraud, deception, abuse of power, or abuse of the victim's position of vulnerability. The *Trafficking Protocol* stipulates that the 'consent' of the victim is irrelevant if it can be proved that any means of force or coercion was employed.[51] Thus, when the two elements are combined, they mean that human trafficking involves moving a person from one place to another by some use of force or deception.

The third element is exploitation: these acts must be carried out for the purpose of exploiting the victim. As described in the definition above, exploitation includes, but is not limited to, forced prostitution, other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs. Thus, combined with the previous two elements, trafficking constitutes the acts involved in moving a person from one place to another through the use of force or deceit for the purpose of exploiting that person. Involvement in any stage in this process can be considered to be involvement in trafficking.

While there are similarities between smuggling and trafficking, there are at least two noteworthy differences. First, the element of exploitation is inherent in trafficking, whereas in smuggling, the intent is not necessarily to exploit the individual. In some respects, then, smuggling is concerned with illegal entry and departure, while trafficking is concerned with illegal entry in addition to exploitative treatment of

51. *Trafficking Protocol*, Article 3(b).

the victim once the process of illegal entry begins. Second, smuggled migrants are usually aware of the conditions of travel and are voluntarily engaged in the process of illegal migration. Victims of trafficking, on the other hand, are seldom aware of what they are getting themselves into; they are victims of the deception, coercion, cruelty and exploitation of another party.

Some common examples may help to illustrate the meaning of trafficking:

- An agent recruits a young woman to work as a domestic labourer in a big city near her village; upon arrival the woman is forced into prostitution.

- A young boy is abducted or sold by his family to be used as camel jockey in the Middle East.

- A migrant who has illegally entered a country (and is thus in a vulnerable position) is forced by an unscrupulous employer to work in a dangerous or degrading job for little or no wage.

These examples highlight that the victims of trafficking can include men and women, young and old. It is important to note, however, that women and children are disproportionately the victims of trafficking. It also highlights that trafficking can take place across international borders or within a given country, and that victims can be forced into a range of degrading and life-threatening situations. In situations of trafficking, a power relationship is involved – that is, the trafficker exercises coercive power over the victim.

3.2 Consequences of Trafficking

Trafficking is an international problem. The United States Department of State estimates that approximately 800,000 - 900,000 people annually are trafficked across international borders worldwide.[52] The United Nations estimates that trafficking in persons generates USD 7-10 billion dollars annually for traffickers. Thus, not only are vulnerable people being exploited, a large number of unscrupulous individuals are benefiting from this multi-billion dollar 'industry'. A government's approach to trafficking will depend on its understanding of the challenges it poses. Since trafficking is a complex, multi-faceted and international problem, it should be dealt with as such.

The OSCE considers trafficking from three primary perspectives: human, politico-military and economic.[53] First, trafficking is a flagrant violation of human rights – the rights to liberty, dignity, security of the person and health. It is also a violation of the right to freedom from cruelty and inhuman treatment, slavery and involuntary servitude. These are fundamental human rights, enshrined in various international instruments, and many, if not most, national Constitutions. Trafficking violates these rights by putting victims in cruel and degrading situations, and limiting their ability to take action to protect themselves.

Second, as discussed above with respect to smuggling, trafficking similarly constitutes a security threat. It is a criminal offence in most

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52. Trafficking in Persons Report June 2003, Office of the Under Secretary for Global Affairs, United States Department of State, Publication No 11057, Washington, DC, 2003, p. 9 [hereinafter the US Trafficking in Persons Report]. Available online at: <http://www.state.gov/g/tip/rls/tiprpt/2003/>.

53. "Trafficking in Persons: Implications for the OSCE," Organization for Security and Co-operation in Europe Review Conference, September 1999, ODIHR Background Paper 1999/3 (Office for Democratic Institutions and Human Rights), section 3. Available online at: <http://www.osce.org/odihr/1999/09/1503en.html/documents.

countries in the world, and is often linked directly to organised international crime. Trafficking has the added aggravation and human cost of inherently exploiting vulnerable people and causing direct suffering to individuals and their families.

Third, from the economic perspective, traffickers prey on poor and vulnerable people. Women and children are vulnerable to trafficking because conditions in their home communities are not conducive to securing a livelihood. Victims of trafficking are more often than not taken from poor areas to work in more economically developed areas or countries. They go because they believe, or are made to believe, that they can earn a better living. They are used as a cheap workforce and to perform undignified, dangerous or degrading work. In other words, two important drivers of trafficking are a) the poverty that forces individuals into vulnerable positions, and b) the demand for cheap labour in more economically developed regions of the world. A broad approach to combating trafficking will thus take into account these economic factors, as well as the broader issues of poverty, gender, social and economic development.

3.3 International Norms

In December 2000, Sri Lanka signed the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, but it has yet to ratify this Protocol. The *Trafficking Protocol* was the first international instrument to address 'all aspects' of trafficking in persons. The purposes of the *Trafficking Protocol* are to: prevent and combat trafficking in persons; protect and assist the victims of trafficking, taking into account their human rights; and, in this regard, promote cooperation among States.[54] The title, Preamble and various sections of the *Protocol* reiterate that the emphasis is on protecting women and children.

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54. *Trafficking Protocol*, Article 2.

Similar to the *Smuggling Protocol*, the *Trafficking Protocol* adopts a broad approach to the challenges posed by trafficking. It consists of three main components: legislative and law enforcement measures; procedural steps to combat trafficking, internally and in coordination with other States; and the protection of the rights of victims.

With respect to legislative measures, the *Trafficking Protocol* obliges States Parties to implement legislation that renders trafficking a criminal offence, in keeping with the definition quoted above. In particular, Article 5 stipulates that the national legislation must hold responsible those involved in directing, organising and assisting in these operations for the commission of the offence of trafficking.[55]

Article 6 of the *Trafficking Protocol* encourages States Parties to take legislative and procedural measures such as ensuring that victims' identities, privacy and physical safety are protected and that the legal right to obtain compensation for damages suffered is also protected.[56] The *Trafficking Protocol* further requires States to take adequate measures to provide victims with procedural rights in the form of full information about and participation in the legal proceedings.[57] States must also 'consider' the social, physical and psychological needs in the recovery process for the victim, and are encouraged to provide material assistance in the form of housing, education and training opportunities.[58] Finally, States, in dealing with victims of trafficking, are required to be sensitive to the age, gender and special needs of the victim.[59]

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55. *Ibid.*, Article 5.

56. *Ibid.*, Article 6(6).

57. *Ibid.*, Article 6(2)(a), (b).

58. *Ibid.*, Article 6(3)(a), (b), (c), (d).

59. *Ibid.*, Article 6(4).

With respect to combating trafficking, States are required to undertake border measures similar to those taken against smuggling in the *Smuggling Protocol*[60], and deal appropriately with the security and validity of travel documentation.[61]

In terms of protections, the *Trafficking Protocol* states that not only should victims be provided with care and assistance with full respect for their rights, they also should not be punished for alleged crimes related to their trafficking. Due to the element of coercion or force, the victim cannot be held responsible, especially given the suffering they would have endured. For example, a woman forced by a trafficker into the commercial sex industry must not be arrested for prostitution.

States Parties are also required to adopt "comprehensive policies, programmes and other measures" to combat trafficking and protect victims of trafficking.[62] Such measures include research, information campaigns and cooperation with NGOs, and in bilateral and multilateral fora. States are encouraged to participate in information exchange and technical training between States Parties regarding trafficking legislation, the means to combat it and other relevant information.[63]

3.4 Sri Lankan Legislation

In Sri Lanka, trafficking is criminalized in the *Penal Code*.[64] Section 360 of the *Penal Code*, which was passed prior to the drafting of the *Trafficking Protocol*, deals explicitly with crimes related to trafficking within the country or externally.

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60. *Ibid.*, Article *11.*

61. *Ibid.*, Articles *12 and 13.*

62. *Ibid.*, Article *9.*

63. *Ibid.*, Article *10.*

64. *Penal Code (Amendment Act No. 22 of 1995) [hereinafter Penal Code)*

The *Penal Code* clearly makes trafficking of any kind a criminal offence. In general, the procurement of individuals, with or without coercion, is prohibited in Section 360(A)(1), while "the act of buying or selling or bartering of any person for money or for any other consideration" is prohibited in Section 360c.

With direct reference to prostitution, procurement involving the movement of individuals across international borders is prohibited under the *Penal Code*,[65] as is movement within the country.[66] With specific reference to the protection of children, Article 360(a)(4) prohibits procurement of a minor with movement of a person into the country, while Article 360c details the various offences related to procuring a child.

The Sri Lankan legislative definition of trafficking as an offence is less flexible than the *Trafficking Protocol*. This is a positive development, as it is widely believed among human rights activities that the Protocol definition of trafficking has too many elements and would be too difficult to prove in most States.[67] Furthermore, the *Penal Code* metes out a harsh punishment to convicted offenders: a minimum term of two years and a maximum of twenty years imprisonment, and the possibility of a fine.[68] If the offence involves a child, the minimum sentence is increased to five years.[69]

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65. *Penal Code*, Section. *360 (A) (2)*.

66. *Ibid.*, Section. *360 (A) (5)*.

67. Jordan, Ann D, "The Annotated Guide to the Complete UN *Trafficking Protocol*", (Washington, DC: International Human Rights Law Group, 2002), p. 7. Available at: http://www.hrea.org/erc/Library/display.php?doc_id=818&category_id=12&category_type=3&group=>.

68. *Penal Code*, Section 360 (1) (b).

69. *Ibid.*

With regard to border and documentation measures, as discussed above, the government has been actively cracking down on illegal migration. So, while these measures are not legislated, the activities of the government are conducive to preventing and combating the problem. There is no doubt that the CID has in many respects made the traffickers' jobs more difficult over the past year. As discussed above, however, these activities have been focussed primarily on preventing illegal travel. This means that fewer resources are invested in monitoring and detecting internal trafficking, and protecting victims. Furthermore, it ignores the possibility that some victims of trafficking travel using legal routes.

It is noteworthy that the *Sri Lanka Bureau of Foreign Employment (SLBFE) Act*[70] also has provisions that serve to combat trafficking. The *SLBFE* Act prohibits unauthorized recruitment of individuals for overseas employment.[71] It is also an offence to forge documents for this purpose.[72] While these are useful protections, these sections of the *SLBFE* Act have not been enforced. The government has indicated that the *Penal Code* is a more effective method to prosecute traffickers, and it provides for stiffer penalties.[73]

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70. Act No 21 of 1985.

71. SLBFE Act, Section 62.

72. *Ibid.*, Section 63 (a).

73. Interview with Vijitha K. Malagoda, Senior State Counsel, Attorney- General's Department, 21st January 2004.

3.5 Trafficking within and from Sri Lanka in 2003

The impact of trafficking on Sri Lanka is difficult to assess. Most reports admit to having little grasp on the extent of the problem, and there is a clear need for comprehensive research on the issue.[74] Some estimates of the number of victims of trafficking come from assessments of the number of children in the commercial sex trade. The following is a survey of some of the current estimates:

- According to the International Organisation for Migration (IOM), internal trafficking affects about 100,000 children under the age of 16, forcing them into commercial sexual activity, domestic servitude or into military service. An estimated 2,000 – 3,000 are trafficked overseas for domestic service or commercial sexual activity.[75]

- UNIFEM estimates that there are between 20,000 and 30,000 child prostitutes in Sri Lanka, and the problem of international trafficking is considered less than in other South Asian countries.[76]

- According to UNICEF and ILO, approximately 40,000 child prostitutes are working in Sri Lanka.[77]

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74. " A Human Rights Report on Trafficking of Persons, Especially Women and Children: Sri Lanka", The Protection Project, March 2002; Hemachandra, Damitha, "Many Children Still Abused and Neglected in Sri Lanka" *Daily Mirror*, 8th October 2003.

75. Trafficking in Migrants, Quarterly Bulletin – Special Issue, International Organisation for Migration, No. 23, April 2001.

76. UNIFEM Country Report Sri Lanka, 1998.

77. Hemachandra, Damitha, "Many Children Still Abused and Neglected in Sri Lanka," *Daily Mirror*, 8th October 2003.

- The United States Department of State estimates indicate that 10,000 to 15,000 children are trafficked within Sri Lanka annually, and 500 are sent overseas.[78]

- The Lawyers for Human Rights and Development (LHRD) estimate that about 3,000 people disappear annually due to trafficking, most of them women and children.[79]

There is presently no real way to confirm these figures, but even employing the most conservative estimates, there is clear evidence that a significant number of Sri Lankans are suffering as a result of trafficking.

Within Sri Lanka, women and children are often lured by promises of jobs and are forced into commercial sexual activity, domestic servitude or fishing. In the North and East of the country, the LTTE is well-known for abduction and recruiting children as soldiers or into employment.[80] Another particular problem is that Western tourists seek out young boys and girls for commercial sexual activities. For the most part, these children come from rural areas. According to the ILO, another problem is the children who are recruited into fishing 'vaadiyas' in rural areas and are kept under slave-like conditions. Finally, there are also reportedly a small number of foreign women in Sri Lanka working as prostitutes, some of whom are believed to be victims of trafficking.[81]

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78. US Trafficking in Persons Report, p. 141.

79. Gunatilleke, Nadira, "US Ready to Assist Curbs to Human Trafficking," *Daily News*, 30th May 2003.

80. The recruitment of child soldiers is a complex and sensitive issue. While it is related to trafficking, the international community has given it unique attention beyond the rubric of trafficking. For this reason, the issues will not be addressed in this paper.

81. "Call Girls Capitalise on Spot Visas," *Sunday Island*, 8th June 2003.

In 2003, the media did not report on trafficking issues in any significant way. A few cases were reported, however. They are worth reviewing as they cover a range of trafficking 'scams' and highlight that almost anyone can fall victim to traffickers. The examples also highlight the need for more legislation, action, awareness-raising and international cooperation to combat trafficking.

- A well-publicized case of suspected trafficking involved Somalatha Satharasinghe, a Sri Lankan domestic worker who went to Kuwait to work as a domestic servant in May. She died a few weeks after her arrival, though it is unclear how or why. Immediately after her death a number of her organs were removed, including her kidneys, corneas and bladder.[82] It is alleged by the Kuwaiti authorities that she had indicated her desire to donate her organs before her death. Her family alleges that she was a victim of a sale-of-body-parts scam.

- In October, it was reported that a man paid Rs. 1,200,000 to an agent who had promised to arrange to send him to Germany for employment. Using a forged visa provided by the agent, he attempted to travel to Germany, but was intercepted in the Maldives and returned to Sri Lanka. The victim spent 113 days in remand prison on a charge of travelling illegally to Maldives.[83]

- In November, four foreign nationals were arrested attempting to traffic several young Sri Lankan children (2 boys and 3 girls) out of the country using forged passports. It is also alleged that the children had been sexually abused.

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82. Samath, Feizal, "Furor over Dead Worker Shows Migration Risks," *IPS-Inter Press Service*, 2003.

83. *Lankadeepa*, 2nd October 2003.

The CID and the National Child Protection Authority intervened to assist these children and arrest the foreign nationals.[84]

- Also in November, it was reported that an illegal agency operating in Sri Lanka offered students an opportunity to study at a university in Cyprus. It took payments from three hundred students, who were then provided with forged visas and transport to Cyprus. Upon arrival there, the students discovered that no such university existed. The students were stranded in Cyprus, without the means to return home.[85]

Enforcement

With respect to enforcement in the area of trafficking, the government still has some improvements to make. The 2003 US Trafficking Report indicated that the "government's ability to provide long-term assistance to victims is limited".[86] The report further concluded that the GOSL did not comply with minimum standards to prevent trafficking, but was "making significant efforts to do so".[87] The report listed the following measures as necessary to improve its counter-trafficking efforts:

a) enhance law enforcement efforts against sex tourists;

b) ensure the protection of children recruited as child soldiers by the LTTE; and

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84. Gamage, Anjana, "Chinese Foursome, Lankan Children Held at BIA," *Daily News*, 11th November 2003.

85. *Lankadeepa*, 3rd November 2003.

86. US Trafficking, in Persons Report, p. 141.

87. *Ibid.*

c) ensure that foreign women who are trafficked to Sri Lanka are not arrested.[88]

International Cooperation

Internationally, Sri Lanka has actively cooperated with other States to combat trafficking and smuggling. The Ad Hoc Expert Group 1 Meeting was held in Colombo, 13th-14th March, as a follow up to the Bali Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime.[89] The Expert Group meeting, organized by the Government of Sri Lanka with close co-ordination and financial assistance from IOM, was attended by senior officials from 38 countries. The Expert Group met to devise ways of strengthening regional and international efforts to combat people smuggling and trafficking by raising awareness and understanding on these issues, and identifying and mapping existing national efforts to combat such transnational crimes.[90]

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88. *Ibid.*

89. "Thirty Eight Countries to Discuss Human Smuggling and Crime," *Daily News* 12th March 2003, "Reps from 38 Countries in Pow-Wow here on Human Trafficking," *Island*, 12th March 2003; "Experts Meet in Colombo to Discuss Human Smuggling," *Daily Mirror*, 13th March 2003.

90. The first Bali Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime was held in Bali, Indonesia, 27th – 28th February 2002. The conference was an opportunity for ministers and senior officials to exchange information and plot new directions in combating people smuggling trafficking in persons and related transnational crime. The conference continues to serve as a platform to discuss issues of common concern, and a forum to seek out practical solutions through enhanced cooperation and collaboration. The second meeting was held in Bali on 28th - 30th April 2003.

The government also undertook an important bilateral initiative with Italy. The Government of Italy instituted a programme in which Sri Lankans could apply for up to 1,500 temporary work visas over the next two years.[91] Eligible job applicants could receive training in Colombo for specific jobs. By providing Sri Lankans with legal opportunities, the government of Italy hopes to prevent the illegal entry of Sri Lankans into Italy and their abuse by employers or criminals once there.

Finally, through 2003, the government took steps to conclude a Reàdmission Agreement with the European Community.[92] One of the objectives of the agreement is to combat illegal migration, in the spirit of cooperation and on the basis of reciprocity. The purpose of the agreement, which should be finalised in 2004, includes: "rapid and effective procedures for the identification and repatriation of persons who do not, or no longer, fulfil the conditions for entry, residence or presence on the territories of Sri Lanka or one of the Member States of the European Union, and to facilitate the transit of such persons in a spirit of co-operation."

3.6 Conclusions on Trafficking

Sri Lanka's legislation addressing trafficking in persons is adequate in terms of creating a framework for prosecution of offenders. However, the GOSL lacks the resources necessary to enforce these laws and provide the protections afforded to victims of trafficking. As discussed with respect to smuggling, the GOSL has invested heavily in operations to combat illegal migration, but not necessarily to combat trafficking.

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91. Kannangara, Ananda, "Italy Grants 500 New Jobs to Sri Lankans," *Daily News*, 23rd July 2003.

92. Sri Lanka Reàdmission Agreement; available at:.statewatch.org/news/2003/feb/srilanka.pdf>.

If this trend continues, the GOSL risks "ignoring the human dimension of the trafficking phenomenon".[93] The recommendations which follow are intended to provide basic suggestions for improving Sri Lanka's counter-trafficking initiatives.

First, there is a need to better understand the problem of trafficking in Sri Lanka. The government must invest resources into determining the extent and nature of the problem and the best way to prevent and combat it. This will require a coordinated inter-departmental government effort, in addition to involving civil society.

Second, it is essential that the government take as broad an approach as possible to combating trafficking. Trafficking is a social, political and economic issue, affecting the country's most vulnerable people. Incorporating a human rights approach to trafficking would also help to highlight the importance of individuals and their rights, and assign a universal standard to dealing with the problem. Trafficking is also an international issue, and a number of powerful countries have expressed support for wide-scale counter-trafficking initiatives. Ideally, the same efforts and resources that have gone into combating illegal entry and departure from Sri Lanka should be harnessed to combat internal and external trafficking.

Third, victims of trafficking, whether citizens or non-citizens, must not be punished by the State for coerced involvement in criminal activities. Every effort must be made to determine whether an individual is a victim or not. One way to prevent punishing victims of trafficking is to ensure that they are not subject to the 'non-bailable' designation assigned in the current legislation for illegal departures.

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93. Human Rights Watch, "The International Organisation for Migration (IOM) and Human Rights Protection in the Field: Current Concerns" Submitted by Human Rights Watch at the IOM Governing Council Meeting (Geneva: 18th– 21st. November 2003), p. 12.

Finally, Sri Lanka must ratify the *Trafficking Protocol*, and legislate measures to ensure that:

a) victims' identities and privacy are protected;

b) criminal proceedings against traffickers are confidential;

c) there is a legal right for a victim to obtain compensation for damages suffered;

d) procedural rights exist to ensure that the victim has full information about and participation in the legal proceedings; and

e) that non-citizens are afforded the same protections as citizens. The government should ensure that once legislated, these measures are implemented fully and consistently.

4. Conclusion

It is important to keep in mind that the United Nations Convention against Transnational Organized Crime and the Trafficking and Smuggling Protocols are not human rights instruments. They are considered law enforcement instruments, overseen by the UN Crime Commission. This does not mean that they cannot be employed as tools to advance human rights, and as this chapter demonstrates, they are empowering documents. One challenge for the Government of Sri Lanka and civil society groups will be to transform these international instruments into successful tools for the advancement of human rights in Sri Lanka.

A second challenge for Sri Lanka will be to help ensure that the rights of Sri Lankans living and travelling overseas are protected. Part of the human smuggling and trafficking dilemma for Sri Lanka is that many

human rights abuses against its citizens are committed overseas, well beyond the reach of the Sri Lankan law enforcement authorities or assistance groups. Almost one million workers are officially overseas, while an untold number live overseas without proper documentation. Many of these individuals are subjected to abuse by their employers and criminals. Moreover, it is widely reported that many receiving countries in West Asia have inadequate and outdated legislation dealing with migrant labour.[94] Other States have harsh measures in dealing with those who break the law.[95] Civil society and governments must cooperate to ensure that the established international norms can work to protect the rights of Sri Lankan migrants, wherever they are.

94. UN Migration Report, p. 23.

95. Kasturisinghe, Nilika, "Are Lankan Workers Among 40,000 Arrested in UAE?" *Sunday Times*, 6th July 2003.

IV

Workers' Rights

Manori Witharana[*]

1. Introduction

Sri Lanka has ratified all the principal United Nations Conventions on human rights and labour rights and also all eight of the International Labour Organization (ILO) fundamental conventions reflected in the 1998 Declaration of Fundamental Principles and Rights at work (see Annexure 1). This chapter discusses the situation of workers' rights in Sri Lanka in the light of international labour rights standards reflected in the conventions of the International Labour Organization (ILO) and

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the ILO Declaration on Fundamental Principles and Rights at Work,[1] with special focus on ILO Convention No. 87 concerning freedom of association and protection of the right to organize (1948) and ILO Convention No. 98 (1949) concerning the application of the principles of the rights to organize and bargain collectively.

Approximately twenty percent of the 6.1 million labour force in Sri Lanka (excluding the North and East) is unionized. Most of the large unions are affiliated with political parties and play a major role in the political process. About 1600 trade unions are registered, but less than 500 of these are active.

Although Sri Lanka has a higher rate of unionization than other countries in the region, there is a continuing decline in the overall percentage of unionized workers. Most workers in large private firms are unionized. However, those in small-scale agricultural undertakings and small businesses usually do not belong to unions. There are about 68 different trade unions in the plantation sector[2] and approximately seventy per cent of the plantation workforce is unionized. Public sector workers are unionized at a very high rate.

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1. The ILO Declaration on Fundamental Principles and Rights at Work and its follow up were adopted in June 1998 by the International Labour Conference - the legislative body of the ILO. The Declaration reaffirms the commitment of the international community "to respect, to promote and to realize in good faith" the rights of workers and employers to freedom of association and the effective right to collective bargaining, and to work towards the elimination of all forms of forced or compulsory labor, the effective abolition of child labour and the elimination of discrimination in respect of employment and occupation. The Declaration underlines that all member countries have an obligation to respect the fundamental principles involved, whether or not they have ratified the relevant Conventions.

2. Chris Slee, "Sri Lanka: Tamil plantation workers fight for rights" *Green Left Weekly*, 28th May, 2003.

2. Freedom of Association and Collective Bargaining

According to ILO Convention No. 87, freedom of association is the right of workers and employers to: establish and join organizations of their own choosing without previous authorization (Article 2); draw up their own constitutions and rules, elect their representatives and formulate their programs (Article 3); join in confederations and affiliate with international organizations (Article 5) and be protected against dissolution or suspension by an administrative authority (Article 4). Article 4 of ILO Convention No. 98 defines collective bargaining as the "voluntary negotiation between employers or employers' organizations and workers' organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements."

In general the difference between freedom of association and the right to organize and bargain collectively is that freedom of association concerns relations between unions and governments, whereas the right to organize and bargain collectively concerns relations between unions and employers.[3]

Sri Lanka has ratified both ILO Conventions No 87 and 98,[4] and the principle of Convention 87 has been included in Article 14 of the Sri Lankan Constitution (1978), which guarantees to every citizen the freedom of association and the freedom to form and join a trade union. However, Sri Lankan labour legislation contains critical shortcomings on freedom of association, the right to organize, and the right to bargain collectively. The ILO's Committee of Experts on the Application of Conventions and Recommendations has pointed out that non-managerial prison employees, court employees, and agricultural corps

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3. 'Justice For All – A Guide to Worker Rights in the Global Economy' – American Center for International Labour Solidarity / AFL- CIO, May 2003.

4. Convention 87 was ratified in 1995 and Convention 98 in 1972.

employees are all excluded from the right to form trade unions. Furthermore, persons under sixteen years are not allowed to become union members, although employment is allowed at age fourteen.

In December 1999, Parliament passed an amendment to the Industrial Disputes Act No.43 of 1950, to require employers to recognize trade unions with a membership of forty per cent at the workplace as bargaining agents. Accordingly, the law prohibits anti-union discrimination. The Industrial Disputes (Amendment) Act No. 56 of 1999 states that: "No employer shall refuse to bargain with a trade union which has in its membership not less that forty *per centum* of the workmen on whose behalf such trade union seeks to bargain." It further states that: "For the purpose of this paragraph, the Commissioner of Labour or an officer authorized by him in that behalf may conduct a poll at any work place in order to ascertain whether at least 40% of the workmen on whose behalf the trade union seeks to bargain with the employer, are members of such trade union."

Although Sri Lanka's existing labour legislation applies throughout the private sector without exception, the practice is not to allow freedom of association and the right to bargain collectively in free trade zones (FTZs). There are no laws preventing unionization within the FTZ although in reality attempts at organizing are opposed as an unwritten policy. Unionization within the FTZ are around 0.2%. The FTZs currently employ over 450,000 people, over 70% of whom are women.

The issue of freedom of association and the right of workers to organize in the FTZs is currently at a critical juncture, with particular attention being paid to the perceived lack of enforcement of labour laws which would allow unions to organize and function. Complaints on these matters have been made to the ILO, European Union (EU) and the United States Government, compelling the Sri Lankan Government and to some extent the business community to take the enforcement of

labour standards seriously, as became evident in the Jaqalanka factory dispute in July 2003.

In the Jaqalanka case, according to a report[5] of an international observer,[6] members of the Free Trade Zone Workers Union (FTZWU) working at the Jaqualanka factory in Katunayake had faced threats and intimidation from the management in the lead up to a referendum to determine if the union had forty per cent membership and could therefore be recognized as a collective bargaining agent. The ballot was held in July 2003, but according to the report, only a handful of workers actually voted because of management's tactics. As this was the first referendum to be held in the FTZ since the United States Generalized System of Preferences (USGSP) petition,[7] international opinion was already focused on the case. The company's actions and attitudes caused the EU to delay their decision on granting Sri Lanka extended GSP facilities, and the government faced international pressure to resolve the situation. Local and international campaigns continued, and in October 2003, the Jaqalanka factory dispute was resolved following the intervention of the Fair Labour Association,[8] with the Jaqalanka management agreeing to recognize the FTZWU as representing the concerns of its members at Jaqalanka. This was a substantial victory for the FTZWU. In the aftermath of the Jaqalanka case and under international scrutiny, the All Ceylon Federation of

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5. TIE Asia Web site: http://www.tieasia.org/Jaqalanka_observers_report.htm.

6. Earl Brown – Labor Law Consultant ; American Federation of Labour - Congress of Industrial Organizations (AFL – CIO).

7. AFL-CIO, "Petition to remove Sri Lanka from the list of Beneficiary Developing Countries under the Generalized System of Preferences", submitted to the Office of United States Trade Representative, 2nd December 2002.

8. See ILO Complaint by the International Confederation of Free Trade Unions (ICFTU): Sri Lanka: anti union tactics in Jaqalanka Ltd (EPZ) – 21st July 2003 - http://www.icftu.org/.

Free Trade Unions (ACFFTU) succeeded in winning the referendum held at the Polytex garment factory in Koggala (Southern Province). The union was recognized and entered into the process of bargaining collectively with the management.

Sri Lankan law provides for the right to bargain collectively but this right is not practiced widely. Mere recognition of trade unions will not assure workers' rights. The result of collective bargaining procedures is a collective agreement. Currently there are relatively few collective bargaining agreements in the private sector, as compared with the total number of both enterprises and registered unions. This is indicative of an inherent weakness of a trade union system which, under the Sri Lankan Trade Union Ordinance[9], allows any seven people to form a trade union and have it registered. This means that in any given workplace there can be a multiplicity of trade unions without any collective bargaining agreement being in force. Indeed, as many as 50-60 different trade unions can operate within a single large firm.

3. Board of Investment (BOI) guidelines for the formation and operation of Employees Councils

The BOI, which is the overseeing public authority in the FTZ, issued a set of guidelines in October 2002[10] for the formation and operation of Employees Councils in Sri Lanka. The BOI in the introduction to the guidelines[11] states that, *'As a measure of promoting employees' participation in decision-making on matters affecting them and labour-management consultation and cooperation on matters of mutual*

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9. No.14 of 1935.

10. October 2002 (Revised and Updated: 23rd May 2003 &1st August 2003).

11. Board of Investment (BOI) Guidelines for the Formation and Operation of Employees Councils - 1st October 2002, p. 01.

concern at the enterprise level, the Board of Investment (BOI) of Sri Lanka facilitates the establishment of Employees' Councils consisting of elected representatives of employees in the BOI enterprises'.

However, labour advocates point out that many provisions of the guidelines blatantly undermine the rights of freedom of association and collective bargaining. They further state that the guidelines are solely regulated by the BOI, which is responsible for promoting investment, and obviously lack the minimum safeguards to which trade unions are entitled under the Trade Unions Ordinance. In addition, there are a number of provisions in these guidelines that undermine the independence of the elected councils .

In March 2003, the International Textile, Garment and Leather Workers Federation (ITGLWF) on behalf of the Ceylon Mercantile Industrial and General Workers Union (CMU), complained to the Freedom of Association Committee of the ILO that the Guidelines for the Formation and Operation of Employees Councils issued by the BOI hamper the creation of free and independent trade unions and prevent them from exercising the right to bargain collectively for five reasons:

> *(a) they require trade unions and employees' councils to compete for collective bargaining rights; (b) they do not guarantee free elections for employees' councils; (c) they do not safeguard the independence of employees' councils vis-à-vis the employer; (d) they provide employees' councils with favorable treatment which could influence the choice of workers as to which organization they wish to represent them; and (e) they set up a special regime*

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12. See Case No. 2255, Report No. 332 (Sri Lanka): Complaint against the Government of Sri Lanka presented by the International Textile, Garment and Leather Workers' Federation (ITGLWF) on behalf of the Ceylon Mercantile Industrial and General Workers' Union (CMU).

for the resolution of industrial disputes under the authority of the BOI instead of the competent labour authorities.[12]

The Freedom of Association Committee of the International Labour Organization, after examining the various allegations made in the complaint and the responses of the government, pointed out that certain provisions of the BOI Guidelines are contrary to Convention Nos. 87, 98 and 135 and the principles of free and voluntary collective bargaining. The Committee therefore requested the government to take all necessary measures to amend certain sections of the BOI guidelines to ensure conformity with the relevant ILO Conventions.[13]

4. Key events during 2003

4.1 Trade Union Action

The right to strike, even though is not a fundamental right,[14] is a legitimate trade union mechanism. Sri Lankan law prohibits retribution against strikers in non-essential sectors. A strike is illegal in Sri Lanka only when it is in violation of the Industrial Disputes Act, the Public Security Ordinance or the Essential Public Services Act.[15]

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13. See the recommendations of the Freedom of Association Committee of the International Labor Organization / Case No. 2255, Report No. 332 (Sri Lanka): Complaint against the Government of Sri Lanka presented by the International Textile, Garment and Leather Workers' Federation (ITGLWF) on behalf of the Ceylon Mercantile Industrial and General Workers' Union (CMU).

14. FRD Vol. 01 pp. 143, 161-163.

15. Gotabaya Dasanayake, "Freedom of Association and Collective Bargaining in Sri Lanka: Law and Practice – An Employers Perspective", Employers' Federation of Ceylon (Unpublished).

'Picketing' is nowhere defined in the Sri Lankan law. Picketing, however, raises important considerations of freedom of assembly and freedom of expression, which are fundamental rights. Freedom of expression could be interpreted to include picketing. Actions such as 'go slow', 'boycott' and 'gherao' are considered as misconduct.[16]

During 2003, workers in Sri Lanka from both private and the public sectors struck and picketed for various reasons and demands, but most concerned pay demands and salary anomalies. Some of the disputes remained unsettled and ongoing at the time this report was written.

In June, over a thousand medical doctors and dental surgeons belonging to the Government Medical Officers Association (GMOA) went on strike over salary anomalies and for the maintenance of a risk allowance payable to medical officers working in the country's war-ravaged Northern and Eastern Provinces. The action led to the GMOA receiving a 44 per cent salary increase for graduate medical officers. However, following this achievement, other hospital workers belonging to the Health Services Trade Union Alliance (HSTUA) began to campaign for a pay rise to eliminate the disparity between themselves and medical officers (doctors). The HSTUA members include attendants, clerks, drivers, paramedics, health inspectors, midwives and health auxiliaries. In September, 80,000 health workers participated in an island-wide strike that lasted for 13 days. It ended with none of the union's demands being met. The dispute continued, however, and had not been settled at the time of writing. Further, in September, employees of the National Water Supplies and Drainage Board picketed at regional offices during their lunch-hour demanding a pay increase and the resolution of certain salary anomalies. During the same period, workers from the State Engineering Corporation also demonstrated outside the company's

16. *Handbook on Labor Relations*, Friedrich Ebert Stiftung (FES), 1997.

office in Colombo over several demands concerning pay, and over their opposition to management plans to liquidate the corporation.

In March, around 800 electrical, mechanical and civil superintendents of the Ceylon Electricity Board (CEB) went on strike demanding a salary revision and a change in the CEB restructuring. The Chairman of the CEB considered the union's demands to be impractical. Further in June, over 10,000 power workers from 25 unions, including most of the officers of the CEB went on strike demanding payment of a salary increase outstanding since 2000.

Over 800 power workers of various categories, such as data entry operators, clerks, technicians, meter readers and peons went on strike in November to demand confirmation of their jobs and payment of salary arrears. They also claimed that the government's privatization plans for the CEB threatened the jobs of workers who had been recruited in 1997 but not confirmed.

Public sector workers went on strike in October to demand a salary increase in line with inflation. The strike involved over 50,000 employees comprising telecommunication, education, health, local government, electricity, petroleum, government press, excise, customs and audits and university staff. The public sector workers also demanded the government end its privatization program and forced transfers.

Non-academic workers in universities also fell in line with other workers in Sri Lanka striking over pay hikes. A token strike was launched in November at all universities, demanding a Rs. 2,000 (Approx.US$20) salary increase. Other demands included resolving salary anomalies, the provision of funds for "distress loans" and an end to plans to privatize universities.

In December, hundreds of Ceylon Petroleum Corporation (CPC) workers at the main storage complex in Kolonnawa, (Western Province) who had not been paid overtime for two years, went on strike demanding the immediate payment of overtime arrears. Authorities pledged payment of arrears and the strike ended within a few hours.

Industrial action opposing privatization was also significant during 2003. The powerful 80,000-member, Inter-Company Employees Union continued with its struggle to block economic reforms, which the government hopes, would attract foreign aid. The Union opposed opening the labour market and privatizing state firms, both measures that could lead to job cuts and diminish union influence.

Among other workers opposing privatization of the state-run industries were the railway workers. On 24th July, hundreds of workers at the Ratmalana Railway Workshop (Western Province) put down their tools, and on 30th July, about 5,000 railway workers picketed outside the railway's head office. Union leaders called off a nationwide strike scheduled for 31st July after discussions with the transport minister. Railway employees feared that a gazette notice transferring Sri Lanka Railway Department functions to the newly established Sri Lanka Railway Authority in July was a step towards privatizing the rail system. Further, in October, approximately 10,000 Sri Lankan railway workers, including engine drivers, controllers, guards and stationmasters, launched a two-day strike for union rights and job security. The workers requested a 75 per cent pay increase and benefits in line with those given to public servants. Representatives of the Joint Railway Federation of 60 trade unions organized the strike as discussions with the Transport Minister had failed to resolve the dispute. The union stated that the strike was for job security as there was growing uncertainty over employment after the establishment of the new Railway Authority. Railway jobs are reported to have been slashed

from 25,000 in 1993 to 17,000 in 2003. Workers believed the cuts were made to justify railway privatization.

On 11th December 2003, workers of the National Water Supply and Drainage Board held a four-hour national strike to demand a salary increase and oppose government plans to privatize the country's water supply system, which it feared would lead to lay-offs and increased prices for consumers. Over 6,000 workers joined the action. The workers struck over the same issue in October and again on 17th December they organized another four hour strike demanding a Rs 4,000 (US $ 41) minimum salary and payment of arrears. Meanwhile, in March over a thousand public sector workers including bank, hospital, railway, government press, port and municipal council workers struck to oppose privatization, the dismantling of their pension scheme and changes to labour protection laws. This was jointly organized by the State Service Committee to Gain Pay Hike, which consists of 52 state sector trade unions, and the Alliance for Safeguarding National Assets and Human Rights (ASNAHR), an alliance of unions and non-government organizations. Hundreds of private sector workers also joined the strike, which also demanded a pay rise to compensate for inflation.

