

## SRI LANKA: STATE OF HUMAN RIGHTS 2008

BURENTHAMA MALABERTA 2008

## SRI LANKA: STATE OF HUMAN RIGHTS 2008

This report covers the period January to December 2007

Law & Society Trust
3, Kynsey Terrace
Colombo 8
Sri Lanka

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ISBN: 978-955-1302-16-0

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### ABBREVIATIONS & ACRONYMS

AAIB Agricultural & Agrarian Insurance Board

AG Attorney-General

APRC All Party Representative Committee

AZC Autonomous Zonal Council

BOI Board of Investment

CAT Convention Against Torture

CCHA Consultative Committee of Humanitarian

Agencies

CEACR Committee of Experts on the Application of

Conventions and Recommendations

CEDAW Convention on the Elimination of All Forms

of Discrimination against Women

CFA Cease Fire Agreement

CHA Consortium of Humanitarian Agencies

CHAP Common Humanitarian Action Plan

CID Criminal Investigation Department

COI Commission of Inquiry

**CPA** Centre For Policy Alternatives

CRC Convention on the Rights of the Child

CWC Ceylon Workers Congress

EFC Employers' Federation of Ceylon

EPDP Eelam People's Democratic Party

FTZGSEU Free Trade Zone and General Services

Employees Union

GOSL Government of Sri Lanka

GSP+ Generalised System of Tariff Preferences

HRC Human Rights Commission

4873

HRW Human Rights Watch

HSZ High Security Zone

IASC Inter-Agency Standing Committee

ICCPR International Covenant on Civil and Political

Rights

ICESCR International Covenant on Economic, Social

and Cultural Rights

ICFTU International Confederation of Free Trade

Unions

ICG International Crisis Group

ICJ International Commission of Jurists

IDP Internally Displaced Persons

IIGEP International Independent Group of Eminent

Persons

ILO International Labour Organisation

IMADR International Movement Against All Forms of

Discrimination and Racism

INGO International Non-Governmental Organisation

IOM International Organisation of Migration

IPS Institute of Policy Studies

ITCC Indian Tamil Cultural Council

JAAF Joint Apparel Association Forum

JHU Jathika Hela Urumaya

JMO Judicial Medical Officers

JPTUC Joint Plantation Trade Union Centre

JSC Judicial Service Commission

JTUC Joint Trade Union Centre

IVP Janatha Vimukhti Peramuna

LJEWU Lanka Jathika Estate Workers Union

LST Law & Society Trust

LTTE Liberation Tigers of Tamil Eelam

MP Member of Parliament

NGO Non-Governmental Organisation

NHRC National Human Rights Commission

NPC National Police Commission

OCHA Office for the Coordination of Humanitarian

Affairs

OHCHR Office of the High Commissioner for Human

Rights

PNM Patriotic National Movement

**PSO** Public Security Ordinance

SCOPP Secretariat for Coordination of the Peace

Process

SEZ Special Economic Zone

SLA Sri Lanka Army

SLFP Sri Lanka Freedom Party

SLHRC Sri Lanka Human Rights Commission

SLMM Sri Lanka Monitoring Mission

STF Special Task Force

TMVP Tamil Makkal Viduthalai Pulikal

TNA Tamil National Alliance

UNHCR United Nations High Commissioner for

Refugees

UNICEF United Nations Children's Fund

UN United Nations

UNP United National Party

### **FOREWORD**

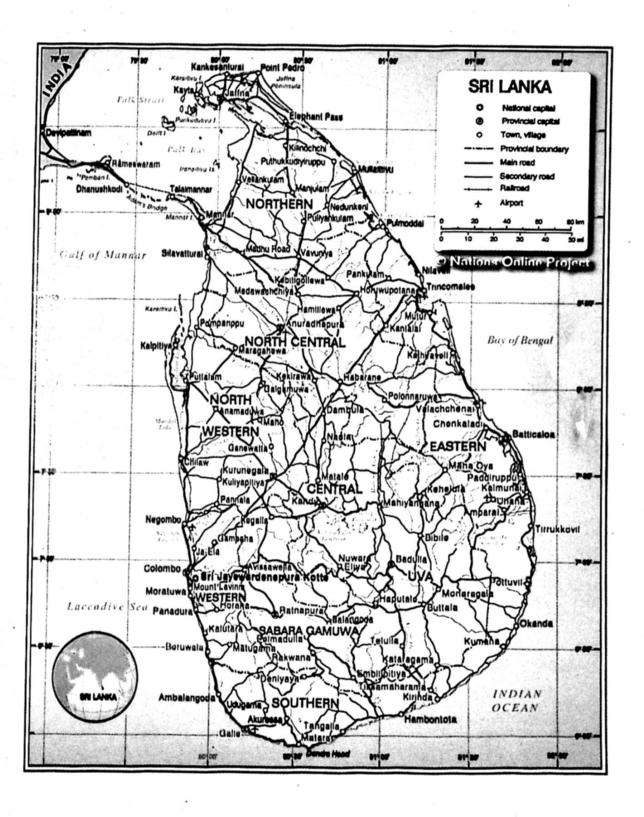
This annual report sets out the status of human rights in Sri Lanka in those areas which emerged as important in 2007, and attempts to assess to what extent Sri Lanka has conformed with both its international and national human rights obligations. It has been published without interruption by the Law & Society Trust since 1993.

This report is an important periodic measure of Sri Lanka's progress towards full compliance with the international legal standards it has undertaken to uphold, as well as a means of holding the State to account where it has fallen short. It is hoped that this report will facilitate the effective protection and promotion of human rights by the State, by encouraging dialogue within society, as well as between civil society and the State. It is also intended as an entry point for the public to engage critically with topical human rights issues of vital national significance.

Each chapter is authored by a specialist in the subject area and given that the topic covered in each chapter could be approached from several viewpoints, some overlap between chapters is inevitable, while some cross-cutting issues are covered more comprehensively than others.

We deeply regret the considerable delay in the publication of the Sri Lanka: State of Human Rights 2008 report.

Law & Society Trust Colombo





### OVERVIEW: HUMAN RIGHTS IN SRI LANKA IN 2007

Ambika Satkunanathan'

#### 1. Introduction

2007 was marked by the rapid deterioration of the rule of law and the state of human rights in Sri Lanka. After the government wrested back control of territory held by the Liberation Tigers of Tamil Eelam (LTTE) in the East, fighting shifted to the north of the country. The political climate was unfavourable for the resumption of peace talks with the military option taking precedence as the primary means of resolving the national question. Rhetoric and public pronouncements of the government denied the existence of an ethnic conflict and instead labelled the conflict as a terrorist problem which could be resolved through military means. Abductions, arbitrary arrests, disappearances, crackdown on dissent, intimidation of journalists and attacks on humanitarian workers continued during the year.

<sup>&#</sup>x27;Independent Researcher.

<sup>&</sup>lt;sup>1</sup> President Rakapakse in an interview on Al Jazeera stated that the army was winning the battle against the LTTE and peace would be negotiated at a point where the LTTE recognises this and stops its aggression. While denying that he was pursuing a military solution, he said that only if the LTTE is weakened would they realise they have no option but to negotiate, 31 May 2007.

<sup>&</sup>lt;sup>2</sup> 'President has historic audience with the pope', 20 April 2007 at <a href="http://www.president.gov.lk/sinhala/html/news/200704/20070420news.htm">http://www.president.gov.lk/sinhala/html/news/200704/20070420news.htm</a>.

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The government when it was accused of committing human rights violations denied responsibility and failed to hold perpetrators accountable or take remedial action. The people in the LTTE controlled areas were subjected to forced recruitment, restrictions on their movement and severe curtailment of the exercise of their human rights.

On the political front, the relationship between the governing coalition United People's Freedom Alliance (UPFA) and the United National Party (UNP) broke down with the crossing over of 18 MPs of the UNP to the government. This act which contravened the spirit of the Memorandum of Understanding between the UNP and Sri Lanka Freedom Party (SLFP) signed in October 2006 put paid to any hope of bipartisanship, at least in the immediate future. In July the UNP formed an alliance with two SLFP dissident MPs, Mangala Samaraweera and Sripathi Sooriyarachchi, who accused President Rajapaksa of bribing the LTTE to win the 2005 Presidential elections and turning the party into a family fiefdom. Former President Chandrika Kumaratunge in her letter to Samaraweera, which was made public, supported the alliance by stating that it reflected the need of the hour and expressed her dissatisfaction with the change in several important policies of the SLFP, such as those on the ethnic conflict and the economy. The fissures within the Sinhala polity deepened with the Janatha Vimukthi Peramuna (JVP), an important UPFA coalition member, joining the ranks of the opposition. In 2007 the LTTE suffered several setbacks. In addition to military defeats, the group lost its Chief of the political division Tamilchelvan in a Sri Lanka Air Force raid in Kilinochchi in November.

In December 2006, the government incorporated various aspects of the Prevention of the Terrorism (Temporary Provisions) Act, No 48 of 1979, which was effectively suspended under the Ceasefire Agreement, in the Emergency Regulations. A further amendment was introduced in September 2007 to extend the definition of terrorism to include activity aimed at bringing about 'any other political or governmental change, or compelling

government change, or compelling the government of Sri Lanka to do or abstain from doing any act...'3, thereby effectively stifling dissent and political activism.

The Constitutional Council, tasked with appointing members of independent commissions was not established as per the 17th amendment to the Constitution of Sri Lanka (1978) due to disagreements regarding the nomination of the tenth member of the Council. The consequent Presidential appointment of members to several independent commissions, including the Human Rights Commission (HRC),4 jeopardised the effective functioning, credibility and independence of the said institutions and illustrated executive efforts to increase the ambit of his power. The National Human Rights Commission was downgraded to observer status by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights for two reasons; failure to comply with domestic law which meets international standards and concerns regarding the practice of the Commission which the ICC viewed as not 'balanced, objective and non-political, particularly with regard to the discontinuation of follow-up to 2,000 cases of disappearances in July 2006'.5

Sri Lanka's human rights record was placed under further scrutiny when it sought to renew its Generalised System of Tariff Preferences (GSP+) status, which provides tariff preferences conferred by the European Union to specific countries. In order to qualify for renewal the government enacted the International Covenant on Civil and Political Rights (ICCPR) Act to fulfil the requirement that a beneficiary country 'ratify and fully implement' 27 international conventions. GSP+ provides several benefits to the apparel industry in Sri Lanka and non-renewal would lead to the

<sup>4</sup> Ayesha Zuhair, 'The resuscitation of the 17th Amendment: Does anyone care', Daily Mirror, 11 January 2007.

<sup>&</sup>lt;sup>3</sup> Dilrukshi Hanundetti, 'Forcing a government change defined as terrorism', *The Morning Leader*, 5 September 2007.

<sup>&</sup>lt;sup>5</sup> Sri Lanka: Human Rights Commission Downgraded, Human Rights Watch, 18 December 2007 at <a href="http://hrw.org/english/docs/2007/12/18/slanka17581\_txt.htm">http://hrw.org/english/docs/2007/12/18/slanka17581\_txt.htm</a>

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loss of thousands of jobs which would adversely affect not only the national economy but also the livelihoods of the mainly female workforce that services this sector.

The ICCPR Act No 56 of 2007 which the government claims incorporates the provisions of the Convention into domestic law, contains only four Convention rights - the right to be recognised as a person before the law, provision of certain entitlements to alleged offenders, certain rights of the child and right to access state benefits. Despite government claims that most Convention rights are recognised in the Constitution and domestic law, there are several rights, such as the right to life and the right to compensation for unlawful arrest or detention, that are not contained in the Act. Further, several non-derogable ICCPR rights, such as the right to a fair trial, are derogable in Sri Lanka. As the Act does not set out standards for the restriction of fundamental rights, one has to look to Article 15 of the Constitution, which sets out restrictions to fundamental rights, for guidance. This provision is inadequate as it doesn't provide a 'threshold of substantive justification prior to imposition of restrictions by recourse to standards such as 'necessity in a democratic society", "reasonableness" and/or "proportionality" that are required by the ICCPR..."6 Hence, the Act falls short of effectively incorporating the rights enshrined in the Convention, of which many do not exist in domestic law.

Humanitarian workers and local rights groups were targeted by all parties to the conflict. Attacks ranged from abductions, killings, intimidation and forced recruitment of staff by the LTTE to investigations of their activities by the Parliamentary Select Committee for the Investigation of the Operations of Nongovernmental Organisations (NGOs) and their Impact.

Nationalist rhetoric against the international community by the government, partly in response to added international scrutiny, was

<sup>6</sup> Asanga Welikala and Rohan Edrisinha, 'GSP+ Privileges: The Need for Constitutional Amendment' at www.cpalanka.org/newspaper\_Articles/ Article\_on\_ICCPR.pdf

stepped up during the year with several veiled threats made by senior government officials and Ministers against diplomats, including UN agencies, for 'interfering' in the domestic affairs of Sri Lanka.

### 2. Security Situation

As the conflict escalated civilian casualties increased with around a thousand civilian deaths reported in 2007.7

In the early hours of 26 March, the LTTE conducted an air raid on a Sri Lanka Air Force base situated next to the Colombo International Airport using light aircraft fitted with bombs (billed as the new Tamil Eelam Air Force or Air Tigers). While the attack appeared to have caused limited damage, it had major propaganda value and led to considerable political fallout due to the apparent lapses in security at the time of the attack.8 The second air attack targeted another military base in the north.9 The last LTTE air raid in 2007, during the Cricket World Cup Final in the early hours of 29 April, targeted government oil facilities located in the suburbs of Colombo. 10 The firing of anti-aircraft weapons over Colombo during this attack resulted in civilian injuries and damage to buildings.11 Following these attacks and subsequent suspension of service, the international airport was closed to night flights for a short period<sup>12</sup> and several countries issued revised travel advisories requesting citizens to reconsider travel to Sri Lanka.13

<sup>&</sup>lt;sup>7</sup> US Department of State, Sri Lanka: Country Report on Human Rights practices 2007, 11 March 2008 at <a href="http://www.state.gov/g/drl/rls/hrrpt/2007/100620.htm">http://www.state.gov/g/drl/rls/hrrpt/2007/100620.htm</a>

<sup>&</sup>lt;sup>8</sup> Sri Lankan rebels launch air raid, 26 March 2007 at <a href="http://news.bbc.co.uk/1/http://news.bbc.co.uk/http://news.bbc.co.uk

<sup>9</sup> Sunil Jayasiri, 'Capacity of SLAF and Tiger air raids', Daily Mirror, 27 April 2007.

<sup>10 &#</sup>x27;LTTE air raid over Colombo', Sunday Leader, 29 April 2007.

<sup>&</sup>lt;sup>11</sup> Sandun A Jayasekera, 'Several houses hit, civilians injured', *Daily Mirror*, 30 April 2007.

<sup>&</sup>lt;sup>12</sup> Fully fledged air defence system vital to counter Tiger air threat', Sunday Observer, 6 May 2007.

<sup>&</sup>lt;sup>13</sup> http://www.srilankaexpedition.com/us-state-department-updates-travel-warning-on-sri-lanka.

Internecine violence within the Tamil armed groups appeared set to become worse with the reported split within the LTTE breakaway group, the Tamil Makkal Viduthalai Pulikal (TMVP). The new commander Pillayan issued a warning to Karuna, the Eastern commander of the LTTE who initiated the split from the LTTE in 2004, to leave the group or face being removed by force.<sup>14</sup> The intra group conflict is said to have stemmed from Karuna's misuse of funds. 15 Many TMVP officials are alleged to have fled the country and incidents of violence were reported in the East with many Pillayan cadres either being placed under house arrest or targeted by Karuna. 16 According to a press release issued by the TMVP, Karuna was re-appointed leader with Pillayan being replaced by Mangalan Master. Karuna later fled the country and Pillayan announced he was acting leader of the group in his absence.17 In October Karuna was arrested in London by the British police for travelling to the United Kingdom on a forged diplomatic passport which was reportedly issued by the Department of Immigration and Emigration of Sri Lanka. The government denied this. 18 The visa, which was valid, was issued to Karuna based on a Third Party note given to the British High Commission by the Ministry of Foreign Affairs of Sri Lanka. 19 At the end of 2007, Karuna was awaiting trial for using forged travel documents to travel to the UK.

Violence between Tamil armed-politico groups erupted again in July with clashes between the Eelam People's Democratic Party (EPDP) and Tamil Makkal Viduthalai Puligal (TMVP - Karuna faction) in the Eastern Province. Despite a later joint statement in

<sup>&</sup>lt;sup>14</sup> Pillayan gives final warning to Karuna, Daily Mirror, 28 May 2007.

<sup>&</sup>lt;sup>15</sup> Factional war grips Karuna group, Tamil Guardian, 6 June 2007 at <a href="http://www.tamilguardian.com/article.asp?articleid=1265">http://www.tamilguardian.com/article.asp?articleid=1265</a>

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

<sup>&</sup>lt;sup>18</sup> Sonali Samarasinghe, 'Democracy continues Sri Lanka style: The Karuna affair and Pillayan, *Sunday Leader*, 11 November 2007.

<sup>&</sup>lt;sup>19</sup> Government smuggled Karuna to London on forged DPL passport, www.Lankanewspapers, 7 November 2007.

which both groups claimed they had come to an agreement to 'act with mutual understanding while wiping out all enmities' 20 tension between the various armed groups continued to exist and exacerbated instability in the region. Further, the presence of these groups in IDP camps hampered the effective functioning of aid agencies in the area. 21

### Militarisation

In the Eastern Province, militarisation took many forms; men in civilian clothing carrying arms; increased number of checkpoints and appointment of ex-military personnel to positions in civil administration.<sup>22</sup> Women's groups indicated an increase in the incidence of violence against women in the East and its contiguous districts.<sup>23</sup> Arbitrary arrests, detentions, extra-judicial killings and disappearances, particularly during curfew hours, continued to take place in the North.

In May by Gazette notification<sup>24</sup> the President declared a new High Security Zone (HSZ) covering Sampur and Muttur East (eleven Grama Niladari divisions) for the establishment of a Special Economic Zone (SEZ). The Gazette states that no one will be allowed to enter or remain in the stipulated area. Anyone found guilty of such offence shall be subject to rigorous imprisonment ranging from three months to five years and of a fine of not less than Rs.50,000.<sup>25</sup> Although the government announced that it had acquired land for the relocation of families displaced by the

<sup>&</sup>lt;sup>20</sup> 'EPDP-Karuna settle differences', 11 July 2007 at http://www.lankanewspapers.com/news/2007/7/16862.html

<sup>&</sup>lt;sup>21</sup> Inter-Agency Standing Committee Country Team, Situation report 103, 30 November – 7 December 2007

<sup>&</sup>lt;sup>22</sup> IDPs in Sri Lanka: Report of the fact finding mission to the North and East of Sri Lanka to assess the state of displaced persons, South Asians for Human Rights, August 2007.

<sup>&</sup>lt;sup>23</sup> Interviews with groups working on gender issues.

Gazette Extraordinary N.1499/25 of 30th May 2007
 High security zones set up in Trinco, Sunday Leader, June 6 2007.

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creation of the HSZ, reports indicated that thousands of families were stranded in transit camps due to lack of alternatives<sup>26</sup>. Eastern Security Forces Commander Parakrama Pannipitiya was appointed as the Competent Authority for the implementation of the regulations<sup>27</sup>. Residents of Muttur and Thoppur filed a fundamental rights petition challenging the creation of the HSZ. The Supreme Court which failed to give leave to proceed instructed all persons who wished to return to their homes in the HSZ to make applications to the Competent Authority. While criticising the petitioners for bringing sensitive issues relating to national security, the Chief Justice stated that the government was taking all possible action to resettle the displaced quickly and should be given time to finalize security measures related to the area.<sup>28</sup>

# 4. Abductions, Disappearances, Arbitrary Arrests and Detention

With the escalation of the conflict and stepping up of military operations there was an increasing number of detentions under the emergency regulations targeting mainly Tamils.<sup>29</sup>

According to a statement by the Sri Lanka Monitoring Mission (SLMM) within the space of one week, 34 persons were reported abducted in the East. 30 Abductions in the North of the country

<sup>27</sup> 'Return to war: Human rights under siege', Human Rights Watch, volume 19, no.11, August 2007, p.34.

<sup>&</sup>lt;sup>26</sup> Can the East be won by Human Culling? Special Economic Zones. An Ideological Journey Back to 1983, UTHR (J), August 2007.