Further, in March, over 1,000 technical staff of the CEB, supported by civil, electrical and mechanical superintendents, billing officers and engineers, organized trade union action demanding the withdrawal of the restructuring bill, which they feared would result in severe attacks on CEB jobs and working conditions. Later, in April and December, employees of the Inland Revenue, Sri Lanka Customs and Excise Departments stayed away from work in a sick note campaign against the government's proposed Revenue Act, which would establish a new Revenue Authority, merging all three departments.

Postal workers belonging to the Front of Unions for Protecting the Postal Service also organized an industrial campaign demanding assurances that the postal service would not be privatized. They also wanted improved working conditions, cost-of-living pay rises, the timely filling of staff vacancies and increased opportunities for promotion.

During 2003, trade unions organized several actions against amendments to the labour laws and proposed Acts which would curtail workers' rights. Prominent among them were the actions organized by the technical staff of the Ceylon Electricity Board, employees of the Inland Revenue, Sri Lanka Customs and Excise departments, and the All Ceylon Trade Union Congress.

Trade unions also took action for reasons such as closure of factories, job security and conditions of work. In July 2003, hundreds of laid-off workers from factories that had closed down since January 2002 picketed at the BOI office demanding measures to protect jobs. According to a statement of the Inter Worker Union, in the 18 months since January 2002, 50 factories had closed and 22,534 workers had been laid-off. In December around 150 workers from Reckitt Benckiser (Lanka) Ltd (RBLL) held a protest outside the factory, to oppose the plant's sudden closure. The Ceylon Mercantile, Industrial and General Workers Union accused RBLL of violating its collective agreement with the union.

Teachers working at Sri Lanka's technical colleges launched a protest campaign in November against an extension of work schedules from 36 weeks a year to 48 weeks. They further demanded amendments to the guidelines governing transfers, the filling of vacancies for technical education officials and the establishment of a proper scholarship scheme.

In addition to protests over local issues, workers also protested over international concerns. Sri Lankan workers held a two-hour protest picket in Colombo to oppose US plans for war against Iraq. The protest was organized by the Alliance for the Protection of National Resources and Human Rights (APNR), a coalition of independent trade unions, non-government organizations and protest groups. Hundreds of workers belonging to different trade unions representing all sectors took part. During 2003, trade unions in the plantation sector also launched trade union action to protect and promote the rights of their members. Over one hundred workers from an estate in Hatton went on strike in February demanding that the management deposit deductions made from their wages for the Employees Provident Fund (EPF) and Employee Trust Fund (ETF) with the Central Bank, as required by law. Although the money had been deducted, no funds had been deposited for over 15 years. In November, several plantation trade unions including the Labour National Congress, United Plantation Workers Union and the United Lanka Democratic Front urged the government to appoint a separate committee to study a pay hike for the private sector. The trade unionists pointed out that almost 80 per cent of the private sector employees had been denied government approved salaries and allowances.[17]

4.2 Formation of the National Trade Union Federation and the Health Services Trade Union Alliance

The National Trade Union Federation (NTUF) was formed in late 2003. It comprises five leading trade unions: the Lanka Jathika Estate Workers' Union (LJEWU), Jathika Sevaka Sangamaya (JSS), National Estate Staff Union (NESU), Jathika Teachers' Union Federation (JTUF), and Public Services National Trade Union Federation (PSNTUF). The NTUF's membership include workers from the

17. Colombo Page News Desk, Sri Lanka, Monday, 3rd November 2003.

plantations, public and private sectors, and state enterprises. In a similar move, 52 public sector trade unions in the health sector also joined together and created a new alliance called the Health Services Trade Union Alliance (HSTUA). Both the NTUF and HSTUA represent the first step Sri Lankan trade unions are taking to unite, and work together. Until now, the labour movement has been badly fractured – divided by sector, ideology, politics, personality and geography.

5. Amendments to the Labour Law

During 2003, several bills were presented to Parliament to amend various statutory provisions in the labour laws. The Industrial Disputes (Amendment) Act, No. 11 of 2003, the Termination of Employment of Workmen (Special Provisions) (Amendment) Act, No. 12 of 2003 and the Industrial Disputes (Hearing and Determination of Proceedings) (Special Provisions) Act, No. 13 of 2003 were passed in 2003.[18] These bills, some of which mirror International Financial Institution's (IFI) recommendations, clearly sought to implement changes that would erode worker rights and employment security. Trade unions complained that they were not given adequate time to study and respond to these proposed legislative changes, thus virtually ensuring that they would be brought into operation without proper debate or discussion. Trade union representatives declared that they would be forced to withdraw from the National Labour Advisory Council (NLAC),[19] accusing the

18. The Gazette of the Democratic Socialist Republic of Sri Lanka, Extraordinary, No. 1288/14 - Wednesday, 14th May, 2003.

19. A consultative body on labor matters chaired by the government and with representatives from employers, employees and trade unions.

government of sneaking legislation into parliament without consulting the council. Some trade unions had boycotted NLAC meetings since August 2002, after the government pushed through legislation, which turned out to benefit employers more than employees.[20] Labour law experts and trade unionists have pointed out that the introduced 'Statutory Compensation' on termination under the Termination of Employment of Workmen Act and the unemployment benefit scheme are disadvantageous to the workers.

The Cabinet approved an unemployment benefit insurance formula in March 2003 under the Termination of Employment of Workmen (Special Provisions) (Amendment) Act, No. 12 of 2003 and the Industrial Disputes (Amendment) Act, No. 11 of 2003. Trade unionists pointed out that the jobs of 6.2 million people in the private sector would be in danger if the government did not withdraw the new compensation formula introduced by the Gazette (extraordinary) of 31st December 2003. The 'safety net' for employees was not introduced, although it was supposed to be implemented before the Gazette notification.[21] With this Gazette, a company will be able to terminate an employee at the Labour Commissioner's discretion. The government has been under pressure to implement the compensation formula and the revision process of time bound dispute settlement as part of its commitment to the IMF and the World Bank.

6. Conclusion

Some positive changes were evident with regard to freedom of association in the FTZ in 2003. While the eventual outcomes of the Jaqalanka and Polytex cases were welcome, it would be premature

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20. "Sri Lanka `Labour Reform' hurts workers," Inter Press Service, 14th February. 2003.

21 Indeewara Thilakarathne, 'Jobs of over 6 million workers threatened', *Daily News*, 5th January, 2004.

to conclude that unions in the FTZ can now be recognized and freely negotiate collective bargaining agreements without external pressure on the employers and the government. The garment industry is already cutting its run up to 2005, when the Multi-Fiber Agreement (MFA) ends, and the garment sector will face increased competition from other developing countries. One adjustment strategy that should be actively pursued is to encourage producers to attract customers and investors by adhering to socially responsible practices, including the adoption and implementation of ILO core labour standards. The government could introduce comprehensive legislation to ensure conformity with these standards and to assist in securing preferential access for Sri Lankan exports based on implementation and compliance.

The recent labour law reforms, some of which mirror IFI recommendations, clearly sought to implement changes that would erode worker rights and employment security. Labour advocates point out that this legislative trend indicates an intention to remove workers' few safeguards against involuntary and mass termination, without the prior implementation of any form of "safety net" as proposed by trade unions. This legislative development has happened at a time when the vulnerability of employment to market forces and external shocks caused by the liberalization of trade and investment policies is anyway increasing rapidly.

It is clear that in Sri Lanka, workers and management lack awareness of how to communicate effectively as to the rights and responsibilities of both parties. Given that fact, labour – management relations tend to end in confrontation and industrial action as opposed to dialogue and negotiation.

In spite of Sri Lanka ratifying all eight core conventions of the ILO, serious issues still persist over the application of these standards in

practice. If they were effectively enforced, the ILO's core labour rights principles would address many of the major concerns voiced by workers in Sri Lanka and would contribute to sustainable economic growth. The implementation and enforcement of these principles, then, must become a high priority.

Annexure - I

Sri Lanka has ratified all eight of the ILO's fundamental conventions reflected in the 1998 Declaration of Fundamental Principles and Rights at Work:

- Convention No. 29 on Forced Labour, 1930 (Ratification Date: April 05, 1950)
- Convention No. 87 on Freedom of Association and Protection of the Right to Organize, 1948 (Ratification Date: September 15, 1995)
- Convention No. 98 on the Right to Organize and Collective Bargaining, 1949 (Ratification Date: December 13, 1972)
- Convention No. 100 on Equal Remuneration, 1951 (Ratification Date: April 01, 1993)
- Convention No. 105 on the Abolition of Forced Labour, 1957 (Ratification Date: January 07, 2003)
- Convention No. 111 on Discrimination (Employment and Occupation), 1958 (Ratification Date: November 27, 1998)
- Convention No. 138 on the Minimum Age for Admission to Employment, 1973 (Ratification Date: February 11, 2000)
- Convention No. 182 on the Worst Forms of Child Labour, 1999 (Ratification Date: March 01, 2001)

V

Judicial Protection of Human Rights

Dr. J. de Almeida Guneratne[*]

1. Introduction

Human rights, in their many faceted dimensions, have been formulated and embodied in international instruments and norms, and most especially in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both of which Sri Lanka has ratified.[1] Most other international

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1. The International Covenant on Civil and Political Rights (ICCPR) adopted and opened for signature, ratification and accession by the General Assembly of the United Nations Resolution, 2200 A (xxi) of 16.12.1966 and the International Covenant on Economic, Social and Cultural Rights (ICESCR) adopted and opened for signature, ratification and accession by the General Assembly of the United Nations by Resolution as of at the same date as the ICCPR (*Supra*).

instruments can be regarded as specific accentuations of the rights contained in these two instruments.[2]

While the fundamental rights and freedoms chapter of the Sri Lankan Constitution captures the letter and spirit of these rights,[3] it has for the most part been the task of the Supreme Court to define the limits of those rights.[4] In that regard, while the Supreme Court has not encountered major constitutional inhibitions in its response to civil and political rights, its advances in regard to socio-economic rights have been made in the context of Article 12, namely, the "equality" provision.

This chapter will analyse some of the significant decisions handed down by the Supreme Court during 2003 in the context of its response to the fundamental rights chapter in the Sri Lankan Constitution. It will highlight the positive aspects of the judicial response by attempting to conceptualise new doctrines that have emerged in the wake of those decisions, and will also point to some areas where the judiciary has yet to realise the potential for expanding the canvas of human rights in Sri Lanka.

While the decisions examined have been subdivided into judicial responses to civil and political rights, followed by socio-economic rights, the reasoning of the Supreme Court in relation to guaranteeing

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2. For example, Optional Protocol to the International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by the General Assembly Resolution (Supra, n. 1), the United Nations Declaration on the Elimination of All forms of Racial Discrimination proclaimed by the General Assembly Resolution 1904 (xviii) of 20th November, 1963, the Declaration on the Elimination of Discrimination against Women proclaimed by the General Assembly Resolution 2263 (xxii) of 7th November, 1967.

3. Chapter 4

4. By virtue of Article 126 of the Constitution of Sri Lanka.

the right to vote of Sri Lankan citizens has been accorded a separate analysis.

2. Judicial Response in the context of Civil and Political Rights

The year 2003 witnessed several decisions in this context, as a result of which, as observed by the Supreme Court in one case, "the number of credible complaints of torture and cruel, inhuman and degrading treatment (showed) no decline."[5]

There were numerous complaints of brutal assault.[6] These included a labourer assaulted with batons and sticks while in army detention,[7] the cleaner of a van assaulted after being blindfolded,[8] an Attorney-at-Law pulled out of his car and assaulted,[9] a reserve police constable subjected to assault by a reserve sub inspector,[10] another Attorney-at-Law who was a by-stander at a protest demonstration (and not a participant) shot at close range,[11] and an alleged army deserter tortured

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5. per Justice M.D.H. Fernando in *Sanjeewa* v. *Suraweera, O.I.C. Wattala and Others*, SC (FR) No. 328/2002, S.C. Minutes 04.04.2003.

6. *Supra*, assault on a cook.

7. *Konesalingam* v. *Major Muthalif and Others*, S.C. (FR) No. 555/2001, S.C. Minutes 10.02.2003.

8. *Shanmugarajah* v. *Dilruk, S.I., Vavuniya*, S.C. (FR) No. 47/2002, S.C. Minutes 10.02.2003.

9. *Adhikary and Adhikary* v. *Amerasinghe and Others*, S.C. (FR) No. 251/2002, S.C. Minutes 14.02.2003.

10. *Ekanayake* v. *Weeraawasam*, S.C. (FR) No. 34/2002, S.C. Minutes 17.03.2003.

11. *Sujeewa Arjuna Senasinghe* v. *Karunatilleke and Others*, S.C. (FR) No. 431/2000, S.C. Minutes 17.03.2003.

to the extent that he died in police custody.[12] Such cases revealed a wide range of circumstances in which such treatment had been meted out by the police or service personnel – the very people who are expected to protect and safeguard the fundamental rights of members of a society. Even a thirteen year old boy was not spared.[13]

Thus, not surprisingly, the Human Rights Committee of the United Nations after its 2156th and 2157th meetings held at its seventy ninth session concluded *inter alia*, in its observations that:

> *"[it] remains concerned about persistent reports of torture and cruel, inhuman or degrading treatment ... by law enforcement officers and members of the armed forces ...."*[14]

In the ensuing paragraphs, several of the decisions handed down by the Supreme Court in the context of Article 11 of the Constitution of Sri Lanka will be examined, with a view to conceptualising the reasoning and approaches adopted by the Court in the year 2003.

Sriyani Silva v. *O.I.C., Paiyagala Police*[15]

In this case, an alleged army deserter who had been arrested by the police, died whilst in remand custody. The widow filed an application on the basis that the deceased had died as a consequence of torture by the police during an excessive period of detention and had been thereby

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12. *Sriyani Silva* v. *O.I.C. Paiyagala*, S.C. (FR) No. 471/2000, S.C. Minutes 8.08.2003.

13. *Harindra Shashika Kumara* v. *D.I.G. De Fonseka and Others*, S.C. (FR) No. 462/2001, S.C. Minutes 17.03.2003.

14. Concluding Observations at the 2164th Meeting (CCPR/C/SR, 2164) of the Human Rights Committee held on 6th November, 2003.

15. *Supra*, n. 12.

prevented from filing an application in violation of his fundamental rights. The petitioner, in her application, claimed compensation for herself and for her minor child, which the deceased would have received but for his untimely death.

The Court accepted the petitioner's version of the alleged incident and awarded compensation to both the petitioner and the minor child payable both by the State and the guilty respondent police officers personally. The concepts and principles articulated by Court in this decision and the issues arising from them are examined below.

The Right to Life declared as an Implied Fundamental Right

There is no express provision in the Constitution of Sri Lanka that recognises the right to life. However, Article 13(4) provides that "no person shall be punished with death or imprisonment except by an order of a competent Court." In interpreting this provision, it was held that, "Article 13(4), by necessary implication, recognizes that a person has a right to life – at least in the sense of mere existence, as distinct from the quality of life – which he can be deprived of only under a Court order."[16]

The Right to Sue in Respect of a Deceased's Right to Life that has been violated – Expansion of Locus Standi

On the facts, the Court found that the deceased's fundamental rights under Article 11 (along with Article 13(2)) had been so seriously infringed that he did not live long enough even to give instructions to file the application to which he was entitled, either by himself or by an Attorney-at-Law, in terms of Article 126(2) of the Constitution.

16. per Justice M.D.H. Fernando (Yapa, J. and de Silva J. agreeing at p. 8 of the Judgment), *ibid.*

The court observed that if Article 126(2) was construed narrowly, it would mean that no one else would be entitled to sue wrongdoers, resulting in a situation whereby there is no remedy for causing death in violation of Article 13(4). This would make the right to life implied therein, illusory. Secondly, it would also create the anomaly of providing a remedy for the lesser infringement of imprisonment but none for the much graver infringement of causing death. The Court thus opted to interpret the word "person" in Article 126(2) broadly as including the lawful heirs or dependents of such person, thus advancing the frontiers of *locus standi* in an application for violation of fundamental rights.

Concept of Fundamental Rights and Nature of Constitutional Remedies for their violations – Establishment of an Innovative Nexus

Ordinarily, the person whose fundamental rights had been violated would make an application himself or through an Attorney-at-Law, as provided by Article 126(2), and would seek the appropriate constitutional remedy. The right to make such an application by itself had already been recognized as an independent fundamental right.[17] Against that background, Justice Fernando posed the question thus:

> *"if a person is temporarily prevented from making or pursuing, such an application, he will certainly be entitled to complain that his fundamental right under Article 17 has been infringed. But if he is put to death in order to prevent him – totally and permanently – from complaining, can it be that no one else can complain?"*

If the answer was affirmative, it would be mean that such a person's fundamental right to life would be illusory, whereas a negative answer

17. *Porage Lakshman* v. *Fernando*, S.C. (FR) No. 24/90 S.C. Minutes 29.9.95 referred to by Court at p. 9 of the Judgment.

would necessarily put the constitutional remedy in the hands of another person. Opting not to interpret the right restrictively, the Court chose to look at the issue from the perspective of the entailing constitutional remedy by adopting an expansive interpretation deriving assistance from the constitutional duty imposed on the Court by Article 4(d) of the Constitution "to respect, secure and advance fundamental rights."

Judicial Interpretation in the light of International Instruments

Article 14.1 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment provides that,

> *"Each state shall ensure in its legal system that, the victim of an act or torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.*[18]

In recognizing the petitioner's right to sue and seek compensation for himself as the victim's widow and for the minor child, the Court, in its own words, brought the "law into conformity with international obligations and standards."[19]

Nature of Responsibility of Perpetrators – Personal and Vicarious Duties and Liability – Concept of Culpable Inaction

The police officer who had arrested the deceased was found to be directly liable for the unlawful custody (though not for the initial arrest),

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18. Adopted and opened for signature, ratification and accession by the General Assembly Resolution 39/46 of 10th December, 1984.

19. per Justice M.D.H. Fernando, at p. 10 of the Judgment, *Supra.*

thereby facilitating the circumstances that brought the case under Article 11. The officer in charge, on the other hand, was held to be vicariously liable for failing in his duty to take all reasonable steps to ensure that persons held in custody were treated humanely and in accordance with the law, which included the monitoring of the activities of his subordinates. As the Court noted,

> *"such action would not only have prevented further ill-treatment, but would have ensured speedy investigation of any misconduct as well as medical treatment for the petitioner. (The 1st Respondent is) ... therefore in any event, liable for his culpable inaction."*[20]

Relevance of an Alleged Criminal Record on a Right to Life victim

Respondents' Counsel had argued for reduced compensation to be awarded (if any) in the light of the deceased's "criminal record". Counsel sought to distinguish the instant case from a case where a victim with no "bad record" had been subjected to similar treatment by the police.[21] The Court noted the irrelevance of that argument on two counts, first, holding that, the authorities

> *"should have concentrated their efforts to have allegations against the deceased determined by a competent Court, after a fair trial. Until then the deceased was entitled to the benefit of the presumption of innocence."*

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20. *Ibid.*

21. The case of *Sanjeewa* v. *Suraweera,* discussed later in this paper, n. 5, *supra.*

And secondly noting that,

> *"the deceased had lost his life, and indeed, the opportunity to redeem his bad record".*[22]

Incidentally the right to be presumed innocent is itself a fundamental right recognized by Article 13(5) of the Constitution and in that light, Counsel's argument in any event could not have been entitled to merit.

Compensation as opposed to a Solatium

A sum of Rs. 800,000 in equal shares as compensation and costs was awarded by Court to the petitioner and the minor child, of which a sum of Rs. 700,000 was ordered to be paid by the State and Rs. 50,000 each by the two errant police officers personally. The award of compensation as opposed to a mere solatium following the declaration of a violation of a fundamental right could be open to debate in as much as the concept of compensation as understood in the ordinary law (such as in the areas of delict, contract or property) is based on certain criteria that must be established.

On the other hand, it could be argued that, if the proper concept in the case of a fundamental rights violation ought to be a solatium, then it cannot vary, resulting in the same quantum having to be awarded in the case of a violation of the right to have been called for an interview at one extreme, and a violation involving the right to life at the other. That would be an illogical and insensitive result for the law to reach. Thus, the concept of award of compensation as opposed to a grant of a mere solatium, is defensible. The quantum must be left in the hands of the Court, which must be relied upon to award the same, based on both qualitative as well as quantitative considerations. This would also

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22. per Justice Fernando, at p. 11, *supra.*

be in accord with Article 14.1 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, which speaks of compensation, and also in conformity with Article 14.2 of the said Convention which declares that,

> *"Nothing in this Article shall affect any right of the victim or other persons to compensation which may exist under national law."*[23]

This is an indirect acknowledgment of the universal fact of laws' delays under ordinary national laws as opposed to fundamental rights jurisprudence constitutionally decreed by Article 126(5) in setting a time standard.

Judicial Dialogue with the National Police Commission – Article 4(d)

Article 4(d) requires "all organs of government to respect, secure and advance fundamental rights and freedoms."

At the same time Article 155G(2) of the 17th Amendment to the Constitution requires the National Police Commission established thereunder, to establish a procedure to entertain and investigate public complaints and complaints of any aggrieved person made against a police officer or the police service, and provide redress in accordance with the provisions of any law enacted by Parliament for such purposes. Such procedures had not been effected by the NPC at the time of writing this chapter.[24]

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23. *Supra*, n. 18.

24. Despite draft procedures in this regard being forwarded to it by the Hong Kong based Asian Human Rights Commission consequent to a study engaged in by this author along with lawyer and rights columnist/writer Ms Kishali Pinto-Jayawardena.

Alive to these constitutional duties, the Court in the instant case directed the Registrar "to forward a copy of the Judgment to the National Police Commission for necessary action ...".[25]

***Adhikary and Adhikary* v. *Amarasinghe and Others*[26]**

In this case, an Attorney-at-Law, his wife (a teacher), their eighteen-month-old child and others were travelling in their car in heavy traffic, with no police officer present to control the congestion. After a virtual standstill, just as the petitioners began to move their vehicle, the respondents, boasting they were security personnel of a minister, had pulled the 1st petitioner out from the car and slapped him. The petitioner's wife (2nd petitioner) attempted to rescue her husband, but met with the same treatment coupled with verbal abuse. The 1st petitioner's disclosure that he was an Attorney-at-Law only aggravated the circumstances.

Following complaints to the Bar Association of Sri Lanka (which condemned the incident) and certain ministers, the police authorities terminated the services of three of the respondents, two of whom later apologized to the petitioners, while the other respondent was interdicted. The petitioners alleged violation of their fundamental rights in terms of Article 11 of the Constitution on the ground of cruel, inhuman and degrading treatment. On the versions presented to Court, participation of the respondents in the incident being established, the Court[27] found that the petitioners' case had been established. The principles and concepts emerging in the decision of the Court are discussed below.

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25. per Justice Fernando, at p. 11, *supra*.

26. n. 9, *supra*.

27. Comprising (Dr.) Justice Shiranee Bandaranayake (with Yapa, J. and Edussuriya. J. agreeing).

What Constitutes Degrading Treatment – an extended Psychological Criterion

Although there was no complaint in regard to physical injuries, nor evidence to show that medical assistance had been sought, the Court held that Article 11 encompassed psychological and countless other situations that could be faced by the victim. The jurisprudential significance of this judgment lies in the clues provided by the Court regarding what may constitute those psychological and countless other situations.

Having noted that the conduct of the perpetrators showed a total lack of discipline and respect for the general public, leading to a lack of esteem in those who are expected to safeguard and protect the rights of the people,[28] Justice Shiranee Bandaranayake recognized anguish faced by a victim on account of indisciplined conduct of a perpetrator in such circumstances as constituting an ordeal, which may be construed as a standard satisfying the concept of degrading treatment. Thus:

> *"During heavy vehicular traffic, the ordeal faced by the 2nd petitioner was of an aggravated nature and the anguish faced by the wife who was torn between the safety of her husband and child but still moved to prevent her husband being assaulted while carrying her eighteen month old baby and the feeling of a forlorn husband who could not protect his wife and child from abuse and assault ... and the psychological trauma faced by an innocent child, while in the tender hands of the mother ..... would add to the severity of the actions."*

The Court ordered Rs. 20,000 as compensation and Rs. 5,000 as costs to be paid by the State. The Court emphatically rejected the idea of

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28. As striking a responsive chord with what is envisaged in Article 4(d) of the Constitution.

awarding a high quantum as compensation based on a theory of deterrence, deriving support from an earlier decided case,[29] which had taken into consideration the financial burden that eventually would be passed on to the taxpayer. The contrary basis of awarding compensation has already been noted[30] and it is proposed to make a further relative evaluation of the competing schools of thought at a later point in this paper.

***Konesalingam* v. *Major Mutalif*[31]**

The petitioner, a labourer, was arrested (without the reason for such arrest being disclosed) and detained in an Army Camp for over a month. There, he was assaulted with batons and sticks, and had later been handed over to Vavuniya Police Station. He was held there for over a month more. Under interrogation, he was forced to admit in writing that he was a member of the LTTE, an allegation for which there was no other evidence. When trying to explain his innocence, he was once again assaulted. Thereafter, he was produced before a Magistrate who had committed him to remand prison.

The Court found that the Emergency Regulations relied upon by the perpetrators to justify the arrest had in fact only been issued on a date subsequent to the arrest. The medical evidence placed before Court showed physical injuries resulting from assault. On these facts, (accepted by Court), the Court ruled that the petitioner had been subjected to cruel treatment (Article 11); that he had been unlawfully arrested (Article 13(1)) and that the petitioner had been unlawfully detained (Article 13(2)).[32] The Supreme Court decision handed down

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29. See: at p. 6 of the Judgment.

30. Re: n. 23, *supra.*

31. SC (FR) No. 555/2001, S.C. Minutes of 10.02.2003.

32. Detention for over a month without a valid detention order.

by Justice Shiranee Bandaranayake[33] is viewed below from a socio-political perspective.

Organised Terrorism as opposed to a Community under Persecution – Judicial Sensitivity

The petitioner had been arrested and kept under detention on vague suspicion. As there was no material to substantiate the suspicion that he was a member of the LTTE, the fact that he was a member of the Tamil community appears to have been the reason for his arrest and detention. This is revealed by the forced confession that the perpetrators extracted from him.

The assault, which was related to the petitioner's attempt to explain his innocence, revealed the prejudice of the perpetrators, who appeared to presume that as the petitioner was a Tamil, he was therefore a member of the LTTE. There are many instances of this attitude on the part of law enforcement officers.[34] Such attitudes on the part of law enforcement officers create a feeling among members of the Tamil community that they are persecuted by those very persons who are expected to protect and safeguard their fundamental rights as decreed under Article 4(d) of the Constitution. Such attitudes among law enforcement officers are implicitly referred to in the Court's judgment:

> *"although the detention orders refer to the petitioner as a member of the LTTE, no material was produced before this Court to show that, at the time of the arrest of the petitioner, the arresting officers had such information prior to the decision to arrest ...".*[35]

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33. With S.N. Silva, C.J. And Edussuriya, J. agreeing.

34. See for example *Gnanamuttu* v. *Military Officer Ananda and Others*, 1999(2) SLR 213 and *Vinayagamoorthy* v. *The Army Commander* 1997(1) SLR 113.

35. per Justice Bandaranayake at p. 4 of the judgment.

Shanmugarajah v. Dilruk, S.I. Vavuniya and others[36]

This case involved another person arrested on suspicion of LTTE connections. In this instance, the petitioner, a cleaner of a van who plyed daily from Pesalai to Mannar, had been arrested without reasons being disclosed but on suspicion that he had LTTE connections (in regard to which the Court found credible information). He was subsequently blindfolded and assaulted. He was forced to sign documents in Sinhala, which he could not understand. Having found that Article 13(1) and (2) had not been violated, the Court held, on the medical evidence placed before it, that the allegation based on Article 11 stood established.

The line between a Vague Suspicion and Credible Information for an Arrest - Importance of Pleadings

The respondents said that they had received information from other suspects held in custody which led to the arrest of the petitioner. On this showing, the Court held that:

> *"It appears that (the respondents) had received credible information about the petitioner's involvement and his subsequent arrest was the result of the investigations carried out on such information ...."*[37]

The Court further held that:,

> *"It is evident that the petitioner was arrested not on a vague suspicion, but on credible information received ... and therefore his arrest was on reasonable grounds."*[38]

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36. SC (FR) No. 47/2002, S.C. Minutes 10.02.2003.

37. *Ibid*, at p. 3 of the judgment.

38. *Ibid.*

The fact that the Court accepted that the respondents had information from other suspects made this case distinguishable from the case of Konesalingam.[39] This demonstrates the importance of pleadings. However, the acceptance of a mere averment that the respondents had credible information obtained from other suspects, may be open to question. This position could arguably be justified on the basis of security considerations governing non-disclosure of the identities of the sources of information. But overall, the case demonstrates the thin line that separates a vague suspicion from what might be held to be "credible information", which can be bridged by clever drafting of pleadings.

Being in a position to inform the Reason for Arrest and Duty to inform the Reason for the Arrest – Restrictive Interpretation of Article 13(1)

However, on the facts as recounted above, the Court also proceeded to hold that:

> *"In such circumstances, it is my view that the 1st Respondent was in a position to inform the petitioner the reason for his arrest (and that) therefore, ... the arrest of the petitioner was done according to the procedure established by law."*[40]

Article 13(1) of the Constitution, which contains two rights, decrees that,

> *"No person shall be arrested except according to procedure established by law (and that) any person arrested shall be informed of the reason for his arrest."*

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39. *Supra*, n. 31.

40. *Supra*, n. 37 and 38.

However, the judgment made no reference to evidence that the respondents had informed the petitioner of the reason for his arrest (even while protecting their sources). Consequently, it would seem that the petitioner's right contained in the second limb of Article 13(1) had been violated.

Impact of Article 15(7) and (8) and the Resulting Position from the Decision of the Court

Article 15(7) subjects Article 13(1) to such restrictions as may be prescribed by law in the interests of (*inter alia*) national security ..... or for the purpose of securing due recognition and respect for the rights and freedoms of others or of meeting the just requirements of the general welfare of a democratic society." Article 15(8) throws further light on that restriction.

If the term "law" is interpreted to include judicial decisions,[41] the decision of the Court may be interpreted as implied by laying down the proposition that, where there is credible information as to involvement of an arrested person who poses a threat to national security, there is no requirement for such person to be informed of the reason for the arrest. Instead, it is enough for the **person** carrying out the arrest to be in a position to disclose the reasons for the arrest, whether or not they do so. This approach may be open to the critique that it could weaken fundamental rights under the Constitution and permit greater laxity among law enforcement officers.

Ekanayake (R.P.C.)* v. *Reserve S.I. Wewawasam[42]

In this case the petitioner, a reserve Police Constable, had been illegally arrested and assaulted by a Reserve Sub Inspector. The reason for the

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41. *Walker and Sons Ltd.*, v. *Gunatillaka and Others*, (1978-79) SLR 231.

42 *Supra*, n. 10.

arrest had not been disclosed. A police jeep had stopped near the petitioner when he was passing Galnewa Police Station. The main perpetrator had got down from the jeep, questioned the petitioner in obscene language about where he was going and, not waiting for an answer, assaulted him with hands and feet, even kicking him in the chest. The assault continued despite the petitioner stating that he was a police officer. The petitioner had then been taken to the Police Station, where he had been slapped. Many civilians had witnessed the degrading manner in which the petitioner had been treated. Later, on being identified as a Reserve Police Constable by two police officers, he had been chased away from the Police Station. He had subsequently been hospitalised and the medical evidence disclosed several injuries. In those circumstances, Court found that the petitioner's fundamental rights had been violated under Article 11 and Article 13(1) of the Constitution.

Several issues arose for consideration and determination in the case, as discussed below.

Principles in assessing the relative probabilities of the competing versions – Nature of Respondents' Burden

The judgment lays down two principles for assessing the relative probabilities of competing versions. Firstly, in order to defeat a petitioner's claim regarding an alleged violation, it is incumbent on the alleged violators to point out any significant inconsistency or intrinsic improbability in the petitioner's version. Secondly, unsatisfactory features in the respondents' version would result in an inference being drawn that the petitioner's version is more probable than the respondents'. In the instant case, the "In Entry" and the supporting affidavits filed on behalf of the principal perpetrator were found to contain serious discrepancies, as opposed to mere

inconsistencies, particularly in regard to the main incident as having prompted the arrest.[43]

Re: Impact of Rule 44(7) on Pleadings

The Supreme Court Rules[44] provide for an informal complaint under Rule 44(7) to be treated as a petition under Article 126(2) of the Constitution. Rejecting a preliminary objection the Court held that there need not be a specific reference in the pleadings to Rule 44(7) where the initial complaint and the subsequent pleadings are in fact in conformity with Rule 44(7).[45]

Re: Financial Circumstances of Petitioners – Judicial Notice

The petitioner was a Reserve Constable who had sought legal aid to prosecute his application. By holding that it is reasonable to infer that such a person cannot afford the expenses of a fundamental rights application, the Court, in effect, extended the matters in respect of which judicial notice may be taken, which amounts to a response to the social cum financial conditions of certain segments of our society. The significance of the approach on the part of the Court lies in the Court having laid down a basis to entertain applications made under Rule 44(7) where otherwise, petitioners (even those genuinely in

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43. In the "In Entry" it had been stated that the petitioner was attempting to throw something at the jeep, while in the main perpetrator's affidavit he had stated that the petitioner was throwing stones at passing vehicles – not mentioned in the other affidavits. No explanation was forthcoming as regards the injuries the petitioner admittedly sustained. Then there was the claim that the petitioner had been so drunk that he could not look after himself, which ought to have been substantiated by subjecting the petitioner to a medical test, which was not done.

44. The Supreme Court Rules of 1990 published in Gazette Extraordinary No. 665/32 of 7th June, 1991.

45. Per Justice M.D.H. Fernando (with Ismail, J. and Wigneswaran, J. agreeing).

indigent circumstances) may run the risk of being rejected for want of a plea or an unsubstantiated plea of lack of means.

Hardindra Shashika Kumara (appearing by his next friend, his mother, Himali Rupika Ratiyala) v. D.I.G. De Fonseka and Others[46]

A thirteen-year-old boy had been subjected to cruel, inhuman and degrading treatment by police officers from the Anti Corruption Task Force. Complaints made to the Human Rights Commission and the S.S.P. in overall charge of the Anti-Corruption Task Force had fallen on deaf ears. On the two versions presented, the Court, accepting the version of the petitioner, held that the petitioner's fundamental right under Article 11 had been violated.

Several issues that surface from an analysis of the judgment are discussed below.

Discrepancies in Petitioner's Statement Weighed with Medical Evidence – A Sensitive Judicial Approach.

On the material placed before Court, the medical evidence firmly showed the range of injuries sustained by the petitioner. However, there were discrepancies regarding the injuries in the petitioner's statement. The Court was inclined to regard these discrepancies as being of little significance and attributed them to a possible lapse in communication at a time of stress.

Vicarious Liability of Persons in Authority.

The S.S.P. who was in overall charge of the Anti-Corruption Task Force had not participated in any act of assault. His position was that he had

46. SC (FR) No. 462/2001, S.C. Minutes 17.03. 2003.

looked into the complaint of the alleged assault made at the intervention of a Member of Parliament and "had been informed that the child's ears had been tweaked by one person and that the child had not been assaulted." The allegation of assault being established, however, the Court held that the S.S.P. had to take responsibility for the same on the reasoning that, if he had not been able to prevent the assault, he should have at least reported it, thus recognizing a principle of vicarious liability in fundamental rights applications.

Re-iteration of the principle laid down in Bandaranayake v. Rajaguru[47]

The assault had taken place in consequence of the police party launching a search of the house that the petitioner was living in, on the suspicion that the inmates ran an illicit liquor business. The police failed to establish that they had reliable information from an informant or otherwise. In those circumstances, the raid rendered itself illegal and in so holding, the Court re-iterated the principles enunciated in the case of *Bandaranayake v. Rajaguru*.

Re-statement of the Doctrine of Margin of Appreciation in the context of Article 11 situations – An Emerging Principle of Proportionality in Fundamental Rights Jurisprudence

The doctrine of margin of appreciation in public law postulates the means by which a leeway is afforded to a public authority concerning its actions in a given situation, considering whether the means adopted were strictly required in given circumstances.[48]

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47. 1999 (1) SLR 104.

48. See-Wade and Forsythe, Administrative Law, 8th ed., Oxford, p. 185.

The closely affiliated principle of proportionality ordains that governmental and administrative measures must not be more drastic than is necessary for the desired result.[49] The interaction of these principles was seen at play in the Court's observations[50] that there may be mitigating circumstances where a police officer may assault in an atmosphere of tension and violence in an emergency as opposed to a situation where indifference is displayed to pain and suffering.

***Sanjeewa (Attorney-at-Law)* v. *Suraweera*[51] (on behalf of Gerald Perera).**

This was a case of torture under Article 11, unlawful arrest under Article 13(1) and unlawful detention under Article 13(2), which the Court found to have been established.

Re: Article 11 – New Dimension in Cruel and Inhuman Treatment

While the minimum force defence was held to be defeated on account of the medical evidence available to Court, the failure to release the petitioner (who had been arrested and detained) promptly or at least to secure prompt medical attention was ruled to be "cruel and inhuman".

Re: Arrest under Article 13(1) – A Conscious Response to the 2nd Limb.

The victim had been arrested on the basis of information that "a Gerald had committed murder". He was not given the reason for the arrest. The information was not sufficient to justify the arrest of any person believed to be "that Gerald", particularly where no statement had been

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49. *Ibid*, at p. 368.

50. Per Justice M.D.H. Fernando (Gunasekera, J. and Wigneswaran, J. agreeing).

51. SC (FR) No. 328/2002.

recorded promptly of the said Gerald. Thus, even subjectively there was no basis to believe that the person arrested had committed murder, which showed that the arresters were simply hoping that something would turn up.[52]

Re: Detention under Article 13(2) – Enunciation of Principles for Speedy Production before a Magistrate.