 <sup>28 &#</sup>x27;Sampur FR petition dismissed', BBCSinhala.com, 17 July 2007 at <a href="http://www.bbc.co.uk/sinhala/news/story/2007/07/070717">http://www.bbc.co.uk/sinhala/news/story/2007/07/070717</a> sampur hsz.shtml
 29 In December, the government arrested more than thousand Tamils in Colombo after suicide bombings in the capital in late November, Sri Lanka: Amnesty International condemns mass arrests, 4 December 2007 at <a href="http://www.amnesty.org/en/for-media/press-releases/sri-lanka-amnesty-international-co...">http://www.amnesty.org/en/for-media/press-releases/sri-lanka-amnesty-international-co...</a>

<sup>&</sup>lt;sup>30</sup> Easwaran Rutnam, '34 abductions in the East within one week, says SLMM', Daily Mirror, 25 June 2007.

also continued with the Human Rights Commission reporting twenty one cases of disappearances in the first three weeks of August alone.31 In some instances, such as the case of the three journalists of the Akuna newspaper who were accused of colluding with the LTTE, abductions by state officials were later justified as arrests.<sup>32</sup> The reasons for abductions varied: some abductions were due to political reasons while others, such as those of Tamil businessmen, were for extortion. Louise Arbour, the UN High Commissioner for Human Rights during her visit to Sri Lanka pointed to the 'alarming' number of abductions and disappearances and called for an independent monitoring mechanism because of the failure of the government to investigate and provide remedies to the families of the victims.33 Although government support and/ or collusion was suspected in the abductions, particularly since in many cases the vehicles passed through several military checkpoints, the GOSL publicly questioned the veracity of many claims and accused complainants (and their NGO supporters) of aiding LTTE propaganda.34 Although initially only Tamil businessmen were abducted, later Muslim businessmen also became targets. Despite this, a group of Muslim MPs in the ruling coalition issued a statement that the abduction of Muslims had been blown out of proportion, denied any government involvement and said they would resign from their positions if it was proven otherwise.35 Rauf Hakeem, though the Minister in the governing UPFA, coalition did not take part in the press conference and instead made statements calling for the government to take action.36

<sup>32</sup> Statement by the Free Media Movement, 12 February 2007 at <a href="http://www.ifex.org/en/content/view/full/81062">http://www.ifex.org/en/content/view/full/81062</a>

36 http://federalidea.com/focus/archives/date/2007/07/26

<sup>&</sup>lt;sup>31</sup> Sri Lanka: Launch of the Human Rights Watch Report "Return to War: Human Rights under siege" in the European Parliament, Human Rights Watch, 11 September 2007 at <a href="http://hrw.org/english/docs/2007/09/11/slanka16838">http://hrw.org/english/docs/2007/09/11/slanka16838</a> txt.htm

<sup>33</sup> Statement, 10 December 2007 at <a href="http://www.unog.ch/unog/website/news-media.nsf/(httpNewsByYear-en)/A923C8EE6A7D90D%206C125">http://www.unog.ch/unog/website/news-media.nsf/(httpNewsByYear-en)/A923C8EE6A7D90D%206C125</a>
34 Interview with Mahinda Samarasinghe, *The Nation*, 18 March 2007.

<sup>35</sup> Muralidhar Reddy, 'Sri Lanka: Muslim concerns', Frontline, 26 August 2007.

In June, former Air Force Squadron Leader Nishantha Gajanayaka was arrested for alleged involvement in the abduction of Tamils and Muslims, extortion and killings. The Criminal Investigation Department (CID) identified him as the brains behind the operations and intimated that he might have been involved in the abduction and killing of the two Red Cross workers earlier that month. The arrest came a fortnight after UNP Parliamentarian, Lakshman Seneviratne claimed in Parliament that Gajanayake was conducting operations from a hotel room in Colombo and that his bills were paid by the brother of a non-cabinet minister.<sup>37</sup>

The government response to the phenomenon of abductions and disappearances was at best slow and ineffective. In some instances the issue was trivialised by government claims that the person in question had left home due to a love affair or domestic dispute.38 Mahanama Tillekeratne, the former High Court judge appointed by President Rajapakse to probe abductions, disappearances and killings made a public statement in which he recommended tough action against policemen who had failed to take action in complaints of abductions and disappearances.<sup>39</sup> Though Mr. Tillekeratne acknowledged that in many cases the police had been reluctant to register complaints, he also said that the majority of abductions were not actually abductions as persons had left their homes due to domestic disputes 'over trivial matters' or had left home with people they knew. 40 According to him, of 2020 reported disappearances, 1134 had returned home. 41 Mr. Tillekeratne also pointed out that the Commission was established for purposes of fact finding and hence did not have the power to impose punitive measures. He recommended that investigations be carried out against police officers by a unit comprising a retired

<sup>&</sup>lt;sup>37</sup> Gajanayake's complain that backfired on the Rajapakses', Sunday Leader, 15 July 2007.

<sup>&</sup>lt;sup>38</sup> False complaints hamper investigations in abductions', Saturday 2 June 2007.
<sup>39</sup> Return to war: Human rights under siege', Human Rights Watch, volume 19, no.11, August 2007, p

False complaints hamper investigations in abductions', Saturday 2 June 2007.
 Return to war: Human rights under siege', Human Rights Watch, volume 19, no.11, August 2007, p.

civil servant and a State counsel.<sup>42</sup> His report has not been made public.<sup>43</sup>

In an attempt to stem criticism and public outcry the government appointed yet another committee, this time an inter-ministerial committee comprising the ministers of foreign affairs, defence, justice and human rights and the Attorney General and the commanders of the three armed forces. The committee was mandated to investigate abductions and prepare a report in this regard every year. 44 No public mention of the committee has been made since the initial announcement and it is unclear whether it is functioning.

### 5. Freedom of Expression

As the government rhetoric on war became stronger, it intensified the crackdown on dissent, i.e. anything deemed to be anti-government or critical of the war effort was subject to censorship, censure and even violence. The discourse on patriotism labelled dissidents as 'traitors' who were jeopardising national security and the well-being of the nation for personal gain. Statements by government ministers illustrated a blatant disregard for basic human rights norms and increasing impunity at the highest levels.

Government officials and ministers used verbal threats to intimidate and silence critics/dissent. This extended to diplomats, parliamentarians and UN officials. Minister Jeyaraj Fernandopulle called John Holmes, the UN Under Secretary-General for Humanitarian Affairs, a terrorist in response to a comment by Holmes in an interview to Reuters that Sri Lanka was 'one of the

<sup>43</sup> Amantha Perera, 'Disappearances on the rise charges AI', Sunday Leader, 2. September 2007.

<sup>42</sup> Return to war: Human rights under siege', Human Rights Watch, volume 19, no.11, August 2007, p

<sup>44</sup> http://www.priu.gov.lk/news\_update/Current\_Affairs/ca200610/ 20061029geneva\_talks.htm (current affairs, Official website of the Government of Sri Lanka)

most dangerous places for aid workers in the world. Several veiled threats were made by senior government officials and ministers against diplomats for 'interfering' in the domestic affairs of Sri Lanka. Tyronne Fernando, Senior Advisor to the President stated that unnecessary interference by foreign diplomats in the local affairs of a sovereign country could make them liable to be declared persona non grata. In July Minister Jeyaraj Fernandopulle indicated the government was considering the establishment of a Parliamentary Select Committee to examine the conduct of the German Ambassador.

Journalists were subjected not only to threats and intimidation but also to physical violence, with those working in the North and East particularly vulnerable. A total of six media personnel were killed in 2007.48 Mohan, a reporter of the Tamil newspaper Thinakural was assaulted by air force personnel at a checkpoint and seriously injured while on his way to cover a meeting at the Presidential Secretariat. This followed an incident a couple of days earlier when the reporter was harassed by air force personnel at another checkpoint in the same area. He was then taken to the Fort Police Station where the airmen filed a complaint against him alleging he had attempted to jump in front of the motorcade of a VIP. Mohan lodged a counter complaint of assault. 49 In another incident, the editor of the Daily Mirror Champika Liyanarachchi was threatened by Defence Secretary and the President's brother Gotabaya Rajapakse who allegedly telephoned her, criticized 'antigovernment stories' published in the newspaper, and made veiled threats regarding her safety.50 In an attempt to intimidate Sunday Times Defence Correspondent Iqbal Athas, his security detail was withdrawn after he wrote unfavourable articles regarding a defence

46 www.dailynews.lk/2007/04/12/news03.asp

<sup>45 &#</sup>x27;Top Sri Lanka officials calls UN aid chief "terrorist", Reuters India, 15 August 2007 at http://in.reuters.com/article/topNews/idINIndia-28991720070815

<sup>47</sup> www.lankaenews.com/English/news.php?id=4401

<sup>48 &#</sup>x27;Sri Lanka: List of media workers killed, abducted and arrested', www.freemedia.org

<sup>&</sup>lt;sup>49</sup> Reporter allegedly assaulted by airmen, *Daily Mirror*, 29 June 2007.

<sup>50</sup> Daily Mirror editor threatened', BBCSinhala.com, 18 April 2007 at http://www.freemediasrilanka.org/English/news.php?id=524&section=news

deal despite continuing threats against his life.51

The government strategy to crackdown on dissent extended to parliamentarians, with the government accusing certain Parliamentarians of indirectly assisting LTTE propaganda by being critical of the government. For instance, Minister Keheliya Rambukwella defended the government's actions which he said were 'out of the box' in the interests of national security. He stated that by 'raising objections or making statements either inside or outside Parliament against such moves condemning them as human rights violations, the objectives of the rebels were supported unintentionally.'52 The Minister also wanted 'drastic measures against miscreants who were attempting to tarnish Sri Lanka's image by disseminating false information about the situation in the country both locally and internationally.'53

As the government offensive to recapture territory under LTTE control moved northward towards Killinochchi, there were attempts to control information relating to military operations and the conflict, such as blocking access to the website Tamilnet, a Tamil nationalist site with alleged links to the LTTE, which provides extensive coverage of news from the North-East. Local internet providers stated they blocked access following instructions from higher authorities. When questioned by journalists, government spokesman, Keheliya Rambukwella while denying the government had instructed internet providers to block the site, stated that he would not be averse to hiring hackers to block access to the website.<sup>54</sup>

As part of the campaign to restrict press freedom, President Rajapakse made moves towards re-introducing criminal

<sup>51</sup> Antony David, 'Speak now or hold your silence forever', *Sunday Times*, 2 September 2007.

<sup>&</sup>lt;sup>52</sup> Govt claims some MPs assisting Tigers', *Daily Mirror*, 31 May 2007.
<sup>53</sup> Govt claims some MPs assisting Tigers', *Daily Mirror*, 31 May 2007.

<sup>54</sup> Tamilnet blocked in Sri Lanka, BBCSinhala.com, at http://www.bbc.co.uk/sinhala/news/story/2007/06/070620\_tamilnet.shtml

defamation law<sup>55</sup>. This law which has been used by successive governments to stifle dissent was repealed by the Wickremasinghe government in 2004. Due to a lack of consensus within the cabinet and protests by rights and media groups, both nationally and internationally, the government stalled the reintroduction, at least in the short term.

Censorship with the aim of safeguarding 'morality' and 'culture' also became increasingly common with anything that was deemed contrary to Buddhist, Sri Lankan or even South Asian values being subjected to attack and censure. The arbiters of what was appropriate consisted of mainly those in positions of power within the government and the Buddhist clergy. For instance, the movie by filmmaker Asoka Handagama named Aksharaya was approved by the Public Performances Control Board to be shown to adult audiences but permission was withdrawn by the Ministry of Cultural Affairs as it felt the movie which dealt with the Oedipus complex was unsuitable for Sri Lankan audiences. Handagama filed a fundamental rights petition challenging the recall which he stated violated his fundamental rights. The Chief Justice in his decision stated that it was the judiciary that had to judge whether the film was suitable to be shown because the main protagonists in the movie were judges. He further said that the film should be destroyed as it sought to demolish the judicial system in the country and the offenders jailed for contempt of court. He also directed remarks at the filmmaker and members of the Public Performances Board who were present in court and said that they were able to walk on the roads because of the courts and otherwise they would have to walk with guards.

<sup>55 &#</sup>x27;Media watchdog: Sri Lanka weighting return of criminal defamation law', International Herald Tribune-Asia Pacific, 28 June 2007.

# 6. Humanitarian Situation and Internally Displaced Persons

The resumption of armed conflict in 2006 created a humanitarian crisis which worsened in 2007. Following the capture of Vaharai in January, the SLA stepped up military operations in the East and conducted incursions into LTTE-held areas around Vavuniya and Mannar in the North. Much of the fighting in Batticaloa and Mannar occurred in areas with high concentrations of civilians. This led to an increase in IDPs in Batticaloa and had the GOSL and humanitarian agencies scrambling to provide food and shelter. During the fighting, both parties to the conflict continued to shell the vicinity of the Batticaloa town and IDP camps. 57

The closure of the Muhamalai checkpoint on the A9 highway in August 2006 effectively cut the North off from rest of the country and led to a serious shortage and price hike of basic goods, particularly in the Jaffna peninsula. Average prices of basic food increased over 100% more than standard prices.58 Civilian travel to and from the Jaffna peninsula was severely restricted following the closure of the land route. The resettlement process in the Eastern Province was plagued by controversy with allegations made by civil society and rights groups of forced resettlement, inadequate support to the newly resettled and imposition of policies which restricted the freedom of movement of resettled persons. In the wake of the displacement crisis in the East, the GOSL used various coercive measures to encourage IDPs to return home to areas in both Batticaloa and Trincomalee districts. Primarily, this involved the presence of police and armed military in the camps, threats to terminate assistance, and failure to provide appropriate food, shelter, sanitation or security in the location of

58 http://www.rds.homeoffice.gov.uk/rds/pdfs07/sri-lanka-151107.doc-

<sup>56</sup> Sri Lanka: Bridging the food gap remains a challenge, 25 April 2007 at http://www.irinnews.org/report.aspx?ReportID=71801

<sup>&</sup>lt;sup>57</sup> Sri Lanka: Urgent need for effective protection of civilians as conflict intensifies, Amnesty International, 5 April 2007; Human Rights Watch

displacement. So According to the IASC report on forced displacement, the return of 13,000 IDPs from Batticaloa to Vaharai in February and March was forced. Initially, UNHCR stated that the resettlement process was in line with international protection standards and called for free access to aid agencies to work in the areas. In contrast, Minister Hakeem made a statement during the emergency debate in Parliament on 6 June that he had credible information that authorities were forcibly resettling those displaced by the conflict. He also stressed the need to resettle people of both Tamil and Muslim communities due to the interdependence of their livelihoods in order to restore normalcy.

Due to the controversy surrounding return and resettlement, UNHCR publicly set forth conditions for its involvement in the resettlement process (to ensure that returnees were voluntary and subject to conditions of safety and dignity)<sup>63</sup> and the IASC Country Team distributed a one page pamphlet to IDPs in all three languages explaining their rights related to return.<sup>64</sup> While some IDPs wished to return to their places of origin at the time, the majority of the newly displaced did not, due to continuing shelling, the presence of landmines and UXOs, and general insecurity, including abductions by both the LTTE and the Karuna faction. In addition, there were problems with access to public services and infrastructure (medical facilities, schools), as well as looting

<sup>59 &#</sup>x27;IASC frowns upon government handling of IDPs', *The Morning Leader*, 5 September 2007; Sri Lanka: Civilians who fled fighting are forced to return, Human Rights Watch, 16 March 2007 at <a href="http://hrw.org/english/docs/2007/03/16/slanka15497">http://hrw.org/english/docs/2007/03/16/slanka15497</a> txt.htm

<sup>&</sup>lt;sup>60</sup> Conflict related internal displacement in Sri Lanka: A study on forced displacement, freedom of movement, return and relocation, Inter-Agency Standing Committee; UNHCR Sri Lanka: Protection report October 2006, 15 November 2006.

<sup>61</sup> Return starts of displaced people in Batticaloa West, UNHCR Briefing notes, 15 May 2007 at <a href="http://www.unhcr.org/news/NEWS/464982332.html">http://www.unhcr.org/news/NEWS/464982332.html</a>
62 Hansard 6 June 2007.

<sup>63</sup> UNHCR pulls out of resettlement process in east, *Daily Mirror*, 22 March 2007.

<sup>64</sup>www.internaldisplacement.org/8025708F004CE90B/(httpDocuments)/ E91275EDA50017C12572A70051513A/\$file/LeafletReturn+IASC+final-final.pdp

and damage to houses. IDPs were also concerned about access to livelihoods upon return. Further, access to resettlement areas such as Vaharai and Pattipallai were restricted to certain agencies/INGOs/NGOs. While some government officials maintained or acknowledged that return should be voluntary, there appeared to be a disconnect between these officials (e.g. Minister of Disaster Management and Human Rights) and the security forces and local officials.

Displacement figures were hotly contested and at various points during the year the government denied the accuracy of IDP figures published by international and local non-governmental organisations. Illustrative of the government attitude and strategy is a reported meeting between Banbury, Asia Regional Director, WFP, and Palitha Kohona, Secretary to the Ministry of Foreign Affairs where Kohona cautioned the UN to be mindful of exaggerated figures of Internally Displaced Persons (IDPs) released by certain international agencies as they often exploited statistics for propaganda purposes in order to attract more foreign aid.<sup>67</sup>

### 7. Rights of Minorities

Minorities, particularly Tamils were subject to harassment, intimidation and rights violations. A particularly egregious violation was the forcible eviction of Tamils from Colombo in June.

From about 3 a.m. on 7th June 2007, Tamils residing in boarding lodges in many parts of Colombo were evicted by the police at short notice. Persons were given only half an hour to pack their belongings, forced on to buses and were not informed of their

67 FM cautions UN of 'exaggerated figures', Daily Mirror, 24 May 2007.

<sup>65</sup> Conflict related internal displacement in Sri Lanka: A study on forced displacement, freedom of movement, return and relocation, Inter-Agency Standing Committee.

<sup>66</sup> IDPs in Sri Lanka: Report of the fact finding mission to the North and East of Sri Lanka to assess the state of displaced persons, South Asians for Human Rights, August 2007.

destination. Most, if not all, evicted Tamils were from the conflict affected North and East and had migrated to Colombo for security, economic, medical and personal reasons. According to reports and testimonies of witnesses, all those without a 'valid' reason for residing in Colombo were sent back to their places of permanent residence, with the 'validity' being determined in an arbitrary manner by the police. Due to protests by local and international human rights groups and statements by the missions of many countries including the United States, the government transported the persons back to Colombo.68 The Centre for Policy Alternatives (CPA) filed a fundamental rights petition in the Supreme Court against the evictions. The Supreme Court issued an interim order and called for an immediate halt to the evictions. In its application, the CPA also asked for substantive and/or punitive compensation for the affected. The Supreme Court granted leave-to-proceed with three fundamental rights petitions on the eviction of Tamil lodgers from Colombo. The petition alleged violation of the right to equality and equal protection of the law, freedom of movement and the right to choose one's place of residence, freedom from arbitrary arrest and detention, freedom from torture and discrimination on the grounds of race, religion, language and place of birth. At the next hearing on November 28, the petitioners agreed to consider an amicable settlement.69

Prime Minister Ratnasiri Wickremanayake apologised for the evictions on behalf of the government<sup>70</sup> while the President ordered a probe into the incident<sup>71</sup>. However, Jeyaraj Fernandopulle, Chief Government Whip, made statements justifying the evictions and stated that the government had no reason to apologise.<sup>72</sup>

69 Lasantha Wickrematunge, 'Ethnic cleansing in Sri Lanka', Time, 11 June 2007.

<sup>68</sup> Sri Lanka: End expulsion of Tamils from Colombo, Human Rights Watch, 8 June 2007 at http://hrw.org/english/docs/2007/06/08/slanka16106\_txt.htm

<sup>&</sup>lt;sup>70</sup> Lanka apologises for Tamils' expulsion', Times of India, 10 June 2007.

<sup>&</sup>lt;sup>71</sup> Lodge Residents - President Asks IGP for Immediate Report," Media Centre for National Security news release, June 9, 2007, <a href="http://www.nationalsecurity.lk/fullnews.php?id=6169">http://www.nationalsecurity.lk/fullnews.php?id=6169</a>

<sup>&</sup>lt;sup>72</sup> Mahinda to meet rights watchdogs, BBCSinhala, 13 June 2007 at http://www.bbc.co.uk/sinhala/news/story/2007/06/070613\_president\_geneva.shtml

Investigations by the Sunday Leader newspaper revealed that instructions to evict had been given by Gotabaya Rajapakse, Secretary, Ministry of Defence and the President's brother at a meeting of high ranking army officers and police officers.<sup>73</sup>

Other concerns of minority communities included fears that state sponsored colonization programmes might be used to alter administrative boundaries in the Eastern Province and change the ethnic demography of the Province.<sup>74</sup> Since the Eastern Province forms an important part of the area demarcated by the LTTE as the homeland of the Tamil people, i.e. Tamil Eelam, state colonization programs have been taking place in the region for many years with the aim of changing the ethnic demography and thereby defeating LTTE claims of the Tamil homeland.<sup>75</sup>

#### Children and armed conflict

Child recruitment by both the LTTE and the breakaway faction TMVP continued in 2007. The report submitted by UNICEF to the Secretary-General listed the TMVP (Karuna Faction) for continued child recruitment. The LTTE was also accused of not abiding by its commitments not to recruit those under the age of 18. Though UNICEF reported a reduction in child recruitment it was difficult to ascertain whether it was due to an actual drop in recruitment or under reporting due to fear.

Alan Rock, Special Advisor to the UN Special Representative on Children and Armed Conflict 'found strong and credible evidence

<sup>&</sup>lt;sup>73</sup> Lasantha Wickrematunge, "The Sunday Leader Blows the Lid on Eviction Drama Following the President's Call for Probe," *Sunday Leader* (Colombo), June 10, 2007.

<sup>&</sup>lt;sup>74</sup> IDPs in Sri Lanka: Report of the fact finding mission to the North and East of Sri Lanka to assess the state of displaced persons, South Asians for Human Rights, August 2007.

<sup>75</sup> Malinga Gunaratne, 'For a sovereign state', Sarvodaya Book Publication Services, 1988.