The victim had been kept in detention beyond the upper limit of 24 hours at the Police Station without being produced before a Magistrate. While conceding that an hour or two in detention would have been justified, the Court enunciated the principle that,

> *"Reason for speedy production before a Magistrate is that continued detention at police stations creates opportunities for ill treatment as well as false allegations of ill treatment."*

It added a further adjunct principle that,

> *"Prolonged questioning by subordinate officers who had informed that there was no evidence against the victim (constitute) unlawful detention."*

Vicarious Liability of Person in Authority.

It was held that the officer in charge who had ordered the arrest – in as much as he had overall responsibility to supervise and control the conduct of his subordinates and also had the power to release – was liable for the arrest, detention and any subsequent torture in consequence thereof.

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52. See the reasoning of Justice M.D.H. Fernando (Edussuriya, J. and Wigneswaran J. agreeing).

Impact on the application filed by Attorney-at-Law – Preliminary objection that he had no personal knowledge – Judicial Response

The preliminary objection that the Attorney-at-Law who filed the application on behalf of the victim had no personal knowledge, was rejected by Court on the basis that the affidavit filed by the wife, who had such personal knowledge of the incident, was sufficient and supportive of the attorney's affidavit. The statement had been based on credible information given by the victim of an alleged violation of his fundamental rights in circumstances where he was unable to make an application himself.

Impact of an earlier informal application under Article 44(7)

It was held that, such an application made by a third party on the victim's wife's instructions was no bar to a petitioner's constitutional right under Article 126, particularly where no action had been taken on it.

The Misdescription of a Respondent – No Prejudice as the Criterion

One of the respondents, a police officer, had been wrongly described. It was held that this was not fatal to the application as the said respondent had filed an affidavit as such respondent, showing that he had not been mislead. In these circumstances, the Court regarded amendment of the caption to be the correct measure.

Application of International Norms – Right of choice of hospitals

The Court considered the question of whether a victim of police torture could choose between state or private medical care. The petitioner had claimed re-imbursement of medical expenses incurred at a private hospital. Rejecting the respondents' argument that the petitioner could

have sought treatment at a State hospital, given worries about delays, overcrowding, strikes, shortages of equipment and drugs, the Court held that citizens[53] have the right to choose between state and private medical care. The Court found justification for this stance in Article 12 of the International Covenant on Economic, Social and Cultural rights, which recognizes "The right of everyone to the enjoyment of the highest attainable standard of physical and mental health."

Command Liability – Recognition of a Principle of Condonation and Acquiescence

A complaint made to the IGP had not been acted upon, rendering such inaction a dereliction of the Constitutional duty imposed by Article 4(d) of the Constitution. The Court held that,

> *"A prolonged failure to give effective directions designed to prevent violations of Article 11, and to ensure the proper investigation of those (violations) which nevertheless take place followed by disciplinary or criminal proceedings, may well justify the inference of acquiescence and condonation (if not also of approval and authorization)."*[54]

Guidelines for the Discharge of Duty under Article 4(d)

Apart from the disciplinary and criminal proceedings, the IGP is expected to initiate in such situations, the judgment also provides

53. Taken in the context of Article 11, "Citizens" must be taken to have been a reference to "person".

54. Justice Fernando, at p. 9 of the judgment.

guidelines to the IGP on the manner he should fulfil the constitutional obligation imposed by Article 4(d) of the Constitution reflected in the judgment, wherein it was observed that,

> *"At least, he (the IGP) may make arrangements for surprise visits by specially appointed police officers and representatives of the Human Rights Commission and/or local community leaders who would be authorized to interview and to report on the treatment and conditions of detention of persons in custody."*[55]

Seneviratne* v. *Sub Inspector, Rajakaruna and five Others[56]

In this case, the petitioner had been arrested and detained on suspicion that his passport was forged. There was evidence of tampering on the passport which suggested a possible photo insertion, and this had to be investigated. The suspicion was based purely on the condition of the passport, which was just one out of many travel documents for passenger acceptance detailed in the guidelines contained in the Passenger Service Manual of Sri Lankan Airlines. The Court found that the only evidence to support the suspicion of "possible photo insertion" were some erasure marks.

On these facts, viewing the matter in the light of the phrase "procedure prescribed by law" contained in Article 13(1) and (2) of the Constitution, the Court read with section 32 of the Code of Criminal Procedure Act, No. 15 of 1979 (as amended) that, in as much as an arrest (and detention) must be on the basis of "the reasonable complaint" or "..... information" or "reasonable suspicion" there was no

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55. *Ibid.*

56. SC (FR/646/2001, S.C. Minutes 30.05.2003.

legislative warrant for "a mere suspicion" where the petitioner had produced several other documents to clarify his *bona fides (vis a vis)* his travel documents. Accordingly it was held that the arrest and the detention were illegal and that the petitioner's fundamental rights under Article 12(1), 13(1) and (2) had been violated. Justice Shiranee Bandaranayake, in an emphatic judgment, held that:

> *"The officers at the BIA, including the Immigration officers and CID Officers, no doubt, must be empowered to carry out necessary investigations ... However, in this particular instance, where there was material available to indicate the bona fides of the petitioner, the conduct of the Officers and the respondents involved in overlooking the credentials of the petitioner, paints a dismal picture of the attitude towards a hapless traveller* en route *to accept his employment in a foreign country."*[57]

Sujeewa Arjuna Senasinghe* v. *Gamini Karunatilleke and Others[58]

The President had prorogued Parliament under Article 70 of the Constitution and simultaneously under Article 86, read with Section 2 of the Referendum Act, No. 7 of 1981, had called for a Referendum on the question of whether a new Constitution was a matter of national importance and a necessity for the country.

Thereafter, some opposition parties and groups organised protest marches against the prorogation of Parliament and to call upon the government to reconvene Parliament and to uphold and preserve democracy. On the day of the protest march, as the police attempted to

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57. Justice Shiranee Bandaranayake, at p. 8 of the judgment (Sarath N. Silva, CJ and P. Edussuriya, J. agreeing).

58. SC (FR/431/2001, S.C. Minutes of 17.03.2003.

disperse the crowd, the petitioner – a bystander who had been prevented from getting back to his car by police officers – had suffered injuries when police used fire-arms. He had subsequently been hospitalised.

On an examination of the facts, the Court found that the firing had not been related to any genuine attempt to disperse the protesters or to prevent any specified offence, and had been without due regard to the risk of injury to bystanders and contrary to the clear provisions of the Police Departmental orders. In the circumstances, the firing could not be excused or mitigated by any *bona fide* belief that the protest was unlawful. Thereafter, the petitioner had been arrested on superior orders, but released almost immediately. The crux of the determination of Court lies in its ultimate finding that, even assuming that the protest had been unlawful and the petitioner had been a willing participant,

> *"yet in the circumstances the use of live arms (especially directed above the knees) was unjustified, unreasonable and excessive and in violation of (Police) Departmental orders (which reiterated the applicable provisions)*[59] *reflected in* Sections 77 and 78 *of the Police Ordinance.*

In its order, the Court held that prevention of the petitioner from returning to his car had resulted in the infringement of his freedom of movement under Article 14(1) (h), that the action of the police officer in authority which resulted in his subordinates opening fire on and injuring the petitioner had resulted in the violation of the petitioner's to be free from cruel and inhuman treatment (Article 11), and that the ordering of the petitioner's arrest had violated his fundamental right under Article 13(1).

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59. Per Justice M.D.H. Fernando (Gunasekera, J. and Wigneswaran, J. concurring).

The other significant determinations of the Court are reflected in the following propositions:

1. Although Section 45 of the Referendum Act prohibits unlawful protest and assembly and constitutes a restriction on Articles 14(1) (a) and 14(1) (b) (in the light of Article 15), such restrictions must be reasonable and their interpretation must be construed narrowly having regard to the Directive Principles of State Policy contained in Article 27(2) (a) and Article 3 (which vests sovereignty in the People) and Article 4(d). This meant that the prohibition in Section 45 of the Referendum Act would apply only where there had been a valid proclamation in respect of a valid Referendum proposal.

2. The Court had jurisdiction to consider whether the prorogation proclamation and the Referendum proposal were in conformity with the Constitution and the Referendum Act by reason of the fact that Article 35 only conferred a shield of personal immunity from court proceedings on the President, leaving the impugned acts open to judicial review.

3. Given the fact that the Referendum was called simultaneously with the prorogation of Parliament, Parliament was denied the opportunity of exercising whatever powers it had under Article 42 (and Article 43). Declining jurisdiction on the basis of the "political questions" argument would have served to place the proclamation beyond review, thus undermining the rule of law.

4. The proposal to hold a Referendum did not satisfy the requirement of Section 2 (2) (a) of the Referendum Act in as much as the alternative answers contemplated therein were not designed to convey clear, intelligible and meaningful information on issues relevant to future governmental action.

3. Judicial Response in the context of Socio – Economic Rights

In the human rights discourse, there has been much emphasis on civil and political rights. However, during the period under review, the Supreme Court handed down several decisions in the context of Article 12 of the Constitution which show a growing human rights jurisprudence on socio-economic rights as well.

Right to Education and to pursue a Profession of Choice

Nadeeka Hewage and Others v. U.G.C. and others[60]

In this case, the petitioners had been denied admission to follow undergraduate courses in Medicine and Veterinary Science based on G.C.E. (A/L) results, notwithstanding a Cabinet decision which had been favourable to the petitioners. There had been confusion and uncertainty in admissions procedures to universities for the academic years 2001/2002 and 2002/2003 due to changes in the number of subjects to be offered, the basis on which students were evaluated and the relevant registration year of the student. However, the Chairman of the University Grants Commission (UGC) opted to assess these factors to the detriment of the petitioners.

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60. SC (FR) 627/2000, S.C. Minutes 8.08.2003.

Even if the benefit in interpreting the relevant UGC Rules was given to the UGC, the Court observed that:

> *"it is nevertheless necessary to remember that access to higher education is the right won by a small minority of students by their sustained effort over a considerable period of fire, and not by luck or by chance."*[61]

Interpretation in the light of International Norms and Directive Principles of State Policy.

In adopting an interpretation of the Rules of the UGC in a manner favourable to the petitioners, Justice M.D.H. Fernando was guided by Article 13.2(c) of the International Covenant on Economic, Social and Cultural Rights[62] which provides that "higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means" and Article 27 (2) (h) of the Constitution which sets out as the Directive Principles of State Policy applicable to all state agencies (although not legally enforceable in terms of Article 29) the objective of "the assurance to all persons of the right to universal and equal access to education at all levels."

A 'Right' Conferring Principle – Enunciated in regard to (Higher) Education

Based on those values, the Court enunciated the principle in the context of higher education that the relevant rules,

> *"must be interpreted in the light of Sri Lanka's obligation to make higher education more accessible, as well as accessible*

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61. Per Justice M.D.H. Fernando (Weerasuriya, J. and Jayasinghe. J. agreeing).

62. *Supra*, n. 2.

> *on the basis of merit, rather than otherwise ..... must be read as conferring a right or option to a registered student in respect of access to a higher education for a subsequent year, and not as providing for a mere gamble; and as enhancing access based on merit rather than restricting access."*[63]

Regarding procedural fairness in higher education, it was pointed out that the "system of university admissions must not only be fair but seen to be fair." [64]

This principle, which had been enunciated in an earlier case, was applied by His Lordship T.B. Weerasuriya in *Kanekeratne and Others* v. *Sri Lanka Institute of Advanced Technical Education*[65] where the respondent institute was found to have adopted a discriminatory attitude towards the petitioners by not permitting them to attend the practical training classes pending a repeat examination, for the reason that attendance at practical training courses had been allowed in comparable circumstances to others.

Re-assertion of the Principle of Proportionality

Denying attendance at practical training classes as aforesaid and the insertion of "a failed notation" in the petitioners' academic records were held to be disproportionate to the petitioners, who had not turned up at the examination in question.

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63. Per Justice Fernando, n. 61, at p. 7, *Supra.*

64. Per Justice M.D.H. Fernando, *Supra*, n. 60.

65. SC (FR) 263/2003, S.C. Minutes 17.10.2003 and 3.12.2003 (with Justice M.D.H. Fernando and Justice C.V. Wigneswaran agreeing).

Padmanath* v. *Sri Lanka Institute of Advanced Technical Education[66]

This Case arose in the context of dual registration by the Petitioner at the Respondent Institute as well as at a University.

Application of the Contra Preferentium Rule

The Respondent Institute in their newspaper advertisement calling for applications from prospective students, had stated that persons "following a course of study as an internal student at any University, affiliated University College or any Technical College, are not eligible to apply for admission to the Institute." The petitioner had registered himself first at the Respondent Institute and later at the University of Ruhuna, but there was no proof that the Petitioner had attended lectures at the University. While holding that "mere registration" was not tantamount to "following a course of study", His Lordship Justice T.B. Weerasooriya[67] held that,

> *"Even if there had been any ambiguity, it was the respondents who were responsible for the drafting of (the advertisement), which must therefore be construed Contra Preferentium and in favour of the Petitioner."*[68]

Procedural Impropriety – Dimensions of Breach of Natural Justice

The Respondent Institute having first cancelled with immediate effect the petitioner's registration (already found to be flawed by Court), directed him to show cause to the contrary. Cancellation (affecting the

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66. SC (FR) 273/2003, S.C. Minutes 17.10.2003 and 3.12.2003.

67. Justice M.D.H. Fernando and Justice Wigneswaran agreeing.

68. At pp. 5-6 of the judgment.

petitioner's rights), was the operative decision and giving an opportunity to show cause to the contrary thereafter, the Court held amounted to a breach of natural justice.[69] Justice Weerasuriya identified the nexus between such a course of impugned conduct and the concept of bias when His Lordship held that,

> *"Once a decision is taken it is difficult to vary it, even when reasonable grounds exist, since initial bias prevails."*[70]

Sirimal and Others v. CWE and Others[71] – Right to Extension of Service

This case concerned the right to extension of service. It revolved round the provisions of the Establishments Code and a Circular which laid down that generally extension of service beyond the optional age of retirement of 55 years will be granted, subject to medical or disciplinary grounds. The practice is to grant such extensions for one year at a time. The petitioner's case thus rested on the scope of the doctrine of legitimate expectations.

Re: Scope of the Doctrine of Legitimate Expectations - Response to its Substantive Content

Having noted the judicial controversy in England with regard to the scope of the said doctrine, Justice T.B. Weerasuriya[72] found that procedural fairness had been breached for lack of any form of consultation, and awarded compensation in appreciable sums, taking into consideration the respective years of service left to the petitioners

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69. per Justice Weerasuriya, at p. 7, *ibid.*

70. *Ibid.*

71. SC (FR) 445/2002, S.C Minutes 8.08.2003.

72. With whom S.N. Silva, CJ and Ameer Ismail, J. concurred.

on the basis of their fundamental rights being violated. This implicitly recognized that the petitioners' legitimate expectations, which had been frustrated, contained a substantive content as well (although the respondent was not directed to extend the petitioners' service).[73]

This approach had been foreshadowed in an earlier part of His Lordship's judgement,where it was noted that:

> *"If... the legitimate expectations are substantive, the position is different, in that it is open to a Court to require the public authority to confer upon the person the substantive benefit which he is expected to receive under the earlier policy."*[74]

His Lordship formulated the doctrine of substantive legitimate expectations on the following basis:

> *"This doctrine seems to be somewhat controversial since it appears to fetter the freedom of action of the public authority. However, it is equally necessary to give relief to people who have been betrayed by officials after making solemn assurances on which they have placed their trust. There is no interest of conflict between legitimate expectation and the rule against fettering discretion because the discretion is only fettered to the extent that the public interest does not require otherwise."*[75]

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73. It is not clear from a perusal of the judgment whether the petitioner had prayed for compensation in lieu of extension of their service.

74. If the substantive benefit expected was the extension of service the award of compensation in lieu of such expectant benefit (if such compensation had not been prayed for in the alternative) would amount to accepting only the compromised substantive content.

75. At p. 11 of the judgment, *supra*, n. 71.

Other Issues Arising from the Decision - Availability of Alternative Remedies

It was not disputed that the petitioners could seek relief either by way of an application to the labour tribunal or through arbitration in terms of Section 26 of the CWE Act. This was held to be no bar to the petitioner seeking relief in terms of Article 12(1) of the Constitution for the purpose of which sole and exclusive jurisdiction was vested with the Supreme Court under Article 126(2). Justice Weerasuriya held thus:

> *"It is to be highlighted that the Constitutional provisions being the higher norm, will prevail over other statutory provisions and therefore petitioners are entitled to seek relief for alleged infringement of their fundamental right even in situations where there are other remedies to pursue."*[76]

Applicability of the Establishments Code to CWE Employees – Retirement Age in the Public Sector

It was also established as a principle that the age of retirement of its employees stood to be determined in accordance with Section 5 of chapter V of the Establishments Code applicable to all employees of the Public Sector. In any event, the Respondent had failed to produce a single circular[77] for any Regulation formatted by the Ministry or a decision of the 1st Respondent which governs the age of retirement of its employees.

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76. *Ibid*, at p. 25 of the judgment.

77. The Respondents however had relied on a circular which sought to make retirement compulsory at 55 years.

***de Silva* v. *The U.G.C.*[78]**

The Petitioner had been unsuccessful in securing a place in the Faculty of Law on her G.C.E. (A/L) performance, having been a candidate from the Colombo District, but had been admitted to Faculty of Arts. She sought to transfer to the Law Faculty by exchanging places with a student there.

Another student who had been in a similar position as the Petitioner, but who had "excelled in the sport "kabadi" (which the UGC relied on, on the basis of UGC Rules), had been allowed such a transfer, despite her score being lower than the Petitioner's. The UGC had resisted the petitioner's request, even though the Dean of Faculty of Law had revealed that there was a vacancy in the faculty. The Court found that the petitioner had been treated arbitrarily and discriminated against. Several features in the Supreme Court determination warrant mention.

Re: Dangers wrought in Ascribing Discretionary Power on Statutory Authorities without adequate guidelines.

Paragraph 18(b) of the UGC Hand Book vested discretion in the UGC to admit a percentage of students to a course of study who had excelled in such fields as sports at national or international level, but who had failed to gain admission under the normal intake because of the short fall of a few marks.

It was held by the Court that:

> *"the criteria (so) set out ...is vague and it purports to reserve a power to the UGC to make selections at its sole discretion (and) the provision does not contain adequate guidelines to ensure*

78. SC (FR) 133/2002, S.C. Minutes 10.01.2003.

that the power reserved by the UGC to itself would not be exercised arbitrarily."[79]

The arbitrary nature of this power became more apparent as it was not disclosed whether the student who had been allowed to transfer had performed kabadi at national or international level.

Criteria for Transparency Responsibility and Accountability

The Court also implicitly approved the suggestion made by the Dean, Faculty of Law, in his affidavit that the UGC should publish openly every year the criteria it had adopted to select candidates.

Other Notable Decisions of the Supreme Court Widening the Scope of Fundamental Rights in the Context of Socio-Economic Rights

As well as the decisions analysed in some detail in the course of this chapter, several other decisions during 2003 may also be regarded as having widened the scope of socio-economic rights.

In ***Arjuna Ranatunga v. Johnston Fernando and Others***[80] a ministerial regulation, by gazette (amending an earlier regulation), disqualifying members of Parliament, provincial council members and members of local authorities from being office bearers in sports associations was held to be unduly and unfairly restrictive. The regulation had been intended to depoliticise sports, but was found to be self-defeatist.[81] The rights application filed by the petitioner (a

79. At p. 4 of the Judgment (with E Wussuriya, J. and Yapa, J. agreeing).

80. SC (FR) 133/2002, S.C. Minutes 10.01.2003.

81. Judgment of Justice J.A.N. de Silva (S.N. Silva, CJ and Weerasuriya, J. agreeing).

member of Parliament)[82] under the circumstances, was allowed in the context of Article 12(1) and Article 14(1)(g).

Duty to give reasons in Transfers

In ***Dayasena* v. *Bindusara and Others***[83] a transfer of a public servant, a boook keeper, merely for administrative reasons, but without disclosing these reasons, was held to be violative of Article 12(1). Consequently, the duty to give reasons where transfers are concerned (in the context of Article 12(1)) was re-iterated as a principle.[84]

Duty to Consider (De facto) Acting Functionaries for Promotions

In ***Senanayake and Aruna* v. *The Airport and Aviation Services Ltd., and Others***,[85] the petitioners had not been considered for appointment to the higher rank in which they had been acting for a period. Persons external to the institution were appointed, contrary to past practice (which had been on the basis of a written test), and the vacancies had not been advertised. This was held to be violative of Article 12(1). Past practice, as a criterion in selection processes, thus emerged as a principle.[86]

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82. The former Captain of the Sri Lanka Cricket Team.

83. SC (FR) 583/2001, S.C. Minutes 29.01.2003.

84. Judgment of Justice M.D.H. Fernando (Gunasekera, J. and Yapa, J. agreeing).

85. SC (FR) 510/2001, S.C. Minutes 29.01.2003.

86. Judgment of Justice M.D.H. Fernando (Weerasuriya, J. and de Silva, J. concurring).

Reviewability of Cabinet Policy Decisions

In ***Augustine Perera and Two connected applications v. Richard Pathirana and Others,***[87] twenty five school principals sought a retrospective alteration of their salary scales, as anomalies in the salary scales relating to retired teachers had been remedied belatedly.

The Court rejected the argument for the respondents that the decision on the salary scales could not be reviewed by a Court because Cabinet's collective responsibility was only to Parliament, and it was Cabinet policy not to grant a salary differential to a category of aggrieved persons. The Court held that,[88]

> *"It is no doubt true that the Executive, the President, under Article 42 and the Cabinet as a whole under Article 43, is responsible to Parliament. However, those provisions do not mean that Parliament is the only institution empowered to review, under and in terms of the Constitution, of all executive decisions, including those relating to 'Policy', particularly on the ground of infringement of fundamental rights."*[89]

Ad hoc decisions cannot constitute "Policy"

Further significance in the judgment lies in the proposition enunciated by Court that:

> *"In any event, the decision impugned in this case – that the new salary scales of Principals Class I should not be retrospective – is an ad hoc decision, and by no stretch of the imagination, a matter of 'Policy'."*[90]

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87. SC (FR) 453/454/1997 and 390/99, S.C. Minutes 30.01.2003.

88. Per Justice M.D.H. Fernando (Gunasekera, J. and Weerasuriya, J. agreeing).

89. At p. 8 of the judgment.

90. *Ibid.*

***Weerasekera* v. *Director General of Health Services and Others*[91]**

This case witnessed a further expansion of the scope of Article 12(1). A dispenser had applied for promotion. Although she had not fulfilled the qualification criteria at the time she had applied, she had qualified by the time she presented herself for the written examination. She had been permitted to sit the examination, and her application had been entertained. The Court's interpretation of the circumstances marks an instance of a legitimate expectation arising out of an implied representation or estoppel by conduct or waiver. The Court rejected the defence arguments that time and other administrative constraints had meant that they could not consider all the applications for their regularity.[92]

In ***Abeyratne* v. *Janatha Fertilizer Enterprises Ltd., and Three Others***,[93] which concerned a dismissal of an employee for dereliction of his duties without a formal inquiry or serving a charge sheet, it was held that since the petitioner could have exculpated himself if an opportunity to do so had been given to him, his dismissal was procedurally flawed and violative of Article 12(1). Once again the Supreme Court re-iterated the procedural content of Article 12(1).

***Dhanu Contractors (Pvt.) Ltd. and Another* v. *Matale Municipal Council and Others*[94] – Principles on Public Tender Procedure upheld**

In this case, the petitioners' complaint was that, despite being the lowest qualified tenderer, another person had been awarded the tender, thereby

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91. SC (FR) 86/2002, S.C. Minutes 04.04.2003.

92. Per Justice J.A.N. de Silva (Justice M.D.H. Fernando and Yapa agreeing).

93. SC (FR) 311/2000, S.C. Minutes 23.05.2003.

94. SC (FR) 461/2001, S.C. Minutes 13.10.2003. Judgment of M.D.H. Fernando (Yapa, J. and Wigneswaran, J. agreeing).

violating their fundamental rights under Article 12(1). On the facts, the Court found that the petitioners' case was established. Several principles were enunciated in the case, which are set out below.

The finality attached to an unrevoked decision

Initially, the tender had been awarded to the petitioner (a limited liability company). In as much as that decision had not been revoked or varied, it became final.

Breach of the Audi Alteram Partem Rule

Having awarded the tender to the petitioner, the subsequent decision to award it to another where the earlier decision was not revoked or varied amounted to the violation of the *audi alteram partem* rule.

Breach of Principles governing Public Tenders

A process by which tenderers, are evaluated where there is bargaining with one selected tenderer only, totally eliminating any form of competition, was held to be contrary to the basic principles governing public tenders.

4. Guaranteeing the Right to Vote

Thavaneethan v. Dissanayake and Others, Thangavel and Another v. Dissanayake and others and Alagasundaram and Another v. Dissanayake and Others[95]

The voters of "uncleared areas" in the Batticaloa and Vanni Districts (while proceeding to vote at the 2001 parliamentary elections in areas which had been "cleared" for voting), were prevented at "check points" from reaching their polling stations. The ostensible reason given was "security factors on account of LTTE infiltration". This was in contrast to the freedom to vote allowed to voters of the Trincomalee District which the ruling People's Alliance had won in the 2000 elections.

On the documents called for by Court and produced by the Commission of Elections, newspaper reports and respondents' affidavits, the Court held that the decision to close the entry points was not *bona fide* but motivated by extraneous considerations. Having considered the interaction between several articles in the Constitution such as Article 15(1), (6), (7), Article 170 and statutes such as the Public Security Ordinance and the Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979, the Court held that the petitioners' fundamental rights to freedom of movement under Article 14(1) (h) had been violated.

Principles established in the context of the finding under Article 14(1) (h)

First, after noting that a distinction exists between "public security" and "national security and public order", the Court held that public security assumes a narrow sense, as meaning the Public Security

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95. SC (FR) 20/2002, 25/2002 and 26/2002 (heard together), S.C. Minutes 25.03.2003.

Ordinance and any enactment which takes its place, which contains the safeguards of Parliamentary Control set out in chapter XVIII of the Constitution. It was held that:

> *"Article 15 does not permit restrictions on fundamental rights other than by plenary legislation which is subject to pre-enactment review for constitutionality. It does not permit restrictions by executive action (i.e. by regulations) the sole exception permitted by Article 15(1) and (7) being emergency regulations under the Public Security Ordinance because those are subject to Constitutional Controls and limitations ..."*

Secondly, the Court distinguished between the actions of the respondents in issue in the instant case and *bona fide* actions preventing the voters from entering "cleared areas" on account of national security or to prevent the disruption of the election, which latter factors, the Court found, were not evidenced on the facts of the case.

The Court also held that, in the established circumstances of the case, the petitioners' freedom of speech and expression as enshrined in Article 14(1) (a) had been violated in that the right to exercise the franchise as flowing from that right had been violated. The Directive Principles of State Policy Contained in Article 27(2)(a) and Article 27(4) were also called into aid in coming to that conclusion.

The Court also found that the right to equality as enshrined in Article 12(1) had been violated for two reasons. First, the petitioners had been subjected to unequal treatment compared to other voters or sections of voters in Sri Lanka. Secondly, a handful of voters had been permitted to vote from the safety of their homes (not sanctioned by law), while no action had been taken to protect the petitioner's right to vote.

Further appreciable progress with regard to the right to vote was made during the period under review, with the cases of *Centre for Policy Alternatives and Dr. Saravanamuttu and Rohan Edirisinghe* v. *Dissanayake*[96] serving as a notable illustration, where the elective principle and the franchise were held to take precedence over the principle of political party dominance.

5. Conclusion

The foregoing account reveals that a rich body of jurisprudential doctrines and principles has been developed in the context of the human rights discourse during 2003 through the provisions contained in the fundamental rights chapter of the Constitution.

Some decisions were seen to have called in aid, the Directive Principles of State Policy and international covenants and norms in advancing the frontiers of human rights. In some cases, guidelines were suggested for the authorities to follow to help them discharge their responsibilities and perhaps escape future liability. The solatium principle as opposed to the award of enhanced compensation in regard to violations appears to present a judicial debate.

Yet, despite some advances, other areas still remain to be addressed. For example, an important issue is whether applications ought to be dismissed for defects in pleadings[97] and insufficiency of material furnished,[98] or whether an opportunity to cure the defect or supply the insufficiency ought to be afforded, having regard to the overriding

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96. SC Appeal 26/2002 in CA/487/99 – and SC Appeal 27/2002 in CA/488/99, SC Minutes 27.03.2003.

97. *Kanesapillai* v. *Bank of Ceylln and Others*, SC(FR) 186/2002, S.C. Minutes 23.06.2003.

98. Gas Conversions (Pvt) Ltd., and Others of 13th January, 2003.

constitutional objective of giving effect to fundamental rights as reflected in Articles 3, 4(e) read with 4(d) as against mere technical objections. Other outstanding issues are the recognition of the right to quality of life[99] and the right of next of kin and dependents (as opposed to intestate heirs) to sue on behalf of a person whose right to life has been violated.

Another matter which demands consideration is the expansion of human rights through the links that the fundamental rights jurisdiction of the Supreme Court bear to the writ jurisdiction of the Court of Appeal under Article 140 of the Constitution, particularly in the context of socio-economic and cultural rights, an area which has hitherto not received emphasis.

Apart from the strides made by the Supreme Court through expanding the scope of Article 12(1), the judicial initiatives reflected in the Court of Appeal decision of *Dr. Kunanandan* v. *University of Jaffna and Others*[100] set a welcome trend. In overruling an objection of a preliminary nature, it was provisionally held by Justice P. Wijeratne that in contractual matters an application for writ under Article 140 of the Constitution could be maintained, must rank as setting a welcome trend.

In conclusion, then, future challenges still remain for the judiciary in expanding human rights protection in the country.

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99. Left open by the Court in Sriyani Silva's Case, *Supra* n. 15.

100. CA/1559/2003, C.A. Minutes of 9.12.2003, Judgment.

VI

The National Police Commission

J.C. Weliamuna[*]

1. Introduction

This chapter focuses on the National Police Commission (NPC) and its functions during the year 2003. It examines the legal provisions relating to the NPC as well as some key issues that have arisen since the NPC was established in November 2002. Although public expectations for the Commission are high, general understanding about the scope of NPC's functions is limited. It is hoped that this chapter will help clarify some of the relevant issues in this regard.

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2. Legislative History

2.1 The Basnayaka Commission, 1970

A Commission comprising five eminent members, headed by Hon. H. H. Basnayake, submitted its final report in July 1970 to the Governor with comprehensive recommendations for making the police service more effective. The recommendations included a proposal to introduce a Police Act, drafted and annexed to the report. Clauses 7 to 27, of this draft Police Act contained provisions relating to the establishment of an independent Police Service Commission.[1] The justification for this recommendation was two-fold. The first was the considerable delay on the part of the then Public Service Commission to deal with appointments, promotions, transfers and disciplinary matters.[2] The second was, that appointments and promotions were subject to political interference, which affected the independence of the police.[3] As stated by the Commissioners, "in the interest of the efficiency of the Police Service, there should be an impartial body of persons entrusted with the power of appointing, transferring, punishing, dismissing and exercising disciplinary control."[4] The Commission also recommended that it should not be possible for the head of the police to be arbitrarily removed by the executive and that removal should only be possible after the address of both Houses on proven misconduct.[5]

Time went by. No legislative steps were taken by subsequent governments to implement these recommendations.

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1. Final Report of the Police Commission, XXI Sessional Paper, 1970 , p. 162.
2. *Ibid.*, para. 32.
3. *Ibid.*, para. 35.
4. *Ibid.*, para. 36.
5. *Ibid.*, para. 37.

2.2 The 13th Amendment to the Constitution, 1987

The 13th Amendment to the Constitution, which was introduced in 1987 with the main objective of devolving powers to the Provinces, contained certain provisions on law and order. Among the devolved powers set out in Appendix 1 of the Ninth Schedule to the Constitution are public order and the exercise of police powers. The 13th Amendment also provides for the establishment of a National Police Commission composed of the Inspector General of Police (IGP), a nominee of the Public Service Commission in consultation with the President and a nominee of the Chief Justice. The National Police Commission is responsible for promotions, transfers and disciplinary control of members of the National Division other than the IGP. It is also responsible for setting standards for recruitment and promotion of police officers in all Provincial Divisions with a view to creating and maintaining uniformity in police practices in both National and Provincial Divisions.[6]

The 13th Amendment also provides for the establishment of a Provincial Police Commission for each Provincial Division, consisting of the Deputy Inspector General of Police (DIG) of the Province, a person nominated by the Public Service Commission in consultation with the President and a nominee of the Chief Minister of the Province.[7] The Provincial Police Commission is responsible, *inter alia,* for transfers, promotions and disciplinary control over officers in the Provincial Divisions.

Although specific provisions were introduced in the Constitution for the establishment of these Police Commissions, no Provincial Police Commissions have yet been established.

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6. Item 3 of the Appendix 1 of the Ninth Schedule to the Constitution.

7. Item 4 of the Appendix 1 of the Ninth Schedule to the Constitution.

2.3 Police Commission Act of 1990

Consequent to the 13th Amendment to the Constitution, in order to give effect to the relevant provisions relating to police service, Parliament enacted the Police Commission Act, No. 1 of 1990, which was certified on 23rd January 1990. However, this law has not come into operation.[8]

2.4 The 17th Amendment to the Constitution and the Police Commission

The questions and concerns raised in the Basnayaka Commission Report, which was submitted in 1970, remain valid even 30 years later. Of particular importance is the need for an efficient police service, and that the police service should be free from political interference. The public service, including the police, have become highly politicised and in 2001, political parties, civil society organisations and individuals put pressure on the government to remedy this situation, stressing the need for an independent public service, including an independent police service. Against this background, the 17th Amendment to the Constitution was enacted introducing provisions for, *inter alia*, the establishment of the National Police Commission that is discussed in this chapter. For purpose of clarity, especially in view of several police commissions provided for in earlier legislation, the National Police Commission established under the 17th Amendment is hereinafter referred to as the NPC.

The 17th Amendment to the Constitution in effect modified the structure of governance in the country by introducing important changes to the existing institutional pillars, including the Department of Police and the Public Service Commission. Despite its extreme importance, the

8. In terms of section 1 of the Act, this law is to come into operation on such date as the President may appoint by order published in the Gazette.

Bill containing these provisions was introduced as an urgent Bill, leaving little time for public debate. Moreover, Parliament debated the entire Bill in a single day in a marathon session and passed the Bill without opposition.[9] Perhaps it is necessary to understand the mood of Parliament in the introduction of the Bill, and especially in relation to the NPC.

Members generally accepted that the 17th Amendment was being introduced to broaden democratic values and good governance in the country and to depoliticise the public service. Mr. Ratnasiri Wickramanayaka, the then Prime Minister, introducing the Bill referred to the fact that the draft "Constitution of 1997" contained provisions for independent commissions including a police commission.[10] Mr. Tyronne Fernando tabled a document containing a resolution of the United National Party whereby his party had first resolved to introduce an Independent Police Commission.[11] There was no serious debate on the establishment of the police commission and none of the Members referred to the Basnayaka Commission Report during the debate. Mr. Batty Weerakoon, the Minister of Justice, expressed his reservations on the establishment of an independent police commission, arguing

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9. However, the Tamil United Liberation Front (TULF) had walked out stating that the Constitutional Council did not have sufficient Tamil representation and that while the war continued in the North and East there could be no justification for these constitutional changes. *Hansard*, 24th September 2001, column 129. The single member from the Sihala Urumaya also abstained.

10. *Hansard*, 24th September 2001, column 17. The Constitutional Package of October 1997, published by the Ministry of Constitutional Affairs, in its draft Article 216 recommends the establishment of a National Police Commission headed by the National Police Commissioner (equivalent to the present Inspector General of Police). The powers contemplated were similar to the powers of the present NPC.

11. *Hansard*, 24th September 200, column 24 and 25.

that as the maintenance of law and order is an important function of the executive, the executive must therefore be accountable for the actions of the police.[12]

At the beginning of the debate, the opposition had decided not to vote in favour of the Bill. However, around 8.00 p.m., as the debate was reaching its conclusion, three major parties agreed to support the Amendment after consensus had been reached on certain modifications to the draft. These modifications were made on the very day of the debate, while the debate was still in progress.[13]

2.5 Several National Police Commissions – A Confusion

As seen above, there exist legal provisions for the establishment of two distinct national police commissions, both of which are called the National Police Commission. A few important similarities and differences between these two commissions are worth mentioning here.[14]

The NPC (established under the 17th Amendment) is an independent commission comprising seven members appointed by the President on the recommendation of the Constitutional Council, whereas the commission under the 13th Amendment read with the Police Commission Act, No 1of 1990, comprise the IGP, two nominees of the Public Service Commission and the Chief Justice. The 17th

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12. *Hansard*, 24th September 2001, column 129.

13. *Hansard*, 24th September 2001, column 164 and 165. (Mr. Ranil Wickramasinghe's speech).

14. No detailed analysis has been given here. Comparison is based on the provision of the 13th Amendment (Appendix 1 of 9th Schedule), National Police Commission Act (sections 2, 5, 7 and 8) and the 17th Amendment (Articles 155A, 155G, 155K, 155H and 155L).

Amendment was designed to secure the independence of the NPC whereas such intentions are not demonstrated in the 13th Amendment or the Police Commission Act, except that interference with the functions of the commission is an offence both under the 17th Amendment and under the Police Commission Act (but with different punishments).[15]

Both commissions deal with the appointments, promotions, transfers, disciplinary control and dismissals of police officers while maintaining uniformity in police services in the Provincial Divisions. Under the 13th Amendment, the commission has powers of appeal on decisions of the Provincial Police Commission and the decisions of the National Police Commission are final. Under the 17th Amendment, decisions of the NPC are appealable to the Administrative Appeals Tribunal.

Another major distinction is that the 13th Amendment placed the police directly under the executive and therefore contains no specific provision for answerability to Parliament. The 17th Amendment, on the other hand, made the NPC directly answerable to Parliament through reports. The public complaints mechanism is another feature in the 17th Amendment NPC, which is absent in the 13th Amendment.