No safety, no escape: Children and the escalating armed conflict in Sri Lanka, Watch list on Children and Armed Conflict, April 2008, p. 33.

that certain elements of the government security forces were supporting and sometimes participating in the abductions and forced recruitment of children by the Karuna faction?<sup>77</sup> In late April UNICEF released a statement criticizing the Karuna faction/TMVP for failing to live up to commitments on child recruitment and access to camps that were given following Alan Rock's visit. 78 The TMVP refuted these claims, accused UNICEF of false reporting and said that UNICEF officials had free access to the areas under their control.<sup>79</sup> Later in the year, in a visible change of strategy, the TMVP accepted they had children within their ranks but justified it saying they joined voluntarily.80 Human rights organisations in the East reported that in some cases of child recruitment the parents felt the children were better off in the TMVP camp rather than at home due to the fact they're provided with board and a salary. This should be viewed in context of the general situation in the East where there is resignation and acceptance of the current state of militarization and the position of TMVP.

According to rights groups in the East, children and young persons who have returned/released from armed groups faced additional problems in the newly resettled areas. For instance, the Special Task Force (STF) well aware of their history with the armed groups often warned them that they were being watched. The families therefore feared the STF would round up and detain the children and young persons known to be ex-members of the groups in the event of an incident. Further, the family ID cards that were issued also caused problems for young persons. For example, parents often left teenage children in Batticaloa when they re-settled in areas such as Vaharai and Pattipalai due to the prevailing insecurity in these areas. Hence, the children were left out of the family photo,

<sup>&</sup>lt;sup>77</sup> Statement from the Special Advisor on Children and Armed Conflict, 13 November 2006.

<sup>78</sup> UNICEF says Karuna faction "not serious" about child releases', 27 April 2007 at http://www.unicef.org/infobycountry/media 39477.html

<sup>79</sup> www.infolanka.com/news/2009/july/index26.html

<sup>80</sup> www.lankanewspapers.com/news/2007/1/11591.html

an integral component of the family ID, and could not return to these areas as the STF prohibits anyone who is not in the photo residing with the family.<sup>81</sup>

Increased insecurity in Jaffna led parents to hand over around 200 children to the Jaffna office of the Human Rights Commission.<sup>82</sup> Though the children were accommodated in a special building in Jaffna following a court order, it proved to be inadequate due to increasing numbers and there were reports of children falling ill due to overcrowding and unsanitary conditions.<sup>83</sup>

#### 9. Eastern Province

The year saw the massive displacement of civilians in the East due to military operations conducted by the GOSL to take control of the area from the LTTE.<sup>84</sup> The presence of armed groups in the East and the militarization of civil administration contributed to the deterioration of the rule of law in the region.<sup>85</sup> The politics of the Eastern part of Sri Lanka, always controversial, was further complicated by the split within the LTTE. The breakaway Karuna group which assists the government forces in their security efforts in the East is also involved in establishing its own hegemony amongst the people of the East. The people of the East appear to be stuck between the various parties engaged in a contestation for power and control of the region. The element of fear has had a major impact on the people and their lives due to the multiplicity

<sup>&</sup>lt;sup>81</sup> IDPs in Sri Lanka: Report of the fact finding mission to the North and East of Sri Lanka to assess the state of displaced persons, South Asians for Human Rights, August 2007.

<sup>82</sup> www.defence.lk/new.asp?fname=20070516\_04

<sup>83</sup> www.lankanewspapers.com/news/2007/5/16/lankanews.html

<sup>84</sup> Patrick Fuller, 'Red Cross Red Crescent responds to massive population displacement in Eastern Sri Lanka', 21 March 2007 at <a href="http://www.reliefweb.int/rw/RWB.NSF/db900SID/EGUA-6ZHNJ2?OpenDocument&rc=3&cc=lka">http://www.reliefweb.int/rw/RWB.NSF/db900SID/EGUA-6ZHNJ2?OpenDocument&rc=3&cc=lka</a>
85 IDPs in Sri Lanka: Report of the fact finding mission to the North and East of Sri Lanka to assess the state of displaced persons, South Asians for Human Rights, August 2007. 'Sri Lanka: armed groups infiltrating refugee camps', Amnesty International, ASA 37/007/2007, 14 March 2007.

of actors.

On 11 April, the government forces gained full control of the A5 road west of Batticaloa confining the LTTE to the Thoppigala jungles, thereby bringing a major part of the Eastern Province under government control. The government forces captured Thoppigala, claimed to be the last LTTE bastion in the East, on July 11. With the fall of Thoppigala, the entire Eastern province came under government control for the first time in fourteen years. In response to the capture, the LTTE issued a statement that withdrawal from the East was a tactical move and raised doubt on the ability of the government to hold on to the territory. The entire Eastern province can be captured to hold on the territory.

There was increased presence and activity of the LTTE breakaway group TMVP, which with the acquiescence, if not collusion of the state, carried out abductions, extra-judicial killings and forced recruitment. Further, to a large extent the military apparatus appeared to be in control of civil administration in the East. For instance, a circular issued by the Ministry of Defence set up local structures with the membership of military and civilians to oversee development in the province.88 Government officials stated that activities of local and international NGOs would be subjected to restrictions while engaging in development work in the newly captured areas. This was announced at a meeting in Vaharai which was convened by the Eastern Security Forces Commander, Major General Parakrama Pannipitiya.89 At the meeting, organizations were told that they would not be allowed to commence new projects without the approval of the District Secretary who would grant approval after the proposal was given the go ahead by the district development committees. Civil administrators, area

articles/2007/aug2007/sril-a10.shtml

89 Ibid.

<sup>&</sup>lt;sup>86</sup> Thoppigala falls: Entire East under government control, 11 July 2007, Current Affairs Sri Lanka at <a href="http://www.priu.gov.lk/news\_update/Current\_Affairs/ca200707/20070711thoppigala\_falls\_entire\_east\_under\_govt\_control.htm">http://www.priu.gov.lk/news\_update/Current\_Affairs/ca200707/20070711thoppigala\_falls\_entire\_east\_under\_govt\_control.htm</a>

Muralidhar Reddy, 'Celebrating war', Frontline, 10 August 2007.
 Nanda Wickremasinghe, Military administration imposed in eastern Sri Lanka, World Socialist Website, 10 August 2007 at http://www.wsws.org/

commanders and the police were instructed not to allow NGOs to start new projects without the requisite approval.90

#### 10. Humanitarian Workers

Humanitarian workers and local rights groups were targeted by both parties to the conflict. A total of thirty seven humanitarian workers were abducted, disappeared and killed during 2007.<sup>91</sup>

In February, a humanitarian assessment mission including the Minister of Disaster Management and Human Rights, the RC/HC, UN heads of agency and several ambassadors, came under LTTE mortar attack when their helicopter landed in Batticaloa. No member of the mission was seriously hurt. The LTTE asserted that it had not been informed of the humanitarian mission, and that the attack was in response to earlier SLA shelling. The attack, which was a clear signal of the LTTE's opposition to perceived international backing of the Government's military strategy,92 highlighted the precarious position of humanitarian workers in this conflict.

In June two volunteer workers of the Sri Lanka Red Cross who were residents of Batticaloa were abducted at the Fort Railway station in Colombo and their bodies with gunshot wounds were found the following day in a tea estate in Kiriella. According to witnesses five persons claiming to be CID officers arrested the victims and took them away in a white van. The CID denied any involvement in the arrest. 93 The Police later stated that the vehicle

<sup>90</sup> Ibid.

<sup>91 &</sup>quot;Under Fire": Persons in Humanitarian Service, Law & Society Trust, Colombo 2008, http://www.lawandsocietytrust.org/PDF/

UnderFire PersonsInHumanitarianService FullReport WEB.pdf

<sup>&</sup>lt;sup>92</sup> Maseeh Rahman, 'Italian Ambassador hurt in Tamil tiger attack', *The Guardian*, 27 February 2007 at <a href="http://www.guardian.co.uk/world/2007/feb/27/maseehrahman">http://www.guardian.co.uk/world/2007/feb/27/maseehrahman</a>

<sup>93</sup> Red cross workers killed in Colombo, BBCSinhala, 3 June 2007 at http://www.bbc.co.uk/sinhala/news/story/2007/06/070603 icrc killed.shtml

used in the abduction was traced to the Karuna group and was seen in the area on the day of the abduction. The Karuna group denied any involvement in the crime and instead said that one of the victims was a close relative of a high ranking official in the Karuna group and could have been killed as an act of revenge or to threaten the said official. Instead of focusing on the seriousness of the crime and the need to hold the perpetrators accountable, the Presidential Secretariat stated the killings were an attempt to discredit the President and the government and tarnish the image of the country ahead of a upcoming European Parliament public hearing on Tsunami Reconstruction and Human Rights and the President's address at the ILO Conference in Geneva. In the ILO Conference in Geneva.

The lack of progress in the case of the killing of the seventeen aid workers of Action Contra la Faim was criticised by several rights groups. The International Commission of Jurists (ICJ) made a statement highlighting significant flaws in the investigation and recommended the establishment of an independent investigation team of the police and security forces, and a comprehensive witness protection programme to ensure the prosecution of the perpetrators.<sup>96</sup>

## 11. The All Party Representative Committee (APRC)

The All Party Representative Conference (APRC) convened by the government in January 2006 and charged with developing a southern consensus on a political devolution package that could be the basis for renewed talks, had still not reached a consensus at the end of 2007. Although called the 'All' Party Representative Committee, the APRC never included all political parties. For

<sup>&</sup>lt;sup>94</sup> Vilani Peiris, Two Sri Lankan Red Cross workers abducted in Colombo, World Social Website, 14 June 2007 at <a href="http://www.wsws.org/articles/2007/jun2007/sril-j14.shtml">http://www.wsws.org/articles/2007/jun2007/sril-j14.shtml</a>

<sup>&</sup>lt;sup>96</sup> 'Impunity for rights violations' in Return to war: Human rights under siege', Human Rights Watch, volume 19, no.11, August 2007.

instance, the LTTE proxy party the TNA was not invited. The progress of the process stalled several times due to the withdrawal of the UNP and JVP and lack of political will on the part of the government. The APRC appointed a panel of experts consisting of seventeen lawyers, public servants and scholars which produced two reports in December 2006; the majority and minority reports.

The majority report sets out broad principles with various options. It recognised the need for power sharing in laying the framework for a solution but at the same time provided space for negotiation and alternate options. The proposals provide several safeguards, such as a Constitutional Court to settle disputes between the centre and province, to ensure genuine power sharing. The document identifies the concerns and fears of all communities. particularly the minorities, which is an important step in addressing grievances and is not averse to putting in place special measures to address historical grievances. It calls for a comprehensive Bill of Rights that recognises socio-economic, cultural and group rights. The proposals go some way towards dealing with the shortcomings of the 13th Amendment to the Constitution by stipulating that the Concurrent List should have minimal subjects. With the aim of providing greater access to human rights remedies, it proposes extending fundamental rights jurisdiction to the Courts of Appeal in the provinces and the establishment of regional human rights mechanisms. The document also recognizes and addresses the non-implementation of the language provisions in the Constitution and points to a lack of clarity giving rise to uncertainty with respect to the application of the provisions'. Disappointingly it doesn't stress the important role of political will in the implementation of language provisions.

The minority report on the other hand, retained the province as the unit of devolution and reserved additional powers for the centre. The report therefore rejected devolution in no uncertain terms. It further recommends the de-merger of the Northeast Province. The resulting controversy over the reports prompted Prof. Vitharana, the chair of the APRC to prepare a consensus

document which rejected the notion of the unitary state and proposed the determination of the de-merger based on talks with the LTTE.<sup>97</sup>

In mid 2007 the ruling SLFP filed its own submission which reflected the government position. These proposals which were regressive and failed to shift from the concept of the unitary state were rejected by a majority of the members of the APRC. The proposals mooted the district as the unit of devolution, ignored the de-merger of the north and east, vested extensive powers in the President and retained the special position of Buddhism in the Constitution.

The Jathika Hela Urumaya (JHU) a Sinhala nationalist party in its proposals to the All Party Representatives Committee (APRC), denied the existence of an ethnic conflict in Sri Lanka and stated the country needed a dictatorship for at least five years to put the country back on track. The JHU proposals advocated the abolition of the provincial council and its replacement with district level institutions, the maintenance of the executive presidency and increasing the number of parliamentary seats to 270.

The fact that at the end of 2007 the final proposals of the APRC were yet to be presented indicated the absence of political will to formulate a viable solution to the conflict and exposed the entire process as an exercise initiated by the government to buy time rather than a bi-partisan effort at finding a solution to the national question.

#### 12. Electoral Reforms

The Parliamentary Select Committee on Electoral Reforms presented its report to Parliament despite opposition by a majority of the political parties due to the hurried manner in which the reforms were introduced. The report proposed a combination

<sup>97</sup> ICG report

system (First Past the Post and Proportional Representation) with 140 members to be elected on the FPP, 70 on the district PR system and 15 to be appointed from the National List. It also recommended a ward system for local government and the redemarcation of present electoral boundaries to form a smaller electoral unit.

# 13. The Commission of Inquiry to Investigate and Inquire into Alleged Serious Violations of Human Rights (COI)

The Commission of Inquiry to Investigate and Inquire into Alleged Serious Violations of Human Rights (COI) was established by Presidential Warrant in November 2006. The Commission has a limited mandate to investigate within one year 15 cases dating from 1 August to 16 October 2006. An additional case was later added making the total number of cases 16. An International Independent Group of Eminent Persons (IIGEP) consisting of eleven persons from a number of countries were invited by the President to observe the work of the COI 'with a view to satisfying that such inquiries are conducted in a transparent manner and in accordance with basic international norms and standards pertaining to investigations and inquiries'.

From the inception of the process, the IIGEP focused on the need to ensure structural independence for the Commission of Inquiry and the establishment of effective witness protection measures. During 2007 the Commission engaged in preparatory work and began in-camera proceedings.

In June the International Independent Group of Eminent Persons (IIGEP) released its first report in which it voiced its concern about the lack of progress in the investigations and inquiries of the Commission of Inquiry. The panel also raised other issues

<sup>98</sup> Statement of the Independent Group of Eminent Persons, 11 June 2007 at www.iigep.org/prelease/estatement.pdf

such as the role of the Attorney-General's Department in investigations which they identified as a conflict of interest that might impact adversely on the independence of the Commission. The management of the finances of the Commission by the Presidential Secretariat was also cited as a factor which compromised its functions, including the confidentiality, safety and integrity of the proposed victim and witness protection scheme. The IIGEP expressed concern about the lack of an adequate victim and witness protection scheme and questioned the prudence of inviting the public to come forward and give evidence in the absence of such a scheme. In light of the limited mandate of the Commission and IIGEP, they expressed regret about statements by State officials which created the impression that the Commission and IIGEP are tasked with powers and resources to inquire into ongoing human rights violations.99 The Secretariat for the Coordination of the Peace Process (SCOPP) initially welcomed the statement and acknowledged existing shortcomings. President Rajapakse did the same and instructed the relevant agencies to study its observations and take required action.100 The Commission and the Attorney-General's Department however responded to the IIGEP statement by defending their actions and a battle of words ensued between the parties.101

The controversy surrounding the work of the Commission continued with the report of the International Commission of Jurists (ICJ) alleging evidence tampering<sup>102</sup> which SCOPP rejected. Rajiva Wijesinghe also criticised the SLMM ruling that the killing of the 17 ACF workers was a gross violation of the CFA by the security forces and questioned the objectivity of the head

<sup>99</sup> Ibid.

<sup>100</sup>http://www.infolanka.com/news/2007/june/index13.html; http://www.lankabusinessonline.com/

fullstory.php?newsID=279290824&no\_view=1&SEARCH\_TERM=33 - Sri Lanka to study critical rights report, 12 June 2007

http://sundaytimes.lk/070923/News/news00018.html (Sunday Times online version "AG charges IIGEP with "hidden agenda', Sept 23, 2007

<sup>102</sup> http://www.thesundayleader.lk/archive/20070701/defence.htm

of SLMM. This was just one of the many instances in which the Peace Secretariat, established to promote and support the 2002 peace process, engaged in criticism and verbal attack of various international institutions such as the IIGEP and international organisations such as Human Rights Watch and Amnesty International. This marked the intensification of government attacks on 'foreign/outsiders-do-gooders' who challenged Sri Lanka's human rights and humanitarian record and led to an increasingly confrontational relationship with the international community.

The fractious relationship between the COI and IIGEP continued with the release of the second and third statements of the IIGEP which raised similar concerns. 103 The Attorney-General's Department and the Secretariat for Coordinating the Peace Process (SCOPP) also responded to the statements of IIGEP by denying the findings of the IIGEP and at times even accusing it of overstepping its mark. 104

# 14. Visits of United Nations Special Rapporteurs and the High Commissioner for Human Rights

In 2007 several high level UN officials visited Sri Lanka. In most instances the visits took a predictable pattern; critical statements by the official led to vehement government denials followed by scathing government attacks on the official. In August, the UN Under-Secretary General for Humanitarian Affairs, Sir John Holmes, undertook a four day mission to Sri Lanka. At the end of his visit, Holmes announced that the government had promised to increase access to aid agencies to newly resettled and conflict areas. He also called upon the LTTE to allow aid workers to carry out their duties in the areas under their control without restric-

<sup>103</sup> http://lankawhistleblower.blogspot.com/2007/06/international-independent-group-of.html

<sup>104</sup> Frontline: http://www.hinduonnet.com/fline/fl2414/stories/ 20070727001005300.htm

tions. Holmes stressed that the Karuna group which was hampering the effective functioning of aid groups in the East had to be disarmed. 105 His comment in a Reuter's interview that Sri Lanka was one of the most dangerous places in the world for aid workers raised an outcry in Sri Lanka. The government expressed its outrage, rejected his claim outright and pointed out that the statement issued by the UN Office for the Coordination of Humanitarian Affairs upon the conclusion of his visit did not make such claims. 106 Minister Jeyraj Fernandopulle called Holmes a terrorist and accused him of supporting and receiving a bribe from the LTTE. 107 Furthermore, it was reported that prior to his visit to Jaffna, the army commander had convened a meeting of NGOs where he instructed them to confine their discussions to humanitarian issues and avoid raising human rights concerns. On the day of the meeting there was a heavy military presence at the Jaffna Library, the venue, which deterred many organisations from attending the meeting. 108

Louise Arbour, the UN High Commissioner for Human Rights visited Sri Lanka in October. Though Arbour paid a brief visit to Jaffna, she was not able to visit either the Eastern Province or Killinochchi. Even her visit to Jaffna was conducted under military escort and she was not able to meet freely with non-governmental organisations and rights groups. At the conclusion of her visit, Arbour made a strong statement expressing

<sup>105</sup> http://www.president.gov.lk/sinhala/html/news/200708/20070809news.htm

<sup>106</sup>Government rejects John Holmes' assertion on Sri Lanka and humanitarian workers, Current Affairs Sri

Lanka,10 August 2007 at <a href="http://www.priu.gov.lk/news\_update/Current\_Affairs/ca200708/">http://www.priu.gov.lk/news\_update/Current\_Affairs/ca200708/</a>

<sup>20070810</sup>govt rejects john holmes assertion on sl.htm

<sup>107</sup> http://federalidea.com/focus/archives/143

with UN Under Secretary General on humanitarian affairs, 9 August 2007 at <a href="http://www.reliefweb.int/rw/rwb.nsf/db900sid/AMMF-75XC">http://www.reliefweb.int/rw/rwb.nsf/db900sid/AMMF-75XC</a>
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concern that 'in the context of the armed conflict and of the emergency measures taken against terrorism, the weakness of the rule of law and prevalence of impunity is alarming.'109 She also said that though the government stressed the adequacy of national human rights mechanisms that people from various communities had expressed their lack of faith in the said mechanisms. The 'absence of reliable and authoritative information on the credible allegations of human rights abuses' was pointed out by Arbour as one of the main shortcomings in the protection of human rights in Sri Lanka. 110 Arbour encouraged the Government of Sri Lanka to 'urgently resolve' ongoing discussions about a more productive relationship between the government and the Office of the High Commissioner for Human Rights (OHCHR).111 The government stated its opposition to international human rights monitors and refused to discuss the opening of the OHCHR Office in the country. Instead, the government called for increased OHCHR support in the form of technical assistance and capacity building.112 The High Commissioner while accepting the importance of capacity building measures, reiterated that it could not address the challenges facing human rights protection in Sri Lanka.

The Special Rapporteur on Torture, Manfred Nowak undertook a visit from 1-8 October. While noting the legal steps and other measures taken by the government to combat torture, he stated that these measures 'cannot be regarded as fully effective'. Nowak pointed to the high number of complaints of torture received by

<sup>109</sup> http://www.un.org/apps/news/story.asp?NewsID=24279

<sup>110</sup> www.chrdsrilanka.org/PAGES/Human%20Rights%20News3.html

www.asjantribune.com/index.php?q=node/7818

<sup>&</sup>lt;sup>112</sup>Sri Lanka protests UN statement, BBCSinhala.com, 30 November 2007 at http://www.bbc.co.uk/sinhala/news/story/2007/11/

<sup>071130</sup> mahinda arbour.shtml

<sup>&</sup>lt;sup>113</sup>Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, A/HRC/7/3/Add.6, 26 February 2008, p.2.

the Human Rights Commission, and successful fundamental rights cases, to illustrate that torture is 'still widely practised in Sri Lanka'.114 The difficulty in accessing Judicial Medical Officers (JMO), which results in the loss of evidence and impedes effective prosecution, the lack of a witness and victim protection scheme and 'the absence of an ex-officio obligation on law enforcement officials or judges to investigate cases of torture' were cited as obstacles to the effective implementation of existing laws. 115 Nowak reported that detainees complained of ill-treatment during inquiries, which they said was done with the aim of extracting confessions. While expressing shock at the brutality of the torture methods used, Nowak expressed concern about the continued use of corporal punishment in prisons. He pointed to overcrowding and lack of natural light or ventilation as examples of the failure to follow minimum standards during detention and incarceration. 116 Nowak called on the government to be mindful that the prevalent state of emergency during which period normal measures for the protection against torture do not 'apply or are disregarded... leads to a situation in which torture becomes a routine practice in the context of counter-terrorism operations. The non-applicability of important legal safeguards in the context of counter-terrorism measures, as well as excessively prolonged police detention, opens up the doors for abuse.'117

In December, Walter Kalin, the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons undertook an eight day mission to Sri Lanka. In this case too, the government failed to permit Kalin to visit Killinochchi. While noting the complexity of the IDP situation in Sri Lanka, due to cases of protracted displacement and the tsunami displaced, Kalin pointed out the government bore primary responsibility for protecting and assisting IDPs and stressed the need to ensure

<sup>114</sup> Ibid.