In conclusion, it must be stated that contradictory legal provisions exist in provisions contained in the National Police Commissions. If the Police Commission Act No. 1 of 1990 ever came into operation, there would be real conflict between its provisions and those of the NPC under the 17th Amendment. However, it is clear that the NPC operates under the mandate given to it under the 17th Amendment and that it

15. The maximum punishment under the 17th Amendment is 7 years imprisonment with a fine not exceeding Rs.100,000 whereas the Police Commission Act sets out a punishment of one year's imprisonment with a fine of Rs.5,000.

does not follow the Police Commission Act.[16] Having regard to the nature of governance in Sri Lanka and to reduce the potential for conflict that exists in the current legal situation, it would be advisable for the National Police Commission Act to be repealed or for it to be amended to make it consistent with the 17th Amendment to the Constitution.[17]

3. Specific Features of the NPC

3.1 Independence

The NPC consists of seven members appointed by the President on the recommendation of the Constitutional Council. Members are appointed for a term of three years and are eligible for re-appointment for another term. There is a guarantee against arbitrary removal of Members in that a removal could only be effected by the President on the recommendation of the Constitutional Council.

The Chairperson and the Members are entitled to an allowance as determined by Parliament, which shall be charged on the Consolidated Fund and shall not be diminished during the term of office.[18] It is the NPC, which selects and recruits the Secretary to the Commission and other staff on terms and conditions as may be determined by the

16. Discussion with the Chairman of the NPC held at the NPC office on 27th January 2004.

17. For example, the Railway Authorities Act No. 60 of 1993, passed by Parliament on 15th December 1993, was not operative for 10 years. However, the law was made operative by a gazette notification issued by the Minister under Section 01 of the Act on 23rd July 2003. Thus, nothing prevents a future President from invoking Section 1 of the Police Commission Act to make it operative at any given time in the future.

18. Article 155A(7) of the Constitution.

Commission.[19] The expenditure of the NPC is charged on the Consolidated Fund.[20]

In order to secure independence from outside interference, Article 155F introduces penal provisions making such interference an offence, triable before the High Court and carrying a seven-year imprisonment and a fine of Rs 100,000. Any person who directly or indirectly influences or attempts to influence or interfere with any decision of the NPC or any member is guilty of this offence. However, it should be noted that Article 155F covers interferences with the NPC or any committee thereof but it does not extend to the IGP (or any officer) delegated with powers and functions in terms of Article 155J, which powers are more fully dealt with under paragraph 3.2 below. Thus it could be argued that the provisions for the NPC still leave room for political interference in respect of those delegated functions, if NPC powers are delegated to the IGP or to any police officer.

3.1.1 Financial Independence of the NPC

From its inception, there were reports that the NPC had insufficient staff and resources to function effectively. However, the costs and expenditure of the NPC are charged on the Consolidated Fund[21] and hence Parliament does not have to vote on specific funds for the NPC. Therefore, the lack of resources cannot be an obstacle to the smooth functioning of the NPC.

The financial independence given to the NPC goes beyond that given to any other institution: even the Election Commission and the Auditor General do not enjoy this degree of independence under the 17th

19. Article 155D of the Constitution.

20. Article 155E of the Constitution.

21. Article 155E.

Amendment. However, in the absence of a special parliamentary committee to decide on the budget of independent institutions, treasury control of the finances of the NPC needs to be accepted for accountability purposes.

3.2 Powers of the NPC

The NPC is vested with the powers of appointments, promotions, transfers, disciplinary control and dismissal of all police officers except the IGP. These powers are exercised by the NPC in consultation with the IGP.[22] Any aggrieved police officer may appeal against the orders of the IGP, a committee of the NPC or a police officer, to the NPC, which has authority to alter, vary or rescind any such orders.[23] Any officer aggrieved by the decisions of the NPC may appeal therefrom to the Administrative Tribunal.[24]

However, once the Provincial Police Service Commissions are established, these provincial commissions will exercise the respective powers in respect of provincial police services.[25]

The NPC is also required to determine all matters regarding police administration, including formulation of schemes, improving independence and efficiency of the service, nature and types of arms and ammunition and other equipment necessary for the use of National

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22. Article 155G.

23. Article 155K(1).

24. Article 155L. It should also be noted that fundamental rights jurisdiction has not been ousted by these provisions and therefore aggrieved police officers are also entitled to invoke the fundamental rights jurisdiction of the Supreme Court. See also Article 155C.

25. Article 155G(b).

and Provincial Divisions.[26] This is necessary to maintain uniformity in the administrative as well as the executive functions of the police in provincial police services.

The NPC's powers include the power to formulate procedures to entertain and deal with public complaints. Thus, it is the duty of the NPC to establish procedures to entertain and investigate public complaints and complaints of aggrieved persons made against a police officer or the police service.[27] Current mechanisms for complaints are discussed in paragraph 5.2 below.

3.2.1 Appeals to the NPC and Administrative Appeals Tribunals

A police officer aggrieved by any order of the IGP, or any committee or police officer exercising delegated powers of the NPC on promotion, transfer or any disciplinary order, may appeal to the NPC. The NPC on such appeal may alter, vary, rescind or give directions against such initial orders.[28] If an officer is aggrieved by any orders of promotion, transfer or disciplinary action of the NPC, such officer may appeal to the Administrative Appeals Tribunal established under the 17th Amendment.[29] The Administrative Tribunal Act, No. 4 of 2002, provides that the Tribunal shall consist of three members appointed by the Judicial Services Commission (JSC), each having over twenty years of experience as a public officer or 10 years in the legal profession.

The Administrative Appeals Tribunal is the final appellate body in respect of orders made by the Public Service Commission and the

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26. Article 155G(3).

27. Article 155G(2).

28. Article 155K(1) and (2).

29. Article 59.

NPC.[30] The constitutional framework and the spirit of the 17th Amendment require that the members of the Administrative Appeals Tribunal should be chosen from candidates with an impeccable record of service and integrity, so that they would discharge their functions independently, efficiently and with due regard to the principles of the 17th Amendment. The present Tribunal was appointed on 1st February 2003 and its functions are little known.[31]

3.3 Answerability to Parliament

The NPC is answerable to Parliament for the exercise of its powers and duties and is required to submit an annual report of its activities to Parliament.[32] The NPC has general immunity against court actions except under fundamental rights jurisdiction.[33]

At the time the NPC was established, concerns were expressed in some quarters about the desirability of making it independent. It was felt that if the NPC was not placed under a Minister, the NPC could not effectively be answerable to Parliament on the functions of the police.[34]

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30. However, the fundamental rights jurisdiction of the Supreme Court under Article 126 has not been ousted.

31. The Members of the Tribunal are former Supreme Court Judge S W B Wadugodapitiya (chairman) , Mr D M Ariyaratne (member) and S.M.M. Gafoor (Member).

32. Article 155N.

33. Article 155C.

34. Mr. Batty Weerakoon, *Hansard*, 24th September 2001, column 129; Tassie Seneviratne, *Sunday Island*, 13th April, 2003.

If the NPC enjoys the operational functions of the police, this criticism could be valid to some extent. On the other hand, if answerability through a Minister is the yardstick for measuring accountability to Parliament, then no institutions could exist independent of a Minister. Thus the accountability of the NPC to Parliament needs to be viewed from a different perspective, and compared with other provisions for independent institutions in the Sri Lankan legal system.[35] The NPC is responsible and answerable to Parliament in accordance with the provisions of the Standing Orders of Parliament.

3.4 Delegation of Powers

The NPC is entitled to delegate to the IGP or to any other police officer, in consultation with the IGP, its powers of appointment, promotion, transfers, disciplinary control and dismissal of any category of police officer.[36] When such powers are delegated, the NPC is required to publish such delegation by way of a gazette notification.[37] Criticisms relating to the issue of delegation of powers are discussed in paragraph 4.2 below.

3.5 Immunity from legal proceedings

The NPC enjoys constitutional immunity against legal proceedings. According to Article 155C except in the Supreme Court's fundamental rights jurisdiction, no Court or tribunal shall have power or jurisdiction

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35. Similar provisions are in existence in respect of the Election Commission (Article 104(b) (3) of the Constitution), the Human Rights Commission (Section 30 of the Human Rights Commission Act No. 21 of 1996), the Public Service Commission (Article 55 (5) of the Constitution) and the Bribery Commission (Section 26 of the Commission to Investigate Allegations of Bribery or Corruption Act, No. 19 of 1994).

36. Article 155J.

37. Article 155J(2).

to inquire into or pronounce upon or in any manner call in question any order or decision of the NPC or a committee thereof.

4. Main criticisms against the present NPC in 2003

Since its establishment in November 2002, the NPC has attracted various criticisms, some of which are based on its structural defects. The following are the main criticisms that were made during 2003.

4.1 Resignation of a Member

In September 2003, the media reported the resignation of NPC member, Dr. B.S. Wijeweera. Dr. Wijeweera had reportedly resigned citing unacceptable conduct by NPC member, Mrs. Ebert. It was stated that Mrs. Ebert acted in conflict of interest by not disclosing to the NPC and disqualifying herself from proceedings in which one of the persons concerned was her brother.[38] It was reported that a committee appointed by the Constitutional Council subsequently inquired into her conduct,[39] but in the mean time, Mrs. Ebert resigned.

The issues arising from this case raised challenging questions about the process for selecting members of the NPC.

4.2 Issues relating to Delegation of Authority and Present Status

4.2.1 Initial delegations

The NPC is empowered to delegate its powers of appointment, promotion, transfer, disciplinary control and dismissal of police officers

38. *Island*, 7th September 2003.

39. *Sunday Times*, 28th September 2003.

to the IGP or, in consultation with the IGP, to any police officer. By virtue of that provision, the NPC first delegated certain powers relating to transfers of police officers to the IGP in a circular dated 26th March 2003. The powers of transfer that were delegated are as follows:

- Authority to transfer all police personnel of all ranks in the police service provided, however, transfer orders in respect of senior gazetted officers and officers in charge of police stations will be made with the concurrence of the National Police Commission.

- Other transfers to be made as a general rule according to the schemes of transfer approved by the Commission.[40]

The NPC was established in order to remove specific administrative powers of the IGP and senior police officers so that police administration would not be subjected to political pressure. Yet the NPC, after delegation of these powers, will not exercise these powers while such delegation remains in force.

This delegation of authority back to the IGP was widely criticised, although it is hard to see how a large police force could be administered by the NPC without some delegation. Mr. Edward Gunawardana, for example, expressed the following view:

> *"In this pathetic and virtually helpless predicament that the NPC is in ... [it] has no alternative but to fall back on the existing machinery of the Police Department. This really means that we are going back to square one. Police officers delegated to handle this task will keep falling on their knees to please politicians."*[41]

40. Circular No. 1703/2003 dated 26th March 2003. Annexure A, Clause 3.

41. Edward Gunawardena, 'Crime, Code of Ethics and the Police Commission', *Island*, 29th June 2003.

4.2.2 Present delegations

The NPC attempted to answer this criticism by altering the delegations. By orders published in Gazette Extraordinary of 30th July 2003, the NPC cancelled previous delegations. Instead, it delegated its powers mainly to a committee of three persons headed by a retired High Court Judge, while limiting the delegation made to the IGP.[42] A summary of the present delegation is given below:

a) Appointments, promotions and transfers of officers including and below the rank of Sub Inspector are to be effected by the said sub committee, in terms of schemes approved by the NPC. However, transfers within the Ranges and Divisions on grounds of exigencies of service and contemplated disciplinary action may be exercised by the Deputy Inspectors General of Police and the Senior Superintendents of Police.[43]

b) Disciplinary control (including interdiction and dismissal) of officers of and below the rank of Inspector of Police have been delegated to senior officers above the rank of SSP and the specific delegations thereon have been tabulated in a Schedule to the said Gazette Notification. These powers also include transfer of police officers on grounds of exigency of services and contemplated disciplinary action.

As these were the sole delegations, all powers that have not been delegated remained with the NPC. In other words, the NPC directly exercises the powers of appointment, promotion, disciplinary control

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42. Members of the Committee are Mr. Sarath Gunatilleka (Chairman), Mr. G.N. Pathikirikorale (Member) and Mr. K. Kanapathipillai (Member).

43. Clause 2 of Gazette Extraordinary of 30th July 2003.

and transfer of all officers of and above the rank of Inspector of Police. The IGP and senior officers in the designated ranks exercise these powers over officers of and below the rank of Sub-Inspector of Police.

4.2.3 Desirability of Delegation

One reason for the delegation of NPC powers to the IGP was that the present members of the NPC do not include a technical person.[44] It has been argued that "a retired senior police officer in whom the Constitutional Council has confidence" should be included in the NPC membership to overcome this problem.[45]

Serious questions have been raised about the possibility of political interference continuing to compromise the police service when NPC powers are delegated to the IGP or any other senior police officer. With this delegation, the IGP deals directly with appointments, promotions, transfers, disciplinary actions and dismissals of officers covered in the delegation. The mechanism introduced under Article 155F (making it an offence to interfere with the NPC or any of its committees) is not applicable to the IGP or to other police officers. The delegation of powers to the IGP or other police officers thus threatens to nullify the main purpose of the NPC, which is to prevent political interference with the police. On the other hand, it could be argued that no system can eliminate political interference entirely and that a proper balance must be achieved that will not jeopardise the functions and efficiency of the police service.

Unlike Article 155J, Article 155H enables the NPC to delegate its powers to any of its subcommittees (not consisting of its members)

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44. Editorial, *Island*, 3rd May 2003, referring to a public discussion held on the NPC.

45. Mr. Ranjith Abeysuriya, Chairman of the NPC, quoted by Mr. Tassie Seneviratne in *Sunday Island* 13th April, 2003.

who shall function in accordance with the procedure established by the NPC. If the present delegations, described above, have been made to a committee of the NPC, the criticism on the question of interference would not arise.

5. Appointment of IGP

Under the 17th Amendment, the NPC has no role to play in the appointment of the IGP, who is the Head of the Department. Generally the appointments of heads of department are vested in the Cabinet who shall exercise the powers of appointment "after ascertaining the views of the Public Service Commission."[46] The appointment of the IGP is left to the President, who shall make the appointment upon recommendation made to the Constitutional Council by the President.[47]

The NPC needs to consult with the IGP in order to exercise its main powers of appointments, promotions, disciplinary control and dismissals.[48] Such consultation has provoked questions relating to the procedure for appointing the IGP: "the NPC getting the advice of the IGP is alright so long as the IGP is of unassailable integrity but where is the independence of the NPC then?"[49] The independence and integrity of the IGP is clearly crucial, but the 17th Amendment does not require the Constitutional Council to seek views of the NPC in appointing the IGP, which is regrettable.[50]

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46. Article 55(3) of the Constitution.

47. Article 41C of the Constitution read with Part II of the Schedule there under. See also Article 155G(1).

48. Article 155G.

49. Mr. Ranjith Abeysuriya, Chairman of NPC is quoted by Mr. Tassie Seneviratne in *Sunday Island* April 13, 2003.

50. In a similar situation, Article 55(3) of the Constitution requires the Cabinet (appointing authority of Heads of Department) to seek the views of the Public Service Commission before appointing heads of departments.

On 14th October 2003, Mr. T.E. Anandarajah, the then IGP, retired from his post amidst serious allegations of impropriety. President Kumaratunga recommended that, the then DIG Indra de Silva, should be the next IGP, but the Constitutional Council first rejected this proposal as Mr de Silva was not the senior-most officer of DIG rank. The President thereafter appointed DIG Indra de Silva as the acting IGP. It was reported that the President again forwarded the name of DIG Indra de Silva to the Constitutional Council, which in turn sought the assistance of the NPC to clarify the seniority issue. Three months after the retirement of the former IGP, on 18th December 2003, Mr. Indra de Silva was appointed as the IGP.

This delay in filling the position of IGP raised questions about the procedure laid down in the 17th Amendment. The country was without a Head of the Police Department for three months. Unfortunately, there are no legal provisions to prevent such a crisis recurring in the future. If the President and the Constitutional Council do not agree on the appointment of a Presidential nominee, the Police Department could have to function without an IGP.[51] The NPC has no statutory function in the appointment of the IGP even in a crisis situation, as it is the President who is ultimately responsible for maintaining law and order.

6. Positive Achievements of the NPC

6.1 Cancellation of mass-scale, politically-motivated transfers

The NPC was born into a world of enormous expectations. The Police Department had been confronted with political transfers at every

51. Similar deadlock has arisen with regard to the appointment of the Members of the Election Commission at present, where the President has declined to appoint nominees recommended by the Constitutional Council.

important juncture of governance, and politically motivated transfers were frequent in the Department. Notwithstanding the establishment of the NPC, reports continued of attempted politically motivated and arbitrary transfers. In December 2002, the NPC reportedly rejected the transfer orders of 60 Assistant Superintendents of Police and OICs, which had been recommended by the Police Department, under the direction of the Minister of Interior. The *Daily Mirror* reported as follows:

> *"The transfer list of 60 ASPs and OICs was prepared at the request of certain ministers and government party MPs, Interior Ministry sources said. In addition some of the transfer orders were made at the request of the UNP, SLMC, CWC and TNA, the sources said. This is the first occasion when the Commission had issued orders countermanding the orders of the Police Department."*[52]

The NPC's action to countermand these politically motivated, mass-scale transfers was certainly a welcome move in keeping with the spirit of the 17th Amendment.

6.2 Mechanism to address public complaints

Yet another development was the attempt to implement the provisions relating to the investigation of complaints against police. The NPC has constituted seven coordinating Committees on district level to make the complaint entertainment process effective.

In July 2003, the NPC went on an advertisement drive calling upon the public to forward any complaints "in relation to the duties of police officers working in a police station or other police office located within

52. *Daily Mirror*, 24th December 2002.

the Districts of Colombo and Gampaha".[53] The advertisement further stated that "the NPC is starting this programme initially from Colombo and Gampaha and will soon extend to other Districts too. Kandy, Anuradhapura, Puttalam and Kalmunai have been identified already." At a press conference held in September, the Chairman of the NPC disclosed that within three weeks of the advertisement, 26 public complaints had been received in response to the advertisements and that investigations were being conducted into these complaints irrespective of any bias or political party affiliations.[54]

A close scrutiny of Article 155G(2) reveals that the NPC has a statutory duty to establish procedures to entertain and investigate public complaints of aggrieved persons made against the police and that victims of torture and arbitrary arrest or detention can make complaints to the NPC. Such interpretation is consistent with the constitutional duty placed on all organs of government to "respect, secure and advance" fundamental rights guaranteed in the Constitution.[55] This provision has authorized the NPC to establish an investigation unit and a mechanism to hear public complaints against atrocities committed by police officers in operational activities, though the granting of relief may not be possible at present.[56]

It is significant to note that the scheme of Article 155G has drawn a distinction between the procedure for entertainment of complaints and granting of redress thereon. The constitutional duty referred to in this

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53. *Daily News*, 18th July 2003.

54. *Daily News*, 9th September 2003.

55. Article 4(d) of the Constitution.

56. Last part of the sentence in Article 155G(2) states "... provide redress in accordance with the provisions of any law enacted by Parliament for such purpose."

Article is limited to the establishment of procedures to entertain and investigate public complaints. Close scrutiny of the powers of the Commission establishes that the NPC, being vested with disciplinary control of Police officers, is legitimately entitled to consider public complaints for the purpose of disciplinary action. However, it could be argued that the 17th Amendment does not confer specific powers to the NPC to grant redress and no inherent powers could be inferred from a statute. Thus, it is for the Parliament to seriously consider introducing a specific statute facilitating the process of granting redress to the complainants aggrieved by police action. It is also clear that once a specific law is introduced, the NPC will then grant redress following an administrative mechanism, which might entitle the public to seek relief from the NPC in addition to other judicial remedies.

6.3 Integrity of Police

In the public perception, the Police Department is often considered one of the most corrupt public institutions in Sri Lanka,[57] with the politicisation of the police service often being criticised by the public, including retired senior police officers.[58] The NPC's main challenge therefore is to restore the dignity and integrity of the Police. The NPC is expected to achieve this goal within the limited powers vested in it under the Constitution. Recent pronouncements by the Chairman of the NPC clearly give the signal to the Police 'not to tolerate any interference from any person.'[59]

There were no reported incidents of political interference or attempted interference into the affairs of the NPC during the period under review.

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57. *Transparency International Regional Survey Report*, December 2002.

58. *Island*, 27th October 2001.

59. *Island*, 13th July 2003.

Having regard to the functions of the NPC, it could be assumed that police administration remained independent during 2003.

7. Structural limitation of the NPC

7.1 Limitations on operational activities

The NPC has obvious structural deficiencies. One of the major limitations is its inability to impact on operational activities of the Police Department, even when political influence is manifest in an inquiry or where scandals are alleged in operational functions of the police. This conclusion is inevitable from an analysis of the powers of the NPC under the 17th Amendment. The Police Department is responsible for the prevention, detention and investigation of all offences and subject to the powers of the Attorney General under the Code of Criminal Procedure, No. 15 of 1979, the institution of prosecutions in the relevant courts in respect of those offences. A similar mechanism has been provided in respect of Provincial Divisions. In other words, the operational powers of the police have been clearly separated from the administrative powers and vested with the IGP.

The Police Commission Act No. 1 of 1990, which has not come into operation, however, provides an interesting mechanism for the investigation of offences. The Provincial Division is basically responsible for investigating offences within the province but the National Division of Police may investigate offences under the following circumstances:[60]

60. Section 13 of the Act No. 1 of 1990.

a) If the Chief Minister of the Province requests that the investigation of such offence be conducted by the National Division; or

b) Where the IGP is of the opinion that investigation of such offence by the National Division is necessary in the public interest and directs, after consultation with the Chief Minister and with the approval of the Attorney General, that the offence be investigated by the National Division.

The above provisions are in line with the arrangement for the police to continue with operational activities but unfortunately the Chief Minister, who is a political authority, plays a major role in setting about the transfer of an investigation to the National Division. The desirability of such involvement by the Chief Minister remains questionable.

7.2 No power to summon

The NPC has powers to deal with the discipline of police officers. The disciplinary functions undoubtedly imply the power to hold disciplinary inquiries and public servants are required to be present before the inquiry officers whatever inquiry it may be. Thus the NPC obviously enjoys the right to summon the accused officers or other police officers for the purpose of disciplinary inquiries.[61] However, if the NPC wishes to call witnesses outside the police, they do not seem to have any specific legal authority to do so.[62]

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61. Establishments Code, Chapter XLVIII section 20:1. Failure or refusal to cooperate with an investigation is a grave misconduct under s.13.10 of the same Chapter.

62. To the contrary, the Human Rights Commission Act, s.18(c) gives such powers to the Human Rights Commission to summon any person or to require production of documents.

This lacuna also has an impact on the NPC's ability to entertain and investigate public complaints. This entire procedure is nullified without the NPC having power to call for documents and to summon witnesses for examination. Thus NPC does not have powers to investigate effectively into public complaints.

8. Conclusions and Recommendations

The establishment of an independent police administration has long been a dream of many. The 17th Amendment to the Constitution made the establishment of an independent commission a reality, a leap towards success. Although serious criticisms of the existing framework still remain to be answered, legal provisions have now been put in place to secure independence in the administration of the police. Given the long history of politicisation of this Department, it can only be expected that de-politicisation will take a considerable time. Hence it is for the members of the NPC to demonstrate their commitment by implementing the mandate given in the 17th Amendment as expeditiously as possible. Government, on the other hand, is also required to cooperate with the NPC to enable it to implement its mandate fully.

In addition to making the NPC more effective and independent in line with the 17th Amendment, legislative and administrative steps need to be taken, as recommended below:

- The Police Commission Act, No. 1 of 1990 must be repealed or suitably amended, making it consistent with the 17th Amendment to the Constitution.

- The provisions relating to the interference with the NPC set out in Article 155 (f) of the Constitution should be extended to the administrative functions of the IGP and other police officers.

- The appointment of the IGP should be made after ascertaining the views of the NPC. The appointment procedure should be concluded within a very short period of time, stipulated by law.

- The NPC should be given supervisory powers in operational functions, particularly in special instances where allegations of bias or political interferences are alleged.

- Parliament should immediately pass special legislation setting out the redress mechanism as required by Article 155 (g) (2) of the Constitution.

- The NPC should be conferred with powers to summon or call documents with a view to making their inquiries more effective. Refusal to obey should be made an offence punishable in law.

- The NPC should introduce proper criteria for the appointment of members to its committees, appointed under Article 155H of the Constitution.

VII

Bindunuwewa: Justice Undone?

Dr. Alan Keenan[*]

1. Introduction

On 25th October 2000, a mob of unknown size stormed the government's rehabilitation camp at Bindunuwewa, 5km north of Bandarawela town. After a fury of violence lasting anywhere from thirty minutes to an hour, unrestrained and to a significant degree supported by the local police stationed to protect the camp and its inmates, 27 Tamil detainees were left dead, and another 14 injured, some of them very seriously. Three or four days of violence between Tamils and Sinhalese in the surrounding hill country followed the attack at Bindunuwewa.

In the wake of this violence, and the national and international outcry at the murders at the camp, the government announced a series of

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investigations. A Commission of Inquiry,[1] comprising the sitting Appeals Court Justice P. H. K. Kulatilaka, was appointed by President Kumaratunga on 8th March 2001 and held public hearings between May and October of that year. The Commission's report was completed in November 2001 and officially handed over to the President some time in early 2002, but it has still not officially been released to the public.[2] Meanwhile, as the Commission was gathering its evidence, investigations by the Criminal Investigations Department (CID) of the police and criminal proceedings by the Attorney General's Department got underway, culminating in the indictment on 25th March 2002 of 41 suspects, among whom were 10 members of the police. The trial of the 41 suspects[3] began in July 2002 in the form of a trial-at-bar before

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1. The Commission of Inquiry was appointed by the President under the powers granted by the Commissions of Inquiry Act (No. 17 of 1948). The commission is mandated to report back to the appointing authority on a given factual situation. It is empowered to look into records maintained by any government body and to require any person to give evidence before it. Evidence gathered by, or testimony given to, a Commission of Inquiry, however, has no legal validity in a later criminal trial. In the case of the "Presidential Commission of Inquiry Into Incidents that Took Place at Bindunuwewa Rehabilitation Camp, Bandarawela, on October 25th 2000," its mandate was to look into "I. the circumstances that led to the incidents that took place at Bindunuwewa Rehabilitation Camp on 25.10.2000 in the course of which 27 inmates died and 14 persons were injured," "II. the administration of the Rehabilitation Camp at Bindunuwewa and the conduct of public officers in so far as it is relevant to the said incident," "III. the person or persons if any, directly or indirectly responsible, by act or omission for: (1) bringing about the said incidents; (2) causing injuries to persons, or the death of the inmates," and "IV. the methods necessary to prevent the recurrence of such incidents and the remedial measures that could be taken in this regard."

2. This writer was able to have access to the Commission's unpublished report in the course of preparing this chapter. The full text of the report, as well as the Sinhala text (and English translation) of the High Court judgment, are now available at www.brynmawr.edu/peacestudies/srilanka/bindunuwewa.

3. Curiously, this is also the number of Tamil inmates present in the Bindunuwewa camp on the day of the attack.

a panel of three judges at the Colombo High Court.[4] Testimony ended in January 2003, and all hearings had concluded by early May 2003. The verdict announced on 1st July 2003 convicted and sentenced to death five of the accused, including two police officers.

When the Colombo High Court announced the long-awaited verdicts on 1st July 2003, reactions were swift, and divided. Some human rights lawyers and activists were quick to announce their satisfaction that justice had been done. According to one Tamil lawyer who had followed the case closely, the judgment was "a victory for the rule of law," given that it was one of the few human rights or massacre prosecutions in which there has been a conviction.[5] Another long-time human rights activist was quoted as saying that, "On this massacre, the law took its normal course and the suspects after trial were convicted. But unfortunately this was not so in several other similar cases... All these should be expeditiously disposed of in a similar manner as the Bindunuwewa case. The rule of law should be applicable to everyone irrespective of whether they are politicians, members of the armed forces or police."[6] While some expressed disappointment that other, higher ranking officers hadn't in fact been prosecuted, the judgment was nonetheless felt by many to be a rare victory against impunity for officially sanctioned violations of human rights.

Yet while some expressed general satisfaction with the outcome of the case, others were outraged. Scenes of the two convicted policemen, one of them wailing in shock and despair and both protesting their

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4. High Court at Bar Case No. 763/2002.

5. Personal interview with author, 1st July 2003. The two other cases of successful prosecutions were the Krishanthi Kumaraswamy rape and murder case and the Embilipitiya disappearances case. As Bindunuwewa, however, no senior officers were convicted in either of these cases.

6. "Bindunuwewa Massacre Judgment: Human Rights groups hail quick court action," *Sunday Observer*, 6th July 2003.

innocence, were shown on TV and were featured on the front of all the next day's newspapers. Both officers – Inspector Senaka Karunasena and Sub-Inspector Tyronne Ratnayake – proclaimed loudly that senior officers had been at the scene of the crime when the massacre had taken place and had unfairly made them their scapegoats. The English and Sinhala language media gave much highly sympathetic coverage to the plight of the two officers and their suffering families. The effects of the verdict were especially strong in and around Bandarawela, located just three kilometres from Bindunuwewa. Prominent businessmen, lawyers, and other local leaders immediately formed a defense committee for the five convicted, promising to raise money for their legal appeal and to support their families. Public meetings were held, moneys were raised, and outrage at the perceived injustice was expressed widely.[7] Frequent mention was made of the fact that the two senior officers – Headquarters Inspector Jayantha Seneviratne and Assistant Superintendent of Police A. W. Dayaratne – escaped any punishment while their junior officers had been made to take the fall. The fact that Sinhala officers were being sentenced to death while "Tiger terrorists" were being allowed free reign under the terms of the ceasefire agreement with the government was also a frequent source of complaint. From this perspective, the verdicts were seen as an affirmation of business as usual, rather than being any kind of blow against impunity.

What is perhaps most striking about the case, in the end, is that neither of these diametrically opposed perspectives can simply be dismissed. From the very beginning, a thick cloud of ambiguity and confusion has surrounded the case, which may never completely disperse. Still, with the conclusion of the trial much about the case and the events

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7. For examples of the press coverage of these developments, see Sithara Senani, "Sihala Urumaya Gives Legal Aid to the Bindunuwewa Accused," *Dinamina*, 6th July 2003; Palitha Ariyawansa, "Tears Oozing from the Hearts of Bindunuwewa Tragedy," *Lankadeepa*, 6th July 2003.

that put Bindunuwewa on the political and legal map has now been clarified and can be told with some degree of certainty. Through close analysis of published and unpublished legal documents, newspaper articles, and personal interviews with many people with first hand knowledge of the camp and the legal process, it has been possible to piece together the major elements of the case.[8] Of course, it is important to state that none of the available documents or statements can simply be taken at face value. This is especially true of the testimony before the Commission of Inquiry and the Trial-at-Bar, where witnesses had had a lot of time to arrange their stories, as well as being obvious targets for intimidation. However valuable the official record is, then,

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[8] This essay is based on months of field research, including attendance at most of the hearings of the Commission of Inquiry, attendance of some of the trial-at-bar, analysis of the media coverage of the case in all three languages, close analysis of many of the essential documents in the case, and more than fifty interviews with those involved, including a number of the victims, some the accused and their families, prosecution and defense lawyers, lawyers for the Human Rights Commission and those representing the interests of the victims and survivors, former and current staff from the Bindunuwewa and Telipilai Rehabilitation Centres, journalists, residents and politicians in the Bandarawela area, activists who followed the case, and various individuals who had personal experience of the Bindunuwewa Centre prior to the attack. My sincere thanks are offered to all who gave of their time to help me make sense of this complicated case. While I have chosen to maintain the anonymity of most of the individuals I spoke with, I would like to acknowledge the support I received from the following institutions, without whose assistance this report would have been much less accurate and complete: Amnesty International, the Centre for Human Rights and Development, the Centre for Policy Alternatives, the Home for Human Rights, the Institute of Human Rights, the International Centre for Ethnic Studies, the Law and Society Trust, the Social Scientists' Association. Special thanks go to the University of Pennsylvania's Solomon Asch Center for Study of Ethnopolitical Conflict, whose financial support gave me the time to do much of the research that led to this chapter. I would also like to express my appreciation to Justice Kulatilaka and the staff of the Presidential Commission of Inquiry for their cooperation and assistance, and to the lawyers in the Attorney General's Department. Special thanks go to State Counsel Priyantha Nawana, who was repeatedly generous with his very precious time. Any inaccuracies in this report are, of course, entirely my own responsibility.

the real story could still be different in important ways from the one these documents tell.

2. The Attack

After being away for four days, the Officer-in-Charge (OIC) of the Rehabilitation Centre, Captain Y. K. Abeyratne, returned to a tense camp on the evening of 24th October. Many of the forty-one inmates – all of them Tamil men and boys, ranging in age from twelve to their mid-thirties – began to complain of various small grievances. This culminated in a collective protest against being held beyond what they thought would be their dates of release from detention, which eventually became a demand for their immediate release. The shouting soon turned physical – a shot was fired by one of the police stationed to guard the camp, one inmate attacked and slightly wounded the second in command of the camp, Lieutenant P. Abeyratne (no relation).[9] A hostage-like situation ensued, with Captain Abeyratne apparently prevented by the inmates from leaving the camp while the second in command, Lieutenant Abeyratne, escaped the camp and announced to neighboring villagers that "the Tigers" had attacked him and would be attacking the village. Lieutenant Abeyratne then traveled to the Bandarawela Police Station and alerted them to the events in the camp. Headquarters Inspector (HQI) Seneviratne, along with Inspector Karunasena and about a dozen other police quickly headed to the

9. The staff at the camp were all employees of the National Youth Services Council, (NYSC) but its two senior administrative officers, Captain and Lieutenant Abeyratne, were also volunteer members of the Cadet Corps, a youth training wing of the army. Hence their military ranks. It is worth noting, however, that Captain Abeyratne has never served in the army proper. He was trained as a teacher and had previously worked as a principal. Information on Lieutenant Abeyratne's background was not available.

camp.[10] A disarmed HQI Seneviratne was allowed into the camp, where he negotiated with the inmates and reached a temporary calm, agreeing to remove the police post that was within the camp premises. Captain Abeyratne assures HQI Seneviratne that everything would remain under control as long as the police protected the camp from the crowds of Sinhala villagers who had gathered around the camp since the altercation began. The situation eventually calmed down later in the evening, as the crowds around the camp were dispersed by a small army contingent sent from the nearby Diyatalawa army camp. The army returned to barracks sometime after midnight, leaving a small band of police standing guard overnight.

By 6:45 the next morning, well-armed police reinforcements began to arrive and were stationed at various points around the camp.[11] At about the same time, crowds once again began to gather. A bus was stopped and its passengers were asked to join the protest against the camp. Others arrived on foot and in cars and lorries – perhaps spurred in part by posters that had sprung up overnight featuring racist slogans calling for the violent removal of the camp and its inmates. Eventually a sizable crowd had gathered – estimates range from 500 to 3,000 – many of whom were armed with sticks and knives and poles (but none with any firearms). At some point around 8:30 am, the camp was stormed

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10. Headquarters Inspector Seneviratne was the senior officer attached to the Bandarawela police station. As we will see, there was another senior police officer involved directly in the case: Assistant Superintendent of Police (ASP) Dayaratne. An ASP outranks an HQI but has an area of jurisdiction beyond a single police station. In the case of ASP Dayaratne, his office was located in a separate building from that of the HQI and the rest of the Bandarawela police. There was also a Senior Superintendent of Police (SSP) stationed in Bandarawela at the time of the attack. However, SSP B. M. Premaratne was away in Colombo on the 24th and 25th and thus never directly implicated in the attack. On the 24th and 25th, ASP Dayaratne was acting in his stead.

11. The camp sits at the top of a hill surrounded by a scattering of other buildings and numerous small hamlets, or clusters of dwellings.

by some portion of the crowd. The inmates were attacked and killed in multiple and gruesome ways – hacked and clubbed to death, their bodies dismembered and burned, some even burned alive. The police not only failed to prevent the attack, but some even partook in the massacre, shooting at least three of the inmates – and killing one of them – as they fled their pursuers. A number of those detainees who reached the apparent safety of a police truck were subsequently attacked, and one of them killed, while the police looked on. None of the attackers were arrested. No police and very few of the attackers were injured. Twenty seven of the detainees were killed. Fourteen were injured, some very seriously. By the time the riot squad arrived from the Bandarawela police station and the army arrived from the nearby Diyatalawa camp around 9:30, the violence was all over. The wounded were taken to a variety of different hospitals.[12]

Almost as soon as the attack was over, a number of competing narratives and explanations began to vie for supremacy in the public sphere, feeding off the lack of clear information available from trustworthy sources. Among the most popular initial stories were two diametrically opposed accounts. The first held that the attack was actually the intended result of an LTTE conspiracy, instigated by a recent arrival at the camp, the immediately infamous "Anthony James". Phone calls he made from the camp to contacts in Batticaloa on the evening of the 24th and morning of the 25th were interpreted by some as evidence of his dangerous LTTE connections and involvement in the attack.[13] An

12. Most of the survivors ended up staying at the hospital of the Diyatalawa Army Camp for a few months after the attack, before being sent to the Telipilai Rehabilitation Centre in the Jaffna peninsula to complete their periods of detention. According to eyewitness accounts, for the first few weeks of their stay at Diyatalawa the surviving inmates were handcuffed to their beds, supposedly for their own safety, to prevent any "incidents".

13. According to reliable sources, at least one of Anthony James' phone calls was to the International Red Cross office in Batticaloa, while another was to Joseph Pararajasingham, then a TULF MP from Batticaloa.

opposing account held that there were in fact many more inmates killed, their bodies and identities hidden in a plot organized and carried out by the police and army, and perhaps government politicians. There has yet to be uncovered any convincing evidence for either of these conspiracy theories.[14] While Anthony James did apparently help lead the initial protests on the evening of the 24th, there is no available evidence that he was an LTTE plant – and no evidence more generally that the LTTE had any hand in organizing the detainees' agitation, or that it was intended as a deliberate provocation. Similarly, there is no evidence that there were any more than 41 detainees in the camp at the time of the attack or that there were any additional victims not acknowledged by government authorities.

On the other hand, there are important indicators of some degree of organization behind the attack by the "villagers" – people were needed to write and post the hate-filled posters calling for the camp's violent destruction, and someone made calls to bring people from neighboring villages and the town of Bandarawela to join the crowd.[15] The fact that there had been a significant agitation by Sinhala nationalist parties during the campaign for the October 10th, 2000 Parliamentary elections,

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14. Both stories nevertheless continue to live on and can be found on various websites. For instance, the Tamilnet site still features a post-trial account of the case that claims the camp held 83 inmates at the time of the attack. No one has yet offered any support for such claims. See www.tamilnet.org art.html?catid=13&artid=9329.

15. The Human Rights Commission was one of the first to point to the importance of these posters and of following up the leads they could provide as to who might have helped plan the attack. In their words, "All the information we have been able to gather so far does not suggest that what occurred on the 25th was an unpremeditated eruption of mob violence caused by the provocation of the inmates. It is more consistent with a premeditated and planned attack." This very early report remains the best published analysis of the attack. "The Bindunuwewa Massacre: Interim Report of the Human Rights Commission." 1st November 2000, published in the *Law and Society Trust Review*, Volume 11, Issue 158, December 2000, p. 11.

some of it explicitly calling for the camp's closure, offers further grounds for suspicion. The fact that the Commission showed no interest in pursuing these leads, and that whatever CID investigations into such connections there might have been were never made public and bore no fruit, has left this brand of conspiracy story hard to fully discount. We will return to these points later.

3. The Camp and the Detainees

Before the causes and consequences of the attack can fully be analyzed, it is important to understand the nature of the Bindunuwewa rehabilitation camp and the basis on which the 41 detainees were held in the camp.

The Bindunuwewa camp was one of three "rehabilitation centers" that operated under the auspices of the Commissioner General of Rehabilitation.[16] However, like the other two rehabilitation centres, Bindunuwewa was actually administered by the National Youth

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16. Another similar camp still exists – if just barely – in Telipilai, north of Jaffna town; a much smaller center known as Meth Sevana and located in the Gangodawila suburb of Colombo, is designed for the rehabilitation of women LTTE cadre. Such camps were first established in the early 1970's in order to process militants of the Janatha Vimukthi Peramuna (JVP) who had been captured or surrendered during their first violent uprising. The camps were similarly used in the aftermath of the second JVP uprising in the late 1980's and early 1990's. They were also used at times for the rehabilitation of drug addicts. The Bindunuwewa camp was established as a rehabilitation center in 1990. It first began receiving LTTE suspects and surrendees in 1993. The Telipilai camp was established in November 1998. See "Report of the Presidential Commission of Inquiry Into Incidents that Took Place at Bindunuwewa Rehabilitation Centre, Bandarawela, 25th October 2000," p. 18. The text of the report will hereinafter be cited as "Commission Report." The Commission Report is available on the internet at www.brynmawr.edu/peacestudies/srilanka/bindunuwewa.

Services Council, which in 2000 came under the auspices of the Ministry of Sports and Youth Affairs.[17]

The job of determining both eligibility for rehabilitation and an inmate's period of detention belonged to an Advisory Committee that was appointed by the President under the terms of the Emergency Regulations. The Committee worked closely with the Secretary to the Ministry of Defence. How exactly the Committee made its decisions depended on whether the inmate arrived at Bindunuwewa as a "detainee" held under the terms of section 9 of the Prevention of Terrorism Act (PTA) or Regulations 17-19 of the Emergency Regulations (ER) then in force, or as a "surrendee" who had handed

17. The staff at the camp were employees of the NYSC. There was also some involvement by the National Child Protection Agency, as well as local and international NGO's, in developing and carrying out certain training programs for the centre staff and inmates. According to a reliable source, the Camp was taken over by the Ministry of Sports and Youth Affairs only in 1997. It had formerly been directly under the Presidential Secretariat, with a direct line to the Treasury. According to this source, the move to the Ministry of Youth Affairs resulted in the camp losing a significant amount of its funding. Security for the camp was provided by a small contingent of police attached to the Bandarawela station. In late 1998 and early 1999, Captain Abeyratne had asked the Bandarawela police for better protection of the camp, but the Bandarawela HQI and SSP had replied that they were unable to provide additional security. Their exchange of letters was entered into evidence before the Commission; the letters are listed in the Commission Report's appendix of documents received by the Commission. For some reason, however, this issue is not discussed in the Commission Report.

himself over to the police or armed forces.[18] None of the inmates had

18. Under the provisions of Section 5 of the Public Security Ordinance No. 26 of 1947 (as amended), the President has the power to declare Emergency Regulations, which automatically have the force of law (though they must be ratified each month by Parliament). These regulations have given the government – acting through the Secretary to the Ministry of Defence or other public authorities – vast powers for the search, arrest, and detention of citizens without charge or trial, in addition to authorizing many other restrictions on basic civil and political rights. At the time of the attack on the Bindunuwewa camp, the Emergency Regulations in force were those promulgated by President Kumaratunga on May 3rd , 2000, known as Emergency (Miscellaneous Provisions and Powers) Regulations No. 1 of 2000. Regulations 17-20 laid out a series of different forms of permissible detention, each with different procedures for, and lengths of, detention. ER 17 allowed for "preventive detention," authorizing the Secretary to the Ministry of Defence to detain individuals for up to a year, "with a view to preventing any person from acting in a manner prejudicial to national security/public order." Regulations 18 and 19 allowed for the arrest and detention for purposes of investigation of anyone involved or suspected of involvement in violating other Emergency Regulations. Such "investigative detention" allowed individuals to be held for as long as nine months without charge. Regulation 20 laid out the terms of "detention for rehabilitation," which would be applicable to anyone already detained under ER 17-19, or under the terms of Section 9 of the Prevention of Terrorism Act (1979). This meant that the length of any rehabilitation order would be in addition to any previous detention the detainees had undergone. The detention of those who surrendered to the army or police was handled according to a distinct set of rules laid out in ER 20 (c). Whereas such "surrendees" could previously be investigated and released within short periods of time, since 1996 the Emergency Regulations required that anyone who surrendered automatically be sent for rehabilitation. This applied even to those who turned themselves over to the police for their own protection! See Amnesty International, "Sri Lanka: New Emergency Regulations – Erosion of human rights protection," July 2000 (ASA 37/19/00), pp. 7-13, and INFORM, "Review of Emergency (Miscellaneous Provisions and Powers) Regulation No. 1 of 2000," 15th May 2000.

been convicted, or even charged, with any offence.[19] In the case of those detained under the PTA or ERs, the Secretary to the Ministry of Defence would consult with the four-member Advisory Committee[20] to determine the suitability of a given person for rehabilitation and the period of rehabilitation. The resulting "rehabilitation order" was required to specify the length of rehabilitation/detention, but in the case of detainees there was no maximum period prescribed by the regulations establishing such a rehabilitation order.[21] There was thus a

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19. As Amnesty International points out in a report on the Emergency Regulations of 2000, this violates the terms of the International Convention on Civil and Political Rights (ICCPR) to which Sri Lanka is a signatory. The ICCPR states that all people arrested shall be promptly notified of the reasons for their arrest and promptly informed of any charges against them. It also specifies that "anyone arrested or detained on a criminal charge shall be promptly brought before a judge... and shall be entitled to trial within a reasonable time or to release." See Amnesty International, "Sri Lanka: New Emergency Regulations – Erosion of human rights protection," July 2000 (ASA 37/19/00), p. 13.

20. The Advisory Committee was chaired in 2000 by the late retired Appeals Court Judge Ananda Grero.

21. As the Civil Rights Movement has pointed out in a very valuable paper submitted to the Presidential Commission of Inquiry, "the order may therefore be for any length of time. There is no provision enabling more than one order for rehabilitation to be made in respect of a person. Nor is there any provision to extend the period of rehabilitation. However, the Commissioner General is by Regulation 20(b) (2) (d) empowered to 'make recommendations ... to the Secretary regarding the release of youth who have completed their training.' This suggests that release at the end of the period specified in the Rehabilitation Order is not automatic. (Commission Report, pp. 28-9.) The analysis of the detention regulations published by the Civil Rights Movement, "Detention in the Context of Rehabilitation and Surrender," was reprinted in the *Weekend Express*, 13th–14th January 2001. It is also available directly from CRM's Nadesan Centre Library, at No. 4, Charles Circus, Colombo 3.

sizeable amount of ambiguity about the length of "rehabilitation" for detainees.[22]

In the case of "surrendees," the terms of the Emergency Regulations are more precise. Surrendees are required to be handed over to the Commissioner General of Rehabilitation and assigned to a rehabilitation centre within ten days of their surrender. Within that same ten-day period, the officer to whom the surrendee has surrendered must inform the Secretary to the Ministry of Defence of the fact of surrender and of the handing over to the Commissioner General. At this point, the Advisory Committee is tasked with considering the specific case of the surrendee and determining both his or her eligibility for, and period of, rehabilitation. This process, which generally takes at least a number of months, would happen even while the surrendee was being held at one of the rehabilitation centers. If recommended for rehabilitation, a surrendee's initial term of detention would range from three to twelve months, with a provision that allowed the Commissioner General to recommend additional rehabilitation in increments of three months, up to an aggregate period of 12 additional months.[23] In sum, surrendees could be held for a maximum of two years. Thus even in the less ambiguous cases of surrendees, the process was complex and fluid enough for it to be difficult for a given inmate to be certain when she or he would be released.

The fact that the most serious complaints lodged with Captain Abeyratne on the evening of 24th October concerned the belief of many

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22. This is even more the case given that those detained for "rehabilitation" could have already been held for quite a length of time under other forms of detention – "preventive detention," or "detention for investigation" – specified by the ER, or under the PTA. It was not infrequent for Tamil detainees suspected of involvement with the LTTE to be shuttled back and forth between these different forms of detention without trial (and often even without charge).

23. Commission Report, p. 32.

inmates that they were being held beyond their dates of release should thus have come as no surprise. While there is no evidence that these beliefs were accurate in the case of any particular inmate, the fact that there was no mechanism for making clear the final release dates for the inmates certainly contributed to their anxiety and restlessness. Indeed, there had been a history of complaints along these lines at Bindunuwewa and the other camps. According to testimony before the Commission given by the Deputy Commissioner General of Rehabilitation, Col. M. A. Vipulagune, sometime in the year preceding the attack the inmates at Bindunuwewa had given Col. Vipulagune and the camp administrators a petition requesting that married inmates be released as soon as possible and that the others be released after six months. Vipulagune testified that he had handed the petition over to the Ministry of Defence, which had replied that it was unable to adjust the periods of detention.[24] The Commission report further states that during a visit to the women's centre, "Meth Sevana," the inmates there said that they were not aware of their release dates but would like very much to know when they would be able to return to their families.

Other factors further complicated matters. First, the category of "surrendee" includes those who give themselves over to the police or security forces "through fear of terrorist activities". As the Commission points out, it is wrong to consider them as surrendees, "because they have neither committed nor are suspected or accused of committing any offence. They are persons seeking protection... [and therefore] should not be housed in a rehabilitation centre meant for 'detainees' or 'surrendees'."[25] Indeed, the Commission report points out that one of the fourteen survivors of the Bindunuwewa attack fell into this category, having fled the LTTE after being arrested/abducted by them during a family visit to the Wanni. As someone who was attempting to escape

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24. *Ibid.*, p. 29.

25. *Ibid.*, p. 30.

the control of the LTTE, the Commission rightly argues, he should never have been held against his will.

Second, the Commission points to the more basic problem that the Rehabilitation Centres mixed "detainees" and "surrendees," whose situations are obviously very different.[26] While those who surrender have in one way or another rejected the LTTE, detainees often maintain strong loyalties to the LTTE.[27] The meaning and nature of appropriate "rehabilitation" would obviously be very different for these two sets of inmates. With respect to a related possible source of difficulty, the Commission report goes into detail about the dangers posed by the fact that the LTTE might in the guise of a "surrendee" plant a spy or "hard-core" cadre in the camp in order to undermine its operations. This danger is increased by the fact that a surrendee can remain within the camp for months before the Advisory Committee actually reviews his record – and even such background checks are far from foolproof. What's more, even within the category of "detainee," there were young people with a wide range of different experiences: some had actually been members of the LTTE, but others had simply been picked up on "suspicion" of "terrorist activities" with little or no evidence to support

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26. The Commission report points out that according to the language of the Emergency Regulations, there should actually be two distinct kinds of Rehabilitation Centres for the two sorts of inmates: "Protective Accommodation Centres," designed for surrendees, and "Youth Development and Training Centres," designed for detainees, (Commission Report, p. 30). Bindunuwewa combined the two into one location, with the same staff.

27. Indeed, there is evidence that the LTTE was not happy with the existence of Bindunuwewa and the other camps. Prior to the ceasefire between the LTTE and the Sri Lankan Government in 2002, there were occasional reports of harassment of former Bindunuwewa inmates by the LTTE after their release. Since the ceasefire, which brought with it the effective suspension of the PTA, LTTE violence against ex-Bindunuwewa inmates has apparently increased. According to reliable sources, numerous ex-inmates have been threatened, killed, "arrested," or forced into hiding by the LTTE.

the suspicion.[28] Finally, the fact that children as young as ten were housed together with men in their mid-thirties is not only less than ideal from the standpoint of rehabilitation, but is also a clear violation of the International Convention of the Rights of the Child, to which Sri Lanka is a state signatory.

In short, the rehabilitation system was founded on a less than consistent or logical set of legal procedures. And the centres' actual activities, in turn, were a far cry from the "internationally acclaimed" models of "rehabilitation" that the Foreign Ministry publicized as part of its campaign against LTTE use of child soldiers.[29] "Rehabilitation" at Bindunuwewa consisted of a combination of vocational training, regular religious observance, basic education in arithmetic, Tamil, English, and Sinhala for the younger detainees, and regular community service – but no real psychological counselling.[30] Captain Abeyratne was, however, like his counterpart at the Telipilai camp, often quite helpful at arranging jobs for the inmates once their detention was over.

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28. Indeed, the anger felt by many hill country Tamils at the massacre, which exploded into three days of violence that shook the hill country, can be attributed in part to the fact that two of the twenty-seven inmates murdered were from the hill country, one of whom had been sent to Bindunuwewa for the mere fact that his identity papers were not seen as being in order. For an interesting and useful discussion of the reaction to the Bindunuwewa massacre among Upcountry Tamils and Sinhalese, see Jenneth Macan Markar, Dinesha Samararatne, and Amal de Chickera, "Beyond Bindunuwewa: Rebuilding the Broken Tank," Faculty of Law, University of Colombo, Fall 2003.

29. See for instance, DBS Jeyaraj, "The Bindunuwewa Massacre: The Inside Story," *Tamil Times*, 15th October 2000, p. 6, originally published in the *Sunday Leader*, 29th October 2000. The article cites in particular a Foreign Ministry booklet entitled "Impact of Armed Conflict on Children: The Sri Lankan case," which was distributed at the September 2000 International Conference on War Affected Children held in Winnipeg Canada, and which made much of the great work the Sri Lankan Government was doing at Bindunuwewa.

30. In the final year of the camp's existence there had been a number of training programs in counselling skills for the camp staff. Commission Report, p. 46.

In practice, then, "rehabilitation" was at best a way of offering the inmates a transitional space away from the LTTE or whatever other factors had led them to be picked up by the police or army on suspicion, and perhaps improving their chance to survive apart from active involvement in the conflict.[31]

Despite its limitations as a source for "rehabilitation," however, the consensus opinion among those who had visited and observed the operations of the camp, was that it was fairly well run and the inmates treated relatively well. For example, the Commission's report cites the testimony of Colin Glennie, at that time the country representative for UNICEF, who had visited the camp in November 1999. In Glennie's words, "On the whole, the centre was providing good care and rehabilitation in spite of the lack of resources necessary.... The caring attitude of Capt. Abeyratne was particularly commendable."[32] The atmosphere in the camp was certainly not that of a prison. The security was light, the inmates had frequent overnight visits from their families and spouses, and the inmates could also come and go from the camp with permission from Captain Abeyratne. The inmates did the shopping in Bandarawela town for the food that they themselves cooked for their meals. While some reports have emerged of excessive and unfair corporal punishment inflicted by the senior camp staff, it is clear that the camp was not an especially hostile environment, particularly in

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31. According to one former Tamil trainer who worked with the younger inmates, coming to the camp represented a significant improvement in living conditions for the detainees. Materially speaking they were much better off, and the relations within the camp between the inmates and the training staff and between inmates and the local residents was generally said to be excellent.

32. Commission Report, p. 42.

relation to the state of Sri Lanka's formal prison system.[33] Nonetheless, power was not absent from the camp dynamics: the camp was clearly designed to turn rebellious Tamil youth into more docile subjects of state power, and the requirement that the inmates address the camp OIC with the words "Shanti" and palms folded before them is only the most obvious of what was a more systematic set of patronizing relationships.[34] That some inmates, particularly the older and married inmates, might have found such dynamics humiliating would not be surprising.[35]

From evidence presented at the Commission hearings, as well as post-attack reports from other sources, it nonetheless seems clear that the inmates maintained cordial relations with the local community. The

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33. For one negative report, see "Following the Massacre of Tamil Detainees: A S.E.P. member speaks about his time in Sri Lankan 'rehabilitation' camp," *World Socialist Web Site* (www.wsws.org/articles/2000/nov2000/sri-n03.shtml), 3rd November 2000. This article recounts the experience of Selliah Rajkumar, detained in Bindunuwewa for seven months in 1997. He portrays a much harsher, even racist, Captain Abeyratne, who was prone to beating the inmates when they disobeyed, and who generally intimidated his inmates. For a more positive first hand account of the camp, see S. Manoranjan, "The Bindunuwewa Massacre," *Amudhu*, Nov/Dec 2000. This tells the story of a visit to the camp to meet the inmates and observe a drama workshop conducted by the Centre for Performing Arts. Manoranjan suggests the inmates were anxious to be free as soon as possible, and he mentions concerns that Captain Abeyratne expressed about the villagers' fears that the Tigers might one day attack the village in order to free the detainees. But he reports no tension between the inmates and the administration.

34. One regular visitor to the camp complained about the attitude of camp and other government officials that they were doing the inmates a favor by allowing them to live under such good conditions. For this visitor, the opposite was the case: it was the inmates who were doing the government a favor by remaining in the camp and helping to legitimate the system of detention and "rehabilitation."

35. According to one reliable source, Captain Abeyratne had written to the National Youth Services Council in February 2000 to alert them to tension among the inmates. It is not clear what, if anything, followed from these warnings.

inmates performed regular community service, or *shramadana*, for their neighbors and took part in local religious festivals; two former detainees were living and working peacefully in the Bandarawela town at the time of the attack; local residents even took part in games and festivities within the camp, as well as making offerings (*dana*) to the inmates as part of their own religious observances. Other than reports of some initial hostility to the introduction of LTTE cadre to the camp in 1993, there seems to have been no serious complaints from their Sinhala neighbors prior to the October 2000 election campaign, when the local Sihala Urumaya affiliate began to agitate against the camp.[36]

4. The Commission's Findings

4.1 The Events of October 24th

That there were problems in the camp – both in its administration and in its very conception – prior to the attack is thus clear. But that it had functioned for seven years without serious trouble is also undisputed. How did a small incident within the camp spiral out of control and

36. After the attack, some stories emerged about resentment by local residents at the relative luxury of the inmates' treatment – e.g., mattresses to sleep on, clean water brought in by bowser – as well as complaints that the inmates had been "teasing" or "harassing" the local girls when they went by the camp. Given that these stories appeared in the press only after the attack, their veracity and significance is hard to determine. In "The Bindunuwewa Massacre: the Inside Story," D.B.S. Jeyaraj reports that the animosity had recently been spurred by the work of Sinhala chauvinists campaigning in the October 2000 elections.

lead to such an outburst of terror and violence?[37] To answer that question, the Commission's report begins with the events of the evening of October 24th, when a portion of the inmates began lodging their complaints with Captain Abeyratne, who had just returned after four days away, during which time Lieutenant Abeyratne had been in charge. Eventually the inmates' complaints turned to vandalism, as Captain Abeyratne was unable to clarify their terms of detention or guarantee their early release. As some of the inmates began to break some of the camp's lights and do damage to the camp buildings, two shots were fired, apparently in the air, by the police guards stationed at the camp. According to the Commission – accepting here the evidence of the second in command, Lieutenant Abeyratne – the shots were fired only after he had been attacked and wounded on his side and shoulder. Other testimony, from Captain Abeyratne and one of the inmates, places the attack on Lieutenant Abeyratne after the shots had been fired. For the Commission, however, the inmates were clearly at fault for protesting so violently, and the police were in their rights to fire in the air. The Commission report also clearly locates a major portion of the responsibility for the inmates' revolt in Anthony (Anton) James. He is named as the ringleader of the agitation. Furthermore, the Commission

37. The following pages rely heavily on the account given in Justice Kulatilaka's Commission Report. However, it is worth emphasizing that the report's contents cannot be assumed to be the unvarnished truth. This is not to suggest any dishonesty or political motives on the part of Justice Kulatilaka or the Commission staff. It is, instead, to point out the nature of the testimony they relied upon to formulate their conclusions: 1) there was often conflicting testimony whose claims needed to be decided between, but without any clear criteria for doing so; 2) the police witnesses were uniformly telling their stories in a way that would put their (in)actions in the best light; and 3) one cannot be sure that the surviving inmates are entirely reliable witnesses either, both because of their traumatic experience of state power and its likely effects on their willingness to tell the truth if it might implicate police officials, and because they, too, were interested parties who would likely want to minimize their responsibility for events getting out of control.

makes much of the fact that he was a dangerous anomaly in the camp: a "hard core" LTTE cadre, who had served with the LTTE for 13 years and taken part in numerous attacks on the Sri Lankan army and police. That he was in the camp was a serious breach of security to begin with, the Commission report argues.[38]

The Commission goes on to fault the Bandarawela HQI and Captain Abeyratne for agreeing to the inmates' request that evening to remove the police post within the camp. This not only left the inmates in virtual control of the camp, but by doing so it sent a very dangerous signal of weakness to the local villagers. The police allowed themselves to look powerless. An equally big mistake, according to the report, was Captain Abeyratne's insistence to the police, and later to the army, that things were under control in the camp. Either Abeyratne was fooling himself, or else he was embarrassed at losing control in his own domain and didn't want to ask for help. But the Commission argues that his failure that evening to alert his boss in Colombo, the Deputy Commissioner of Rehabilitation, Col. Vipulagune, closed down one avenue of possible intervention. And his refusal later that night to accept the offer by the head of the army detachment – which had just cleared away the villagers surrounding the camp – to enter the camp and "settle matters" with the

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38 There are many stories to explain the presence of Anton James at Bindunuwewa. One oft-heard, but unsubstantiated, story holds that he was an LTTE plant. A number of reliable sources suggest, instead, that he was unhappy with the LTTE and had made arrangements with the Sri Lankan military to be sent to Bindunuwewa in exchange for, or perhaps as repayment for, his cooperating with the security forces. According to Rajan Hoole, when James telephoned his brother in Batticaloa on the evening of the 24th, he asked him to get in touch with Colonel Zacki of the Sri Lankan Army, to whom James had originally surrendered. He wanted to ask him to help intervene to protect the inmates from the threatening crowd outside the camp. James and other inmates made calls to the ICRC and others on the 24th and 25th pleading for their protection from the gathering mobs. See *Sri Lanka: The Arrogance of Power* (Colombo, 2001), p. 462.

inmates was another lost opportunity to show the villagers that things were under control and there was no reason to be afraid.[39]

What, then, were the effects of the incidents within the camp, and of the police and army responses to them on the local community? The story the Commission tells, based on testimony from inmates, villagers, police, and others, is as follows. Word that Lieutenant Abeyratne had been attacked and injured – he had conveniently left his blood stained shirt at a neighboring house – quickly spread throughout the area, together with Lieutenant Abeyratne's warning that "the Tigers" were going to attack the village.[40] This rumour, together with false reports that some Tigers had escaped from the camp, was actively endorsed and spread even by the police posted outside the camp that night.[41] Such stories were particularly powerful given the popular fears and hatred of the LTTE, emotions which had recently been strengthened by the Sinhala nationalist tenor of much of the election campaign in the preceding weeks, as well as recent funerals in the area of three soldiers and one army Major. The withdrawal of the police post within the camp and the warnings from the police themselves of possible attacks fed distrust of their ability to protect the camp's neighbors.

In addition, the Commission finds clear evidence that a significant degree of organizing took place in the twelve to fourteen hours between the initial protest in the camp and its violent destruction. Lieutenant Balasuriya, who led the army detachment that dispersed the crowds on the 24th night, testified before the Commission that villagers told

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39. Commission Report, p. 86. It is not clear, however, what this phrase "settle matters," reportedly used by Lieutenant Balasuriya in his testimony to the Commission, would have meant in practice. Presumably it would have meant discussions with the inmates. Allowing an army officer to enter the camp when feelings were so volatile might not have been the wisest idea, however.

40. Commission Report, pp. 94-95.

41. *Ibid.*, p. 96.

him they were planning to demonstrate against the camp the next morning. At eight in the morning of the 25th, the District Secretariat had received a telegram announcing such a demonstration, signed in the name of the Sapugasulpatha villagers. Further evidence reveals that at least fifteen of the anti-camp posters that went up on the 25th morning had been made by residents of Aluthgama, another of the camp's neighboring hamlets (one villager's handwriting was matched to the posters). And finally, the Commission report confirms that vehicles were used to transport protesters to the camp – at least 10-15 vehicles (vans, buses, and three wheelers) were seen that morning at the entrance to the Vidyapeetaya Technical College that bordered the camp. The Commission report suggests these vehicles might have been the work of "extremist elements to exploit the situation to achieve their own objectives."[42]

4.2 The Events of October 25th

The Commission report also offers some further useful points of clarification about the events of the morning of the 25th. Testimony by local residents seems to have established that some 15-20 inmates were visible early that morning outside their barracks carrying poles and screwdrivers.[43] The crowd was heard shouting threats of murder. Given the murderous slogans written on the posters that went up in and around Bindunuwewa that morning – such as "Feed Tiger flesh to our dog" – it is clear that some in the crowd had come to kill, not just demonstrate. The crowd outside initiated the violence by throwing stones at the inmates. The inmates reacted to the provocations by exploding a gas cylinder within the camp. While this initially succeeded in frightening the crowd, its ultimate effect seems to have been to further inflame

42. *Ibid.*, p. 101.

43. This and other evidence, including testimony by the survivors themselves, corrects those narratives that have the attackers striking while the inmates were asleep.

things, as the crowd soon thereafter stormed the camp as the police looked on. Witnesses state that large crowds were standing outside the camp's main gate prior to the attack with armed police standing amidst them, doing nothing to disperse them, or keep them at bay.

That there was an utter failure on the part of the police stationed around the camp is beyond dispute. The Commission report strongly criticizes the two most senior police officers in the area – ASP Dayaratne and HQI Seneviratne – for a series of failures. This begins with their failure to stay at the camp overnight, which would have sent a strong signal to the villagers; indeed, they didn't even wait to get a report back from the army contingent sent to disperse the crowd on the night of the 24th. Their failures were further compounded when they chose not to send the riot squad from the Bandarawela police station, even after being warned the next morning by the highest-ranking officer stationed overnight at the camp, Inspector Karunasena, that large crowds were gathering and buses had been stopped near the camp. The ASP and the HQI failed to send any additional police from the Bandarawela station. Even at the last moment, the inmates could have been evacuated from the camp.

Once the attack began, no attempts were made to stop the invading crowd. Not a single arrest was attempted or made by a single police officer (out of more than 60 stationed at various points around the camp). Given that not all of the hundreds, perhaps even thousands, gathered at the camp were armed, the Commission argues that the police could, as a last resort, have shot at the relatively small number in the crowd who did have weapons – what the report calls "the criminal elements."[44] Instead the only shots fired seem to have been at the inmates – and their deaths were clearly not accidental, as the one inmate who died from by gunshots had seven bullet wounds on his body. The

[44] *Ibid.*, pp. 190, 197.

Commission is particularly critical of Inspector Karunasena – whom it holds was the highest ranking officer at the start of the attack – for ordering the police to shoot: "the order to shoot by Inspector Karunasena and the act of shooting by three policeman consequent to that order were more than what was warranted in the circumstances," the Commission states.[45] Precisely what happened with the shooting remains ambiguous. Karunasena admits ordering his men to fire in the direction of a number of inmates as they were running towards his officers in an attempt to escape their pursuers. But what he intended by this order is not clear. Did Karunasena in fact order his officers to fire on the inmates? Did he order them to fire at those who were chasing the inmates, as he implied in his Commission testimony, but the inmates were hit instead? Or did he order his officers to fire in the air, as he claimed during the trial, but some of them choose to fire at the inmates instead? The fact that Karunasena didn't immediately take action or publicly denounce his officers for hitting the three inmates and killing one of them is suspicious, to say the least.[46]

However, whether Inspector Karunasena really was in charge at the time of the attack remains in doubt. No one disputes that Karunasena was placed in charge of the police detachment left at the camp overnight, or that he was in charge of initially detailing the additional

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45. *Ibid.*, p. 194. This is a noticeably roundabout formulation. If the report means to accuse Karunasena of ordering the inmates to be shot, it isn't clear why it wasn't stated that way? Perhaps when it wrote that the shooting was "more than what was warranted," the Commission had in mind the idea of 'reasonable' and 'proportionate' use of force.

46. As the judgment in the Trial-at-Bar argues, Karunasena must at the very least – despite his later denials – known that the inmates had been shot in response to his orders, since he never claimed, much less complained, that any shots were fired against his orders. "Judgment in High Court at Bar Case No. 763/2002," p. 54. Hereinafter referred to as "Judgment." The original Sinhala version of the High Court's judgment is also available at www.brynmawr.edu/peacestudies/srilanka/bindunuwewa.

squads of police that arrived from various other local police stations at about 6:45 on the morning of the 25th. After that, things get more murky. According to Karunasena, both ASP Dayaratne and HQI Seneviratne were there at the camp from 7:30 am onwards.[47] Another police officer, Sub-Inspector N.S. Walpola (who along with Karunasena, was later indicted and put on trial), identifies the ASP as being near the barracks before the attack.[48] Of course, the interests of both Karunasena and Walpola would be served if it was accepted that their superior officers had been on the scene. But other, less interested parties also identify the ASP and HQI as being there at least by the time the attack was in full swing. Captain Abeyratne stated in his testimony before the commission that he had seen ASP Dayaratne there at the very early stages of the attack, before the crowd had had a chance yet to set fire to the camp (many of the inmates were either burned to death or had their bodies burned afterwards). And according to an even more reliable witness, the Bandarawela Divisional Secretary, W.N.R. Wijeyapala, the ASP and HQI were both well inside the camp when Wijeyapala arrived, soon after 8:30 am, as the attack was actively underway.

Thus, if Captain Abeyratne's and the Divisional Secretary's testimony are correct, the ASP and HQI were there early enough to be as responsible for the shootings and killings of the inmates as any of the other police officers. And indeed, the Commission accepts that the ASP and HQI were at the scene while the attack was going on: "I have no doubt that ... both the ASP and HQI were present in the Rehabilitation Centre while the crimes were still taking place and

47. Commission Report, p. 120.

48. *Ibid.*, p. 126.

assailants were freely moving about carrying weapons inside the Rehabilitation Centre."[49]

While the Commission report is severely critical of the ASP and HQI for their inaction, which it classifies as "dereliction of duty,"[50] it nonetheless presents their failure as one of negligence and indifference, rather than the result of foreknowledge, acceptance, or willful complicity in the attack. "Evidence which I have already discussed in my report do establish that ASP Dayaratne, HQI Jayantha Seneviratne, Inspector Karunasena, Sub-Inspectors Walpola, Ratnayake and Abeynarayana were around whilst the crimes were committed inside the Rehabilitation Centre [sic]."[51] Of these officers, the Commissioner goes on to write, "I have come to the conclusion that the conduct of [these] officers on 25.10.2000 should be the subject of a disciplinary inquiry, for the reason that their inaction, and attitude at the time of the incident is indefensible. There is ample evidence that they were present at the time of the incident and made no effort either to avert the attack or to disperse the mob and arrest the offenders."[52] Without offering any explanation, however, the report chooses to disregard the claims of Karunasena and Walpola that their superior officers had been there from the beginning, choosing instead to accept the ASP's and HQI's claims that they were on their way to a disciplinary hearing in Badulla when they got the news of the attack, and only got to the scene after it was too late to prevent the violence.

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49. *Ibid.*, p. 143. Indeed, according to the testimony of SI Chintaka Abeynarayana, the ASP allowed an inmate to be attacked and beaten at his feet, even as the inmate was pleading for his life. The ASP did nothing to help the inmate other than to eventually order the police to drag the inmate away. The exact fate of the inmate is left unclear in Abeynarayana's testimony. Commission Hearings, 14th September 2001.

50. *Ibid.*, p. 190.

51. *Ibid* , p. 190.

52. *Ibid.*, p. 205.

There is significant circumstantial evidence, however, to suggest that more might well have been going on than the Commission's framing of the events allows one to see.

A host of evidence exists that implicates the hierarchy of the Bandarawela police in a pattern of animosity against the inmates, likely foreknowledge of the attack, and falsification of evidence afterwards – which adds up to something significantly more than negligence. For instance, with respect to the actions of the police, there is strong evidence that HQI Seneviratne was angry at the way the inmates had treated him when he had visited the camp on the evening of the 24th. According to videotaped interviews with the HQI and with others who had been at the scene, it is clear that the HQI felt humiliated by being forced to enter the camp unarmed and negotiate with people who were, after all, suspected and surrendered LTTE cadres. According to one reliable source who had been at the scene, the HQI had denounced the detainees when he was leaving the camp that evening. In a voice loud enough to have been heard by the crowd that had gathered around the camp, the HQI is said to have pronounced something to the effect that, "these people are bad people, they overran the police post, they forced me to come in without a gun and put knives against our throats."[53] In addition, we know from the Commission report and other sources that the anti-camp posters, with their homicidal and bitterly anti-Tamil slogans, had gone up the night of the 24th not only around the camp, but in Bandarawela town, too, and that the police would certainly have seen them. We know from eyewitness testimony before the Commission that the police stationed at the camp on the 24th were themselves spreading rumours that the Tigers would attack the village. And the Commission has also established that the ASP and HQI lied when

53. Personal interview with the author, Colombo, August 2003. For a news article that quotes the HQI in ways that lend support to these claims, see Palitha Ariyawansa, "Tears Oozing from the Hearts of Bindunuwewa Tragedy." *Lankadeepa*, 6th July 2003.

they claim to have fired tear gas during the attack. (Indeed, they had chosen not even to supply their police at the scene with any tear gas at all).[54] Not only did they lie to the investigating authorities, but CID discovered that they had ordered their men in the days immediately after the attack to discharge tear gas in a nearby quarry, so as to create evidence that they had done their best to disperse the attacking mob. And finally, we also know that the Bandarawela police deliberately kept their duty logs from being seen by investigators from the Human Rights Commission.

The Commission also failed to investigate and report upon the distinct possibility that the attack had been planned, or at least aided, by forces outside the surrounding villages. The Commission report leaves unexamined the identities of the owners of the vehicles that came to the camp on the morning of the massacre. The political affiliations of those involved in the attack remain unexplored, although rendered relevant in this context by evidence placed before the Commission. Many of the posters bearing racist and anti-camp slogans were written on the backs of People's Alliance election campaign posters.[55] The possible connections with other political forces also remain unexplored: for instance, the role of the local Sihala Urumaya organizer, who lived directly opposite the turn off to the Bindunuwewa camp from the

54. At one point in the High Court's judgment, it states that Karunasena had tear gas available before the attack took place. However, the Commission report is clear that this was not the case (Commission Report, p. 186). Indeed, even the best claim that ASP Dayaratne can make is that he ordered tear gas to come after the attack and that it was used to disperse the crowd still in the centre (p. 149). Yet the Commission was able to disprove even this claim (pp. 154-8).

55. With respect to these posters, the plot thickens considerably given that the driver for the then Uva Province Chief Minister Weerawanni was seen at the camp during the attack. According to a reliable source involved in the investigations, it was Weerawanni's driver who had brought many of the posters to the Bindunuwewa area and had visited the camp surroundings a number of times during the night of the 24th-25th. Personal interview with author, Colombo, August 2003.

Badulla-Bandarawela road; or reports about the Sinhala nationalist political leanings of some of the homeguards posted to the rehabilitation centre.[56]

Instead, the Commission report offers blanket assurances that there is no evidence to suggest the attack was planned by outside forces. The Commissioner states toward the end of his report that "I have also placed on the record that this attack was not master-minded or planned by any external forces and that it was not a pre-planned one."[57] Such a blanket statement, without any other evidence in the report that such a possibility had been seriously investigated, is clearly not adequate.

While the Commission report certainly adds much to our knowledge about the massacre and the conditions that led to it, and should be made available to a wide public, the overall framework it employs to interpret the attack obscures many of the deeper political dynamics at work in the camp and the rehabilitation system and largely depoliticizes the attack itself. Unfortunately, what knowledge the report does have

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56. These points are made in an essay by Wije Dias, "Sri Lankan High Court Whitewashes Massacre of Tamil Detainees," *World Socialist Website*, 19th September 2003 www.wsws. Similar suggestions can be found in D.B.S. Jeyaraj, "The Bindunuwewa Massacre: The Inside Story."