<sup>115</sup> Ibid.

<sup>116</sup> Ibid, pp-22-23.

<sup>117</sup> Ibid, p.3.

durable solutions. 118 He noted various issues of concern; physical security, disappearances, threats and attacks by armed groups, round ups by security forces, detention without informing family members and restrictions on the movement of IDPs and returnees.119 The suspicion with which whole communities are viewed due to their past habitation in LTTE controlled areas was also cited as a concern. 120 Kalin stressed the need to find a balance between humanitarian and security concerns, despite prevailing tensions between the two, so that people could live in both dignity and safety. 121 He urged the government to restore full access to livelihoods and provide income generating programs for those living in camps. The plight of female headed households and widows was flagged by Kalin as an issue that required attention. 122 He recommended consultation between the affected communities and aid agencies and the government to reduce the existing sense of insecurity and fear amongst the IDPs. This should include information about options for return, entitlements etc which will enable the IDPs to make informed and independent choices regarding return. 123 Kalin also raised the issue of humanitarian access which is restricted to some aid agencies and reiterated that restrictions due to security concerns should be the exception and not the rule.124 He set out the following principles which he requested all relevant actors to consider in the event they are unable to 'find peaceful solutions to spare the populations from new displacement':

 that when displacement is unavoidable for the safety of civilians, safe exit routes be available to them, consistent with international humanitarian law;

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<sup>118</sup> Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, Walter Kalin, A/HRC/8/6/Add.4, 21 May 2008, p.

<sup>119</sup> Ibid, p. 13

<sup>120</sup> Ibid, p.14.

<sup>121</sup> Ibid, p.21.

<sup>122</sup> Ibid

<sup>123</sup> Ibid, p.19

<sup>124</sup> Ibid, p.20.

ii. that both military and civil actors be prepared to receive the displaced in conditions of safety and dignity, and that contingency plans be in place; and

iii. when conditions allow for return or relocation of the displaced, key international human rights standards as articulated in the Guiding Principles on Internal Displacement

iv must be followed to ensure that the choice among solutions is truly voluntary and informed, is sustainable, and is carried out in safety and dignity.<sup>125</sup>

#### 15. Conclusion

The year 2007 marked a rise in impunity and increasing pro-war nationalist rhetoric that was intolerant of dissent. State officials and entities contributed to the breakdown of the rule of law by often acting in an extra-judicial manner. While many rights violations were inextricably linked to the conflict, others have been exacerbated by the prevailing militarized atmosphere, lack of local remedies and breakdown of existing social structures. The lackadaisical attitude of law enforcement agencies in investigating and bringing perpetrators of human rights violations to justice was witnessed in many instances. Minorities were placed under increasing scrutiny with the introduction of several security measures which violated basic human rights norms. Arrests, detention, disappearance and extra-judicial killings continued in 2007, with the majority of the victims being Tamils. With the escalation of the conflict, spaces for expressing dissent and challenging impunity are shrinking and are likely to become worse in the coming months.

<sup>&</sup>lt;sup>125</sup> UN expert emphasizes sustainable and durable solutions for Sri Lanka's Internally Displaced Persons, UN Press Release, 4 January 2008 at http://www.brookings.edu/projects/idp/RSG-Press-Releases/20071227\_sri\_lanka.aspx

# INTEGRITY OF THE PERSON

Dinushika Dissanayake

#### Introduction

"Everyone has the right to respect for his or her physical and mental integrity."

Article 3(1) of the Charter of Fundamental Rights of the European Union<sup>1</sup>

The Integrity of the Person essentially involves the physical well being of the individual, a concept which encompasses both individual and community rights.

One of the foremost defenders of the physical integrity of the person is the International Covenant on Civil and Political Rights<sup>2</sup>, a Covenant to which Sri Lanka acceded in 1980, and its Optional Protocol to which Sri Lanka acceded in 1997. Some of the rights which are recognised by the ICCPR include the right to life, and

LL.B (Honours); Researcher, Civil & Political Rights Programme, Law & Society Trust, Colombo

Charter of Fundamental Rights of the European Union, signed and proclaimed in Nice, 18 December 2000, Official Journal of the European Communities C 364/01, available at http://www.europarl.europa.eu/charter/pdf/text\_en.pdf, cited as EU Charter of Rights

<sup>&</sup>lt;sup>2</sup> International Covenant on Civil and Political Rights, United Nations General Assembly Resolution 2200A [XX1] 16 December 1966.available at http://www.cirp.org/library/ethics/UN-covenant/, cited as ICCPR, ICCPR ratified in 1980 and Convention against Torture and Other Cruel Inhuman and or Degrading Treatment or Punishment ratified in January 1994- Integrity of the person, Nissan E., Sri Lanka State of Human Rights 1997, LST 1998 p.11 at 12

the right to be free from torture and cruel, inhuman or degrading treatment or punishment<sup>3</sup>. Other instruments in international law which protect the physical integrity of the person include the Convention against Torture<sup>4</sup>.

The Constitution of the Democratic Socialist Republic of Sri Lanka (1978) as well as the ordinary law provides safeguards for the preservation of the integrity of the person<sup>5</sup>. These safeguards include the right to be free from torture<sup>6</sup>, from arbitrary arrest and detention<sup>7</sup> and freedom of speech and expression<sup>8</sup>. However these safeguards have been suspended to a great extent by the emergency regulations<sup>9</sup> which override other written laws in the interest of national security.

In this legal context10 one can perceive a number of violations of

<sup>3</sup> Article 4, ICCPR ibid n.2

<sup>&</sup>lt;sup>4</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA res. 39/46, annex, 39 UN GAOR Supp. (No. 51) at 197, UN Doc. A/39/51 (1984); 1465 UNTS 85, hereinafter referred to as UNCAT

<sup>&</sup>lt;sup>5</sup> The Constitution of the Democratic Socialist Republic of Sri Lanka, 1978, cited as 'The Constitution'

<sup>6</sup> Article 7, ICCPR ibid n.2 and the Constitution, ibid n.5 Article 11

<sup>&</sup>lt;sup>7</sup> Article 9, ICCPR ibid n.2 and The Constitution, ibid n.5 Article 13

<sup>&</sup>lt;sup>8</sup> The Constitution *ibid* n.5, Article 14(1)a

<sup>&</sup>lt;sup>9</sup> Emergency (Miscellaneous Provisions and Powers) Regulation No 1 of 2005 as contained in Gazette No 1405/14 of 13 August 2005 as amended.

<sup>10</sup> Other international laws and treaties which recognise the integrity of the person include the Rome Statute of the International Criminal Court. Article 7 of the Rome Statute details crimes against humanity as "any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack", Rome Statute U.N. Doc. A/CONF.183/ 9, 17 July 1998 (entered into force 1 July 2002), cited as Rome Statute. Crimes against humanity are attacks against civilian populations which include murder (Rome Statute, Article 7(1)a), deportation or forcible transfer of populations (Rome Statute, Article 7(1)d), imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law (Rome Statute, Article 7(1)e), torture (Rome Statute, Article 7(1)f), and enforced disappearance of persons (Rome Statute, Article 7(1)i). Under the Rome Statute the prosecutor must show that there was a state or organizational policy to commit such attack. Sri Lanka is however not a state party to the Rome Statute (As of 18th July 2008, 108 states were party to the Rome Statute; International Criminal Court, Assembly of State Parties, available at http://www.icc-cpi.int/statesparties.html [accessed on 12/1/2009])

the physical integrity of persons in Sri Lanka over the year 2007. The allegations of torture, abductions and disappearances and the re-emergence of the vehicle of terror in Sri Lanka – the 'white van' – tell the tale of a continued climate of violence in the country.

The fact that violations of the integrity of the person continue is evidence of the culture of impunity that exists in Sri Lanka. Violations of the physical integrity of the person include torture, abductions, illegal arrest and detention and extra judicial killings.

For the year under review, this chapter limits itself to an analysis of the *physical* integrity of person, firstly as regards the legal regime, and secondly as regards some of the incidents of violations of the physical integrity of the person. The chapter concludes with recommendations.

# 2. Legal recognition of the integrity of the person

Although the domestic laws of Sri Lanka do not expressly recognise a right of an individual to the physical integrity of the person, it can be argued that constitutional provisions and judicial precedent have impliedly recognised this right in the past. This is because the physical integrity of the person is encompassed in other specific rights which include, for example, the blanket prohibition of torture<sup>11</sup> and freedom from arbitrary arrest and detention<sup>12</sup>.

For the purposes of this chapter, the term 'the right to the physical integrity of the person' is defined as follows: "Everyone has the right to life and to physical integrity. The freedom of the person is inviolable. 13 No one shall be sentenced to death, tortured or otherwise

<sup>11</sup> The Constitution ibid n.5, Article 11

<sup>&</sup>lt;sup>12</sup> The Constitution ibid n.5, Article 13 (1), (2)

<sup>&</sup>lt;sup>13</sup> Article 2(2), Basic Law of the Federal Republic of Germany, In the version promulgated on 23 May 1949 (first issue of the *Federal Law Gazette*, dated 23 May 1949), as amended up to and including 20 December 1993, available online at http://www.iuscomp.org/gla/statutes/GG.htm#2, accessed on 8/01/2010

treated in a manner violating human dignity. The personal integrity of the individual shall not be violated, nor shall anyone be deprived of liberty arbitrarily or without a reason prescribed by an Act. A penalty involving deprivation of liberty may be imposed only by a court of law. The lawfulness of other cases of deprivation of liberty may be submitted for review by a court of law. The rights of individuals deprived of their liberty shall be guaranteed by an Act. 14"

### 2.1 Sri Lanka's Obligations under International Law

Sri Lanka acceded to the first optional protocol to the ICCPR (hereinafter OP-ICCPR) in 1997<sup>15</sup> and ratified the ICCPR in 1980. While the Covenant does not carry an *express* recognition of the term "the physical integrity of the person'<sup>16</sup>, the ICCPR is very vocal in defending the many manifestations of the right to physical integrity, ranging from a blanket prohibition of torture<sup>17</sup> to the right to be free from arbitrary arrest<sup>18</sup>.

The Human Rights Committee (hereinafter HRC) is the treaty body set up under the ICCPR in order to act as a mechanism

<sup>&</sup>lt;sup>14</sup> Chapter 2 (Basic Rights and Liberties), Section 7 (The right to life, personal liberty and integrity), The Constitution of Finland, 11 June 1999, (731/1999, as amended up to 802/2007), Ministry of Justice, Finland, English translation available online at http://www.finlex.fi/fi/laki/kaannokset/1999/en19990731.pdf, accessed on 8/01/2010

<sup>15</sup> It must be noted that the Optional Protocol does not apply automatically to state parties to the Covenant. State parties voluntarily consent to be bound by the Optional Protocol (General Comment 33, pg. 1 §4). Sri Lanka acceded to it on the 3rd of October 1997, fully aware of its obligations under international law upon accession. Optional Protocol to the International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, entered into force March 23, 1976, hereinafter referred to as OP-ICCPR or First Optional Protocol to the ICCPR.

16 As opposed to for example, the Constitution of Finland ibid n.14 and the Basic Law of Germany, ibid n.13, which expressly recognize the physical integrity of the person. The ICCPR however expressly recognizes the several manifestations of the physical integrity of the person, such the right to be free from torture, from illegal arrest, from unlawful detention etc.

<sup>&</sup>lt;sup>17</sup> Article 7, ICCPR *ibid* n.2 <sup>18</sup> Article 9(1), ICCPR *ibid* n.2

through which the rights envisaged in the Covenant can be given effect as a part of international human rights law. Under the First Optional Protocol to the ICCPR, the Human Rights Committee is empowered to receive and consider complaints from citizens of the member state as to violations of his/her rights under the Covenant by such member state<sup>19</sup>.

Further, under Article 1 of the OP-ICCPR, a state party not only recognises the competence of the Human Rights Committee, but also accepts an obligation not to hinder access or take retaliatory measures against persons who address communications to the HRC<sup>20</sup>.

In acceding to the first Optional Protocol to the ICCPR on 3rd October 1997, Sri Lanka made the following declaration:

"The Government of the Democratic Socialist Republic of Sri Lanka pursuant to article (1) of the Optional Protocol recognises the competence of the Human Rights Committee [emphasis added] to receive and consider communications from individuals subject to the jurisdiction of the Democratic Socialist Republic of Sri Lanka..."<sup>21</sup>

In acceding, therefore, the state party has by policy agreed and accepted the jurisdiction of the HRC to receive and consider

<sup>&</sup>lt;sup>19</sup> General Comment 33 on the ICCPR interprets Article 1 of the OP-ICCPR to mean that once a state party recognizes the competence of the committee to receive and consider communications, it also imposes upon itself the obligation not to take retaliatory steps against the author of such communication, or in any other way to hinder access to the Human Rights Committee. The HRC in the same General Comment details the action that should be taken by a state party against whom a claim has been made by a state party. *General Comment 33*, CCPR/C/GC/33, 5 November 2008, Human Rights Committee, 94th Session, Geneva, 13-31 October 2008.

<sup>20</sup> General Comment 33 op cit., pg.1 §4

<sup>&</sup>lt;sup>21</sup> See Ratification of the First Optional Protocol to the ICCPR which entered into force on 23 March 1976, in accordance with article 9 of the ICCPR-STATUS AS AT: 18-08-2009 06:26:49 EDT, available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\_no=IV-5&chapter=4&lang=en#EndDec

communications with regard to the violations of the provisions of the ICCPR.

1. The views expressed by the HRC are authoritative determinations on violations of the Covenant<sup>22</sup>. Though it is not a judicial body<sup>23</sup>, the views of the HRC – in its own words – are in a 'judicial spirit', and thereby exhibit some important characteristics of a judicial decision due to the procedure it adopts. Read with Article 2 of the Covenant<sup>24</sup>, this imposes upon the state an obligation to respond to the views of the HRC since 'the state party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant <sup>25</sup>. Therefore where the HRC finds a violation of the Covenant, the state is under an international law obligation to inform the HRC of the measures it has taken to ensure effective realization of the rights under the ICCPR.

The HRC in General Comment 33 also reiterates the obligation of a state party to observe all its treaty obligations in good faith<sup>26</sup>. The HRC has considered situations where the Covenant or the Optional Protocol has not been introduced into the domestic legal order. In such cases it requires state parties to use whatever means available to give effect to its views<sup>27</sup>.

Therefore, it can be correctly concluded that Sri Lanka has accepted several international obligations with regard to the protection of the physical integrity of the person. It has also

<sup>&</sup>lt;sup>22</sup> General Comment 33 *ibid* n.19, pg. 3 §13

<sup>23</sup> General Comment 33 ibid n.19, pg. 2, §11

<sup>&</sup>lt;sup>24</sup> As a state party to the ICCPR, Sri Lanka has an obligation under Article 2 (3)a of the Covenant to "ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by a person acting in an official capacity, see ICCPR *ibid* n.2.

<sup>&</sup>lt;sup>25</sup> General Comment 33 ibid n.19, pg. 3 §14. This General Comment was published on 5/11/2008, after the Singarasa judgment op cit. n.31.

See General Comment 33 id., pg. 3 §15, Human Rights Committee, op cit n. 19
 See para 20, General Comment 33 id., Human Rights Committee, op cit n. 19

therefore created a legitimate expectation among its citizens as to the protection of their rights under both the ICCPR and the domestic legal regime<sup>28</sup>.

#### 2.2 The case of Nallaratnam Singarasa

An ominous background to the dawn of 2007 was the delivery of the Singarasa judgement<sup>29</sup>, when the Supreme Court of Sri Lanka delivered a decision which deeply concerned both the citizens of this country and the international community<sup>30</sup>.

On 26th September 2006, a five judge bench of the Supreme Court including Chief Justice Sarath N. Silva, delivered judgement in the case of *Nallaratnam Singarasa v. A.G*<sup>31</sup>. The Court held that being a dualist country, international covenants acceded to by the state cannot be given effect to in Sri Lanka unless such conventions have been incorporated into national legislation by an Act of Parliament. Sarath Silva CJ stated:

"The accession to the Covenant [ICCPR] binds the Republic qua state. But, no legislative or other measures were taken to give effect to the rights recognized in the Convention as envisaged in Article 2. Hence the Covenant does not have internal effect and the rights under the Covenant are not rights under the law of Sri Lanka."

<sup>&</sup>lt;sup>28</sup> See for example the case of <u>Weerawansa v AG</u>,[2000] 1 Sri LR 387, 409, by Fernando J, where he stated that the state must respect international law and its treaty obligations, particularly where the liberty of the individual is concerned. Cited in the Submission by the Civil and Political Rights Programme of the Law and Society Trust, Sri Lanka in Regard to Draft General Comment No 33 by the United Nations Human Rights Committee, Law and Society Trust, 2008

<sup>&</sup>lt;sup>29</sup> For a more detailed critical analysis of this case see Pinto-Jayawardena, Kishali, The Rule of Law in Decline, Study on Prevalence, Determinants and Causes of Torture and other forms of Cruel, Inhuman or Degrading treatment or punishment in Sri Lanka, The Rehabilitation and Research Centre for Torture Victims (RCT), May 2009, Denmark, hereinafter referred to as RCT Study, at pg.19-20

<sup>&</sup>lt;sup>30</sup> International Federation for Human Rights, 'Sri Lanka's Supreme Court decision undermines human rights protection', 17 October 2006, Online, UNHCR Refworld, available at: http://www.unhcr.org/refworld/docid/482c5bf7c.html

<sup>&</sup>lt;sup>31</sup> Nallaratnam Singarasa v. A.G. (2006) S.C. SpL(LA) No. 182/99, accessible at http://www.srilankahr.net/pdf/s c\_judgement1.pdf

The decision effectively removed the enjoyment of human rights under all covenants to which Sri Lanka was party but which had not been incorporated into national legislation.

The Court also found that the President, who acceded to the Optional Protocol, had no authority from Parliament, the sole repository of legislative power in Sri Lanka, to confer public law rights upon the Human Rights Committee by such a declaration as was made at the time of the accession<sup>32</sup>.

In the lengthy judgement, Silva CJ argues that the conferment of the right to the HRC to accept and consider alleged violations of the Covenant amounted to a conferment of judicial power upon the HRC, in violation of the Constitution of Sri Lanka<sup>33</sup>. He goes on to state that by such a conferment of rights the President had violated Articles 3, 4(c) and 105(1) of the Constitution of Sri Lanka. Therefore, the learned Chief Justice argues that since the President had acceded to and made a declaration that was inconsistent with the Constitution, such accession and declaration had no legal effect upon the state under Article 33(f). He states:

"The accession and declaration does not bind the Republic qua state and has no legal effect within the Republic.

I wish to add that the purported accession to the Optional Protocol in 1997 is inconsistent with Article 2 of the Covenant which requires a State Party to take the necessary steps in accordance with its constitutional processes .....to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the .....Covenant"

In effect, he argues conclusively that no remedy can exist in law where there is no right.

<sup>32</sup> See Ratification of the First Optional Protocol to the ICCPR, ibid n.21

<sup>&</sup>lt;sup>33</sup> The RCT Study argues that there was no conferment of judicial power and that therefore this argument of the learned Chief Justice is fundamentally flawed. When read in conjunction with General Comment 33 *ibid* n.19, the HRC clearly has no judicial power in a domestic legal system, but is merely a mechanism through which the rights envisaged in the ICCPR can be given effect to as a part of the general international law regime. See RCT Study *ibid* n.29, pg. 20.

Therefore, this decision, while noting that the accession to the ICCPR was legally binding, held that it created no additional rights for Sri Lankan citizens since it had not been incorporated into domestic legislation.

The reason why this judgement is so problematic is that it foists upon the HRC the mantle of a judicial body with judicial powers within a domestic jurisdiction – which powers it does not possess and never presumed to possess. At the same time, it clearly violates the principle of pacta sunt servanda, and also robs the ICCPR of its most powerful mechanism of ensuring effective guarantee of civil and political rights, at least in so far as the mechanism applies to Sri Lanka. The decision moreover violates the directive principles of state policy in the Constitution which require Sri Lanka to respect its international law obligations<sup>34</sup>.

# 2.3 The effect of the Singarasa judgement on general international obligations of Sri Lanka

In effect the Singarasa judgement opened a floodgate of queries concerning the legality and effective implementation of international treaties and legal obligations to which Sri Lanka has acceded or which the state has ratified. The obligations of Sri Lanka to give effect to its treaty obligations are clearly spelt out in international law as well as in the domestic legal regime<sup>35</sup>.