57. Commission Report p. 197. Exactly what this refers to, however, is ambiguous, especially given an earlier passage in the report. There the Commission makes a similar claim, but it seems to refer more to the possibility that the Tigers might have been responsible for the attack. The report addresses the issue of "external forces" in relation to the testimony of Brigadier Jayasuriya, who had been asked about the military situation in the country at the time of the attack, "for the purpose of seeing whether there were any extraneous or external forces operating to stage this attack on the Rehabilitation. He testified that the ground situation was very much favourable to the army at the time this incident occurred. Anyway I have considered this matter in another chapter and have come to the conclusion that no extraneous or external forces or persons were involved in staging the attack on Bindunuwewa" (p. 161).

to offer had until recently been unavailable to all but a very small handful of people, as the Commission's report has yet to be released to the public by the President.[58]

5. The Trial-at-Bar: 25th March 2002 – 1st July 2003

5.1 The Indictment

Unfortunately, many of the most important findings of the Commission don't seem to have been taken into account in the indictments, framed by the Attorney General's Department, that constituted the framework for the High Court's Trial-at-Bar.[59] The story of the massacre proposed by the prosecution in its indictments and in the trial follows the general outlines of what is found in the Commission report: it tells the story of a massive crowd spurred into action by fear and rumours of marauding Tigers, and of police who failed miserably in their job of protecting the camp and its inmates, becoming a part of the mob they were supposed to control.[60] Yet, crucially, there were no indictments of the ASP or the HQI, despite all the evidence uncovered by the Commission. Nor was anyone prosecuted for any planning, or foreknowledge, of the attack.[61] It was, instead, a story of rage and hatred and fear getting

58. See note 2.

59. The Commission's Report and recommendations were forwarded to the Attorney General as per standard procedure.

60. The language of the Prosecution's written submission implies that the attack was relatively spontaneous. For example, the Prosecution twice argues in its written submission that the weapons of the villagers were "randomly taken as they constituted the unlawful assembly" (p. 50). Earlier, it writes that the "inmates were severely attacked with a variety of deadly weapons which appear to have been randomly picked up by the attackers" (p. 43).

61. According to an official of the Attorney General's office, CID was given explicit instructions to investigate the possible involvement of any political groups or other forces in organizing the attack. They were able to trace some of the posters to a number of local villagers, but they could find no links to any organizations or politicians.

out of control and police getting caught up in violent forces they should have kept in check.[62]

In the indictments handed down in March 2002, 31 local residents and 10 police offers were each accused of 83 counts. The 83 counts were composed of five categories: 1) one count of belonging to an unlawful assembly with the common object of causing hurt to the detainees (section 140 of the Penal Code); 2) twenty-seven counts of murder in prosecution of the common object of the unlawful assembly (section 296 read with section 146 of the Penal Code); 3) fourteen counts of attempted murder of the surviving inmates in prosecution of the unlawful assembly's common object (section 300 read with section 146 of the Penal Code); 4) twenty-seven counts of murder "on the basis of the Common Intention shared among the doers of the acts of offence" (section 296 read with section 32 of the Penal Code); and 5) fourteen counts of attempted murder on the basis of Common Intention (section 300 read with section 32 of the Penal Code).

The basic legal argument was two-fold. First, that those accused who were identified as members of the crowd and as being armed with weapons constituted part of a larger "unlawful assembly," which was animated by a common object of attacking and killing or harming badly

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62. The High Court's judgment reaffirms this interpretation of the events: "there was displeasure within the villages about maintaining the Bindunuwewa Rehabilitation camp. The evidence presented has proven that this displeasure was due to the fact that the inmates of the camp were known to be members of an organization called the LTTE, better known as Tigers. The evidence shows that the villagers had a significant fear of the inmates who were kept at the camp for rehabilitation. Also disclosed was the fact that the villagers were angry at the inmates for cracking unnecessary jokes at young women who pass by the camp. Evidence has also disclosed that the day before the incident, on the night of 24.10.2000, a false rumour had been spreading that the Tigers in the camp had entered the village and taken weapons belong to police Officers, and that a crowd of people had attacked the camp due to this reason." (p.18)

the inmates. Having a "common object" was here understood not to require explicit agreement between all or any of the members of the assembly, but as a goal that can be ascertained through knowledge of the shared actions and manner of the individuals involved. While the actual involvement in the assembly by each accused must be proven individually, each member of the unlawful assembly takes on a vicarious responsibility for the actions of all the other members.[63] Thus the prosecution was arguing for convictions of the accused "villagers" first for being members of the unlawful assembly (count one), and then for the specific acts of murder and attempted murder that the crowd as a whole committed (counts 2-42). They did not have to show that any given accused had committed any specific acts of murder or attempted murder.[64]

For the police officers among the accused, another strand of argument and evidence had to be added. The case was made that the police posted to protect the camp became members of the unlawful assembly in their failure to act as their legal duty required them to. In standing by as members of the crowd entered the camp and massacred its inmates and in making no attempt to control or arrest any of the attackers, the police came to share in the common object of the unlawful gathering.

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63. As stated in section 146 of the Penal Code, "If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly is guilty of that offence. (Cited in the Prosecution Written Submission, p. 36.)

64. High Court Judgment, p. 76. In respect of charges 43-83, which were based on the separate principle of common intention, the prosecution eventually conceded in their concluding written submission that the evidentiary requirements for proving "common intention" had not been met, given that section 32 of the Penal Code requires that specific doers of positive acts be identified individually by witnesses. (Prosecution Written Submission, p. 51). Thus these charges were effectively dropped at the conclusion of the case, an action the High Court acknowledges in its judgment at pp.79-80.

To make this connection, the prosecution had first to argue that there was ample legal precedent for considering an "illegal omission" to arise from the failure to perform one's duty, a principle they held was especially well established in cases of homicide.[65]

Of the villagers charged, all had been identified by eye-witnesses as being at the scene of the crime with weapons in hand. Unfortunately in criminal cases of this sort, where it is neighbor who has to testify against neighbor (and, in one instance, relative against relative), eyewitness testimony can constitute a less than reliable foundation. And indeed, at the conclusion of the Prosecution's leading of evidence, the Prosecution applied to the court to have charges dropped against 23 of the 41 accused, citing lack of evidence. The withdrawal of charges was due to the failure of four witnesses to testify against their accused neighbors consistent with the statements they had earlier made to the CID.[66] One of the ten accused police officers was also discharged at this stage as well.

With respect to the police officers charged, there were problems of a different nature. Of the more than 60 police officers stationed at the camp at the time of its attack, only those of medium rank – Sub-Inspector and Inspector – were charged: they were either those whom witnesses identified as being posted at the main entrance to the camp,

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65. Prosecution Written Submissions, pp. 36-41.

66. According to a number of reliable sources, among the twenty-three accused discharged were some of the ring-leaders of the attack. The four would-be witnesses claimed that they had been threatened and warned not to testify against their neighbors. The prosecution, with the enthusiastic agreement of the angry judges, had the witnesses charged with perjury and immediately remanded. Their case was heard on 28th August 2003, at which point they were each sentenced to two years of rigorous imprisonment. According to a number of sources, the witnesses who refused to testify had in fact been threatened, as they had claimed. According to unconfirmed reports, so had some of those who did testify.

or those in charge of one of the detachments sent to guard various other locations around the camp.

This prosecution strategy had two problems. The first and most obvious is the failure to charge either of the two senior officers with any crimes. The Prosecution at the Trial-at-Bar chose to endorse the ASP Dayaratne's and HQI Seneviratne's position and make them into crucial state witnesses, despite the incriminating evidence available from the Commission Report and other sources.[67] Second, the Prosecution's choice of police accused meant that at least some of those who were stationed at the camp entrance and who were responsible for the shootings of the fleeing inmates were not charged. Finally, and more generally, the prosecution strategy had another major drawback: it choose to press only the most serious charges – murder and attempted murder – and yet supported it with no other evidence than eyewitness testimony, which was either from other interested parties (e.g., the HQI and ASP) and thus of questionable value, or from those easily intimidated.[68] This was a high-risk strategy.

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67. The Commission had established that at least six officers – ASP Dayaratne, HQI Seneviratne, Inspector Karunasena, and Sub-Inspectors Ratnayake, Abeynarayana, and Walpola – were all implicated in the police failure to act while the crimes were under way. Of these six, the four lower ranking officers all stated to the Commission that the ASP and HQI were there at the scene; the HQI and the ASP each blamed the junior officers. When asked in a personal interview why the HQI and the ASP were not charged, the State Counsel leading the prosecution, Priyantha Nawana, stated that they could find no evidence against them. For those not privy to the CID report and the statements it contains, nor to what testimony other witnesses might have agreed to give in court, it is hard to reject this claim out of hand.

68. The prosecution did enter into evidence a number of photographs taken by a police photographer sometime around 9:15 am, when the attack was over or just winding down. These pictures clearly show police – including officers identified as Ratnayake and Karunasena – standing along side numerous club wielding attackers. The High Court judgment makes no mention of the photos, perhaps because they were taken after the attack was (largely) concluded.

6. The Judgment

Of the remaining eighteen accused, nine were residents from the local area, and of these, the court convicted three. Each was convicted of being a member of an unlawful assembly, and, through their sharing in the crowd's common motive of death and destruction, each was held responsible for multiple counts of murder, one count of attempted murder, and multiple counts of assault.[69] Each was sentenced to death. The three convicted local residents were those whom the court was able to find some convincing evidence of having actually been involved in the attack within the camp, rather than simply being part of the larger crowd surrounding the camp, which the Court held was not sufficient to make one a part of the unlawful assembly. Instead, they held, some more active manifestation of one's criminal intention – in all three cases it was that of being seen armed and within the camp premises – was required.[70]

Thus, the fourth accused,[71] Munasinghe Arachchige Sammy, was spotted by an eyewitness first outside the camp, standing with a club

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69. "This panel of judges conclude that it has been proven that the 4th, 13th, and 21st defendants remained as members of the unlawful assembly knowing at that moment that the crime would be committed, and thus, 4th, 13th, and 21st defendants hold collective responsibility for the crime committed by those gathered." (Judgment, p. 77). Each accused was convicted of only fifteen counts of murder, however, as the judges held that the inability to identify twelve of the twenty-seven bodies meant that "the dead bodies related to post-mortem reports P59-P70 have not been clearly proven to be the bodies of those related to charges 17-28. In addition, only one of the fourteen charges of attempted murder charges were affirmed, as the justices held that most of the injured were not wounded seriously enough to prove attempted murder; three of the charges were dropped outright as no judicial medical reports had been filed for those survivors.

70. Judgment, p. 77.

71. Each of the forty-one accused in the case were given a number. It is on the basis of their number, not their names, that the defendants are referred to in the written submissions by the Prosecution and the Defense, as well as in the High Court's judgment.

in his hand within the grounds of the Teachers' Training College (referred to in Sinhala as the *Vidyapeetaya*) which bordered the Rehabilitation Centre. This same witness later saw him inside the camp, still with the club in his hand.[72] Later, as the witness was helping to rescue one of the younger inmates, he was struck from behind by a club. When he looked up, the only person near him with a club was Sammy. Thus the Justices conclude that there is strong evidence that Sammy, by choosing to enter the camp armed with a weapon, had entered into the common motive of the unlawful assembly. The second of the three local residents, accused number thirteen, D.M.S. Dissanayake, was seen by another eyewitness emerging from the Centre grounds with a club in his hand, as the barracks were burning and the attack was coming to an end.[73] Finally, the twenty-first accused, R.M. Premananda, a taxi driver in the town of Bandarawela, was convicted on the basis of the most extensive evidence of anyone: two witnesses described driving with him to the camp, seeing Premananda enter the camp while the attack was ongoing, then seeing him reemerge with a bleeding hand, after which one of the two witnesses drove him to a private clinic where his hand was sutured. The doctor at the clinic who treated his hand also testified at the trial and was able to identify the accused.

With respect to the role of the police officers in the attack, the Court accepted the prosecution's argument that police inaction amounted to an illegal omission that made them into willing members of the unlawful assembly. In the Court's words, "by allowing a large group of people to gather around the camp, allowing them to enter the camp and burn the halls inhabited by the inmates, allowing them to be present with weapons, allowing them to attack the inmates and kill them, allowing them to attempt burning the bodies to tamper with evidence,

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72. Judgment, pp. 64-67.

73. *Ibid.*, pp. 17, 67-9.

while silently watching, shows that the police aided these actions."[74] Crucial to the Court's judgment on this issue was their finding that, since the attack included the burning of the inmates' bodies, it must have, from beginning to end, taken something on the order of an hour. This would have given the officers plenty of time to make at least some arrests or otherwise express their rejection of the crime.[75] Equally important was the testimony from the survivors that after they had told the police stationed at the camp that they were afraid that the gathering crowd would attack them, they were told to remain in their billets and the police would protect them. Thus the police on duty had ample forewarning and yet had done nothing to disperse the crowd – which the Court holds would have been easily done – or otherwise prevent the attack. For instance, the Court suggests that the police could have chosen to station some or all of its men immediately around the barracks to which they had themselves asked the inmates to retreat. Instead, once the attack was underway, the police not only did nothing to prevent it, they actually took part by firing on the fleeing inmates.[76]

Of the nine police officers still charged when the case went to the bench for judgment, only two were convicted. These were Inspector S.J. Karunasena (the 32nd accused) and Sub-Inspector T.R. Ratnayake (the 41st accused). Both officers were convicted in large part because the Court was convinced that they were stationed at the main gate throughout the attack and therefore were at the center of the action: their failure was manifest.

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74. *Ibid.*, p. 22.

75. The Court's reasoning, then, would seem to implicate the ASP and HQI in illegal omissions as well, since according to the evidence gathered by the Commission, the ASP and HQI were at the scene within ten minutes of the start of the attack.

76. It is important to note, however, that a number of the inmates were saved by police officers, though neither the Commission nor other investigators were able to identify which officers these were. There were also a number of brave local residents who rescued at least two of the younger inmates.

Karunasena, in addition, bore the burden of the fact that it was believed that he had been placed in overall command of the police detachment at the Rehabilitation Centre. Thus, to some degree, the Court implicitly relies on a notion of "command responsibility" to hold Karunasena accountable, repeatedly emphasizing his role as the commanding officer and blaming him for the overall failure to protect.[77] "This Panel of Judges conclude that 32nd defendant had the ability and the means by way of troops to control this situation, and as he failed to do so, he is considered to hold criminal responsibility."[78]

In addition, Karunasena is specifically taken to task for the deadly shots that were fired at the inmates running for their lives. In an effort to show that he had in fact taken some action to disperse the crowd, Karunasena stated in his dock statement at the very end of the trial that he had ordered his men to shoot in the air.[79] If this is so, then it might

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77. The legal principle of "command responsibility" is increasingly recognized in international human rights and humanitarian law, though it is not at this date explicitly recognized in Sri Lankan law. The principle holds that personal culpability can attach to a superior officer for actions committed by those under his command. A commander's failure to take action to prevent crimes he knew of, or should have known were likely, makes those crimes his own. The growing acceptance and application of the principle – most recently in a number of landmarks cases before the International Criminal Tribunal for the Former Yugoslavia – is due in large part to its ability to break with the sad tradition in which lower level soldiers or officers are convicted while their superiors who planned or approved their actions remain untouched. In the Bindunuwewa High Court's judgment, the principle of command responsibility remains only implicit. It is not named or relied upon as such – and its application noticeably fails to reach to the top of the chain of command.

78. Judgment, p. 50. Earlier, the Court has stated that "had defendant 32 had a group in Police Uniform with broomsticks in their hands, he would have been able to prevent this crime."

79. According to one source, a government analyst revealed evidence of trees being damaged by gunfire, which would support Karunasena's claim. It is not clear why this evidence was not submitted at trial.

suggest that the killing of the inmate was accidental. Yet if that is the case, the court asks, why was it that only inmates were shot, not any villagers? "On the other hand," the Court writes, "defendant 32 has not stated that anyone shot outside of his orders. Accordingly, this Panel of Judges has to conclude that shooting at the inmates occurred with the knowledge of defendant 32."[80]

Sub-Inspector Ratnayake, in turn, is also argued to have been at the main gate with Karunasena at the time of the attack. Two witnesses, both of them Police Constables, are cited as giving testimony that locates Ratnayake at the main gate.[81] His inaction, like Karunasena's, is said to have made him a full member of the unlawful assembly and thus criminally liable.

Both Karunasena and Ratnayake made dock statements in which they stated that the ASP and HQI were present at the start of the attack, and that it had been the duty of their superiors, not them, to order action taken against the attackers. Attempting to escape responsibility, the ASP and HQI have blamed them instead. In both cases, the Court ruled that both defendants and their lawyers had had ample time to cross-examine the HQI and ASP when they were giving their testimony, but none did. The fact that they both raised this issue for the first time only in their dock statement (where they cannot be cross-examined) is further reason to discount their claims, the Court reasoned.[82]

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80. Judgment, p. 54.

81. *Ibid.*, pp. 60-63.

82. *Ibid.*, pp. 52-3, 63. Under Sri Lankan law, an accused may opt to make a dock statement rather than give evidence under oath. A dock statement isn't subject to cross examination, but it does constitute evidence that the court can take into consideration in deciding whether the guilt of the accused has been proven beyond a reasonable doubt. The failure to exercise the right to make a dock statement is also relevant.

The other seven officers were all acquitted. This included Sub-Inspector Jayaratne, the 33rd defendant, who was stationed under Karunasena's command at the main gate. The court cites the HQI's testimony that it was Jayaratne who telephoned him to alert them to the attack on the camp just as he and the ASP were heading to Badulla. "Thus," the High Court argues, "according to the behavior of defendant 33, he had informed higher officers about the incident at the beginning of the incident, and requested help. Accordingly, it cannot be concluded that defendant 33 held the common motive held by the others gathered to do harm to the inmates, or that he acted with that common motive."[83]

The remaining six officers were all judged to have been located too far away from the interior of the camp to have known what exactly was happening: the Justices write that "it has been proved that defendants 34, 35, 36, 38, 39, and 40 could not clearly see the camp from the place at which they were positioned."[84] Thus they could not be said to have joined with the unlawful assembly.

Interestingly, this group includes Sub-Inspector Walpola, the 38th defendant, who is acquitted, despite the Commission locating him clearly at the Vidyapeetaya playground, from which large numbers of the crowd surged into the camp, and from which vantage point one could see everything going on in the camp.[85] For some reason, however,

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83. Ibid. p. 56. It is worth noting that the Commission had earlier determined that Karunasena had alerted the HQI much earlier that a large crowd was gathering and that action needed to be taken. By the High Court's own reasoning, this would seem possibly to absolve Karunasena as well. However, this evidence was not presented before the High Court, either by the prosecution or the defence, and Karunasena never testified under oath.

84. Judgment, p. 59.

85. Commission Report, p. 188. Similarly, the Commission locates defendant 35, Sub-Inspector Abeynarayana, at the main gate. It is not clear from the documents available to this writer where exactly the prosecution locates Abyenarayana, but it doesn't appear to be at the main gate.

the prosecution's written submissions makes no specific mention of his location or his specific culpability: Walpola is simply included together with the other 6 officers who were posted elsewhere, some of whom, one could argue, were indeed too far from the scene to have done anything. (Whether this absolves them of all responsibility, however, is questionable, as it's unlikely that they wouldn't have heard the noise of the attack and the inmates' cries, seen the smoke from the burning buildings, and known something was happening).

7. Unanswered Questions

The judgment, and the trial as a whole, while welcomed for the much needed precedent it sets for the punishment of official misconduct and anti-Tamil violence, nonetheless leaves a host of unanswered questions, and raises new ones in turn. These questions can be grouped into two general categories: questions of fact, and questions of law, procedure, and fairness.

7.1 Questions of Fact

1. The first question concerns the basis of the conviction of one of the two police officers, Sub-Inspector Ratnayake. **The Prosecution case for locating Ratnayake at the main gate** during the attack on the Centre is in fact surprisingly uncertain. The testimony of Police Constable H.L. Kusumapala, who arrived with Ratnayake and other police from the Diyatalawa station at the camp at about 6:45 am, is that he and the rest of the team were positioned away from the camp, midway along the road that runs from the camp to the Agrarian Centre, some 50 metres from the camp. Kusumapala says that after positioning the rest of his team there, Ratnayake continued along the same road towards

Bandarawela, which is in the opposite direction from the camp. He then states that while posted near the Agrarian Centre, he heard shouts and noises from the camp and that he was unable to contact Ratnayake because he "had gone down". According to the transcript of the trial proceedings, Kusumapala stated that Ratnayake "went down the road. I was expecting he would come back."[86] It is unclear, however, what "went down the road" refers to: does it mean Ratnayake went towards the camp? Before the noises were heard? If so, why isn't this stated more clearly? A second witness, Police Constable T.M. Gunapala, states that he arrived at the Bindunuwewa camp at about 6:30 a.m., where he met both Karunasena and Ratnayake who were then on the grounds of the Vidyapeetaya.[87] He doesn't state where Ratnayake was during the attack.[88]

What we know with certainty is that Ratnayake was at the main gate after the attack. He was present while the injured, and perhaps bodies of the dead, too, were placed in a police truck at the conclusion of the attack, some time after 9 a.m. We know this from a photograph taken by a police photographer, and confirmed by the eyewitness identification of Ratnayake and Karunasena by Police Constable R.D.

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86. High Court at Bar Case No. 763/2002, Original Case Record, pp. 860-886.

87. *Ibid.*, pp. 886-929.

88. There is no necessary geographical inconsistency in the testimony of the two witnesses. It would have been quite possible for Ratnayake to have left Kusumapala near the Agrarian Centre and gone towards Bandarawela and then end up later on the Vidyapeetaya grounds, and to do so without going past Kusumapala. And there would have been a direct path for both Ratnayake and Karunasena to go from the Vidyapeetaya grounds, where Gunapala locates them, to the main gate: indeed, this is the route that most of the mob took when attacking the inmates.

Mangalasiri. But this is after the attack. And however damning the pictures are – they show the police officers standing at ease next to numerous club-wielding villagers with bodies of victims lying on the ground – they were clearly taken after the attack had largely concluded, so they tell us nothing about where Ratnayake was at the time the attack began. What remains unclear, then, is why the prosecution was unable to offer a stronger case for Ratnayake being at the main gate, or at some other strategic position, when the attack happened. The Commission on its part was certainly convinced that Ratnayake was at the main gate.[89] During the Commission hearings, one of Ratnayake's colleagues, SI Walpola, located Ratnayake at the main gate at the start of the attack. It is unfortunate that the evidence of the Prosecution at the High Court trial was so ambiguous, since it undermines the public legitimacy – and possibly the legal validity – of the conviction by offering grounds, however inconclusive, for Ratnayake and his supporters to claim he was unjustly punished.

2. **The use of photographic evidence** by the prosecution itself raises a number of important questions. The prosecution accepts that the photographs were taken after the attack had taken place and show no specific crimes being committed. Yet the photos were obviously meant to influence the Court's opinions about the attitudes displayed, and actions (not) taken, by Karunasena and Ratnayake towards the attacking mob, large numbers of whom can be seen in various photographs submitted in evidence. And while the Court doesn't make reference to them in their judgment, it remains possible that their opinions about the location of Ratnayake

89. *Ibid.*

were nonetheless affected by having viewed the photos. A further set of questions arises here: if the point of submitting the photos into evidence is to show that the police took no action in the wake of the attack, even as armed attackers were still comfortably mingling amongst the police within the camp, then the photos would seem to implicate the HQI and ASP as well, since they were unquestionably on the scene – even by their own testimony – at the time that the photos were taken. In addition, why was the whole roll of negatives, preferably the originals, not submitted? Based on the testimony of police photographer P.A. Kurukulasooriya, we know that not all of the photographs taken were submitted into evidence and we know that the photos that were submitted were made from negatives that were themselves not the originals, but copied from the first set of "positive" photographs. That second set of negatives was cut up, with only some photographs put into evidence. What, or who, was shown on the missing negatives?[90]

3. This leads us to the most crucial question of fact: **why were no charges filed against the HQI and the ASP?** It would seem, based on the findings of the Commission and numerous witnesses interviewed over the past two years of independent investigation, that a strong case might have been made against both officers for having been on the scene from the beginning of the attack. But at the very least, clear evidence exists for charging them with various crimes once the attack had begun. This would include the obvious dereliction of duty in making no arrests, in allowing the

90. Supporters of Karunasena and Ratnayake are quick to suggest that the missing photos must have revealed the presence of the HQI and/or the ASP. Whether this is the case may never be known for certain, given the unusual handling of the photos.

deaths of inmates in the police truck parked at the main entrance, in allowing some inmates to be shot, and for the suppression of evidence involved in moving the dead bodies before the magistrate was able to arrive and perform post-mortem examinations. The Court judgment cites this last crime in particular, but blames it instead on Karunasena, despite the ASP's own admission that it was he who gave the order to dispatch the bodies.[91] Why, then, were no charges filed against the senior officers? Was it because, as one of the State Counsels involved in the case stated in an interview, there was no evidence against them?[92] Would no one have testified against them? Karunasena and others certainly did so in their testimony before the Commission of Inquiry. The fact that HQI Jayantha Seneviratne is now the SSP of Traffic at Fort Police Station, a significant promotion by all accounts, is viewed with great suspicion among many in the Bandarawela area. (ASP Dayaratne is now retired.)

Closely related is **the failure to challenge the position of the HQI and the ASP through cross-examination**, especially by defence lawyers representing Karunasena and

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91. The Court writes that "the dead bodies had been hauled into trucks and transported by the police, which the Panel of Judges concluded an illegal action and that it is an act of willful tampering with evidence. If the police had not supported this process [i.e., the massacre], what they should have done when they found the bodies was to take necessary measures to keep the bodies as they were until the Magistrate carried out post-mortems." (p. 21) The Court makes this part of its indictment of Karunasena, but it clearly applies more to the ASP and HQI. For the ASP's admission of his decision to dispatch the bodies, see pp. 631-3 of the case record, and p. 9 of the Prosecution's written submission. Other sources, however, claim that it was only until the Army arrived, and on their orders alone, that the injured were shipped to hospitals and the dead bodies gathered and taken away.

92. Personal interview with author.

Ratnayake. Why weren't Karunasena and Ratnayake allowed to testify and state their cases under oath, rather than waiting until their much weaker interventions from the dock? Was it because their lawyers imagined – based on the historical record and what they thought was a weak case against their clients – that the police would be acquitted and so didn't need to take the risk that such testimony would entail (at the very least to their careers as police officers)? Why didn't they call as a witness the Bandarawela Divisional Secretary, who testified to the Commission that the ASP was there in the camp very early on in the attack? Could these decisions be explained in part by the fact that the lawyers for Karunasena and Ratnayake were also the lawyers for SI Jayaratne, who escaped conviction solely on the basis of the HQI's own testimony that it was Jayaratne who alerted him to the mob attacking the camp?[93]

4. **The shooting of the fleeing inmates** is another crucial point where there remain more questions than answers. The inmate who was shot to death had six bullet wounds on his body from three separate bullets – yet none of the bullets could be entered into evidence. According to testimony given to the Commission by Mrs. K.K. Joowzir, who was the Assistant Judicial Medical Officer who performed the autopsy, she gave the three bullets to "an investigation officer" whom she was later unable to identify.[94] This was a violation of

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93. It is interesting to note in this regard that the lawyers for Karunasena and Ratnayake reiterate on p. 12 of their written submissions Karunasena's dock statement that the HQI arrived at the camp by 8 am, well before the attack. This contradicts their own use of the HQI's testimony that it was only at 8:30 that the HQI received a call from IP Jayaratne that the camp was being attacked (p. 16).

94. Commission Hearings, 17th May 2001.

proper legal procedure, and the bullets never reappeared. As a result, there was no evidence that linking the shooting and death of the inmate to any particular police officer. Toward the end of the trial, the prosecution did try to introduce into evidence three T-56 rifles and various used cartridges. But under cross examination by the justices, the Government Analyst could not show any clear, uncontaminated, chain of evidence linking the rifles and cartridges to specific police officers. The justices therefore refused to allow the evidence to be submitted. The Prosecution's written submission states that they weren't able to learn who was using which gun.[95] But is this true? And if so, why? Are no such records kept? One source in the Attorney General's office explained that it wasn't possible to match the spent cartridges found at the scene to particular guns, only to the general type of gun. But if this is so, why attempt to submit these three guns into evidence in the first place?[96] These would all seem to be crucial questions, but what kinds of investigations, if any, took place, and by whom, remains publicly unexplained.

7.2 Questions of Law, Procedure, and Fairness

1. The general line of defense taken by Karunasena, Ratnayake, and their police colleagues was to challenge **the fairness of prosecuting them for illegal omission that rendered them**

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95. Written Submissions of the Prosecution, p. 34: "Prosecution was also not able to pursue the matter with regard to the suspect weapons, as the identity of the user could not be established."

96. The report of the Commission of Inquiry states that three police officers fired their guns – but it doesn't say how it knows this, or whose guns they were.

part of the unlawful assembly. To convict someone of murder and attempted murder should require direct evidence of specific actions by specific individuals. Instead, they argue, first, that they were merely following orders and, second, that they were unable to control the crowd – in large part because the HQI and the ASP hadn't given them the necessary resources: anti-riot equipment, rubber bullets, tear gas, or enough men.[97] How one judges their claims to have been unable to control the crowd depends to some degree on how many people were among the crowd, and of these how many were actually armed. Many witnesses testified to crowds of 2,000 to 3,000 people, yet these would seem to be exaggerated figures for the space involved, and clearly not all the crowd entered the camp, nor was the entire crowd armed. Furthermore, none of the attackers were carrying firearms. In defense of his clients, President's Counsel Daya Perera argued that there is an established principle of law that would hold in this case that the prosecution must show that their interpretation of police (in) action – i.e., that the police shared the common motive of the unlawful assembly – is the only possible or necessary inference from such (in)action. In this case, that standard hasn't been met, he argued, as there are other possible inferences: e.g., that the police were paralyzed with fear, or that they were too scared, especially given their lack of resources, to shoot and kill the attackers, for risk of making the huge crowd turn on them. If there were reasonable grounds for either of the policemen's claims – that they were merely following orders, or that they were unable to control the crowd despite their wishes – the

97. The Court states on p. 42 of their judgment that the police were armed with tear gas. But the Commission report seems to hold that no tear gas was available until reinforcements from the Bandarawela station arrived after the attack was over.

fairness of charging them as members of the unlawful assembly would be substantially weakened.

2. The first question is immediately involved in a second one, which concerns **the failure to examine the degree of involvement of the HQI and the ASP**. The fairness of the verdict is clearly reduced by the obvious involvement of the HQI and ASP (whenever one believes they arrived on the scene). If the Court's intention was to convict those they felt were effectively in charge of protecting the camp, then it clearly is a problem that they didn't have the option to convict HQI Seneviratne and ASP Dayaratne. On the other hand, if the intention was to convict those people who facilitated the mob to do their work, then it would have been better to have more specific evidence of actual acts committed – such as who fired the deadly shots, or who allowed the killings to take place in the police truck. The lack of direct evidence linking specific people to specific criminal acts was clearly one of the reasons why the indictment of the police personnel was framed as it was, namely by charging the police with vicarious responsibility through sharing in the common motive of the unlawful assembly. Yet if this was to be the route to justice, stronger evidence of the exact location of the specific officers would have been beneficial. Assuming the Prosecution's version of events is accurate, then Karunasena and Ratnayake surely weren't the only police committing an illegal omission in allowing the crowd to enter the camp.[98]

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98. Why wasn't stronger evidence presented against Walpola, for instance?

3. Finally, theses issues raise basic questions about the prosecution's high-risk strategy of **choosing to prosecute only the most serious crimes** – murder and attempted murder – but with relatively weak evidence against many of the accused. With hindsight, this might not have been the wisest strategy. Would it not have made sense to include other lesser charges as well, as suggested above: suppressing evidence, aiding and abetting the crowd, dereliction of duty? Perhaps there was the fear that the Court would, if offered the chance, convict on these lesser charges and not on murder and attempted murder. While the gamble paid off in the courtroom in the form of convictions, the verdict is still out on whether the convictions will hold up under appeal. And the political price to pay for this strategy has been high, as the message sent by having some police officers sentenced to death on indirect evidence, even as the HQI and ASP remain untouched, has been far from conducive to either harmonious ethnic relations or to faith in the formal system of justice.

8. Political Consequences and Lessons

The basic ambiguity of the judgment, and the widely held feeling that the extreme sentences, and even the verdicts themselves, were unfair, suggests the political risks involved in demanding human rights prosecutions without having the investigative, judicial, or civil society mechanisms in place to guarantee a full and accurate airing of all available evidence. The strongly negative reaction to the verdicts, especially among police and among Sinhalese in the hill country, is very worrisome. The message many people saw in the verdict, fairly or not, was that average Sinhalese villagers and police are made into scapegoats, while the big guys remain untouched (and the Tigers go

on violating the ceasefire at will). Thus the unclear message it sends about impunity – that for political reasons some people must be held accountable, but that, for political reasons of a different sort, those people won't be the big guys – actually undermines whatever positive message it was hoped to send about ethnic justice. If the Bindunuwewa case proves anything, it is that simply having a trial for trial's sake is not only inadequate, but can actually be dangerous.

The deep and very genuine ambiguities at the heart of the Bindunuwewa case were captured very nicely in a recent discussion with a government official familiar with the case. "In my heart, in a way, I'm satisfied," he said. "Justice has been done." Arguing that the police could have prevented the attack, but were "lethargic, casual, negligent," he held that the judgment sent a clear message to the country: "the police hereinafter can't say they can't prevent things. They now have a clear duty of prevention." Unfortunately, with the tearful interviews with the convicted police spread over the front pages and on people's TV screens, "the whole spirit of the conviction is gone. The general public is now angry – without the intervention of media, people would have been very fair-minded – people have been pushed to be communal-minded by a competitive media." Indeed, as he says, these popular attitudes could very well register in the minds of the Supreme Court Justices hearing the appeal. "They will try to be fair minded but can't help but be very aware of public opinion."

And yet, even as he defended the justice of the decision, the government official went on to say that perhaps an Inspector of Police really can't be expected to stop such an attack – he would be unlikely to shoot at the crowd without clear instructions from his seniors. Of the HQI's claim that he had to attend a disciplinary hearing that morning: it was "absurd" that he would think this takes priority over situation at the camp. Thus, "in a way what junior officers say is true." The Attorney General's Department "does its job going by the law, but practically

speaking there are other factors at work" – i.e., it's not really clear that the police could have prevented the attack, and its clear they didn't take an active part in the killing. Yet the Supreme Court is aware that a reversal on appeal would speak badly of the legal system – thus other political issues will inevitably come into play. The junior officers then are "mere pawns". Perhaps this official is a little too generous to junior officers like Karunasena and Ratnayake, given what we know about the carnage that went on while they stood and watched – and perhaps shot – with their superiors present, too, of course. There can be no doubt that there was an utter moral and legal failure on the part of the police, both collectively and individually, even if the precise details of who failed how and to what degree will likely remain forever unknown.

Yet the tensions and ambivalence that characterize the officials' analysis of the case suggest the deeper strains of a legal and social system struggling under the burdens of a history filled with violence and impunity.[99]

Indeed, the Bindunuwewa case has revealed in particularly sharp relief the continuing weakness of Sri Lankan and international civil society: mechanisms for sustained and effective follow up in cases like Bindunuwewa still need to be developed. The initial outrage generates calls for independent commissions, full investigations, and trials if justified. Yet there were no organized efforts by the media, political parties, civil society organizations, or the "international community" to maintain the pressure for full disclosure and to make sure that the case was being handled well, that the right leads were investigated,

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[99] These strains would also help explain the fact that the President has yet to release the report of the Commission of Inquiry that she herself appointed, a report that has been in her hands since early 2002. One can wonder what exactly the purpose of such commissions if the results of their efforts are simply destined to sit on the President's desk and on the restricted sections of the National Archives.

the proper people indicted, the full evidence presented, and the victims treated with respect.[100]

9. The Next Steps?

While the judgment of the Trial-at-Bar might seem to have brought the case to a close, especially given the apparent finality of the five death sentences, this is not quite true. **With the death sentences comes an automatic appeal to the Supreme Court.** After having received the legal briefs from the appeals, the Chief Justice of the Supreme Court announced in early June 2004 that a five-member bench, headed by High Court Justice J.A.N Silva, would hear the appeals from all five of those convicted. The arguments in the appeal are scheduled to be heard on the 10th and 11th of June, 2004. Given the ambiguities of the case, and the complex and competing political pressures, it is hard to know exactly what a just outcome would look like. Overturning the convictions of the police officers would not send a very positive message, given that it cannot be accompanied by any larger critique of the roles played by the ASP and HQI. Yet simply leaving the sentence

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100. To the list of tasks left largely undone, one would have to add the general neglect suffered by the survivors and families of victims. The former remained handcuffed to their beds in the Hospital of the Diyatalawa Army Camp for months after the attacks. (A small team of counselors, lead by the Institute of Human Rights, made a couple of trips to meet with and comfort the survivors when they were at Diyatalawa.) Five of the survivors were released from Diyatalawa six months after the attack, with the other nine serving out the remainder of their detention in Telipilai, before being released into terrible uncertainty, given the LTTE's current "arrests" and murders of released rehabilitation detainees. The President agreed to pay compensation to the families of the victims and the survivors. In January 2001, compensation of Rs. 200,000 was paid to the families of seventeen of the victims. However, the families of ten victims whose bodies were not able to be identified — due to the nearly complete burning of their bodies — are still awaiting their death certificates and compensation as this volume goes to press, more than three and a half years after the incident.

as it stands would leave a bitter taste in many people's mouths, for a range of different reasons.

Beyond the legal issues involved, there still exists some room for civil society to redeem its reputation. There is, first of all, a crying need to **press for disciplinary hearings to be held on the conduct of the HQI and the other police officers not convicted** (the ASP has since retired and is thus presumably beyond the reach of such a process). The Commission of Inquiry strongly recommended that disciplinary hearings be held against ASP Dayaratne, HQI Seneviratne, IP Karunasena, SI Ratnayake, SI Jayaratne, SI Walpola, and SI Abeynarayana. It also recommended investigations into the conduct of Captain and Lieutenant Abeyratne. At the time of writing, no such investigations or hearings had been held. And indeed, the HQI now occupies a much-coveted position. This situation would seem ripe for public pressure. **A preliminary step would be to call for the President to finally publish the Commission report**, ideally in Sinhala and Tamil as well, so that all Sri Lankans would have a chance to read it. With that objective achieved, more pressure might perhaps be brought to bear for an investigation into police misconduct. Of course, that might be one reason the report has never been released.