<sup>34</sup> Op cit.

<sup>35</sup> Under Article 27(15) of the Constitution, under Directive Principles of State Policy, the State is required to "endeavor to foster respect for international law and treaty obligations in dealings among nations." See RCT Study ibid n.29, pg. 18. The Vienna Convention on the Law or Treaties of 1969 provides for the principle of pacta sunt servanda as follows: "[A] party may not invoke the provisions of its internal law as a justification for its failure to perform a treaty", Article 27, Vienna Convention on the Law of Treaties, 1969. At the same time, the Universal Declaration of Human Rights makes a similar provision: "In other words states should modify the domestic legal order as necessary in order to give effect to their treaty obligations." Article 8, Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

The Human Rights Committee in General Comment 31 interprets the general legal obligations of state parties to the ICCPR as follows:

"Although article 2, para 2 allows states parties to give effect to the Covenant rights in accordance with domestic constitutional processes, the same principle operates so as to prevent state parties from invoking provisions of the constitution law or any other aspects of domestic law to justify a failure to perform or give effect to obligations under the treaty." 56

This responsibility extends not only to the ICCPR but to all international treaties and covenants to which Sri Lanka is party. The Committee on Economic, Social and Cultural Rights has in General Comment 9 commented on the responsibility of the judiciary in giving effect to the rights enshrined in the Covenant. It goes on to say that "...neglect by the courts of this responsibility is incompatible with the principle of the Rule of Law..."

The role of decision makers, be it in the executive branch of government or in the judiciary, is very clear when it comes to the heavy responsibility it bears in terms of the international obligations of a state party:

"...When a domestic decision maker is faced with a choice between an interpretation of domestic law that would place the state in breach of the covenant and one that would enable the state to comply with the covenant, international law requires the choice of the latter." 38

<sup>&</sup>lt;sup>36</sup> General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant: 26/05/2004. CCPR/C/21/Rev.1/Add.13. (General Comments), hereinafter referred to as General Comment 31, Para 4

<sup>37</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 9: The domestic application of the Covenant, 3 December 1998, E/C.12/1998/24, available at: http://www.unhcr.org/refworld/docid/47a7079d6.html [accessed 22 December 2009], hereinafter referred to as General Comment 9, para 14

The Singarasa judgement highlighted the urgent necessity of mobilising the executive to incorporate its international obligations, thereby ensuring effective implementation of the international covenants to which Sri Lanka is a state party, not only as a face saving mechanism, but also in keeping with the spirit of the Covenants to which it is party.

Sri Lanka has acceded to the Convention on the Prevention and Punishment of the Crime of Genocide (accession 1950), the International Covenant on Civil and Political Rights (hereafter ICCPR) (accession 1980), the First Optional Protocol to the ICCPR (1997), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereafter UNCAT or the Convention) (accession 1994), the International Covenant on Economic Social and Cultural Rights<sup>39</sup> and the Convention on the Elimination of all Form of Discrimination Against Women<sup>40</sup>.

Some international conventions and covenants that have been incorporated into national legislation include the Convention on the Rights of the Child<sup>41</sup> by the National Child Protection Act<sup>42</sup> of 1998 and the Convention Against Torture<sup>43</sup>. Citizens are given some assurance of the availability of a legal remedy against grave violations of the physical integrity of the person by offences such as torture since the prohibition against torture is also encapsulated in Article 11 of the Constitution quite apart from statutory protection. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Act No. 22 of 1994 is a legislative mechanism by which the integrity of the

<sup>&</sup>lt;sup>39</sup> International Covenant on Economic, Social and Cultural Rights, General Assembly resolution 2200A (XXI) of 16 December 1966, accession 1980

<sup>&</sup>lt;sup>40</sup>Convention on the Elimination of All Forms of Discrimination against Women, General Assembly resolution 34/180 of 18 December 1979, ratified 1981

<sup>&</sup>lt;sup>41</sup> Convention on the Rights of the Child, General Assembly resolution 44/25 of 20 November 1989, ratified 1991, hereinafter cited as CRC

<sup>42</sup> National Child Protection Act No. 50 of 1998

<sup>43</sup> UNCAT ibid n.4

person is protected, at least on the books<sup>44</sup>. Critics note however that the CAT Act falls short of the protection envisaged under the Convention Against Torture<sup>45</sup>.

### 2.4 The ICCPR Act No. 56 of 2007

Given the international pressure and national agitation<sup>46</sup> following the *Singarasa* decision<sup>47</sup>, legislative measures were taken to incorporate the rights under the ICCPR into national legislation<sup>48</sup>. These efforts translated into the passing of the International Covenant on Civil and Political Rights (ICCPR) Act in late 2007<sup>49</sup> (hereinafter ICCPR Act).

The ICCPR Act notes in its preamble that a substantial part of the civil and political rights recognised by the ICCPR are already recognised in the Constitution of Sri Lanka. It also notes that it has become necessary for the government of Sri Lanka to enact legislation to give effect to civil and political rights referred to in

<sup>&</sup>lt;sup>44</sup> For a detailed discussion of the inadequacies of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Act No. 22 of 1994, (hereinafter referred to as CAT Act), see generally the RCT Study, Kishali Pinto-Jayawardena, *ibid* n. 29

<sup>&</sup>lt;sup>45</sup> See RCT Study, *ibid* n.29 at pg. 10. Writing in May 2009, Kishali Pinto-Jayawardena notes that there have been only three convictions for torture since 1994, and more than seventeen acquittals (at pg. 15). The study points out that the definition of torture in the CAT Act, falls short of the definition in the UNCAT, does not establish universal jurisdiction for acts of torture, and does not recognise command responsibility. See pg. 11.

<sup>\*6 &</sup>quot;Much of the politics of the ICCPR had/has to do with the GSP Plus Privileges issue. I believe there was a lot of pressure brought to bear on the Government with regard to the ICCPR.", Denning A.T, 'The ICCPR Intermingling Law, Politics and Policy', The Official Government News Portal of Sri Lanka, 18 April 2008, available at : <a href="http://www.news.lk/">http://www.news.lk/</a>

index.php?option=com\_content&task=view&id=5574&Itemid=52 47 Nallaratnam Singarasa v. A.G. (2006) ibid n.31

<sup>&</sup>lt;sup>48</sup> The passing of the bill was also politically important with the re-election of Sri Lanka into the Human Rights Council and the Universal Periodic Review of Sri Lanka scheduled for mid 2008, as well as affecting the national economy with the renewal of the GSP+ scheme by the European Union due in 2008. See generally the RCT Study, *ibid* n.29.

<sup>&</sup>lt;sup>49</sup> The International Covenant on Civil and Political Rights Act No. 56 of 2007

the ICCPR which had not been guaranteed by domestic legislation.

Therefore in light of this preamble it is necessary to first identify the civil and political rights which were not recognised in Sri Lankan law at the time of the enactment of the ICCPR Act, and then to analyse to what extent the said Act fulfils the promise in its preamble. The rights which were not recognised expressly as at the enactment of the Act are as follows:

- 1. The Right to Life; Article 6 of the ICCPR50
- Guarantees of the right to liberty and security of the person<sup>51</sup> with regard to preventive detention<sup>52</sup> and arrests made under the Emergency Regulations<sup>53</sup>

<sup>52</sup> The ordinary law provides guarantees for detainees either in pre-trial or preventive detention, which has been effectively suspended by the operation of the Emergency Regulations of 2005 as amended, *ibid* n. 9. See RCT Study *ibid* n.29, pg. 55-60 <sup>53</sup> i.e those who have not been charged with an offence. Those who have been *charged* are guaranteed some protection under the ICCPR Act *ibid* n.49, even if they were

arrested under the Emergency Regulations.

<sup>&</sup>lt;sup>50</sup> This is a non-derogable right (read with Article 4(2) of the ICCPR). This right has however been impliedly recognized by the Supreme Court of Sri Lanka in several judgments. See for example the case of <u>Kottabadu Durage Sriyani Silva VS. Chanaka Iddamalgoda</u>, <u>Officer in Charge</u>, <u>Police Station Payagala and Six others</u>, (2003) 2 Sri L.R. 63 decided by the Supreme Court of Sri Lanka

<sup>51</sup> Rights guaranteed under Article 9 of the ICCPR apply to all detainees whether he is a pre-trial detainee or an administrative detainee. Particularly Article 9(3) requires that a person detained on a criminal charge be brought promptly before a judge. The UNHRC has established that pre-trial detention should be as short as possible (General Comment 8 - Right to liberty and security of persons (Article 9), adopted on 30 June 1982, at p. 131, para. 3). However, under the PTA and Emergency Regulations, a detainee can be detained for up to one year. According to the RCT Study, in practice persons are detained for up to two or more years until the Attorney General decides to indict or request release. See pg. 57 at §3. Similarly a person who is arrested or detained is guaranteed the right to be entitled to take the proceedings before a court in order that the lawfulness of his detention can be examined (Article 9(4), ICCPR). However under the Emergency Regulations a suspect detained as a preventive detainee have no right to take the proceedings to a Court (but Reg. 19(5) recognizes the right to make written representations to the President and to an Advisory Committee appointed by the President), no right to be informed of the reason for his detention, to communicate with family members, and no right to access to lawyers. See RCT study ibid n.29, pg. 60 § 2

- a. The right to be informed of the reason for arrest54
- b. The right to be brought promptly before a court of law<sup>55</sup>
- c. The right to be brought to trial or released within a reasonable time<sup>56</sup>
- 3. The right to be presumed innocent until proven guilty<sup>57</sup>
- 4. The right to reparation/compensation for victims of torture<sup>58</sup>
- The right to independent medical examination and legal representation upon arrest

<sup>54</sup> Art. 9(2), ICCPR *ibid* n.2, Article 13(1) of the Constitution of Sri Lanka also recognises this right, though the Emergency Regulations which supersede constitutional guarantees carry no such safeguard for persons arrested under its regulations.

Sharticle 9(4), ICCPR ibid n.2. This right is not protected by the Emergency Regulations. A person can be detained for up to 30 days before he is brought before a magistrate (ER 2005, ibid n.9). Moreover there is no urgency with regard to such a detainee being indicted. The ordinary law however requires a person to be brought before a magistrate within 24 hours, which can be extended to an outer limit of 48 hours. The RCT Study notes as follows; "...While indictments take years to be served in some cases (which delay is attributed to the lack of resources in the Attorney General's Department), delays in trials are occasioned both by the state counsel and the defence counsel moving for dates, which are granted without demur by the judge.", ibid n.29, pg. 134 §5

<sup>56</sup> Article 9(4), ICCPR *ibid* n.2. There is no recognised domestic legal safeguard against delays in trials. See RCT Study, pg. 132 §4 "...pre trial detention could be indefinite even in terms of the ordinary law."

<sup>57</sup> Article 14(2), ICCPR *ibid* n.2. The ordinary laws of Sri Lanka recognize the presumption of innocence of an accused, but there is a derogation of these guarantees by the emergency regulations which allow a police officer above the rank of an ASP to record confessions which are admissible in a court of law.

second remedies for violations of human rights provided for in the Covenant. Compensation is generally awarded in instances of violations of fundamental rights, and in civil suits for damages in cases of torture, but there is no specific right to compensation under the CAT Act, *ibid* n.44. It has been argued that this is a violation of Article 9(5) of the ICCPR. See RCT Study, *ibid* n.29 pg. 74

6. The right of juvenile prisoners to be kept separate from adult offenders<sup>59</sup>

Some of the other rights that are recognised under the ICCPR Act include: the right to be recognised as a person before the law<sup>60</sup>; some rights to a fair trial<sup>61</sup>; a few rights of the child<sup>62</sup> including that the best interests of the child should be paramount in all proceedings concerning children<sup>63</sup>; and the right of access to benefits provided by the state<sup>64</sup>. These provisions have introduced or re-emphasised the following important guarantees in the domestic law:

<sup>39</sup> The Prisons Ordinance 18 of 1877 provides in section 48(b) that children be kept apart from adult offenders 'wherever practicable'. Similar provisions are there in the Children and Young Persons Ordinance. Article 10 (2)b of the ICCPR requires that juvenile persons be separated from adults. The ICCPR Act has made no provision for this right, presumably on the basis that it is already provided for. The situation is further complicated by the fact that the age of 8 is defined under Sri Lankan law as the lower age limit for offenders (section 75, Penal Code No. 2 of 1883). The RCT study states categorically that "Child offenders are kept in police cells together with adult offenders prior to being produced in court." ibid n.29, Pg. 146, §4. In February 2008, the report of Nowak M., Special Rapporteur on Torture recommended that the state ensure the separation of juvenile and adult offenders. RCT study, ibid n.29, pg. 146, §4

<sup>60 §2</sup> ICCPR Act, *ibid* n.49

<sup>61 §4</sup> ICCPR Act, that is the right to be afforded a trial in his presence, the right to legal counsel of his choosing and to be informed of such right, the right to have legal assistance assigned to him when he is indigent, to examine or have examined witnesses against him, to have access to an interpreter and the right not to be compelled to confess guilt or give evidence against himself, the principle of double jeopardy and the right to appeal to a higher court upon conviction. Of these, the right to have access to an interpreter is an important introduction to the law of Sri Lanka, which did not recognise this right before the passing of the ICCPR Act ibid n.49.

<sup>62 §5</sup> ICCPR Act, *ibid.* These include the right to have his/her birth registered, to be assigned a name upon birth, to acquire nationality, to be protected from neglect, maltreatment, abuse or degradation, have legal assistance assigned to him/her in criminal proceedings if substantial injustice would otherwise result, that the best interests of the child shall be paramount in all matters concerning children. This last significantly applies to a gamut of bodies, public or private, welfare, administrative, judiciary or legislative.

<sup>63 §5(2)</sup> ICCPR Act, ibid

<sup>64 §6</sup> ICCPR Act, ibid

1. Re-emphasised the right to liberty and security of the person for persons *charged* with a criminal offence under any written law<sup>65</sup> (emphasis added); Section 4 guarantees rights envisaged under Articles 14 (3)d, e, f and g, 14 (5) and (7) of the ICCPR.

Introduced the right to legal representation for every child (guarantees required under Article 40 of the Convention

on the Rights of the Child)

 Introduced the right to an interpreter where a person cannot understand the language of the court<sup>66</sup>.

Article 3 of the Act provides for a prohibition on inciting war, racial or religious hatred or discrimination, a crime which now carries a maximum sentence of ten years rigorous imprisonment. The High Court has been vested with jurisdiction to provide relief in applications under Articles 2, 4, 5 and 6<sup>67</sup>.

The Act also re-affirms the right of a person not to confess guilt or testify against himself (Article 14(g), ICCPR), a right already recognised under the ordinary laws, but the effectiveness of this affirmation is doubtful until the emergency regulations cease to operate<sup>68</sup>.

<sup>66</sup> Article 14(f) of the ICCPR, given effect to by section 4(e) of the ICCPR Act *ibid* n.49.

67 §7 ICCPR Act ibid n.49

<sup>65</sup> It can be argued that the Emergency Regulations (which do no recognize most rights under the ICCPR or even the ordinary laws) override this right since under Article 15(1) of the Constitution, fundamental rights such as the presumption of innocence and protection against retrospective legislation, can be suspended by laws or regulations made in the interests of national security (see RCT Study, pg.64 §5). A more liberal interpretation would be that this section applies to any person who has been *charged under any written law*, therefore it is arguable that even a person arrested in terms of the Emergency Regulations will be guaranteed these protections. This section however will not apply to preventive detainees who have not been charged.

<sup>&</sup>lt;sup>68</sup> Under the emergency laws, a confession made to a police officer of the rank of ASP or above is admissible. See Regulation 63 and 41(4) of the Emergency Regulations of 2005 as amended *ibid* n.9, and section 16(2) of the Prevention of Terrorism Act No. 48 of 1979.

The ICCPR Act has been roundly criticised as inadequate<sup>69</sup>. It barely scratches the surface of the rights envisaged in the ICCPR, and seems simply a method of appearing those who agitated for legislative incorporation of these rights following the *Singarasa* ruling<sup>70</sup>.

The new Act begins by establishing that it is simply adding to the substantial rights already recognised in the Constitution of Sri Lanka; however, in reality the rights recognised in the new Act are so vague as to be negligible and in some cases, simply a repetition of rights already recognised in Sri Lankan legislation<sup>71</sup>.

The Constitution of Sri Lanka provides for the following rights: the freedom of thought, conscience and religion<sup>72</sup>, freedom from torture<sup>73</sup> and right to equality<sup>74</sup>. Other fundamental rights and freedoms include freedom from arbitrary arrest, detention and punishment; certain rights of fair trial; freedom of speech and expression; peaceful assembly; association; labour rights; freedom to manifest his/her religion and promote his/her own culture and language; lawful occupation and freedom of movement<sup>75</sup>. The

<sup>69</sup> See also for a detailed analysis of the Act and its repercussions, Pinto-Jayawardena, K., 'Eschewing the dangerous satirical 'ICCPR' act', Sunday Times, 14 Oct. 2007, available at <a href="http://sundaytimes.lk/071014/Columns/focus.html">http://sundaytimes.lk/071014/Columns/focus.html</a> cited as Pinto-Jayawardena, K, 14 Oct. 2007. See also the RCT study by the same author, *ibid* n.29, "Though the intention itself cannot be faulted, the contents of the International Covenant on Civil and Political Rights Act No 56 of 2007 (the so-called "ICCPR Act"), which was passed by Sri Lanka's Parliament in late 2007 fell far short of the standards demanded from the ICCPR..."

<sup>70</sup> Nallaratnam Singarasa v. A.G. (2006) ibid n.31

<sup>&</sup>lt;sup>71</sup> See for example section 6, 'Every citizen shall have the right and opportunity to – (a) take part in the conduct of public affairs, either directly or through representative; and (b) have access to services provided to the public by the state', ICCPR Act *ibid* n. 49. Most of the rights in section 4 of the Act are already recognized under the domestic law, except for the right to an interpreter.

<sup>72</sup> Article 10 of the Constitution ibid n.5

<sup>73</sup> Article 11 of the Constitution id.

<sup>74</sup> Article 12 of the Constitution id.

<sup>75</sup> Article 14(1)a-h of the Constitution id.

Emergency Regulations of 2005 (as amended) have virtually replaced the ordinary laws relating to detention and arrests. Article 21 of the regulations for example stipulates that Sections 36 and 37 of the Code of Criminal Procedure<sup>76</sup> shall not apply to arrests made under Article 19, effectively removing the safeguard of requiring all persons to be brought before a magistrate within twenty four hours<sup>77</sup>.

The right to life held so dear by the ICCPR<sup>78</sup> and by international law continues to be ignored by lawmakers. A three judge bench including Mark Fernando J interpreted the provisions in the Constitution prohibiting torture and inhuman treatment as an implied recognition of the right to life<sup>79</sup>. However, until the legislature expressly recognises this right or a full bench of the Supreme Court recognises this right, citizens cannot be safe in the knowledge that they have a right to live<sup>80</sup>.

This in itself is a violation of Article 2 of the ICCPR which requires that state parties undertake to 'respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant'.

The ICCPR also 'requires each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant'.

<sup>&</sup>lt;sup>76</sup> Code of Criminal Procedure Act, No. 15 of 1979

<sup>77</sup> Regulation 19 allows for a person to be brought before a magistrate at a 'reasonable time' within thirty days of arrest. This type of leverage gives ample opportunity for torture in custody and other forms of violations of human rights while in the custody of the state. For a detailed analysis of the Emergency Regulations as opposed to the ordinary laws with relation to protection from torture and other civil rights, see RCT Study *ibid* n.29, pg 45 to 75

<sup>78</sup> Article 6(1) of the ICCPR, ibid n.2

<sup>&</sup>lt;sup>79</sup> See <u>Silva Vs Iddamalgoda</u>, 2003 (2) SLR, 63 supra, see also <u>Wewalage Rani</u> <u>Fernando and others</u>, SC (FR) No. 700/2002, SCM 26/07/2004. per judgment of Justice Shiranee A. Bandaranayake

<sup>80</sup> For a detailed discussion see RCT Study ibid n.29, pg. 37

These requirements mean that the rights in the ICCPR must be effectively available and persons claiming such remedy must also have the right to have a competent court adjudicate and provide a judicial remedy for such violations<sup>81</sup>.

#### General Comment 31 states as follows:

"Where there are inconsistencies between domestic law and the Covenant [ICCPR], Article 2 requires that the domestic law or practice be changed to meet the standards imposed by the Covenant's substantive guarantees."82

This requirement is unqualified and immediate, and cannot be justified by reference to political, social, economic or cultural considerations within the state<sup>83</sup>. The ICCPR Act of 2007 has therefore fallen short of the requirements laid down by the Covenants to which Sri Lanka is a state party<sup>84</sup>.

The duty of all arms of government to ensure the *effective* implementation of the ICCPR, as well as other international legal obligations of Sri Lanka, continues unabated. The incorporation of the Right to Life into the domestic law of Sri Lanka is one of the foremost of these obligations.