Finally, there is much work still to be done on **rethinking what a just and effective "rehabilitation" system for LTTE surrendees and suspects would look like**, if such a thing is indeed possible. As of early 2004, the system was in a shambles. The Bindunuwewa camp has been closed since the attack, and the Telipilai camp has run out of money and is no longer accepting new inmates.[101] Meanwhile,

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101. The Meth Sevana centre, which caters primarily to the needs of female sex workers and drug addicted women and only ever housed a handful of ex-LTTE fighters, remains quite crowded.

according to reliable sources, young Tamil men who went through the rehabilitation system have been systematically hunted down by the LTTE, and either killed, "arrested" and brought back to LTTE prisons, or forced into hiding. Foreign governments, some of whom were willing to help fund the Bindunuwewa camp, now look on and do nothing, even as some of its former inmates plead for protective asylum overseas. The Commission report contains some sensible suggestions for revamping the system, including placing surrendees and detainees in separate camps. But the problems with the former system went much deeper than this, and in some ways, Bindunuwewa was always a disaster waiting to happen. Though the spectacular and terrifying form of its collapse shocked everyone, its ultimate failure is not, in retrospect, so surprising: the camp was running on a dangerous mixture of legal ambiguity and rights violations, a lack of resources, administrative overlap and neglect, blindness by the Sinhala staff to the ethnic politics within and outside the camp, and a lack of political will within the government to do more than exploit the camp for easy anti-LTTE propaganda. The genuinely good intentions of some of those involved could only do so much.

The failure of the Bindunuwewa camp was also, finally, to some important degree a failure of those sectors of the international system that lent their support to the rehabilitation system. Willing to bestow the camp, and the larger rehabilitation system, with the legitimacy that comes even with limited foreign funding, foreign governments and international NGO's were not willing to give it the resources, or the kind of sustained involvement – built on a serious and critical analysis of the political forces at work and the risks involved – that would have been required to make the system meaningful. Any further international involvement in reconstructing a workable rehabilitation system – beyond the ad-hoc procedures of the UNICEF-TRO Action Plan now

in effect[102] – should begin only after a real commitment has been made to sustained and (self-) critical involvement. This must include a commitment to respect the rights of, and to remain accountable to, Sri Lankan stakeholders – most especially the inmates themselves – even in the inevitable event of further mistakes and failures.

[102] One of the unfortunate side effects of the particular form that the Government-LTTE peace process has taken to date has been the inability to plan long term solutions for the re-integration and safety of those who choose to put down their weapons, especially former child soldiers

VIII

Human Rights and Intellectual Property Rights

Avanthi Gunatilake[*]

1. Introduction

The relationship between human rights and intellectual property rights (IPR) has been the topic of many debates in the recent past. At one extreme, the most pro-IPR camp sees IPR as a human right of the inventor worthy of recognition on an equal footing with any other human right. This argument is strengthened by Article 27 of Universal Declaration of Human Rights (UDHR) which states that 'Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.' Further down the same axis lies the argument that IPR is very much a private property right fully owned by the proprietor and the protection of a patent is a part of the social contract in a liberal democratic society.

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The pro-human rights advocates, on the other hand, recognise IPR subject to the protection of certain basic human rights. Hence, the right to health, it is argued, cannot be compromised through the enforcement of patent rights. The same is said about such rights as food, education and development. In the recent Supreme Court determination on the Intellectual Property Bill, the impact of IPR on the right to health was recognised and the court stressed that the people's right to health must be accorded primacy.

2. Impact of IPR on Human Rights

IPR mainly relates to patents, copyright, trademarks, industrial designs and trade secrets. Trademarks are a distinct category, in that the main purpose behind the protection of a trademark is to prevent any deception of consumers whereas the remaining IPRs provide recognition to the interests of the inventors and/or creators.

Section 62 (2) of the Intellectual Property Act[1] (IPA) states that: 'An invention may be, or may relate to, a product or process.' The provisions in the Act give effect to the Agreement on Trade Related Intellectual Property, commonly referred to as the TRIPS agreement.[2] Article 27 of the TRIPS agreement defines the subject matter of a patent as 'any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application.' The agreement prohibits any discrimination

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1. No. 36 of 2003.

2. The TRIPS agreement is a binding legal obligation on Sri Lanka under the World Trade Organisation (WTO) treaty regime. The TRIPS agreement was negotiated in the 1986-94 Uruguay Round, and introduced intellectual property rules into the multilateral trading system for the first time. For more information see URL: http://www.wto.org/english/tratop_e/trips_e/trips_e.htm.

based on the place of invention, the field of technology or whether products are imported or locally produced. TRIPS obliges governments to grant 20 year patents and limits the manufacturing and trading of generic drugs.[3] This does not in anyway help the health crises faced by many developing, least developed as well as middle-income countries.

Human rights can be loosely defined as a universal set of conditions necessary for the full development of a human being. Commencing from the post World War II period, inspired by the Nuremberg Trials and shaped by the United Nations, human rights are today a growing set of inherent and indivisible State obligations.

Socio-economic rights, having been repeatedly recognised as an indivisible aspect of human rights poses a great challenge to many States. Developed and developing States tend to neglect the protection of socio-economic rights on the grounds of resource constraints. This excuse, however, is not used for some of the very costly civil and political rights which are upheld, and which require holding of elections, maintenance of the judiciary, the courts and suchlike.

The real problem, therefore, seems to be that of reasonable prioritisation. Very low priority is given to maintaining or improving the health system, although money is spent on holding elections without the slightest hesitation. On the other hand, it is doubtful whether the limited funds available for the promotion of socio-economic rights would anyway be allocated properly (e.g. building sports grounds or supermarkets when an operating theatre of a hospital is closed in need of repairs) and even if properly allocated whether it would be used in an optimal manner, untainted by bribery and corruption.

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3. U.S. Food and Drug Administration defines a generic drug as a copy that is the same as a brand-name drug in dosage, safety, strength, how it is taken, quality, performance and intended use.

Hence, one can safely argue that the deterioration of socio-economic standards, especially relating to those living below the poverty line, is connected both to good governance and to the availability of funds. Apart from these general challenges faced in the realisation of socio-economic rights, IPRs too have increasingly come into conflict with socio-economic rights, especially the right to health. The discussion below will highlight some selected areas in the discourse on the impact of IPR on human rights.

2.1 The Pharmaceutical Industry and the Right to Health

The adverse impact of IPR on the right to health has been in the forefront of human rights debates in the twenty-first century. Under the International Covenant on Social Economic and Cultural Rights (ICESCR) the right to health has been defined as the right to be healthy.[4] This includes freedoms and entitlements that ensure the 'highest attainable standard of health.' The General Comment on the Right to Health[5] recognizes certain essential elements of the right to health such as availability, accessibility, acceptability and quality of health care. Considering the resource constraints faced by countries in implementing these obligations, the ICESCR recognises that a State has the duty to take all measures to 'the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present covenant by all appropriate means..."[6]

4. Article 12 of the ICESCR.

5. Committee on Economic, Social and Cultural Rights, General Comment 14, The Right to the highest attainable standard of health, UN Doc. E/C. 12/2000/4 (2000).

6. Article 2 of the ICESCR. The phrase progressive realisation cannot be used to evade the obligations under the Covenant. Article 2 of the General Comment on Health states: "The progressive realization of the right to health over a period of time should not be interpreted as depriving States parties' obligations of all meaningful content. Rather progressive realisation means that Sate parties have a specific and continuing obligation to move as expeditiously and effectively as possible towards the full realisation of Article 12 [elements of the right to health]."

Apart from these immediate *measures or steps* that must be taken for progressively achieving the full realisation of these rights, there are certain aspects of the right to health that must be *realized* immediately. Such obligations are called the "minimum core obligations" and States are bound to comply with them immediately upon the ratification of the treaty. The minimum core obligations ensure the satisfaction of, at the very least, minimum essential levels of a right.[7] The General Comment on the Right to Health states that the minimum core obligations at the very least include[8] the provision of essential drugs, from time to time defined under the World Health Organisation (WHO) Action programme on Essential Drugs, in order to ensure equitable distribution of all health facilities, goods and services.

These obligations, in certain instances, come into conflict with the obligations under the IPR regime. Patented drugs (as opposed to the cheaper generic drugs) produced by the global pharmaceutical giants are usually priced at a level that is beyond the reach of millions of people living in poor countries. On the other hand the generic versions of these drugs, which are mostly produced by Indian or Brazilian pharmaceutical companies, are priced at much lower levels, which are at times less than one fifth of the price of the patented drug. Because of the pressures brought to bear on them by multinational drug companies and some Northern governments, poor countries with limited health budgets are generally compelled to protect IPR and not the health rights of the people.

Especially with regard to the AIDS epidemic, the sub-Saharan countries are faced with the agonizing choice of honouring the patents of the European pharmaceutical companies by purchasing branded drugs, or

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7. Committee on Economic, Social and Cultural Rights General Comment No. 3 of 1990.

8. Article 43.

sustaining the lives of many more patients through the purchase of cheaper drugs. In protecting the rights of patients, the developing countries must swim upstream against forces originating from developed countries and Northern based pharmaceutical companies. In the recent past the US government has exerted much pressure on developing countries to strengthen the protection given to IPR, and the process is still continuing. Developed countries also use pressure tactics to prevent developing countries from purchasing drugs from manufacturers who are not the patent holders. Multinational drug companies such as GlaxoSmithKline (GSK) have in many instances resorted to threatening legal action to resource-drained countries that attempt to purchase drugs at a cheaper rate.

The difference in the costs incurred in purchasing branded drugs as opposed to generic drugs is staggering, especially with anti-retroviral drugs needed for life prolonging treatment in AIDS. Ranbaxi, an India company produced the 'triple cocktail' of three anti-retroviral medications which was offered to African governments at $295 per person per annum, and African countries still needed assistance to purchase the required amount.[9] Until Indian companies such as Ranbaxi offered the generic version of the triple cocktail, the branded product of the same medication had been sold by pharmaceutical companies at around US $10,000 per person.[10] Therefore it is clear that in the absence of generic drug manufacturers, the lives of millions affected by the AIDS epidemic would be in danger.

Another important factor about generic products is that they provide a useful bargaining tool for reducing the price of branded drugs.

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9. TRIPS and Public Health : The Next Battle, Oxfam Briefing Paper, URL: http://www.oxfam.org.uk/ what we do/ issues/health/bp15_trips.htm.

10. Patent Injustice, Make Trade Fair, URL: http://www.maketradefair.com/en/index.php?file=05092003160059.htm.

Developing countries use this option of purchasing generic goods in order to bargain and reduce the prices of branded goods. Examples include GSK, the biggest manufacturer of AIDS drugs in the world, which halved the price of its leading AIDS drug in poor countries. GSK's leading Combivir treatment is now offered to poor countries at the price of 90 cents a day, where as the same drug costs $18 per day in the United States.[11]

From the point of view of the pharmaceutical industry, it must be noted that patents are of special significance. The marginal cost or the cost of manufacturing a drug is usually very low. However, these companies have incurred very high 'sunk costs' or initial investments for the research and development of these drugs. By protecting their drugs through patents, the companies protect themselves from competition and can recoup the costs of research and development. Indian based pharmaceutical companies that offer the same drug for a cheaper price will not have incurred this massive sunk cost, but only the cost of production.

Health rights activists respond to the above by stating that patents and profits must not be a consideration in catering to the health needs of the poor. Such an argument certainly concurs with the right to the highest attainable health of all people. But the point to be emphasised here is that it is not the obligation of the pharmaceutical companies to provide for the health needs of the poor. It is the obligation of the State. The State must ensure that at least the minimum core obligations are fulfilled.

By enacting tougher patent laws the government provides for the continued profitability of pharmaceutical companies. But this burden of

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11. Price of AIDS drugs cut by half , BBC News UK Ed. Monday, 28th April, 2003 URL: http://news.bbc.co.uk/1/hi/business/2981015.stm .

paying the dues for the companies cannot be at the cost of deteriorating health standards. Tougher patent laws will increase the extent of state obligations with regard to the provision of health care, necessitating an increase in State expenditure on drugs. It is therefore important to keep in mind that State expenditure on health must increase with the introduction of tougher patent laws. Unfortunately developing countries (although much criticised by some right wing capitalists as providers of free health care) fall short on this obligation to ensure access to drugs and health care. This results in a very high percentage of private expenditure on health in these countries, which makes a satisfactory health services accessible only to the affluent. The following statistics display the contrast between selected developed countries with effective health care systems and the developing countries.

Country	**Total expenditure on the health as a percentage of GDP(2001)**	**Private expenditure on health as a percentage of total expenditure on health** (2001)**
Sri Lanka	3.6	51.1
India	5.1	82.1
Bangladesh	3.5	55.8
Thailand	3.7	42.9
United Kingdom	7.6	17.8
France	9.6	24.0
Canada	9.5	29.2
Sweden	8.7	14.8

* Source: *The World Health Report 2003* (Annex Table 5).

** Private expenditure on health (PvtHE) comprises the outlays of insurers and third-party payers other than social security, mandated employer services and other enterprise provided health services, non-profit institutions and non-governmental organisations financed health care, private investments in medical care facilities and household out-of-pocket spending.

These statistics illustrate a higher percentage of state funding and a lower percentage of private funding in the developed countries. As a result, in developed countries the increase in prices due to patent royalties is an expenditure borne more by the State. In Sri Lanka, however the situation with regard to drugs is far more critical. In the year 1999, the cost of medicines for outpatients for the public sector was Rs. 384 million, whereas the cost for the private sector was Rs. 9,994 million.[12] This illustrates that approximately 96 per cent of the cost of outpatient medicines is borne by the patients. Unlike in the developed countries, therefore, the impact of IPR legislation will be felt more by the people in developing countries. It is then the responsibility of the State to introduce properly planned systems of State financing and/or compulsory licensing to prevent the escalation of drug prices in countries like Sri Lanka, at the very least for essential drugs.

The obligation on the State to provide for the health needs of the population has been recognised in South Africa[13] and in India. The Supreme Court of India in the case of *Paschim Banga khet Mazdoor Samity* v. *State of West Bengal*[14] recognised the fact that not providing adequate medical care in state hospitals amounts to a violation of the right to life recognised in the Indian Constitution, stating that:

> *It is no doubt true that financial resources are needed for providing these facilities. But at the same time it cannot be ignored that it is the constitutional obligation of the State to provide adequate*

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12. Source: Sri Lanka National Health Accounts. Fore more detailed analysis refer the presentation of Dr. K. Balasubramanuim, Seminar on 'Towards Quality Medicines at Affordable Proces' – World Health Organisation/ Health Action International Drug Pricing Project (March 2004).

13. *Minister of Health and Others v. Treatment Action Campaign and Others*, 2002 (5) SA 721 (CC), 2002 10 BCLR 1033, *Soobramoney v. Minister of Health*, KwaZulu-Natal 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC).

14. 1996 SOL Case No. 169 (Supreme Court of India).

medical services to the people. Whatever is necessary for this purpose has to be done. In the context of the constitutional obligation to provide free legal aid to a poor accused this Court has held that the State cannot avoid its constitutional obligation in that regard on account of financial constraints. [See: Khatri (II) v. State of Bihar, 1981(1) SCC 627 at p. 631]. The said observations would apply with equal, if not greater, force in the matter of discharge of constitutional obligation of the State to provide medical aid to preserve human life.[15]

2.2 Protection of Copyright and the Right to Education and Development.

Another area of conflict between IPR and human rights is that of the right to education and copyright. The ICESCR recognises the right of everyone to education,[16] and also states that primary education shall be compulsory and available free of charge to all. Higher education is to be made equally accessible to all with the progressive introduction of free education. As such the cost of education must essentially be borne by the State. If citizens assume these obligations, it is the duty of the State to ensure that the people have an adequate standard of living that guarantees the fulfilment of this right.

Stringent copyright protection is likely to be an impediment to the fulfilment of the right to education in the poorer nations. Strict rules at times prohibit photocopying of publications and limit the use of the Internet as an effective means of distributing knowledge to underdeveloped countries. The most draconian law enacted in an Asian country in this regard was the Intellectual Property (Miscellaneous Amendment) Ordinance[17] of Hong Kong. The law had only focused

15. At paragraph 16.

16. Article 13.

17. April 1st, 2001.

on the protection of copyright and given no consideration to the '*doctrine of fair use*'. The aforesaid doctrine tries to create a balance between protection of copyright and the need for the free flow of information and the promotion of research, teaching, reporting etc.

The experience of Hong Kong is an eye-opener for all, in that the law proved to be so impractical to enforce that within a span of twelve days it was repealed. The Amendment changed the original Act which prohibited the use of pirated material '*for the purpose of trade*' to read as '*in the course of, or in connection with, any trade or business.*' Specially affected by the new law were education and higher education institutions, news reporting institutions, and other information services. In effect it was unlawful to download copyrighted material from the Internet even for teaching purposes. 'One particularly surreal example urged teachers to draw their own "cubist picture" to illustrate the early twentieth century art style of cubism rather than reproducing paintings by Picasso or Braque.'[18] The overenthusiastic lawmakers, with a view to satisfying the business lobby and attracting investments, were responsible for what was considered by many as a 'comedy of errors'.

With regard to the new law in Sri Lanka, one can see some key new developments. The duration of copyright under the old law is the lifetime of the author and a further period of fifty years.[19] This right has been extended under the new Act to the lifetime of the author and a period of seventy years.[20] Another important feature of the Act is that it has brought about the timely recognition of copyright in computer software, audiovisual work or a sound recording.[21] Section 12 (7) (a)

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18. Colvert, Kieran, '*The inane life of Hong Kong*'s *shortest-lived ordinance*', Asiaweek, 27th April, 2001.

19. Section 19 (1) Code of Intellectual Property Act No 52 of 1979.

20. Section 13 (1) Intellectual Property Act No 36 of 2003.

21. Section 9 (1) of the Intellectual Property Act.

of the Act limits reproduction or copying of a computer programme to the 'lawful owner' and specifies the instances where the lawful owner is permitted to copy. The lawful owner's right to copy or reproduce is limited to only a single copy in a situation where copying is necessary for the use of such software in a computer, or to archive or replace a lawful programme. The Act goes on to state that the possession of a copy of a programme for any other purpose is unlawful and that it shall be destroyed.[22] The practical effect and implementation of such provisions is likely to be somewhat challenging.

Section 12 (5) of the Act is yet another new feature which introduces a limitation on reprographic reproduction, or photocopying of books by libraries.[23] A library or an archive, which does not serve any direct or indirect commercial gain, is authorised to make a single copy either:

a) upon the request of a person for the purpose of study, scholarship or research and where such reproduction is an isolated occurrence.;

b) in order to preserve the original which has been lost or destroyed, provided that it is not possible to obtain another and the reproduction is an isolated occurrence.

Although it is accepted that copyright protection is a necessity in any country irrespective of the level of development, one must also keep in mind the difficulties of implementing these laws. In Sri Lanka most computer users and especially domestic computer users make use of

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22. Section 12 (7) (b).

23. It must be noted that in the absence of subsection (5) of section 12, photocopying by libraries would be considered a fair use under section 11, without limiting it to specific instances under 12 (5).

pirated software. Considering the fact that use of computers is a *sine qua non* of development it is necessary to bear in mind the negative impact of enforcing copyright laws in a country like Sri Lanka. The high price of the authorized version of these programmes is likely to be a severe disincentive to the usage of computers. In most developed countries even the lowest strata in society has access to the free use of computers in public libraries. This ensures a certain level of basic access to computers as well as the Internet. In a developing country, however, the luxury of providing free computers at public libraries is unlikely to be forthcoming in the near future.

The situation with regard to photocopying of material is not any different. Looking at the situation with regard to even the basic textbooks in the university libraries, one sees that implementing section 12(5) is likely to be extremely challenging. The issue here is to find a balance between the protection of copyright on one hand and human rights such as right to education and right to development on the other hand.

The right to development has been called the mother of all human rights. It is 'the precondition of liberty, justice and creativity'[24] which ensures the realisation of all civil, political, social, economic, and cultural rights. Some writers draw an analogy between the right to self-determination and the right to development. As much as it is unimaginable that civil and political rights can exist in the absence of self-determination, in the absence of the right to development the very notion of social and economic rights would be a fallacy.

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24. Bedjaoui, M., 'The Right to Development', International Law: Achievements and Prospects (1991), at p. 1182. Excerpts in Steiner and Alston, International Human Rights in Context (Second Edition), Oxford University Press (2000) at p. 1321.

The right to development can be first traced to Article 55 and 56 of the United Nations Charter (UNC) which gives recognition to the state obligation of promoting a 'higher standard of living, full employment, and conditions of economic and social progress and development.'[25] This is further strengthen by Article 28 of the UDHR which states that everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised.

The most significant source with regard to right to development is the United Nations Declaration on Right to Development.[26] Article 1 of the Declaration states that 'The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.' The Declaration clearly states that governments have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development.[27]

It is in no way implied by the preceding analysis that copyright and other related rights cannot or should not be protected. Such a proposition will in turn go against the very notion of fair play and justice—the foundation of all human rights. What is important here, especially for a developing country, is to strike the right balance in the protection of these two diverse and at times conflicting strands of IPR and human rights. As such, the stringent laws enforced in certain developed countries cannot be replicated in a developing country lacking the welfare and social security services available in the

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25. Article 55 (a).

26. Article 1 of the Declaration on the Right to Development, adopted by General Assembly resolution 41/128 of 4th December 1986.

27. Article 3.

developed world. Such a simplistic attitude towards the protection of IPR leads to the introduction of 'carbon copy legislation', and is likely to violate the human rights of, and cause considerable social injustice to, millions of poverty stricken people.

2.3 Freedom from hunger or preserving the patents

The human right to food and freedom from hunger is embodied in the UDHR as well as the ICESCR. Article 11 (1) of the ICESR recognises the 'right of everyone to adequate food.' Article 11 (2), which is couched in stronger language, stipulates that the state parties recognise the '*fundamental* right of everyone to be free from hunger.' The word 'fundamental' under international human rights law imposes an immediate obligation on the state parties to take necessary measures with existing resources to promote, protect and fulfil the obligation.[28]

Interestingly, Article 11 (2) states certain specific measures to be undertaken by the state parties as follows:

> Article 11 (2) (a) To improve methods of production, conservation and distribution of food by *making full use of technical and scientific* knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilisation of natural resources. (emphasis added)

Contrary to what is contemplated in the above article, technological and scientific knowledge is today confined to a handful of multinational biotechnology companies. Rather than States being able to make the

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28. Fore more information on the content of this right refer Alston, Philip. 'International Law and the Right to Food' p. 162 and Alston, Philip and Eide, Asbjon, 'Advancing the Right to Food in International Law' p. 249. Food as a Human Right, The United Nations University (1984) Singapore.

'full use' of these innovations, the only use has been to provide increasing profits for multinationals. These companies are quick to patent biotechnology and have even gone a step further in patenting traditional plant varieties that had been in the hands of developing country farmers from time immemorial. Some of the more famous examples of patenting indigenous plant varieties include Basmati, the Neem plant, Kothalahimbutu and many more.

Patenting of seeds by biotechnology companies has resulted in farmers being dependent on the companies for seeds, fertilizer, pesticides and other such chemicals, and to a drastic reduction of bio-diversity. Although a comprehensive discussion of this topic is beyond the scope of this paper, it is worth mentioning that hundreds of different crop varieties developed by farmers for thousands of years have now disappeared, and have been replaced by a small number of patented seeds. The different technologies used to increase the dependency of farmers include seeds that need to be sustained with the use of pesticides and/or fertilizer manufactured by the same company, and through the notorious 'terminator technology' where the seeds are self-destructive and cannot be regenerated. Terminator technology in particular makes farmers severely dependent on these companies, by shackling the farmers to a vicious circle of purchasing seeds continuously from a company.

Kofi Annan, the Secretary General of the UN has pointed out that:

> *'It is often assumed that corporations are neutral providers of goods and services and that market forces have everyone's interest at heart. However, it is becoming increasingly clear that monopoly control of the food system by transnational corporations can be directed towards seeking monopoly profits, benefiting the companies more than the consumer.'*[29]

[29] The Right to Food, Note by the UN Secretary General, A/58/330 , 28th August 2003.

The unethical behaviour of biotechnology companies together with the universal legal protection provided by intellectual property laws have a particularly detrimental impact on the lives of small and medium scale farmers. It is also likely to have an adverse impact on food security in countries such as Sri Lanka where 49% of agricultural holdings are less than forty perches, providing only for home consumption.[30]

3. IPR vs Human Rights – Need for Harmonisation

As discussed above, intellectual property law is an essential piece of legislation in any country. The challenging task is to ensure at least a basic level of harmonisation with the human rights that are imperilled by these laws. The need for mitigatory measures in implementing patents is recognised in two ways. Firstly, the IPR regime itself has created certain provisions that may be used for this purpose. Secondly, within international human rights law there exist certain legal as well as moral justifications for the preservation of the human rights of the people.

3.1 Concessions within the IPR regime

The TRIPS agreement, the IPA of 2003 as well as the Doha Declarations[31] contain certain mitigatory provisions, which can be used to further the protection of human rights in certain instances. These provisions have also been widened by a recent decision taken by the TRIPS Council of the WTO. These mitigatory provisions were not initially included in the Intellectual Property Bill and were later incorporated after the Supreme Court determination to that effect.

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30. Department of Census and Statistics, Sri Lanka. (2002).

31. The Declaration is the outcome of the WTO Fourth Ministerial Meeting held in Doha, Qatar in 2001. The Doha Declaration is considered by many as a recognition of the challenges faced by developing countries, following the failure of the Seattle Ministerial Meeting.

In Re Intellectual Property Bill[32] can be commended as a judgment that impacted on millions of Sri Lankans as well as on generations to come. Chief Justice Sarath N. Silva adopted a very farsighted approach and analyzed the likely effect of the proposed legislation on the millions of poor consumers and industrialists in a developing country like Sri Lanka. The court took special note of the rights of patients, and also effectively addressed the issues of patenting plants and microorganisms. This judgment is a great victory not only to Sri Lanka, but to all those in the developing and the least developed world right now faced with the ultimatum of drafting IP laws in conformity with the TRIPS agreement in the near future.

The Supreme Court stated that:

> *"...the provisions in Article 12(1) guarantee equal rights as well as equal protection and the provision of the TRIPS Agreement cannot be applicable to developed and developing countries equally without attributing due consideration to such rights with particular reference to the mitigatory provisions in the Agreement."*[33]

> *"Producers of patented products and processes and their agents in developed nations and consumers of such products in developing countries such as Sri Lanka cannot be taken as parties that are similarly circumstanced. There is ample justification to treat them differently as they cannot be put on an equal footing."*[34]

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32. SC special Determination No. 14/2003.

33. *Ibid* at p. 7.

34. *Ibid* at p. 7.

The mitigatory provisions referred to in the judgement are found in the TRIPS agreement as well the Doha Declaration, which recognized this problem by stating that the 'TRIPS agreements does not and should not prevent governments from taking measures to protect public health'.[35] These mitigatory provisions can be utilised by countries to protect the interests of the right to health of the people. Therefore a clear understanding of the same is essential in attempting to harmonise the protection of IPR and humans rights. Under the heading 'TRIPS and Public Health' the Declaration identified the rights of governments in the following instances:

- **Compulsory licensing**

Compulsory licensing is the granting of a license to use a patent without the consent of the patent holder. This is however subject to the payment of adequate compensation to the patent holder. Article 31 of the TRIPS agreements permits compulsory licensing in specific instances. According to the text, such licensing is permitted to a government or a third party where the proposed user has made efforts to obtain authorization from the rights holder on reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable period of time, unless there exists a national emergency. The agreement goes on to state that:

> - the rights holder shall be paid adequate remuneration considering the circumstances of each case, taking into account the economic value of the authorization.[36]

35. Article 4 of the `Declaration on the TRIPS agreement and the public health` - Doha WTO Ministerial, November 2001, WT/MIN(01)/DEC/2.

36. Article 31 (h).

- any such use shall be authorized predominantly for the supply of the domestic market of the Member authorizing such use.[37]

The Declaration on the TRIPS and public health has adopted a more liberal attitude and states that: 'Each member has the right to grant compulsory licences and the freedom to determine the grounds upon which such licences are granted.'[38] Looking at the domestic law one sees that section 86 of the IPA is identical to that in Article 31 of TRIPS. Section 86(2) of the IPA states as follows:

> 86 (2) (a) Any person, body of persons, a government department or a statutory body may make an application to the Director General for the purpose of obtaining a license to exploit a patent in the manner hereafter provided.
>
> 86 (2) (b) Upon the receipt of such application, the Director General may issue a license for exploitation if he is satisfied that the applicant has made efforts to obtain approval from the right holder on reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable period of time.

The importance of compulsory licensing was correctly stressed in the Supreme Court determination[39] on the Intellectual Property Bill. The draft Bill did not contain provisions envisaged in the TRIPS agreement, nor did it contain those recognised under the Doha Declaration with regard to compulsory licensing. The Supreme Court clearly stated that

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37. Article 31 (f).

38. Article 5 (b).

39. *Supra* n. 32.

the exclusion of these mitigatory features amounted to a violation of Article 12 (1) of the Constitution relating to the equal protection of the law. The Court noted that the TRIPS agreement is applicable to developed, developing and least developed countries which cannot be considered as equals. As such, the enforcement of the TRIPS agreement is to be carried out with due regard to the special and differential needs of countries.

- **National Emergencies and Government Use**

In a national emergency, the government is permitted to issue license without the authorisation of the patent holder, and this is not subjected to the restrictions contained in Article 31 of the TRIPS agreement, discussed before. Section 86 (2) (c) of the IPA states that the Director General of Intellectual Property may waive the requirements set out in 86 (2) (b) 'if he is satisfied of the existence of a national emergency or any other circumstance of extreme urgency, or in case of a public non-commercial use for purposes such as national security, nutrition, health or for the development of a vital section of the national economy.'

The latter part of section 86 (1) (c) referring to public non-commercial use is utilised liberally by many developed countries such as United Kingdom, USA and Canada to issue compulsory licences. It must be noted that this 'government use' or 'non-commercial' use is of greater importance to developing countries considering the high level of poverty. 'The distinction between government use provision and compulsory licence would lie primarily in the nature or purpose of the use of the patent. In the case of the government use, it should be limited to "public, non-commercial purposes", whereas compulsory licences would also cover private and commercial use."[40]

40. Manual on Good Practices in Public Health: Sensitive Policy Measures and Patent Laws, Third World Network (2003) p. 33.

Government use is a very flexible concept where a government retains a final authority to use patents for the public good for non-profit purposes. It must be also be noted that with regard to government use the patent holder is granted compensation. Section 86 (1) (f) of the IPA states that taking into consideration the economic value of the patent adequate remuneration will be paid to the owner of the patent. Looking at IP laws in certain developed countries, one sees that government use is very liberally recognised in the law.[41] For example the Patent Act 1977 of the United Kingdom states:

> Section 55 (1)
>
> *"Notwithstanding anything in this Act, any government department or any person authorised by a government department may, for the services of the Crown and in accordance with this section, do any of the following acts in the United Kingdom in relation to a patented invention without the consent of the proprietor...*
>
> *(a) (i) make, use, import or keep the product..."*

In comparison to the IPA of Sri Lanka the above section is unambiguous and far wider in laying down the authority for government use.

41. Other laws that recognise government use include: 28 USCS 1498 (1997) of the United States, Section 29 of the Patent law (1970) of Austria, Section 55 (1) of the Patent Act of New Zealand and section 65 of the Patent Act (1994) of Singapore.

- **Parallel importing**

The TRIPS agreement and the Doha Declaration allow for parallel importing, which is the import and resale of patented products.[42] As such an importer can freely import a patented product from a manufacturer in another country. This right to import patented products is not implicit and must be included in the laws within the country. The principles with regard to parallel importing are widest and most flexible under the principle of 'international exhaustion of rights' where a patented product from *any* other country can be imported. This is now being recognised by most countries as the principle underlying parallel imports.

The Supreme Court determination on the Intellectual Property Bill correctly stressed the importance of parallel importing to a developing country. Even though the imported goods are patented, this introduces the possibility of benefiting from the lowest prices available in the world market. Section 86 (1) (iv) of the IPA provides for parallel imports, but does not directly refer to the international exhaustion of rights.[43] In light of the Doha Declaration and the reading of the TRIPS agreement, the present law is sufficient to permit parallel imports, in the widest sense of the international exhaustion of rights. In this regard more progressive provisions were brought into the Intellectual Property Laws of countries such as South Africa[44] and Malaysia[45] in the recent past.

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42. Article 6 of the TRIPS agreements leaves it to the members to decide as to the adoption of principles with regard to parallel imports. The Doha Declaration reaffirms this in paragraph 5 (d).

43. The section states that the rights of the owner of the patent shall 'not extend to acts in respect of articles which have been put in the market by the owner of the patent or by a manufacturer under licence.'

44. Section 15 (c) of the Medicines and Related Substance Control Act No 101 of 1965 (as Amended in 1997).

45. Section 58 A of the Patent Act of 1958 (as Amended in 2000).

- **Recent developments in the Council for TRIPS**

From the above 'concessions' under the TRIPS agreement, the ability to grant compulsory licensing can be considered the most attractive. It permits a government to produce the drugs domestically at a more affordable price. Compulsory licensing is however limited to production which is *'predominately to the domestic market'*.[46] This situation causes colossal injustice to the many countries both developing and developed that lack a strong domestic pharmaceutical industry. Other than for countries such as India, Brazil and China, most developing countries including Sri Lanka can find very little relief under compulsory licensing, since there are no companies with the technological know-how and the resources to manufacture drugs domestically. The provision is de facto discriminatory, as it provides the benefit of cheaper drugs to those countries that possess the resources and the technology to manufacture domestically, whilst many other countries including Sri Lanka will be forced to purchase the high priced products. At the Doha Round the Ministers identified this as an issue that must be addressed by the WTO TRIPS Council, instructing the Council to arrive at a solution.[47]

Accordingly the TRIPS Council, creating a historic moment in IP law, decided to waive the 'domestic market' requirement under Article 31(f) of the TRIPS agreement in certain instances of compulsory licensing for pharmaceutical products. The decision recognised that in specific

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46. Article 31 (f).

47. We recognise that WTO members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPS Agreement. We instruct the Council for TRIPS to find an expeditious solution to this problem and to report to the General Council before the end of 2002.

instances an exporting country can grant compulsory licenses to manufacture drugs that are needed for an eligible importing country.[48] To this extent the domestic market requirement is removed. In accordance with the above decision a country is permitted to manufacture drugs for the usage of another country, and the latter importing country is permitted to purchase such products. Article 2 of the decision lays down in clear terms the rules applicable to both the importing and the exporting country.

The said decision of the TRIPS Council is of great relief to countries such as Sri Lanka, especially since the country is, at least in certain areas, dependent on drugs manufactured in countries like India for a low cost. As a consequence of the above decision, even in a situation where a country lacks the capacity to manufacture drugs domestically it can obtain cheaper drugs from another country.

The decision, however, contains certain limitations as to the instances where a country is permitted to make use of this allowance. In order to be recognised as an 'eligible importing member' (i.e. as a country permitted to import drugs under the provisions of this decision) certain qualifying criteria must be adhered to.[49] Any least developed country (LDC) is automatically considered as an 'eligible importing member.' Countries other than LDCs must notify the TRIPS Council of their intention to use the system. Most importantly, in its Note 2 the decision states that 'It is understood that this notification does not need to be approved by a WTO body in order to use the system set out in this Decision.' The decision correctly notes the importance of developing

48. Article 2, Implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and public health Decision of the General Council of 30th August 2003 WT/L/540.

49. Article 1 of the Decision.

the pharmaceutical industry in these countries, with more transfer of technology. For all developing countries and LDCs to develop an efficient pharmaceutical industry is a somewhat unrealistic goal, considering the nature of research and development work necessary. On the other hand, there is most certainly a national interest in developing at least a limited pharmaceutical industry within a country, especially in endemic or pandemic situations. This can be clearly seen in countries like Brazil where the domestic pharmaceutical industry is a great asset in the fight against HIV/AIDS.

Realising the need to manufacture certain essential drugs locally, the Brazilian government has introduced some very progressive provision into the IP laws to compel domestic manufacture of drugs, much to the displeasure of the US government. Section 68 (1) (I) of the Brazil Intellectual Property Law of 1996 states that if a patent product is not being manufactured in Brazil within three years of the granting of the patent, the government may compel the patent owner to licence a competitor to manufacture locally. This provision introduces a form of compulsory licensing which is beyond the scope of the provisions in TRIPS, and was much criticized as 'discriminatory' since TRIPS requires the granting of patents to all products not withstanding whether they are produced locally or imported.[50] The US government set in motion the WTO dispute solution system (although this particular provision was never used by Brazil) but later the two countries shifted towards a more amicable solution with Brazil assuring that it would provide advance notice to the US government in using this provision against a US company.

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50. Principle of national treatment is a fundamental principle within the WTO system. The principle in short means that there will be no discrimination between the nationals of a country and foreign trading partners. This same principle is applicable to the registration of patents. As such it was argued that the manufacturing within Brazil should not be a criteria for the validity of a patent.

3.2 Supremacy of International Human Rights Law

As members of the UN as well as members of the international community, States assumed a basic minimum standard of care towards their people. Is it then legitimate for a state which has assumed binding international legal obligations to take retrogressive measures that seriously contravene the same? What is the position of a State Party which assumes other obligations (regional, trade or otherwise) which have a negative impact on human rights?

The United Nations Charter (UNC), which gave the 'first authoritative expression' to the international human rights movement, makes provision for this dilemma. Article 103 of the United Nations Charter states that 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, *their obligations under the present Charter shall prevail'* (emphasis added).

The UNC therefore has in clear terms stated that the obligations under the Charter are paramount. As a member State of the United Nations let us now briefly examine the few obligations under the UNC that have an impact on the present discussion. The preamble reaffirms faith in fundamental rights and to promote social progress and better standards of life. Article 56 is of great significance, as it stipulates the obligations of the members of the UN. Accordingly, 'All members pledge themselves to take joint and separate action in co-operation with the Organisation [UN] for the achievement of the *purposes set forth in Article 55*.' Article 55 contains the goals of the United Nations stating that it shall promote 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.'

Looking at the UNC, therefore, one sees that the member States of the United Nations have a duty to take action towards the observance of human rights and fundamental freedoms. Human rights are contained in the International Bill of Rights, which includes the ICESCR, which is a binding treaty. As such, in theory at least, the prioritisation of the ICESCR over any other agreement can be justified under international law.

The reality however is very different. Apart from the TRIPS, the developing countries are also being pressured to enter into agreements that are called TRIPS Plus agreements. Sri Lanka has already signed such an agreement with the United States of America.[51]

These agreements seek to reduce the mitigatory measures contained in the TRIPS Agreement (e.g. further limitations in granting compulsory licenses) and extend the IPR even further (e.g. increasing the duration of a patent). Such agreements are detrimental and the short term trade benefits that may result from entering into such an agreement are negligible in comparison to the damage to the country as a whole in the medium and long term. The socio-economic rights of the people are not even a consideration when most governments accede to agreements of this nature.

Looking at the practical dilemma faced by developing and least developed countries in safeguarding international human rights norms *vis a vis* protecting trade interests, there is perhaps more room to make use of the International Bill of Rights. After all, no State party or international financial institution can directly advocate the violation of core United Nations treaties. The more drastic trade rules that governments are arm twisted into complying with can at least be mitigated by resorting more frequently and forcefully to the treaty obligations under the ICESCR.

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51. 1991 US/Sri Lanka agreement on compulsory licensing of patents.

4. Conclusion

The position with regard to international human rights law is very clear – the socio-economic rights of the people are an indivisible part of human rights and must be respected, protected and fulfilled by States. The economic reality today, on the other hand, forces States to turn away from these rights, with a 'tunnel vision' approach towards harnessing entrepreneurship and increasing trade.

These two goals, namely those of social justice and individual (or corporate) welfare, need not essentially result in a conflict. Within a capitalistic economic system, certain Scandinavian countries and other developed countries with superior social welfare systems maintain a reasonable balance between both these goals. These countries, unlike Sri Lanka, have the luxury of channelling a large percentage of government expenditure towards welfare. Whilst recognising the difficulties faced by a developing country governments like Sri Lanka, it must still be stressed that with the introduction of new laws and the continuous liberalisation and de-regulation process, it has now come to a point where the State must pay attention to the impact of these processes on the human rights of the people. Development, after all is not limited to growth of the Gross Domestic Product or a favourable trade balance. Development necessarily means a higher standard of living for all persons, which is achieved through the implementation of equitable laws and policies.

IX

Combating Money Laundering in Sri Lanka

Dappula De Livera[*]

1. Introduction

Money laundering has not been criminalized in Sri Lanka as yet although it is a criminal offence in several countries in the region. However it would be pertinent to state that draft legislation in this regard has been prepared and it is hoped that sometime in the near future, a Bill to combat money laundering will be presented to Parliament. The draft law will be discussed at a later stage in this article.

2. What is Money Laundering?

Money laundering is the process by which criminals attempt to hide and disguise the true origin and ownership of the proceeds of their criminal activities, thereby avoiding prosecution, conviction and confiscation of the criminal funds.

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* LL.M (London), Senior State Counsel.

2.1 Some definitions of money laundering:

1. The conversion or transfer of property knowing that such property is derived from an offence, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offence to evade the legal consequences of his actions.

2. The processing of criminal proceeds to conceal their illegal origin (that is, making dirty money look clean).

3. Turning dirty money into clean money by converting cash or other property derived from criminal activity, so as to give it the appearance of deriving from a legitimate source.

Today money laundering attracts the most attention when associated with trafficking in illicit narcotics and drugs. However, criminals of every sort from stock fraudsters to corporate embezzlers and commodity smugglers must launder their money flow for two reasons. The first is that the money trail itself can become evidence against the perpetrators of the offence. Secondly, the money per se can be the target of investigation and criminal action.

The objective of the launderer is to disguise the illicit origin of the substantial profits generated by criminal activity, both to keep the underlying criminal activity invisible and so that the profits can be used as if they were derived from legitimate sources.

Money laundering should be construed as a dynamic three-stage process that requires: firstly, moving the funds from direct association with the crime; secondly, disguising the trail to foil the pursuit; and thirdly making the money available to the criminal once again with its origins hidden from view. In this respect money laundering is more than

smuggling or hiding tainted funds, though those acts may constitute essential constituents of the process.

2.2 Three stages of money laundering: -

a. Placement

b. Layering

c. Integration

Money laundering is a diverse and often complex process. It basically involves three independent steps that often occur simultaneously.

Placement is the physical disposal of cash proceeds derived from illegal activity. It is the first stage in the money laundering process, and has the highest level of risk. At this stage the physical currency enters the financial system and illegal proceeds are most vulnerable to detection. Placement involves the movement of cash from its source and in most instances the source can be easily disguised or misrepresented.

Layering creates complex layers of financial transactions designed to disguise the source of the money. The purpose is to make it more difficult to detect and uncover laundering activity. Layering is an activity intended to obscure the trail which is left by dirty money. During the layering stage a launderer may conduct a series of financial transactions in order to build layers between the funds and their illicit source.

Integration is where illegal cash is reintroduced into the economy as proceeds from legitimate sources. The last phase of the money laundering cycle is integration of dirty money. This stage involves the recycling of the laundered wealth to appear as if it is derived from legitimate activity. It may involve the selling of assets which were

purchased during the layering process. Integration is the movement of laundered money into the economy mainly through the banking system, resulting in the appearance of legitimate business earnings.

3. The Sri Lankan Scenario

Of particular concern to Sri Lanka is its vulnerability to international trafficking of contraband goods because of its inadequately guarded long and porous shores. It is suspected that sizeable consignments of gold, drugs, arms and ammunition and other goods are smuggled into the country. The illegal trafficking of persons also seems to be common. A significant amount of illegal cross-border transfer of cash is also believed to be taking place. It is also possible for illegal proceeds to be transferred into such investments as the stock exchange and foreign investment projects, especially given the internationalization of capital markets.

Sources of illegal proceeds in Sri Lanka include drug trafficking, illegal gambling, smuggling of persons, fraud, embezzlement, extortion, prostitution, bribery and corruption, illegal trafficking in arms, ammunition, explosives and offensive weapons, organized motor vehicle thefts, illegal exportation of gems and priceless antiques and artifacts and protected and endangered animal and plant species. These proceeds may very well contribute to the money laundering process in Sri Lanka.

Banks and other financial institutions and the stock market remain an important mechanism for the disposal of criminal proceeds. Banks offer a wide range of financial products and hold the largest share of the financial market and accordingly the services they provide may be used for money laundering. Laundering of illegal funds by locals or

foreign individuals and groups in the stocks and securities sector cannot be ruled out.

There also appears to be a significant use of the so-called "underground banking system" (*hawala* or *hundi*), which operates between countries and outside the legitimate banking system. The cross-border smuggling of cash could be considered a very old trade which was also used to avoid strict foreign exchange laws.

The following methods of disposal of illegal proceeds may be prevalent in Sri Lanka. The smuggling or couriering of cash across national borders, the use of bank drafts, alternative remittent services, the purchase of items of high value such as luxury goods, gold, luxury motor vehicles, shares and real estate are some common methods.

Often laundered proceeds are believed to be invested in real estate and other businesses, perhaps through front companies. However, it may be difficult for financial institutions to detect such set-ups through their normal customer identification procedures.

4. Human Rights dimensions of Money Laundering as a Criminal activity

The implications of 'black money' for the Sri Lankan economy need to be understood. Transactions in this informal, hidden or parallel economy often escape the superintendence of the official authorities. This informal financial sector enjoys freedom from official regulation and earnings are not reported to tax or monetory authorities.

The full scope of money flowing through the informal sector is not known, but is believed to be considerable. The financial implications of these informal markets, which provide a haven for money launderers,

are serious; they could threaten and affect the integrity of the formal financial system. They could also undermine monetary policy and promote tax evasion.

Sri Lankan courts have recognized that the rule of law is a fundamental principle which lies at the very foundation of the Constitution. Article 12(1) of the Constitution states that all persons are equal before the law and are entitled to equal protection of the law. Article 4(d) of the Constitution states that the fundamental rights which are by the Constitution declared and recognized shall be respected, secured and advanced by all organs of government and shall not be abridged, restricted or denied.

The rule of law applies to everyone alike and therefore all persons engaged in criminal activity should be brought before the law. Persons who deal with property derived from criminal activity – money launderers – should not be permitted to escape the law and enjoy freedom and liberty; this would go against all norms and human rights standards.

Further, money laundering undermines the economy of a country and also affects the integrity of the financial system. It could thereby have an adverse impact on economic development and in turn affect the welfare of the citizen. This criminal activity could thus impair the right to development of a country's citizens.

5. Banks and Financial Institutions

The integrity of the financial sector depends on the ability of banks and other financial institutions to attract and retain legitimate funds from legitimate customers. Banking organizations are able to attract and retain the business of legitimate customers because of the quality

and the reliability of the services offered and the sound and highly respected reputation of banking organizations within the financial sector. Illicit activities, such as money laundering, fraud and other transactions designed to assist criminals in their illegal ventures pose a serious threat to the integrity of financial institutions.

When transactions at financial institutions involving illicit funds are received, they invariably damage the reputation of the institution involved and potentially of the entire financial sector. Whilst it is impossible to identify every transaction at a financial institution that is potentially illegal or is being conducted to assist criminals in the movement of illegally derived funds, it is necessary that financial institutions conduct safe and sound operations and take every reasonable measure to identify their customers, understand the legitimate transactions to be conducted by those customers and identify transactions conducted by their customers that are unusual and suspicious in nature. Apart from identifying such transactions it is also necessary to implement mechanisms for reporting such transactions in accordance with suspicious activity reporting requirements (SARS). This would enable financial institutions to protect their integrity and assist the efforts of bank regulatory authorities and law enforcement authorities to thwart illicit activities in financial institutions. Banks and financial institutions should be penalised for failure to detect and report suspicious transactions.

5.1 Know Your Customer and Customer Due Diligence

Numerous countries have adapted the idea of "know your customer" and mandatory suspicious transaction reporting as the best means of protecting the financial sector from participating in the movement of illicit funds. The KYC policy will empower financial institutions to obtain information from their customers regarding their identity, the types of transactions to be conducted and the source of funds among

other things. An effective KYC policy will necessarily require the banking institutions to develop customer profiles and realistically determine when customers conduct transactions that are suspicious or potentially illegal.

Financial institutions in Sri Lanka are required to identify customers when they open new accounts. Verification of customer identity would be an integral part of the procedure and the recording of the identity of clients is not new to the system. It should be noted that already financial institutions in Sri Lanka take reasonable measures to obtain information about the identification of their customers.

Identification of customers could take place by calling for identification documents such as national identity cards, passports, driving licenses and in the case of a company, such documents as the certificate of incorporation.

Record keeping is strictly adhered to in Sri Lanka. All banks and financial institutions in Sri Lanka are required to maintain and keep for five years, records of all transactions both domestic and international. Banks and financial institutions can also request information from customers with a view to verifying the legal existence of the customer and the nature of the customer. They can also request such information as deemed necessary to ensure that natural persons do not use legal entities as a method of operating accounts which are effectively anonymous.

However, in Sri Lanka there are no legal provisions under which anonymous accounts or accounts in fictitious names can be set up and operated. In fact, legislation which permitted numbered accounts has now been repealed. However, bearer bonds continue to exist.

Where information with regard to identities sought by banks and other financial institutions from customers is not forthcoming, the application of the customer could be refused, or special attention could be paid to transactions through the accounts of such customers.

Money laundering through financial institutions would take place by the use of wire and telegraphic transfers, use of credit cards, use of bank cheques and bank drafts, use of travelers ' cheques, use of false and assumed names.

5.2 Suspicious Transaction Reporting

At present, large financial institutions in Sri Lanka could report any suspicious transaction to the law enforcement authorities for investigation. However, they do not appear to do so commonly, in view of strict bank secrecy laws which exist in the country today.

The importance of taking effective action against money laundering cannot be over emphasized. As once said by Mr. Kanemoto Toshinori, former Interpol President, "as long as the purpose of international crime is to make money the most effective deterrent will be to divest criminals of their illegal profits."

An effective measure that could be adopted to stop money laundering is to establish a mechanism to help detect suspicious money transactions. Sri Lanka has taken certain draft legislative measures in this direction, although up to now there is no effective legal statutory provision to help the authorities conduct comprehensive investigations into these financial transactions.

Sri Lanka has not conducted any money laundering investigations so far, the obvious reason being that no law directed at this issue has been enacted.

6. Methods of Money Laundering

6.1 Structuring of Cash Deposits

Structuring is defined as the design or structure of a scheme to deposit the cash proceeds of crime into financial institutions in such a way that it does not automatically trigger statutory or regulatory reporting requirements that a government has imposed on financial institutions. In this situation the money launderer makes deposits which are less than the specified cash-reporting threshold in the local anti-money laundering law.

Structuring is done to avoid anti-money laundering reporting requirements, to avoid suspicion of commercial activity and to finally launder proceeds of crime.

6.2 The Use of Gate Keepers

Money laundering can also take place through non-financial businesses through the use of lawyers. For example, lawyers may be utilized to facilitate the purchase of property in false names. Alternatively in the case of accountants, cash deposits could be made to an accountant to purchase real estate in the name of shell companies or trust accounts set up on behalf of the clients. Real estate agents can also be used for money laundering when, for example, they are given cash deposits to use towards the purchase of real estate. Professionals such as lawyers, accountants, auditors and others who engage or facilitate such transactions with knowledge of the illegality, or with reason to suspect illegality, should encounter penal liability for their conduct under anti money laundering law.

6.3 Off Shore Financial Centers

Off shore financial centres are also used by money launderers to launder illegal proceeds. Typically, offshore financial centre jurisdictions offer a high degree of corporate and banking secrecy and provide non-resident clientele with substantial confidentiality. The offshore financial centre provides financial and corporate services to non-residents, often with a higher level of confidentiality provided to non-residents than to residents. Individuals have been known to abuse secrecy provisions in offshore financial centres to conceal assets and income in this jurisdiction for the purpose of evading taxes. A variety of services, which are tailored to the individual or business, are offered to clients. Third parties acting on behalf of a beneficial owner often hold the accounts held in the banks. An offshore financial centre is also an attractive place to set up international business companies as well. international business companies are commonly defined as corporate structures operating exclusively outside the jurisdiction in which they are incorporated, marked by rapid formation, secrecy, broad powers, low cost of formation and operation, low to zero taxation and minimal filing and reporting requirements. They are incorporated as separate legal entities from their parent companies with limited financial liabilities. Also common to international business companies are the use of bearer shares, nominee shareholders, directors and officers. Because of these factors, international business companies are vulnerable to money laundering. Money launderers often use this route to set up shell companies. Other characteristics that make international business companies susceptible to financial crime include the fact that secrecy laws protect beneficial ownership of companies, corporate officers, shareholders and other pertinent information.

Another popular aspect of offshore financial centres is asset protection legislation. This is essentially a legal device where financial institutions or an attorney manage an individual's assets. The client and the client's assets are protected against direct legal exposure.

6.4 Other Methods

It is known that the use of casino chips as a form of currency is another form of money laundering. For example, casino chips may have been used to purchase narcotics and the chips were later en cashed at the casino in return for cheques that registered the amounts as winnings.

Alternative banks and remittance dealers have also be used to facilitate the international transfer of funds. This method of transfer is based on trust and generally involves providing details of the beneficiary to the alternative banker who accepts cash for the transfer plus extra for his commission. The alternative banker generally deposits this cash into an account he holds with a financial institution. The alternative banker then instructs a contact in the country of the beneficiary. These instructions are usually transmitted by way of telephone communication or by facsimile. The *hawala* or *hundi* in the alternative remittance system are quite prevalent iin South Asia, particularly in India and Pakistan. The word h*awala* comes from the Arabic root for 'transfer' but in Hindi and Urdu it has come to mean 'exchange of money' or even 'trust' because of the great deal of trust that is required for the system to operate. It is a remittance system that operates parallel to 'western' banking. *Hawala* brokers conduct *hawala* transactions. A succinct definition of *hawala* is money transfer without money movement. A *hawala* broker uses a network of connections to facilitate the delivery of money, to exchange currency or to arrange precious metal transactions (gold). The *hawala* broker will accept money to be transferred in one location and then use his network to facilitate the delivery somewhere else. No money actually moves and record keeping is sparse. The *hawala* system is often intertwined with the banking system. *Hawala* has been seen as a component of various money laundering schemes.

Bullion sellers can also be used for money laundering. Entities make use of gold bullion sellers to purchase gold for cash for values just

below the reporting threshold. There is also suspicion that money laundering is taking place through new payment technologies and electronic financial instruments which are available on the internet. Launderers have utilized several variations of existing methods of placement, layering and integration.

7. Anti-Money Laundering Strategy

The key elements of an anti-money laundering strategy would be as follows:

1. Legal – appropriate laws and regulations.

2. Preventative – establishment of an effective institutional framework, including a financial intelligence unit, financial supervisors and law enforcement agencies; establishment of procedures, supervision of financial institutions and reporting to authorities.

3. Detection – financial intelligence analysis and law enforcement.

4. International cooperation – mutual legal assistance.

It is essential to create a legal framework that criminalizes money laundering, provides investigative powers for the detection of money laundering and for the freezing, seizing and forfeiture of such proceeds of crime. It is also important to enact legislation for customer due diligence and for the establishment of financial intelligence units.

It is essential to establish an effective, preventative institutional framework based on the work of a financial intelligence unit. The Central Bank and financial supervisors could enhance methods of prevention and law enforcement agencies such as police, customs and immigration services would form an integral part of the preventive mechanism. Further, it would be essential to obtain a comprehensive list of gate keepers and establish obligations on such persons with regard to client identification, record retention and monitoring accounts for any unusual activity which would facilitate other types of reporting such as currency transaction reporting and electronic fund transfer identification. It would also be necessary to monitor compliance.

Investigators should be able to access financial intelligence information which would help lead them to targets of money laundering and predicate crimes.

Mutual legal assistance in the context of international cooperation is an indispensable element in money laundering investigations. International cooperation should be as broad as possible and should cover as a minimum cooperation between supervisors, financial intelligence units, law enforcement agencies and also cooperation within institutions within a jurisdiction such as supervisor and financial intelligence unit, financial intelligence unit and law enforcement agencies, and supervisors and law enforcement agencies.

Customer due diligence should incorporate the Financial Action Task Force (FATF) recommendations such as prohibition of anonymous accounts and accounts with fictitious names, enhanced customer due diligence for politically exposed persons and special attention to high-risk customers and transactions of a complex and unusual nature. Customer due diligence also requires identification of the customer and verification of the customer's identity using reliable independent source documents data or information and also involves the

identification of the beneficial owner and taking reasonable measures to verify their identity. Further, obtaining information on the purpose and intended nature of the business relationship is also necessary.

Enhanced due diligence should be carried out for high-risk customers. Financial institutions should assess the risk of customers depending on types of business and types of transactions and their location. More information should be required from high-risk customers and approval by more senior management of such institutions for establishing a business relationship should be required. Financial institutions should keep records of transactions for at least five years after the business relationship has ended or after the transaction was conducted.

7.1 Financial Intelligence Unit

A financial intelligence unit is an integral part of an anti-money laundering strategy. A financial intelligence unit is a central national agency responsible for receiving, analysing and disseminating to a competent authority disclosures of financial information concerning suspected proceeds of crime.

The Financial Action Task Force (FATF) recommendation 26 requires countries to establish a financial intelligence unit that serves as a national centre for receiving analysis and dissemination of Suspicious Transaction Reports (STR's) and other information regarding potential money laundering. The financial intelligence unit should have access directly or indirectly to the administrative and law enforcement information that it requires to undertake its functions properly, including the analysis of its suspicious transaction reports. The definition of a financial intelligence unit contains five essential elements.

a) The financial intelligence unit should perform its functions on a centralized basis.

b) The financial intelligence unit should exercise a depositary function.

c) The financial intelligence unit should perform an analytical function.

d) The financial intelligence unit should exercise a routine sharing of information function.

e) The financial intelligence unit should exercise all these functions for the specific purpose of detecting the purpose of crime.

As stated earlier a financial intelligence unit is in other words a national unit established by legislation to:

a) Receive information from various sources.

b) Analyse that information.

c) Develop that information into usable intelligence.

d) Disseminate that intelligence into authorized and local agencies.

e) Support investigations into money laundering and sometimes other financial crime.

f) Maintain liaison with other similar units in other jurisdictions.

The objective of a financial intelligence unit is the prevention and detection of money laundering, the apprehension and prosecution of

offenders, the identification of criminally derived assets, support of investigations, the promotion of positive relationships between units, client organizations and the establishment and the maintenance of positive relationships with similar units in other countries.

The intelligence process of a financial intelligence unit would involve the collection, evaluation, collation, analysis, dissemination and re-evaluation of data. The types of reports and information received by an financial intelligence unit would include cash transaction reports, suspicious transaction reports, cross border transaction reports, electronic fund transfer reports, international fund transfer reports and other such formal reports and information from government and non governmental sources.

8. The current Anti-Money Laundering Draft Law of Sri Lanka.

The anti-money laundering draft law of Sri Lanka is designed to counter money laundering in Sri Lanka. It overrides bank secrecy laws and provides for increased diligence of financial institutions. Under the new law financial institutions will be required to pay special attention to all complex, unusual, large transactions and all unusual patterns of transactions which have no apparent economic or visible lawful purpose. The background and purpose of such transactions will as far as possible be examined and the findings will be available to help supervisors, auditors and law enforcement agencies.

Financial institutions will be required to report promptly any suspicious transaction to a financial intelligence unit, which will in turn monitor all suspicious transactions, reported by banks and other financial institutions, probably analyse such transactions and report any

suspicious transactions to the law enforcement authorities for investigation.

The new draft law makes money laundering an offence and establishes a money laundering supervisory authority, which will function as a financial intelligence unit, so all suspicious transactions would be reported to that central authority. The new law also provides for the freezing, seizing and forfeiture of assets in relation to the offence of money laundering. It also facilitates provision for mutual legal assistance and provides for an investigative framework. Legal protection is also afforded to persons who are involved in such investigations in terms of disclosure and so on.

Sri Lanka in terms of its international obligations has also formulated separate legislation to provide for mutual legal assistance in criminal matters. The objective of the statute is to provide assistance in locating and identifying witnesses and suspects, the service of documents, the examination of witnesses, the obtaining of evidence of documents and other articles, the execution of search and seizure, the effecting of temporary transfer of a person in custody to appear as a witness, the facilitation of the personal appearance of a witness, the provision of documents and other records, the location of proceeds of any criminal activities, the enforcement of orders for the payments of fines and the forfeiture and freezing of property.

Consideration is also being given to the enactment of a Financial Transaction Reporting Act, which would serve to prevent and detect money laundering by providing for customer due diligence and suspicious transaction reporting.

9. Current Situation

In a recent regional videoconference of the World Bank and IMF Global Dialogue Series in the South Asian region involving Maldives, Pakistan and Sri Lanka, Mrs. Dharani Wijetilleke, Secretary Ministry of Justice, Law Reforms and National Integration made the following statement, which is quoted here at length:[1]

"Sri Lanka, in its commitment to establishing an efficient anti-money laundering regime has embarked on several initiatives. Sri Lanka is conscious of the ever-increasing need to deal with the problem, the dimensions of which are becoming increasingly alarming. Sri Lanka is also conscious of the need for a greater focus consequent to the threat of global terror groups undermining democratic institutions using wealth acquired via parallel economy.

Sri Lanka believes positively in controlling the menace of money laundering. Towards this end, several initiatives have been taken:

- A draft law to establish a comprehensive anti-money laundering regime is currently being prepared.

- Sri Lankan bribery and corruption legislation already provides for forfeiture of properties acquired through bribery.

- A new poisons and dangerous drugs bill currently under preparation includes a comprehensive chapter to prevent the laundering of money acquired through drug offences.

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[1] *Anti Money Laundering and the Combating of Terrorism*, World Bank and IMF Global Dialogue Series, 2003.

- The Palermo Convention and both of its protocols have been signed. Legislation to deal with transnational organized Crime is being prepared.

- A new organized crime bill provides for the forfeiture of property acquired through crime.

- A cyber crime bill – finalised in 2003 – provides for the criminalisation of the use of modern technology in the perpetration of crimes. This will greatly enhance the legislative regime for tracking down launderers who make extensive use of advances in technology.

- The Mutual Assistance in Criminal Matters Act of 2002 was passed in Parliament in August 15, 2002. The law is based primarily on the Commonwealth model and provides for a comprehensive regime to offer and obtain assistance from other jurisdictions with regard to search, seizure, tracing of proceeds of crime, and enforcement of court orders.

- The anti-money laundering draft bill is currently being finalized and will shortly be submitted for government approval. Based on the Commonwealth model, it provides for comprehensive coverage of predicate offences such as drugs, terrorism, bribery and corruption; the use of firearms, explosives, and offensive weapons; organized crime, cyber crime, human trafficking, sexual abuse of children (including pornography), and human smuggling.

- An expanded definition of financial institutions to include a wider range of activities.

- Introduction of corporate controls compatible with the Financial Action Task Force (FATF) recommendations. Even at present instructions issued by the Central Bank seek to give effect to controls administratively.

- Treating the offence of laundering as a derivative offence. No predicate offences are recognized in this bill. A resolution is to be introduced under which monies that cannot be accounted for would be deemed to be derived from unlawful activities.

To give effect to the United Nations Security Council Resolution 1373 of 2001, Sri Lanka promulgated and published regulations on October 16th, 2001. Under the regulations, all commercial banks are prohibited from entering into any transactions with groups which have connections with terrorist or subversive activities.

Sri Lanka is party to the International Convention for the Suppression of Financing of Terrorism.

The Central Bank has issued circular instructions to all licensed commercial banks and licensed specialized banks giving guidelines on the use of customer due-diligence procedures. The objective is to prevent the unchecked use of the financial system for money laundering and transactions related to terrorism or subversive activities.

Sri Lanka is introducing legislation to establish a single non-bank financial regulatory authority. This institution may be empowered to oversee anti-money laundering measures.

Key challenges in combating money laundering and terrorist financing include:

- Enhancing the efficiency of monitoring and investigative roles.

- Keeping abreast of ruses used by criminals. Their methods are sophisticated and investigators always seem to be one step behind.

- Training investigators.

- . Creating awareness of anti-money laundering developments and international endeavors.

10. International Anti Money Laundering Initiatives

1. Caribbean Financial Action Task Force: since its inception membership in the Caribbean Financial Action Task Force (CFATF) has grown to over 25 states of he Caribbean basin. The CFATF has instituted measures to ensure the effective implementation of and compliance with the 19 CFATF and 40 FATF recommendations. The CFATF member governments have made a firm commitment to submit to mutual evaluation of their compliance both with the Vienna Convention and with CFATF and FATF recommendations.

2. Asia/Pacific Group (APG) on Money Laundering: The Asia/ Pacific Group comprises of member states from South Asia, South East and East Asia and the South Pacific. The APG has conducted several typologies workshops and stressed the need to apply effective anti money laundering legislation in member countries. It has also conducted country evaluations of member states and carried out self-assessment and mutual evaluation exercises in the region.

3. The Committee of Ministers by the Council of Europe established The Select Committee of Experts on the evaluation of Anti Money Laundering measures in September 1977. It has conducted self and mutual assessment exercises of the anti money laundering measures in place in the Council of Europe Countries which are not members of the FATF and continued its work on mutual evaluations.

4. The Offshore Group of Banking Supervisors: the conditions of membership of the OGBS includes the requirement that clear political commitment be made to implement the FATF' s forty recommendations. The OGBS has also carried out a series of mutual evaluations of countries, which are not members of the FATF and CFATF.

5. Financial Action Task Force (FATF): The FATF forty recommendations contain measures to combat money laundering and countries which failed to follow these recommendations and enact legislation are liable to be black-listed. World agencies such as the FATF take serious note of non cooperative territories and countries and would not hesitate to name and shame those who do not cooperate and enact anti money laundering laws and regulations.

11. Conclusion

The scale of the money laundering problem in Sri Lanka is not properly known. However, intelligence information indicates that money laundering is quite prevalent in Sri Lanka though it is not thought to be as widespread as in certain other regions of the world. However, from a global point of view the nature of the money laundering problem is clear, with all regions of the world being used by money launderers. Drug trafficking remains the major problem although other criminal activities discussed above also generate huge proceeds. Sri Lanka needs to join in the global fight against money laundering without delay.

Schedule I

UN Conventions on Human Rights and International Conventions on Terrorism Signed, Ratified or Acceded to by Sri Lanka as at 31st December 2003*

- Convention on the Prevention and Punishment of the Crime of Genocide.
  Acceded on 12th October 1950.

- International Covenant on Economic, Social and Cultural Rights.
  Acceded on 11th June 1980.

- International Covenant on Civil and Political Rights.
  Acceded on 11th June 1980.

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* The consent of a State to be bound by a treaty is expressed by the signature of its representative when the treaty provides that signature shall have that effect. In many instances, the parties may agree either in the text of the agreement or in the negotiations accompanying the formulation of the text, that signature alone is not sufficient; a further act is required to signify consent to be bound which is called ratification. Treaties in which this approach is adopted usually intend that the signature will merely authenticate the text of the agreement. The purpose of ratification is to provide the government of the states concerned with a further opportunity to examine whether they wish to be bound by a treaty or not. For those States which did not participate in the original negotiation and were not signatories to the treaty but nonetheless wish to become parties to the treaty, can do so by acceding to the treaty. Once a State has become a party to the treaty, it enjoys all the rights and responsibilities under the treaty irrespective of whether it became a party by signature and ratification or accession.

- Convention on the Elimination of All Forms of Discrimination against Women.
  Ratified on 5th October 1981.

- International Convention on the Elimination of All Forms of Racial Discrimination.
  Acceded on 18th February 1982.

- International Covenant on the Suppression and Punishment of the Crime of Apartheid.
  Acceded on 18th February 1982.

- Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents.
  Acceded on 27th February 1991.

- Convention on the Rights of the Child.
  Ratified on 12th July 1991.

- Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.
  Acceded on 3rd January 1994.

- International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.
  Acceded on 11th March 1996.

- Optional Protocol 1 to the International Covenant on Civil and Political Rights.
  Acceded on 3rd October 1997.

- International Convention for the Suppression of Terrorist Bombings.
  Ratified on 23rd March 1999.

- Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict.
  Ratified on 6th September 2000.

- International Convention against the Taking of Hostages.
  Acceded on 6th September 2000.

- Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation.
  Acceded on 6th September 2000.

- International Convention for the Suppression of Financing of Terrorism.
  Ratified on 6th September 2000.

- United Nations Convention against Transnational Organised Crime.
  Signed on 15th December 2000.

- Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children - supplementing the United Nations Convention against Transnational Organised Crime.
  Signed on 15th December 2000.

- Protocol against the Smuggling of Migrants by Land, Sea and Air - supplementing the United Nations Convention against Transnational Organised Crime.
  Signed on 15th December 2000.

- Optional Protocol to the Convention on the Rights of the Child on the sale of Children, Child Prostitution, and Pornography.
  Ratified on 9th May 2002.

Ratification of ILO Conventions by Sri Lanka

Con. No.	Name of the Convention	Date of ratification	Present Status
C4	Night Work (Women) Convention 1919	08.10.1951	Denounced
C5	Minimum Age (Industry) Convention 1919	27.09.1950	Denounced
C6	Night Work of Young Persons (Industry) Convention 1919	26.10.1950	Denounced
C7	Minimum Age (Sea) Convention 1920	02.09.1950	Denounced
C8	Unemployment Indemnity (Shipwreck) Convention 1920	25.04.1951	
C10	Minimum Age (Agriculture) Convention 1921	29.11.1991	Denounced
C11	Right of Association (Agriculture) Convention 1921	25.08.1952	
C15	Minimum Age (Trimmers and Stockers) Convention 1921	25.04.1951	Denounced
C16	Medical Examination of Young Persons (Sea) Convention 1921	25.04.1950	

Con. No.	Name of the Convention	Date of ratification	Present Status
C18	Workmen's Compensation (Occupational Diseases) Convention 1925	17.05.1952	
C26	Minimum Wage Fixing Machinery Convention 1928	09.06.1961	
C29	Forced Labour Convention1930	05.04.1950	
C41	Night Work (Women) Convention (Revised) 1934	02.09.1950	Denounced
C45	Underground Work (Women) Convention 1935	20.12.1950	
C58	Minimum Age (Sea) Convention (Revised) 1936	18.05.1959	
C63	Convention concerning Statistics of Wages and Hours of Work 1938	25.08.1952	
C80	Final Articles Revision Convention 1946	10.09.1950	
C81	Labour Inspection Convention 1947	03.04.1950	

Con. No.	Name of the Convention	Date of ratification	Present Status
C87	Freedom of Association and Protection of the Right to Organise Convention 1948	15.11.1995	
C89	Night Work (Women) Convention (Revised) 1948	31.03.1966	Denounced
C90	Night Work of Young Persons (Industry) Convention (Revised) 1948	18.05.1959	
C95	Protection of Wages Convention 1949	27.10.1983	
C96	Pre-charging Employment Agencies Convention (Revised) 1949	30.04.1958	
C98	Right to Organise and Collective Bargaining Convention 1949	13.12.1972	
C99	Minimum Wage Fixing Machinery (Agriculture) Convention 1951	05.04.1954	
C100	Equal Remuneration Convention 1951	01.04.1993	
C103	Maternity Protection Convention (revised) 1952	01.04.1993	

Con. No.	Name of the Convention	Date of ratification	Present Status
C105	Abolition of Forced Labour Convention 1957	07.01.2003	
C106	Weekly Rest (Commerce and Offices) Convention 1957	27.10.1983	
C108	Seafarers Identity Documents Convention 1958	24.11.1995	
C110	Conditions of Employment of Plantation workers Convention 1958	24.04.1995	
C111	Discrimination (Employment and Occupation) Convention 1958	27.11.1998	
C115	Radiation Protection Convention 1960	18.06.1986	
C116	Final Articles Revision Convention 1961	26.04.1974	
C131	Minimum Wage Fixing Convention 1970	17.03.1975	
C135	Workers Representatives Convention 1971	16.11.1976	
C138	Minimum Age for Admission to Employment 1973	11.02.2000	

Con. No.	Name of the Convention	Date of ratification	Present Status
C144	Tripartite Consultations to Promote the Implementation of ILO Convention 1976	17.03.1994	
C160	Labour Statistics Convention 1985	01.04.1993	
C182	Worst Forms of Child Labour Convention 1999	1.03.2001	

Humanitarian Law Conventions Ratified by Sri Lanka

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field 1949
Ratified on 28th February 1959.

Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea 1949
Ratified on 28th February 1959.

Geneva Convention Relating to the Treatment of Prisoners of War 1949
Ratified on 28th February 1959.

Geneva Convention Relating to the Protection of Civilian Persons in Time of War 1949
Ratified on 28th February 1959.

Schedule II

Some Human Rights Instruments not Ratified by Sri Lanka

- Optional Protocol II to the International Covenant on Civil and Political Rights.
- Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity 1968.
- Declaration regarding Article 21 of the above (relating to the entertainment of complaints by one State Party against another).
- Declaration regarding Article 22 of the above (relating to the entertainment of complaints by individuals).
- ILO Convention (No. 102) concerning Minimum Standards of Social Security.
- ILO Convention (No. 143) concerning Migrants in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers.
- ILO Convention (No. 122) concerning Employment Policy.
- ILO Convention (No. 141) concerning Organisations of Rural Workers and Their Role in Economic and Social Development.

- ILO Convention (No. 151) Concerning Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service.

- Convention Relating to the Status of Refugees 1951

- Protocol to the 1951 Refugees Convention 1967

- Protocol Additional to the Geneva Convention of 12th August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)

- Protocol Additional to the Geneva Convention of 12th August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)

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E.M.K. Ekanayake v. *Reserve Sub Inspector Hewawasam.* S.C. (FR) Application No. 34/2002, SCM 17.03.2003.

Farook Abdul Latif v. *DIG, Nuwara Eliya.* S.C. (FR) Application No. 244/2002, SCM 15.12.2003.

Haritha Adhikary and another v. *Kottage Sumith Amarasinghe.* S.C. (FR) Application No. 251/2002, SCM 14.02.2003.

Harinda Shashika Kumar v. *DIG, D.A. De fonseka and others.* S.C. (FR) Application No. 462/2001, SCM 17.03.2003.

H.A. Nalaka Eranda Hettiarachchi v. *Gamini Meegahakumbura.* S.C. (FR) Application No. 340/2001, SCM 17.10.2003.

Indika Chathurani Dias v. *Harsh Amarasingha, Inspector of Police.* S.C. (FR) Application No. 444/2002, SCM 19.12.2003.

Kandasamy Konesalingam v. *Major Muthalif, OIC JOOSSP Army Camp.* S.C. (FR) Application No. 555/2001, SCM 10.02. 2003.

Kottabadu Duruge Sriyani Silva v. *Chanaka Iddamalgoda, OIC and others.* S.C. (FR) Application No. 471/2000, SCM 8.08.2003.

M.W. Sarath Hemachandra de Silva v. *S.I. Karunathilake.* S.C. (spl) No. 02/2002, SCM 10.10.2003.

Manikku Kankanamge Hubert Seneviratne v. *S.I. Rajakaruna, Criminal Investigation Department and others.* S.C. (FR) Application No. 646/2001, SCM 30.05.2003.

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R.M.P. Prasanna v. *Jude R.P.C.* S.C. (FR) Application No. 106/2003, SCM 11.12.2003.

Ranjith Kumara Kariyawasam v. *B.L.V. de Kodituwakku, IGP and others.* S.C. (FR) Application No. 492/2001, SCM 21.10.2003.

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Sellathurai Shanmugrajah v. *Dilruk, Sub Inspector of Police and others.* S.C. (FR) Application No. 47/2002, SCM 10.02.2003.

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Darshan Nayanakantha Senanyake v. *The Airport & Aviation Services (Sri Lanka) Ltd. and others.* S.C. (FR) Application No. 510/2001, SCM 29.01.2003.

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SRI LANKA:
STATE OF HUMAN RIGHTS
2004

This is a detailed account of the state of human rights in Sri Lanka focusing on events which occurred in the country in 2003.

This report focuses on: Rights of the Child, Illegal Migration: Human Smuggling and Trafficking in Persons, Workers' Rights, Judicial Protection of Human Rights, The National Police Commission, Bindunuwewa: Justice Undone?, Human Rights & Intellectual Property Rights and Combating Money Laundering in Sri Lanka. The report, therefore, represents an important watershed with regard to human rights in Sri Lanka.

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