In conclusion, the legal regime of Sri Lanka, though having many safeguards built into its fabric in order to protect the integrity of the person, has at the same time a number of shortcomings which

<sup>81</sup> Art. 2(3) of the ICCPR, ibid n.2

<sup>&</sup>lt;sup>82</sup> General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant: . 26/05/2004. CCPR/C/21/Rev.1/Add.13. (General Comments), para 13

<sup>83</sup> General Comment 31 id, para 14

<sup>&</sup>lt;sup>84</sup> But see <u>ICCPR Reference Case</u>, In the Matter of a Reference under Article 129(1) of the Constitution, SC Ref No 01/2008, hearing on 17.03.2008. Decided by a divisional bench presided over by the Chief Justice, the Supreme Court responding to a matter referred by the President, held that the existing legal framework in Sri Lanka met the standards required by the ICCPR. See RCT Study *ibid* n.29, pg. 21 for a more detailed analysis of the decision.

prevent effective realisation of these rights for many of its citizens. The primary shortcoming is the operation of the emergency regulations which override the ordinary law and suspend many of the safeguards which prevent abuses of the physical integrity of persons. As a result, just as further legislation is necessary in order to introduce rights which are not a part of the legal regime, it is equally or more important to focus attention upon resuscitating the rights already recognised in our law.

# Violations of the Physical Integrity of the Person in 2007

The plethora of legislation does not seem to have curbed violence in Sri Lanka, the actors often being unidentified assailants. Large numbers of unlawful arrests, detention and allegations of torture demonstrate the abject failure of Sri Lanka to implement the CAT Act<sup>85</sup>. Very few perpetrators are charged in a criminal court in the first place, and delays in conviction of perpetrators further contribute to the problem.

The general law applicable to arrest and detention of individuals is encapsulated in Article 13(1) of the Constitution, whereby no person shall be arrested except according to procedure established by law, and in the Code of Criminal Procedure Act, which lays down the detailed procedure on arrest<sup>86</sup>. There is no right to legal representation for suspects in Sri Lanka. One is entitled to legal

<sup>85</sup> CAT Act, ibid n.44

<sup>&</sup>lt;sup>86</sup> There are two methods of arrest under the Code of Criminal Procedure Act (hereinafter CCP Act), No. 15 of 1979. The first is by way of a warrant issued by Court, and the second is by a Peace Officer, in terms of the CCP Act, for scheduled offences. For a detailed analysis see Kishali Pinto-Jayawardena, pg. 48, RCT Study May 2009, *ibid* n.29 at pg. 49

representation only once one has been charged with an offence<sup>87</sup>. The general law has been suspended to a great extent by the continued applicability of the emergency regulations. According to the emergency regulations as of July 2007<sup>88</sup>, the Secretary to the Ministry of Defence has wide powers of arrest and detention of persons<sup>89</sup>.

Under the emergency regulations, a person need not be brought before a magistrate within 24 hours as required under the normal laws, has no legal right to counsel, to contact his/her family members, or to seek medical assistance.

The following sections of this chapter are an attempt to provide a snap-shot view of the violations of the right to the physical integrity of the person in Sri Lanka in the year under review. The author has limited the review to acts which compromise the physical integrity of the person, and strives to provide a review of violations in the year 2007. In terms of perpetrators, the chapter looks at both those acts and omissions attributed to the GOSL as well as to non-state actors where such incidents have been reported.

<sup>&</sup>lt;sup>87</sup> In terms of Article 13(3) of the Constitution *ibid* n.5. For detailed analysis see Pinto-Jayawardena, RCT study, *ibid* n.29, at pg. 52 However under the Criminal Procedure Special Provisions Act No 15 of 2005 and No. 42 of 2007, persons arrested in relation to scheduled offences are afforded the right to consult an attorney-at-law of his/her choice. This right applied only to specific instances covered by this Act.

<sup>&</sup>lt;sup>88</sup> Emergency (Miscellaneous Provisions and Powers) Regulation No 1. of 2005 as contained in Gazette No 1405/14 and Emergency (Prevention and Prohibition of Terrorism and Specified Terrorist Activities) Regulation No 7 of 2006 as contained in Gazette No 1474/5 of 6 December 2006

<sup>&</sup>lt;sup>89</sup> Where a person is taken into custody and detained under an order of the Secretary to the Ministry of Defence, he is deemed to be in lawful custody and can be detained in any place authorized by the Inspector-General of Police (IGP). See Regulation 19, Emergency Regulations of 2005 as amended *ibid* n.9.

<sup>&</sup>lt;sup>90</sup> Emergency Regulations as amended upto 2008; under Regulation 19, a person can be detained upto one year. Regulation 21 provides that where a person has been arrested and detained under Regulation 19, such person shall be brought before a magistrate within a reasonable time, and not later than thirty days after the date of arrest. A person can also be detained in a place authorized by the IGP for ninety days, after which he must either be released or brought before a court of competent jurisdiction.

## 3.1 Acts of Terrorism

Acts of terror comprise one of the foremost methods of compromising the physical integrity of civilians and non-combatants. With the intensification of the war on terror in 2006<sup>91</sup>, terrorist attacks both in the city of Colombo as well as against military bases and civilian targets elsewhere continued unabated in the year under review. The national media report that all attacks are believed to have been perpetrated by the LTTE, and the author limits herself to attacks against civilians and non-combatants<sup>92</sup>.

On 3rd April 2007 the Daily News reported that a bomb had been detonated allegedly by the LTTE in Kondawattuwan in Ampara, killing 16 civilians<sup>93</sup>. On the same day the LTTE has also allegedly gunned down six Sinhalese aid workers in Mailambaveli in Batticaloa<sup>94</sup>.

Meanwhile on 23<sup>rd</sup> April 2007 the Daily News reported that the body of a fisherman killed by the LTTE had been found near the

<sup>&</sup>lt;sup>91</sup> Amnesty International reported that there were over 200,000 internally displaced persons since April 2006, Amnesty International Report 2008: The State of the World's Human Rights,

Amnesty International, 2008, UK (AI Index: POL 10/001/2008), hereinafter referred to as AI 2008, at pg. 279.

<sup>&</sup>lt;sup>92</sup> Incidents such as the March 2007 LTTE air strike which damaged the military base next to the Katunayake International Airport in Sri Lanka (the only international airport in the country) have been left out for the reason that they were aimed at military targets. Daily News Archives, 27th March 2007, available at http://www.dailynews.lk/2007/03/27/main\_News.asp

<sup>&</sup>lt;sup>93</sup> "Sixteen people including two children were killed and 25 civilians were injured as a bomb exploded inside a Sri Lanka Transport Board bus plying from Ampara to Badulla via Bibile when it was stopped at a security checkpoint near the Kondawattuwan tank," Daily News Archives, 3rd April 2007, available at http://www.dailynews.lk/2007/04/03/main\_News.asp

There has been an allegation, however, that this attack was carried out by the Karuna faction of the LTTE, though Karuna denied the allegation; United States Department of State, 2007 Country Reports on Human Rights Practices - Sri Lanka, 11 March 2008, available at: http://www.unhcr.org/refworld/docid/47d92c63b5.html [accessed 14 September 2009]

seas off Baththalangunduwa.

On 25th April 2007 a claymore mine was detonated, believed to have originated from the LTTE, killing four and injuring 35, in a Colombo bound bus from Mannar. The incident took place near Chettikulam<sup>95</sup>.

On 29th May 2007 the LTTE detonated a claymore bomb in Ratmalana, in the suburbs of Colombo city, targeting a military convoy. The bomb killed seven civilians and injured 37 persons including six Special Task Force officers<sup>96</sup>.

The Daily News reported that on 19th September 2007, ten youth had been hacked to death by the LTTE when they were repairing a sluice gate of a reservoir used for irrigation at Iruthakulam near Pottuvil.

On 28th November 2007 two bombings in Colombo city, strongly suspected to be carried out by the LTTE, killed 18 and injured more than 30 civilians, according to Amnesty International. The Daily News reported that in one blast in the town of Nugegoda, 16 civilians had been killed and 37 injured. The bomb had been placed at a parcel counter of a popular clothing store and was detonated at 5.55pm, rush hour in the city.

On the same day, a female suicide bomber detonated herself in front of the EPDP office in Narahenpita, in the city of Colombo. Two persons were critically injured in the attack. Both terrorist attacks on 28th November are believed to have been carried out by the LTTE<sup>97</sup>.

96 Daily News, 29/5/2007, available at http://www.dailynews.lk/2007/05/29/main News.asp

<sup>95</sup> Daily News, 25/8/2009, available at http://www.dailynews.lk/2009/08/25/ fea10.asp

<sup>&</sup>lt;sup>97</sup> BBC News, *Deadly Bomb Attacks in Sri* Lanka, 28 November 2007, available at <a href="http://news.bbc.co.uk/2/hi/south\_asia/7116335.stm">http://news.bbc.co.uk/2/hi/south\_asia/7116335.stm</a>, accessed on 23/12/2009. The attack outside the EPDP offices is believed to have targeted Minister Douglas Devananda, the leader of the Eelam People's Democratic Party.

## 3.2 Detention and Torture

The continued application of Emergency Regulations gives immunity to what would be the unlawful detention of persons under ordinary criminal laws, as discussed above.

# 3.2.1 Detention under the Emergency Regulations and PTA

Legal detention itself has become problematic since the advent of the emergency regulations. These regulations have virtually suspended the procedural safeguards which prevent persons from being detained for unnecessary lengths of time, which increases their vulnerability to torture and other forms of violations of their physical integrity.

As of 25th January 2007 up to 350 Tamil persons had been sent to the TID detention facility in Boossa<sup>98</sup>. Under the emergency regulations and the Prevention of Terrorism Act<sup>99</sup>, they can be detained there without charge for a considerable amount of time<sup>100</sup>.

## 3.2.2 Torture

In October 2007, the UN Special Rapporteur on Torture, Manfred Nowak, visited Sri Lanka. In his report he stated that in his opinion:

"the high number of indictments for torture filed by the Attorney General's Office, the number of successful fundamental rights cases

"Sri Lanka Prevention of Terrorism (Temporary Provisions) Act No 48 of 1979 [Certified on 20 July 1979], cited as PTA of 1979

<sup>100</sup> The Minister can order that the person be detained for up to 3 months, if he believes the person to be connected with or concerned in any unlawful activity (Section 9, Part III, PTA of 1979, id). Under the emergency regulations persons can be detained for up to thirty days without being produced before a magistrate.

<sup>98</sup> Iqbal M.C.M, National Laison Officer to the IIGEP, 'Some Current Human Rights Issues in Sri Lanka (2007)', 5th May 2007, available at http://www.ruleoflawsrilanka.org/resources/writings-of-m-c-m-iqbal/2007-current-human-rights-issues-in-sri-lanka, cited as Iqbal M.C.M. 2007

decided by the Supreme Court of Sri Lanka, as well as the high number of complaints that the National Human Rights Commission continues to receive on an almost daily basis indicates that torture is widely practiced in Sri Lanka. Moreover, I observe that this practice is prone to become routine in the context of counter-terrorism operations, in particular by the TID." 101

While describing some of the forms of torture reported by detainees, the Special Rapporteur concluded that a large majority of these were used in the Terrorism Investigation Unit in Boossa<sup>102</sup>. However, he also noted the commitment of the government in investigating torture by the creation of special units both in the Police and in the Attorney General's Department to investigate and prosecute alleged torture incidents. Nowak also pointed out that the work of the National Human Rights Commission was not satisfactory in monitoring and investigating possible violations<sup>103</sup>. He noted that despite a large number of indictments by the Attorney General's Department, only three cases resulted in convictions.

One of the recommendations he made in 2007 was the establishment of a "truly independent monitoring mechanism to visit all places where persons are deprived of their liberty throughout the country, and carry out private interviews".

In April 2007, the Supreme Court concluded the case of a torture victim, Dhanawardane<sup>104</sup>, who was brutally assaulted by over 100

<sup>&</sup>lt;sup>101</sup> Nowak M., "Special Rapporteur on Torture Concludes Visit To Sri Lanka", United Nations Press Release, 29 Oct. 2007, available at <a href="http://www.freemediasrilanka.org/English/news.php?id=45&section=news\_reports.cited">http://www.freemediasrilanka.org/English/news.php?id=45&section=news\_reports.cited</a> as Nowak M., 2007

<sup>102</sup> Nowak M., 2007 id.

<sup>&</sup>lt;sup>103</sup> See also the RCT Study *ibid* n.29, May 2009 which states as follows: 'There is no functioning independent system to deal with complaints of torture and CIDTP committed by law enforcement officials, resulting in impunity and the lack of accountability.'

<sup>104 &</sup>lt;u>Dhanawardane</u> Reference Number SC/FR/149/06, details of case available online at http://www.ahrchk.net/ua/mainfile.php/2007/2373/

inmates and trainees of the police training facility in Ketapola in 2006. His alleged torture resulted in hospitalisation and severe trauma. In deciding the case the Supreme Court granted the victim compensation of just Sri Lankan Rs. 25,000. The criminal case in the Elpitiya Magistrates Court was pending at the time of the Supreme Court decision, which found that all six respondents were in violation of the petitioner's fundamental rights<sup>105</sup>.

The Human Rights Committee on 2 November 2007 concluded their comments on the case of *Raththinde Katupollande Gedara Dingiri Banda*, who had submitted an individual communication to the HRC<sup>106</sup>.

Dingiri Banda, an ex-army officer, alleged torture and cruel, inhuman and degrading treatment in violation of his rights under the ICCPR by two superior officers while he was an officer in the Sri Lanka army. He alleged that he was attacked in the night by these two officers and that his injuries were so severe as to ultimately require his dismissal from the military on medical grounds. The HRC noted the continuous delay in redressing his cause, over seven years of delay both in the criminal and in the civil courts. Death threats and the failure of the military to court martial the two superior officers involved, were other complaints made by the author of the communication. In fact the only punishment meted out to the perpetrators was suspension of their promotions temporarily; they had since been promoted to the rank of Captain 107.

<sup>&</sup>lt;sup>105</sup> Asian Human Rights Commission, UPDATE (Sri Lanka): Compensation granted to the torture victim by the Supreme Court while criminal prosecution against perpetrators delayed, Urgent Appeals Program, 7 May 2007, available at <a href="http://www.ahrchk.net/ua/mainfile.php/2007/2373/">http://www.ahrchk.net/ua/mainfile.php/2007/2373/</a>

Dingiri Banda Case, Communication No.CCPR/C/91/1426/2005 Human Rights Committee, 91" Session, 13 November 2007, date of communication 20 June 2005, date of adoption of views 26 October 2007 available at http://www.daccessdds.un.org/doc/UNDOC/DER/G07/451/91/PDF/G0745191.pdf?OpenElement

<sup>107</sup> See RCT Study *ibid* n.23, pg.28 §1

The HRC in its consideration of the merits reiterated that the state is under a duty to investigate, prosecute and punish those who are responsible for human rights violations. In terms of the continuing delay in the courts of law to provide redress to the victim, the HRC notes:

"the Committee reiterates the settled rule of general international law that all branches of government, including the judicial branch, may be in a position to engage the responsibility of a State party 108."

Therefore, the fulfilling of the rights of persons under the ICCPR and other international obligations devolves directly not only upon the executive and legislature, but also upon the judiciary. The continuing delays in the courts of law therefore could conceivably give rise to a violation of a person's right to an effective remedy. The HRC further states:

"The Committee considers that the State party may not avoid its responsibilities under the Covenant with the argument that the domestic courts have already dealt or are still dealing with the matter, when it is clear that the remedies relied upon by the State party have been unduly prolonged and would appear to be ineffective 109."

The HRC found a violation of Articles 2 and 3 read with Article 7 of the ICCPR. It directed the state party to inform the HRC of the steps it has taken to provide an effective and enforceable remedy to the victim, and also to report back to the HRC within 180 days<sup>110</sup>.

The implementation of the CAT Act has also been woefully inadequate, with many cases being dismissed from the High Court.

<sup>108</sup> See General Comment 31 (2004), ibid n.30 para 4

<sup>109</sup> ibid

The RCT Study in May 2009 reports that five years after the delivery of the HRC views, the criminal case in the Magistrates Court is still pending at the non-summary stage due to delays in forwarding the relevant medical report to court. The RCT study also states that Dingiri Banda alleges that he was forced to agree to a settlement of the fundamental rights case in the Supreme Court. A civil case he had filed was also pending in mid 2009. See RCT study ibid n.29, pg. 28.

Only three convictions under the CAT Act have been made since 1994. Of those that were acquitted in 2007, the following were mentioned in a recent study on torture: the case of Nanda Warnakulasuriya<sup>111</sup>, the case of Sathisgamage<sup>112</sup> and the case of Ramyasiri<sup>113</sup>.

One of the legal safeguards against torture in state custody is the requirement for detainees to be produced before a magistrate within 24 hours of arrest. This requirement however has been rendered lax if not nugatory, not only by the emergency regulations but also by the Criminal Procedure (Special Provisions) Act No.15 of 2005. Under this Act a certificate filed by a police officer not below the rank of ASP can serve to extend this deadline in respect of certain offences. The Act was extended in 2007 by Act No. 42 of 2007.

At the same time in its report to the Committee against Torture in February 2007, the GOSL reiterated its commitment to prevention and investigation of cases of torture by state agencies<sup>114</sup>

In the report reference is made to a directive issued by the President to all police stations in Sri Lanka detailing the steps to be taken with regard to an arrestee<sup>115</sup>. They also state that the Attorney General has indicted over 100 police and security officers against whom a case could be established *prima facie*. The GOSL indicated that the principals of *non-refoulement* and universal jurisdiction were to be

<sup>&</sup>lt;sup>111</sup> Republic of Sri Lanka v. Nanda Warnakulasuriya and Others, Case No 119/2003, High Court of Kurunegala, HC Minutes 25.06.2007c/r RCT Study ibid n.29 pg.92 §1 and 2

<sup>112 &</sup>lt;u>Republic of Sri Lanka v. Sathisgamage and Others</u>, HC Case No (indistinct), High Court of Galle, High Court Minutes 04.05. 2007, c/r id

<sup>113</sup> Republic of Sri Lanka v. Ramyasiri and Others, HC case No 2854/06, High Court of Galle, HC Minutes 10.12.2007, c/r id

<sup>114</sup> See Consideration of Reports Submitted by States Parties under Article 19 of the Convention, Comments by the Government of Sri Lanka to the conclusions and recommendations of the Committee against Torture

CAT/C/LKA/CO/2/Add. 1 (20 February 2007), pg. 3 §7, cited as CAT Communication 2007, pg.6 §20

<sup>115</sup> CAT Communication 2007, id.

referred to the Sri Lanka Law Commission for their recommendations.

In terms of prosecution in cases of torture, the GOSL stated that the Attorney General had directed his officers to give priority to cases under the CAT Act. At the same time, the government pointed out that:

"Preference given to one case over another would only add to the further delay of the other cases. 116"

In the communication the GOSL also promised to consider making the declarations under Articles 21 and 22 of the CAT Convention, to become party to the Optional Protocol as well as to ratify the Rome Statute of the International Criminal Court<sup>117</sup>.

# Abductions, disappearances and extra judicial killings

#### 4.1 Abductions

As at early March 2007, Reuters reported that nearly 100 cases of abductions and disappearances had been reported for the year 2007 to the Sri Lanka Human Rights Commission, from Colombo, Batticaloa and Jaffna.

Two abductions on 8th May 2007 were reported by the Asian Human Rights Commission<sup>118</sup>. The insignia of abductions – armed men in civil clothes and the inevitable white van – are noticeable features of both cases. In one case the wife of the victim alleged that a police officer who had concealed his insignia bearing his service number was a part of the abducting crew. One abductee was taken from his home in Kotahena and the other from his place of work at Wellawatte, Colombo. Both were abducted in the night

<sup>116</sup> Id. pg. 4, §13

<sup>&</sup>lt;sup>117</sup> See CAT Communication 2007 *ibid* n.114, pg.7 §a, b, c. As at August 2009 Sri Lanka had not ratified or acceded to any of the declarations referred to.

<sup>118</sup> Available at http://www.ahrchk.net/ua/mainfile.php/2007/2394/, accessed on 24/6/2009

and both were originally from Jaffna and had moved to Colombo recently. In one case the abductors informed the wife of the abductee that her husband was being taken to obtain a statement and would be returned shortly. Writing on the 17th of May 2007, the AHRC states that as at that date no information on the fate of the abductees was available.

The Asian Legal Resource Centre in a written statement to the Human Rights Council in September 2007<sup>119</sup> pointed out that if the Government of Sri Lanka (GOSL) was genuinely willing to bring the perpetrators to book, the system in place has the capacity to identify and prosecute those who are guilty. They further argued that political interference in the system had 'paralysed' these investigative institutions.

On 7th March 2007, Reuters reported that the Sri Lankan government suspected the involvement of some police and army personnel in abductions and disappearances. It quoted Defence Spokesmen and government minister Keheliya Rambukwella as saying:

"Out of the arrests of the defence personnel, some may be involved in abductions and killings and disappearances." 120

The UNHCR meanwhile reported an excerpt from the Immigration and Refugee Board of Canada, that on 6th March 2007,

"Sri Lanka's police chief announced that a large number of current and former armed forces personnel and police officers had been

<sup>119</sup> ALRC; written statement submitted by Asian Legal Resource Centre (ALRC), a non-governmental organization in general consultative status, 'Human Rights Council must act on killings and forced disappearances in Sri Lanka', Human Rights Situations that Require the Council's Attention, Human Rights Council, Sixth session, A/HRC/6/NGO/21, 4 September 2007 available at http://daccessdds.un.org/doc/UNDOC/GEN/G07/139/35/PDF/G0713935.pdf?OpenElement

<sup>&</sup>lt;sup>120</sup> Available at <a href="http://www.alertnet.org/thenews/newsdesk/COL285170.htm">http://www.alertnet.org/thenews/newsdesk/COL285170.htm</a>, accessed on 24/7/2009

arrested for their involvement in kidnappings for ransom."121

The Asian Centre for Human Rights (ACHR) reported on 7th March 2007 that the Inspector General of Police, Victor Perera, on 6th March 2007 stated that over 400 persons including "exsoldiers, serving soldiers, police officers and underworld gangs and other organised elements" had been arrested since September 2006 on charges of abduction. The ACHR further commented that this was the first time the Sri Lanka Government had officially recognised the involvement of state security personnel in abductions and enforced disappearances.

It also reported that two days later the Sri Lanka government denied allegations of the complicity of state security personnel in forced abductions and extortions, saying that they were based on hearsay and unfounded fabrications.

The statement also quoted a Reuters report of 4th July 2007 that sixteen individuals had been arrested on suspicion of abductions and extortions, including current and former members of the Sri Lanka Air Force and four officers of the Sri Lanka Police. 123

# 4.2. Extra-Judicial Killings and Disappearances

A working document submitted to the Presidential Commission of Inquiry in August 2007 by the Civil Monitoring Mission, the Law and Society Trust and the Free Media Movement revealed that 547 cases of killings and 397 cases of forced disappearances

LKA.4562d8cf2,47d65462c,0.html, accessed on 24/7/2009, Source: Agence France-Presse (AFP). 6 March 2007. "Sri Lankan Police, Troops Involved in Abductions: Police Chief." (Factiva)

Available at <a href="http://www.achrweb.org/Review/2007/157-07.htm">http://www.achrweb.org/Review/2007/157-07.htm</a>, accessed on 24/7/2009

<sup>123</sup> Op cit., Accessed on 24/7/2009, Source: 4 July 2007. "Sri Lanka Arrests 16 over Abductions, Extortion." http://uk.reuters.com/article/latestCrisis/idUKCOL17649420070704, accessed 10 Jan. 2008

had been reported in the six months from January to June 2007<sup>124</sup>. The report showed that the Tamil community had been disproportionately affected by both killings and forced disappearances. In the case of killings, some 70% of victims had been Tamil compared to 9 percent of Sinhalese and 6 percent of Muslims (the remainder being of indeterminate ethnicity). In most cases the perpetrators are unidentified.

In March 2007, five charred bodies were found in the marshy bogs of Muthurajawela<sup>125</sup>. Identified by a member of the Tamil Makkal Viduthalai Puligal (TMVP) popularly known as the Karuna faction, the perpetrators were believed to have been members of the LTTE. Five more charred unidentified bodies were found in Anuradhapura in the same week, with the Human Rights Commission reporting to the Sunday Times that it had received reports of over 100 abductions and disappearances in the months of January and February 2007. The Sunday Times newspaper quoted the HRC as stating that the majority of these reports came from Colombo, Jaffna and Batticaloa.

The AHRC reported in November 2007 the disappearance of 57 humanitarian workers in the previous year (from November 2006)<sup>126</sup>. They reported that these workers had either been killed or disappeared and that 43 of this number had been killed, according to their sources.

125 Fuard A., 'Mystery bodies: Once again it's who killed whom', Sunday Times, 11 March 2007, online, available at <a href="http://sundaytimes.lk/070311/News/113news.html">http://sundaytimes.lk/070311/News/113news.html</a>

<sup>124</sup> Law & Society Trust; Civil Monitoring Commission; Free Media Movement, Second submission to the *Presidential commission of inquiry and the public on human rights violations in Sri Lanka: January-August 2007*, LST Review, Vol.18, nos.239/240, pp.29-41, 2007 available online at <a href="http://www.lawandsocietytrust.org/web/images/PDF/Public%20report%20on%20Killings%20and%20 Disappearances%20from%20Jan%20 to%20Aug.pdf">http://www.lawandsocietytrust.org/web/images/PDF/Public%20report%20on%20Killings%20and%20 Disappearances%20from%20Jan%20 to%20Aug.pdf</a>.

<sup>&</sup>lt;sup>126</sup> AHRC, 'UPDATE (Sri Lanka): List of another 22 disappeared persons', 30 April 2007, online, available at <a href="http://www.ahrchk.net/ua/mainfile.php/2007/2359/">http://www.ahrchk.net/ua/mainfile.php/2007/2359/</a>

Meanwhile Basil Fernando, director of the Asian Human Rights Commission, writing in December 2007, reported the abduction and killing of two members of the Red Cross<sup>127</sup>. They were reportedly abducted at Colombo's Central Railway Station on 3rd June 2007 by two persons posing as plain clothes policemen, and the bodies of the two workers were found in June 2007 in Ratnapura. Public assurances were made by the President that the perpetrators would be identified within seven days of the incident. The progress on the investigation was not known at the time of writing.

On June 23rd, Arumainayagam Aloysius, an employee of the Danish Refugee Council, was assassinated in Jaffna. On December 14th Sooriyakanthy Thavarajah, an employee of the Sri Lanka Red Cross, Jaffna was abducted from his home. His body was found in Kaithady two days later 128.

In terms of possible politically motivated killings, TNA Party Chairman for Ampara District, Thillainathan Uthayakumar, was killed on June 28th by unknown assailants. On 20th August 2007, S. Thiyagachandran, the brother of TNA Member of Parliament Jeyananthamoorthy, was killed in Oddamaavadi, Batticaloa District<sup>129</sup>.

<sup>127</sup> Fernando B., 'Sri Lankan Government must show Sincerity', 14 December 2007, online, available at <a href="http://www.upiasia.com/Human\_Rights/2007/12/14/sri\_lankan\_government\_must\_show\_sincerety/5284/">http://www.upiasia.com/Human\_Rights/2007/12/14/sri\_lankan\_government\_must\_show\_sincerety/5284/</a>, cited as Fernando B., 14 Dec. 2007, accessed on 23/1/2009

<sup>&</sup>lt;sup>128</sup> International Federation for Human Rights, Observatory for the Protection of Human Rights Defenders Annual Report 2007 - Sri Lanka, 19 June 2008, available at: http://www.unhcr.org/refworld/docid/48646688c.html.

Department of State, 2007 Country Reports on Human Rights Practices - Sri Lanka, 11 March 2008, available at: http://www.unhcr.org/refworld/docid/47d92c63b5.html [accessed 14 September 2009]

## 4.3 Child Soldiers

Human Rights Watch continued to accuse the LTTE of continuing to recruit child soldiers<sup>130</sup>. Violations by the LTTE and the Karuna faction appear to have continued unabated despite a dozen children being released in December 2006 by the Karuna faction. Human Rights Watch reported that according to UNICEF, 35 child abductions had taken place at the behest of the Karuna faction<sup>131</sup>. They also noted that the actual number was likely to be higher. They alleged that three of the released children had been re-recruited by the Karuna faction.

HRW reported that UNICEF had documented 19 cases of child recruitment in January and nine in February 2007. They also reported that the LTTE abducted at least four people from camps for the internally displaced. Meanwhile, Human Rights Watch provided a glimpse of the stance of Karuna on the matter of child recruitment:

"Karuna has denied allegations that his forces are abducting or recruiting children. He told Human Rights Watch in a telephone communication on February 9 that his forces had no members under age 18, and that they would discipline any commander who tried to recruit a person under that age." 132

On a positive note, the Karuna faction (TMVP) in January 2007 had issued regulations to its military wing 'stating that 18 was the minimum age for recruitment, and specifying penalties for members who conscript children 133.

In terms of child soldiers and the armed conflict, the GOSL

<sup>&</sup>lt;sup>130</sup> Human Rights Watch, Sri Lanka: Karuna Group and LTTE Continue Abducting and Recruiting Children, 27 March 2007 Available at <a href="http://www.hrw.org/en/news/2007/03/27/sri-lanka-karuna-group-and-ltte-continue-abducting-and-recruiting-children">http://www.hrw.org/en/news/2007/03/27/sri-lanka-karuna-group-and-ltte-continue-abducting-and-recruiting-children</a>, accessed on 24/7/2009

<sup>131</sup> HRW, March 2007, id.

<sup>132</sup> HRW, March 2007 Ibid n. 122

<sup>133</sup> HRW, March 2007 *Ibid* n. 122

continued to deny the charges of Human Rights' Watch of alleged apathy concerning the abduction and recruitment of child soldiers by the Karuna faction. In January 2007, the Sunday Times reported that these charges had been denied by the government on the basis that the claims were not supported by evidence<sup>134</sup>.

In February 2007, Sri Lanka continued to deny involvement, making a statement to the UN Security Council Working Group on Children and Armed Conflict saying that allegations of military involvement, either directly or indirectly, in such abductions were "superficial and unverified hearsay material" The GOSL in its communication to the Committee against Torture also reiterated its concern on the allegations of child recruitment by the LTTE, referring to the impending visit of Allan Rock, the UN Secretary General for Armed Conflict in Sri Lanka, as evidence of its commitment to the issue 136.

Human Rights Watch in a publication on 27th March 2007 accused the government of being complicit in the crime of child recruitment by the Karuna faction:

"There is strong evidence that government forces are now openly cooperating with the Karuna group despite its illegal activities, Human Rights Watch said. Armed Karuna members regularly walk or ride throughout Batticaloa district in plain view of government forces" 137

137 CAT Communication, ibid n.114

<sup>134</sup> Fuard A., 'Government Denies HRW Charges', Sunday Times, 28 Jan. 2007
135 'Lanka to UN Security Council: Child abduction allegations based on hearsay material', Sunday Times, 11 Feb. 2007 available at <a href="http://www.sundaytimes.lk/070211/News/110news.html">http://www.sundaytimes.lk/070211/News/110news.html</a>

<sup>136 &</sup>quot;The Government of Sri Lanka takes note of the serious concerns expressed by the Committee [against Torture] about allegations of continued abductions and military recruitment of child soldiers by the LTTE. In this regard the Government recently invited Mr. Alan Rock a representative of Ms. Radhika Coomaraswamy, the special representative of the UN Secretary General for children in armed conflict, to Sri Lanka for a fact finding mission," see CAT Communication *ibid* n.114, pg. 6 § 22

In January 2007 Human Rights Watch released a report on child soldiers recruited by the Karuna faction and the LTTE. The report revealed that in June 2006 some 200 Tamil children in the eastern districts of Sri Lanka had been forcibly abducted and recruited by the Karuna faction 138.

The report revealed that the Karuna faction had also forcibly abducted and recruited hundreds of young men aged from 18 to 30. The report suggested evidence of the complicity of the GOSL in abductions and child recruitments carried out by the Karuna faction in the east. These allegations however were hotly refuted by the GOSL.

In April 2007 UNICEF reported that of 285 children recruited by Karuna, there were 195 outstanding cases of continuing conscription<sup>139</sup>. On 18th June 2007, Amnesty International reported that the LTTE had released 135 children. It also cited UNICEF in asserting that child recruitment by the LTTE had declined in 2007.

## 4.4 Forcible Evictions

The Sri Lanka Police on 7th June 2007 raided boarding houses and lodges in Colombo city, evicting Tamil persons who could not give a valid reason for being in Colombo, and sent them in buses to the North and East 140. On 8th June 2007 in response to a fundamental rights petition by the Centre for Policy Alternatives (CPA), the Supreme Court issued an interim order suspending further evictions from the city. The order also directed authorities

<sup>&</sup>lt;sup>138</sup> Human Rights Watch, 'Complicit in Crime- State Collusions in Abductions and Child Recruitment by the Karuna Group', 23 Jan. 2007, online, available at http://www.hrw.org/en/reports/2007/01/23/complicit-crime <sup>139</sup> AI 2008, *ibid* n. 83, pg. 278-279

<sup>&</sup>lt;sup>140</sup> Human Rights Watch (HRW). August 2007, 'Sri Lanka – Return to War: Human Rights Under Seige', online, available at http://hrw.org/reports/2007/srilanka0807/srilanka0807/webwcover.pdf

not to prevent Tamils from entering or leaving the city.

The state media initially reported that the citizens thus evicted had 'volunteered' to leave the city<sup>141</sup>. Following the public agitation and media outrage at the evictions, the Prime Minister Ratnasiri Wickremanayake encouragingly made a public apology for the evictions, promising that such evictions would not recur<sup>142</sup>. By 10<sup>th</sup> June there were reports that at least half the number thus sent to the North and East had returned, GOSL having provided transport facilities for their return<sup>143</sup>.

# 4.5 The physical integrity of media personnel in Sri Lanka

The functioning of a free and independent media is crucial in protecting the integrity of the person and one of the most effective ways to silence the media is to compromise the physical integrity of journalists.

In January 2007, for example, the Sunday Times reported<sup>144</sup> that Munusamy Parameshwari, 25 a journalist at Maubima and a resident of Killionochchi, had been detained by the Terrorism Investigation Unit without following legal procedure, prompting her to file a fundamental rights petition. She had been asked to sign documents and had not been brought before a magistrate as is required by the law.

Daily News, Colombo, Pramod de Silva and Irangika Range, "No Forcible Evicton of Lodgers – Keheliya," 8 June 2007, online, available at <a href="http://www.dailynews.lk/2007/06/08/pol01.asp">http://www.dailynews.lk/2007/06/08/pol01.asp</a>. The Foreign Employment Promotion Minister Keheliya Rambukwella reportedly said that all bombings in the past ten years had been hatched within these lodgings, that more than 20,000 Tamils resided in these lodges, "but we have to secure the lives of 19 million people".

<sup>&</sup>lt;sup>142</sup> Immigration and Refugee Board of Canada, 'Sri Lanka: Reports of forced removals of Tamils from Colombo after 7 June 2007', 15 October 2007. LKA102597.E, Online, UNHCR Refworld, available at: http://www.unhcr.org/refworld/docid/47d65461c.html, cited as IRBC 2007

<sup>143</sup> IRBC 2007 *Ibid* n.134

<sup>&</sup>lt;sup>144</sup> Andappa T., 'Journalist claiming unlawful detention further questioned', Sunday Times, 28 Jan. 2007

As Kishali Pinto-Jayawardena in her weekly column in the Sunday Times pointed out, Munusamy had been judged and convicted by the media long before the investigative process began <sup>145</sup>. The Sunday Times also reported that the family and relatives of Munusamy had been harassed and criticized while the state media played an active role in the cry of "crucify". The role of the Supreme Court and the Attorney General's Department in securing her release was commended by Pinto-Jayawardena.

In February 2007, Dushantha Basnayake, the Financial Director of The Standard Newspapers (Pvt.) Ltd. (publisher of the Maubima), was arrested without charge and detained for two months by the TID.

In April 2007, the journalist Subash Chandraboas, attached to the Tamil newspaper Nilam, was shot dead in Vavuniya town<sup>146</sup>. Less than two weeks later Selvarajah Rajivarman, attached to the Tamil newspaper Udayan, was shot dead by unidentified assailants in Jaffna. In another incident in Jaffna, a journalism student at the Jaffna University and editor of the student union linked magazine *Chalaaram* was shot dead by unidentified gunmen during curfew near his home in Jaffna<sup>147</sup>.

The Free Media Movement reported that security personnel in Jaffna had censored the media and deleted photographs of an agitation by citizens in front of the UN office in Jaffna on the occasion of the visit of the UN High Commissioner Louise Arbour. They also reported that security personnel had grabbed

<sup>&</sup>lt;sup>145</sup> Pinto-Jayawardena K., 'Protecting a finely poised balance of the media and the law', Sunday Times Column: Focus on Rights. 01\* April 2007, available at <a href="http://www.sundaytimes.lk/070401/Columns/focus.html">http://www.sundaytimes.lk/070401/Columns/focus.html</a>

<sup>&</sup>lt;sup>146</sup> Asian Human Rights Commission, Urgent Appeals, SRI LANKA: Several media personnel killed while investigation has failed, available at <a href="http://www.ahrchk.net/ua/mainfile.php/2007/2635/">http://www.ahrchk.net/ua/mainfile.php/2007/2635/</a>, accessed on 22/12/2009

<sup>147</sup> International Press Institute, World Press Freedom Review 2007, 'Sri Lanka', available at <a href="http://www.freemedia.at/cms/ipi/freedom\_detail.html?country=/KW0001/KW0005/KW0132/">http://www.freemedia.at/cms/ipi/freedom\_detail.html?country=/KW0001/KW0005/KW0132/</a> referred to as IPI 2007

the camera of Yal Thinakkural newspaper's reporter Selliayah Ruban and deleted the picture of the incident 148.

In October 2007<sup>149</sup> the Deputy Minister of Labour, Mervin Silva, physically chased away camera crews from a court house, and verbally assaulted them. The journalists were there to cover a case related to the minister's son, who was before court for assault charges. No action was taken against the minister by any of the state institutions<sup>150</sup>.

Within two weeks of this incident, the Criminal Investigations Department (CID) arrested a journalist on the evidence given by a Minister of Parliament, Mano Wijeratne. The journalist, Arthur Wamanan, attached to the Sunday Leader, had called the Minister to obtain his comments on an article published by the Sunday Leader the previous week titled, "Minister gets Gem Authority to pay wife's roaming charges". The Minister alleged that Wamanan had called to obtain a ransom from him. Five days later, the journalist was released by the Mount Lavinia Chielf Magistrate who further reprimanded the CID for arresting a journalist on such grounds and setting an unhealthy precedent<sup>151</sup>.

The editor of Eethalaya.com, the sister online version of Sirasa TV, was shot on 30<sup>th</sup> October 2007 when he was returning home from work. Kumudu Champika Jayawardane underwent urgent surgical operations following the shooting<sup>152</sup>.

Free Media Movement, E-Bulletin October 2007, online, available at <a href="http://www.freemediasrilanka.org/English/news.php?id=46&section=news\_reports">http://www.freemediasrilanka.org/English/news.php?id=46&section=news\_reports</a>, hereinafter referred to as Free Media Movement Oct. 2007

<sup>149 18</sup>th October 2007, Free Media Movement Oct. 2007 ibid n.148

<sup>150</sup> Free Media Movement Oct. 2007 id.151 Free Media Movement Oct. 2007 id.

Lanka Business Online, Sri Lanka Online Journalist Shot in Capital, 31 Oct. 2007, available at <a href="http://www.lankabusinessonline.com/fullstory.php?nid=2014801834">http://www.lankabusinessonline.com/fullstory.php?nid=2014801834</a>, accessed on 23/12/2009

On 29th April, S. Rajivara was shot dead near the Uthayan newspaper office in Jaffna. On the 2nd of August S. Deluxshan, 22, a part-time journalist, was shot dead by unidentified gunmen in Jaffna town 153.

In November 2007 two journalists attached to the Tamil newspaper Veerakesari were arrested by the Slave Island police. They were not given any reasons for the arrest and were released in the morning following representations by several media organisations<sup>154</sup>.

Also in November 2007, the printing press of the Leader Publications was destroyed by arsonists. The Leader Publications publishes the Sunday Leader, the Morning Leader and Irudina. The press was located close to a High Security Zone in Ratmalana. The FMM reported that the damage had been estimated at millions of rupees<sup>155</sup> though no civilian casualties were reported.

On 27th December 2007 the Minister of Labour, Mervin Silva, stormed the state-run television station Rupavahini and physically assaulted the Director, T.M.G Chandrasekera<sup>156</sup>.

# 4.6 Right to movement

The right to movement is recognised by Article 12(1) of the ICCPR. The right is also protected constitutionally by Article 14(1)h. It is a right that is intimately linked with the personal

<sup>153</sup> AI, 2008 ibid n.83, at pg. 279

<sup>154</sup> Free Media Movement, E- Bulletin November 2007, available at <a href="http://www.freemediasrilanka.org/English/news.php?id=47&section=news\_reports">http://www.freemediasrilanka.org/English/news.php?id=47&section=news\_reports</a>, cited as FMM Nov. 2007

<sup>155</sup> Free Media Movement Oct. 2007 ibid n.148

<sup>156</sup> Daily News, SLFP Condemns Mervyn's Actions, 28 Dec. 2007, available at http://www.dailynews.lk/2007/12/28/news03.asp. accessed on 23/12/2009. In a saga worthy of a soap opera the Minister was detained by employees of the media organisation and was only freed after the intervention of the police and armed forces. The chaotic situation at the station was relayed live on the channel for several hours before being taken off air to resume regular broadcast.

liberty of the individual and therefore with his/her physical integrity. In recent years, the right to movement of persons has been restricted both in the city and in other parts of the country due to issues of national security.

Two significant cases were decided in 2007 by the Supreme Court, both of which concerned the violation of fundamental rights by security personnel manning checkpoints in various parts of the country.

On 3<sup>rd</sup> July 2007 the Supreme Court in delivering judgement in a fundamental rights case<sup>157</sup> held that:

"whilst security concerns have to be addressed, such action should be taken with the highest concern and respect for human dignity. 158"

The Court went on to specify the action that can be taken at checkpoints and the restrictions on personal liberty that are permitted taking into account the constitutional rights of citizens. "A person freely moving on the road in compliance with the law could be stopped and made to alight from the vehicle only on a reasonable suspicion of illegal activity. Such suspicion would have to be justified to court. Superior Officers... would themselves be liable for the infringement of the freedom of movement and the freedom from arbitrary arrest guaranteed by Article 14(1)h and 13(1) of the Constitution. 159"

The decision in this case is important in two respects. Firstly, it highlights the activist stance the Supreme Court has taken in latter times in protecting the rights of citizens, positive enforcement being the most effective method of ensuring the protection of fundamental rights.

<sup>&</sup>lt;sup>157</sup> <u>Sarjun v. Kamaldeen – PC 39753, Police Station, Habarana</u> SC(FR) 559/03, S.C. Minutes 31\* July 2007

<sup>158</sup> At pg. 7, Sarjun v. Kamaldeen id.

<sup>159</sup> Sarjun v. Kamaldeen Id.

Secondly, as seen in the excerpt above, the court moved from the particular to the general, setting out grounds upon which all citizens are protected in terms of their right to movement and personal liberty. From the perspective of the integrity of the person, this judgement is a victory won for all citizens in Sri Lanka.

Another case which involved the right to movement and personal liberty is that of V.I.S. Rodrigo v. Ms. Imalka, S.I Kirulapone et all60. The case concerned the stopping of a vehicle during the routine security checks at one of the security checkpoints that have mushroomed in and around Colombo city in the past decade. The court noted the harassment of the petitioner by the police officer engaged in the checking, the demand of a bribe, and upon refusal, the demand of a bottle of perfume which was in the petitioner's car at the time. The petitioner was then subject to further harassment on refusing to comply with the police officer's request; he proceeded to the nearest police station to complain, was arrested and detained overnight, for no cognizable reason other than his refusal to give a bribe. The police seized his temporary driving license as being fraudulent, on no grounds whatsoever. The case was filed by the petitioner "...more from the perspective of the public interest in protecting, securing and advancing the fundamental rights of the people."

Justices of the Supreme Court, Sarath N. Silva C.J., Balapatabendi J., and Thilakawardane J., in deciding the case held that intermittent stoppage of traffic to permit VIP movement amounts to an infringement of the fundamental right to movement of citizens. On the same grounds, the Court ordered that:

"...prevalent executive action in operating permanent checkpoints with unlawful obstructions of public roads and the stoppage of all traffic resulting in serious congestion be discontinued..."

Once again one sees the activist stance of the Supreme Court in protecting the rights of the individual against executive and

<sup>&</sup>lt;sup>160</sup> V.I.S. Rodrigo v. Ms. Imalka, S.I Kirulapone et al. SC (FR) 297/2007, S.C Minutes 2nd December 2007

administrative action. The court moved from the particular rights of the individual complainant to the rights of all citizens in general, and while holding that the rights of the petitioner had in fact been violated, also held that further measures must be taken to protect all citizens from routine harassment at security checkpoints<sup>161</sup>.

From a practical perspective, the judgement had the effect of ceasing the endless "stop and check" security measures introduced at whim by law enforcement agents, which resulted in miles of traffic congestion in and around Colombo city in peak traffic hours. On the other hand, the obstructions referred to above, on bridges, main roads and other public places, continue unabated. Silva C.J in his judgement refers to the temporary shelters housing these 'checkpoints', and the illumination of such checkpoints warning all and sundry of their presence. Two years later these obstructions continue and in some instances have now taken the guise of more permanent shelters.

# 4.7 Oversight Mechanisms Monitoring the Physical Integrity of the Person

National Human Rights Institutions are important institutions which are set up in accordance with the Paris Principles<sup>162</sup>, and serve as a firm guardian of human rights in a country. They play a particularly important role in terms of ensuring effective implementation of human rights treaty obligations in any country, especially through monitoring of violations. Sri Lanka set up its

<sup>&</sup>lt;sup>161</sup> The judgement is heartening to the extent that the right to movement of the person, which was being greatly hindered and obstructed by the security measures of the armed forces, has been re-established. On the other hand, one must also take into account the fact that in practical terms the implementation of security measures is what must be termed a "necessary evil" and the removal of these may in fact make or have made Colombo city all the more vulnerable to terrorist attack. Judicial activism, always a contentious issue, carries with it the necessary criticism that Judges should not be seen to make the law, but should restrict themselves to merely interpreting it.

<sup>162</sup> Principles relating to the Status of National Institutions (The Paris Principles), adopted by the General Assembly resolution 48/134 of 20 December 1993.

National Human Rights Commission by the Human Rights Commission Act No. 21 of 1996.

The Sri Lanka Human Rights Commission (SLHRC) was reconstituted by the President in May 2006, when the term of the previous Commission ended in March of the same year. In the absence of the Constitutional Council being appointed, the President appointed his own nominees to the SLHRC. Largely criticised as being unfair and in violation of the 17th Amendment to the Constitution, the SLHRC continues to operate. Successive governments have been delaying the appointment of the Constitutional Council, rendering the 17th Amendment non-existent.

The GOSL in its communication to the Committee against Torture explained its inability to constitute the Constitutional Council "...due to the fact that the minority parties represented in parliament could not agree with regard to its nominee for the Constitutional Council..." They thus rationalized the constitution of the Sri Lanka Human Rights Commission as well as the National Police Commission by the President in the absence of a Constitutional Council.

Human Rights Watch reported that the SLHRC had been appointed in violation of the Constitution, which requires the Constitutional Council to nominate the SLHRC<sup>164</sup>. The SLHRC originally created in 1997<sup>165</sup>, had achieved an 'A' rating by the International Co-ordinating Committee of National Human Rights Institutions (hereinafter referred to as ICC-NHRI)<sup>166</sup>. An 'A' rating means that the national human rights organization complies with the Paris Principles<sup>167</sup>.

<sup>163</sup> CAT Communication ibid n.114, pg. 5 §17

<sup>164</sup> Human Rights Watch, Sri Lanka: Human Rights Commission Downgraded, 17 December 2007, online, available at <a href="http://www.hrw.org/en/news/2007/12/">http://www.hrw.org/en/news/2007/12/</a>

<sup>17/</sup>sri-lanka-human-rights-commission-downgraded, cited as HRW 2007

165 Human Rights Commission of Sri Lanka Act No. 21 of 1996

<sup>166</sup> In the year 2000

<sup>167</sup> Paris Principles ibid n.162

In March 2007, less than a year after the reconstitution of the SLHRC, the ICC-NHRI downgraded the Sri Lanka Human Rights Commission to 'B' grade 168. A 'B' grade is classified as 'Observer Status - The national human rights organization is not fully in compliance with the Paris Principles or insufficient information provided to make a determination'.

In June 2006, the Secretary to the Commission reportedly in a note said that "for the time being, unless special directions are received from the government" (it had ceased to look into hundreds of reported incidents of disappearances. HRW also reported. that in the same month the SLHRC in an internal circular imposed a restriction of three months for the investigation of reported human rights abuses. After the lapse of the three months, investigations would be at the discretion of the SLHRC.

The media have also reported several death threats against commissioners of the SLHRC. In December 2007, regional office co-ordinators in Mannar and Trincomalee were reported to have received death threats<sup>171</sup>.

Manfred Nowak, in his report following his visit to Sri Lanka in September 2007, wrote:

".......a number of shortcomings remain, and most significantly, the absence of an independent and effective preventive mechanism mandated to make regular and unannounced visits to all places of detention throughout the country at any time, to conduct private interviews with detainees, and to subject them to thorough

169 Paris Principles ibid n.162

<sup>168</sup> i.e. two grades down from A grade, skipping AR grade to B grade.

<sup>170</sup> http://www.lawandsocietytrust.org/PDF/HRC%20-%20Memo%20to %20ICC%20by%20SL%20NGOs.pdf)

<sup>&</sup>quot;Human Rights Commission officers threatened", Daily News, 24 December 2007, cited in 2009 ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia, The Asian NGOs Network on National Human Rights Institutions (ANNI), Asian Forum for Human Rights and Development (FORUM-ASIA), 23 July 2009, at pg.202, available at www.forum-asia.org

independent medical examinations. It is my conviction that this is the most effective way of preventing torture. In the case of Sri Lanka, I am not satisfied that visits undertaken by existing mechanisms, such as the NHRC, are presently fulfilling this role, or realizing this level of scrutiny." <sup>172</sup>

The High Commissioner for Human Rights, Louise Arbour in her statement to the Human Rights Council in December 2007 said:

"Regrettably, the various national institutions and mechanisms that could be expected to safeguard human rights have failed to deliver adequate protection. In particular, the Human Rights Commission of Sri Lanka, which had previously enjoyed a proud reputation internationally, has had its independence compromised by the irregular appointment of its Commissioners and the credibility of its work has suffered.<sup>173</sup>"

HRW reports that the ICC-NHRI gave two reasons for the downgrading:

"first, because of concerns that the appointment of its commissioners was not in compliance with Sri Lankan law, which meets international standards; and second, because of doubts that the commission's practice was not "balanced, objective and non-political, particularly with regard to the discontinuation of follow-up to 2,000 cases of disappearances in July 2006." 174

Apart from the obvious stakeholder interests that are inherent in a commission formed by the GOSL to investigate abuses of human rights by the GOSL itself as well as by the LTTE and other military groups, the National Commission's own mandate was severely

Aparts van Later Arke in

174 HRW 2007, ibid n. 164

<sup>172</sup> Nowak, M. 2007., ibid n.101

<sup>&</sup>lt;sup>173</sup> Arbour, L., United Nations High Commissioner for Human Rights, statement to the Human Rights Council on December 10th 2007, excerpt available at <a href="http://campaigns.ahrchk.net/monitoringsl/ran.php">http://campaigns.ahrchk.net/monitoringsl/ran.php</a>.

restricted<sup>175</sup>. The IIGEP had serious concerns regarding the transparency, witness protection and independence of the National Commission's programme<sup>176</sup>.

The Government of Sri Lanka appointed a Commission of Inquiry to investigate and inquire into and report to the President on violations of human rights since August 2005. Its mandate listed 15 specific instances and extended to other violations which the Commission considered serious violations of human rights. The Commission was appointed in November 2006. An international independent group of experts, the International Independent Group of Eminent Persons (IIGEP), was also to be appointed to observe the investigations and inquiries conducted by the Commission. This was to ensure transparency and the conduct of investigations in keeping with international norms and standards<sup>177</sup>.

The IIGEP, funded by the European Commission, was due to begin its work in February 2007, but only actually began in May

<sup>&</sup>quot;....While Amnesty International welcomes steps to address impunity, it is concerned that the mandate of the CoI and IIGEP is limited to 16 cases (with the possibility of new additions) and cannot address the broader range of human rights violations, particularly the most recent incidents....", Amnesty International, Sri Lanka: Amnesty International calls on the United Nations Human Rights Council to address violations, Public Statement, 4 Sep. 2007, ASA 37/019/2007, available athttp://amnesty.ca/resource\_centre/news/view.php?load=arcview&article=4037&c=Resource+Centre+News

<sup>&</sup>lt;sup>176</sup> International Independent Group of Eminent Persons, Public Statement of 11 June 2007, (hereinafter referred to as 1" Statement, IIGEP) available at http://www.ahrchk.net/statements/mainfile.php/2006statements/1056/. Also see International Education Development (hereinafter IED), Written statement submitted by the International Educational Development (IED)

Inc., a non-governmental organization on the Roster, 'Human rights and humanitarian law monitoring in Sri Lanka', Human Rights Situations that Require the Council's Attention, Human Rights Council, Sixth session, A/HRC/6/NGO/10, 31 August 2007, online, available at http://daccessdds.un.org/doc/UNDOC/GEN/G07/138/96/PDF/G0713896.pdf?OpenElement, para 2, pg. 2

<sup>177</sup> The Media Centre for National Security, Ministry of Defence, Public Security and Law and Order, available at <a href="http://www.nationalsecurity.lk/fullnews.php?id=2087">http://www.nationalsecurity.lk/fullnews.php?id=2087</a>, accessed on 22/12/2009

2007. Despite being composed of 11 experts, the IIGEP's mandate was severely restricted. In its first statement, P.N. Bhagwati J., Chairman, IIGEP, stated as follows: "The Presidential Warrant limits the scope of the Commission to a retrospective and fact finding role" This amounted to their simply observing the investigations and inquiries made by the National Commission of Inquiry established by the GOSL.

The Presidential Commission of Inquiry constituted in November 2006 continued its work during the year 2007. The first plenary meeting between the CoI and the IIGEP was held in February 2007. The work of the Commission and the IIGEP, however, has been criticised by local and international human rights organisations<sup>179</sup>.

#### Conclusions

The integrity of the person was purportedly violated in several instances during the year of 2007, be it in allegations of torture, abductions, disappearances, killings or violations of the freedom of expression. In most instances, the perpetrators were unidentified persons, the civil war providing a convenient cover for all stakeholders involved, and few reports have resulted in arrests of culprits and indictments being issued.

<sup>&</sup>quot;We regret that public statements from State officials are creating the misleading impression that the Commission and IIGEP have wide mandates and powers and the resources to address ongoing alleged human rights violations in Sri Lanka. This is not the case. In the current context, in particular, the apparent renewed systematic practice of enforced disappearance and the killings of Red Cross workers, it is critical that the Commission and IIGEP not be portrayed as a substitute for robust, effective measures including national and international human rights monitoring."

179 A Forwarded Report by the Asian Human Rights Commission, SRI LANKA: CPA on Commission of Inquiry and IIGEP, 17 February 2007, Available at http://www.ahrchk.net/statements/mainfile.php/2007statements/926/

At the same time the number of attacks by the LTTE compromised the physical integrity of many civilians throughout the island. Apart from the identified violations by state actors discussed above, many violations documented and undocumented have taken place at the hands of armed militants operating in the country.

Whomsoever the perpetrators may be, the state still has a continuing and heavy responsibility to take all action to bring perpetrators to book. Where alleged acts of torture, for example, were reportedly perpetrated by state actors (for example by the police) the state has a duty to not only compensate the victim adequately, but also to punish and hold accountable those who initiated and carried out the violations.

The several incidents of violations of the integrity of the person in 2007 lead one to the conclusion that not only must the integrity of the person be recognised as a separate right in Sri Lanka, it must also be effectively protected. The former, however, would be the easier measure of the two to implement.

## 6. Recommendations

The violations over the past decade as well as over the year under review point to two major issues that need to be addressed urgently: firstly, the legislative measures which need to be taken in order to guarantee the physical integrity of the person to all persons in Sri Lanka, and secondly, the policy commitment that must be made in terms of protecting the physical integrity of the person.

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# 7. Legislative measures

- Amendment of the criminal law and reform of the criminal justice system, including the following:
  - a. Recognition of the right of suspects to access to legal counsel of one's choice upon arrest
  - b. Recognition of the principle of command responsibility
  - Recognition of the offence of forced disappearances
  - Removal of right to plead defence of superior orders<sup>180</sup>
- Repeal or amend the emergency regulations in so far as they suspend the safeguards already contained in the domestic law of Sri Lanka, including the following:
  - The right of all persons to be brought before a magistrate within 24 hours of arrest
  - The right of all persons to be examined by a medical officer upon arrest
  - c. The right to be charged or released within a specified reasonable time
- 3. Recognise the Right to Life as a fundamental right
- 4. Recognise the rights of persons who are in preventive detention including the following:
  - a. The right to be informed of the reason for arrest
  - The right to be brought promptly before a court of law
  - c. The right to be brought to trial or released within a reasonable time
  - d. The right to take proceedings before a court of law

Regulations, encompassing the defense of superior orders, is encapsulated in section 73, Emergency Regulations of 2005, *supra* n.9 "No action or other legal proceeding, whether civil or criminal, shall be instituted in any court of law in respect of any matter or thing done in good faith, under any provisions of any emergency regulation or of any order or direction made or given thereunder, except by, or with the written consent of, the Attorney-General".

- 5. The right to be presumed innocent until proven guilty, whether one is arrested under the emergency regulations as a preventive detainee or under any other law as a pre-trial detainee
- 6. The right to reparation/compensation for victims of torture
- 7. The right to independent medical examination and legal representation upon arrest
- 8. The right of juvenile prisoners to be kept separate from adult offenders

In other words, it is recommended that the full gamut of rights to a fair trial and rights of liberty under the ICCPR be guaranteed to individuals within the domestic jurisdiction in Sri Lanka.

#### 8. Political will and Commitment

It is recommended that Sri Lanka takes active steps to punish and bring to book perpetrators of violations of human rights. A case in point is the *Dingiri Banda case<sup>181</sup>* where the subsequent promotion of the perpetrators demonstrates the lack of political will to prevent human rights abuses.

The following steps would demonstrate such commitment:

- Independent and impartial investigation of alleged violations
- 2. De-politicisation of police and security forces
- 3. Timelines for charging of pre-trial detainees by the state
- 4. Active follow up of trials
- Attorney General to ensure commitment of his officers to giving priority to cases involving human rights violations, and conclusion of trials without delay
- Enforcement of the requirement for magistrates to visit places of detention

<sup>&</sup>lt;sup>181</sup> *Dingiri Banda Case*, supra n. 106

7. Strict enforcement of court orders

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 Suspension and disciplinary control of police and other security officers who are convicted of violations of human rights<sup>182</sup>

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It is also recommended that the Constitutional Council be appointed without delay by the President. This would be a step towards resuscitating the National Human Rights Commission and the National Police Commission, both of which have the potential to take the role of active defenders of the physical integrity of persons in Sri Lanka.

<sup>182</sup> See RCT Study for comprehensive recommendations for the prevention of torture, cruel and inhuman treatment or punishment, RCT Study, ibid n.29

# JUDICIAL PROTECTION OF HUMAN RIGHTS

Ser Louis . Slave of Huma . Kugars 2009

(Dr.) J. de Almeida Guneratne\*

#### 1. Introduction

At the risk of oversimplification, it may be said that the fundamental rights enshrined in the Constitution, the rights pursued by way of orders in the nature of writs and the Constitutional guidance laid down by way of principles of state policy (as judicially interpreted), form the human rights framework in terms of the Constitution of Sri Lanka.

The link between fundamental rights and orders in the nature of writs that the Court of Appeal is empowered to issue in regard to alleged violations of rights of aggrieved persons is now firmly entrenched in the law. While fundamental rights are expressly recognized in the Constitution<sup>1</sup> in respect of which the Supreme Court is conferred with jurisdiction<sup>2</sup>, rights forming the subject matter of orders in the nature of writs in respect of which the Court

President's Counsel; Visiting Lecturer and Examiner, Sri Lanka Law College and Faculty of Law, University of Colombo; Consultant, Law & Society Trust; and former Commissioner, 1994 Commission of Inquiry into the Involuntary Removal or Disappearance of Persons in the Western, Southern and Sabaragamuwa Province.

<sup>&</sup>lt;sup>1</sup> Chapter IV of the Constitution of Sri Lanka.

<sup>&</sup>lt;sup>2</sup> Article 17 read with Article 126 of the Constitution.

of Appeal is conferred with jurisdiction<sup>3</sup>, do not find express recognition.

Does the lack of express recognition make a difference? On the one hand, certain procedural rules applicable to fundamental rights litigation such as the one month time limit,<sup>4</sup> the absence of a discretionary bar based on futility and the award of compensation stand as areas of contrast between fundamental rights applications and orders in the nature of writs. However, certain other principles such as the suppression or misrepresentation of material facts have been held to deny relief in both contexts. Through judicial expansion under Article 12(1) of the Constitution, the link between fundamental rights and other rights has been brought closer. This is discernible from litigation, particularly in relation to the right to office and property rights. As way back in 1995, the Supreme Court had observed that:

By entrenching the fundamental rights in the Constitution the scope of the writs has become enlarged (and is implicit in Article 126(3)<sup>5</sup>

In earlier volumes of this publication, these features have been highlighted and reflected upon. The ensuing pages will focus attention on the relevant developments in the context of the year 2007 and the manner and extent to which those rights have been afforded judicial protection both by the Supreme Court and by the Court of Appeal.

## Judicial Protection by the Supreme Court under the Fundamental Rights Chapter of the Constitution

In this regard, out of eighteen decisions of the Supreme Court selected for comment in the year under consideration, almost half

See also, S. Marsoof, "The Expanding Canvass of Judicial Review", X/BALJ 18.

<sup>&</sup>lt;sup>3</sup> Article 140. Also Article 154(p)(3)(a) which confers jurisdiction on the High Courts of the Provinces.

<sup>&</sup>lt;sup>4</sup> Article 126(2). In contrast with the principle of inordinate delay where third party rights have been affected in the meantime applicable in writ applications. <sup>5</sup> W.K.C. Perera v. Prof. Edirisinghe [1995] 1 SLR, 148 per M.D.H. Fernando, J.

had resulted in orders favourable to the Petitioners concerned and others had resulted in dismissals. In this chapter, it is proposed to analyze these decisions, the selection being on account of the principles, doctrines and the underlining reasoning contained in them, with a view to commenting upon the judicial approach to the fundamental rights jurisprudence of the country. It must be stated at the outset that the paucity of decisions reflecting upon and expanding the ambit of rights contained in Article 11 (right to freedom against torture and cruel, inhuman or degrading treatment or punishment) as well as Article 13(1) and (2) (right to freedom against arbitrary arrest and detention) is a matter that warrants conjecture. The IGP, in a recent press release, had proclaimed that there are hardly any abuses by the police of human rights. As against that, there have been press reports to the contrary as well as reports by activists that people who are harassed and intimidated by the police (with no mechanism being in order to protect them legally through a witness protection scheme, though a Bill of Parliament is supposed to be before Parliament, but not enacted into law), are reluctant to seek legal relief.

Since the present study does not claim to be one based on empirical research on the said conflicting positions, this writer will refrain from commenting on the same but, instead, would venture to reflect on the following decisions handed down by the Supreme Court in the context of Articles 11 and 13 (read with Article 12)

of the Constitution of Sri Lanka.

#### Dharmawardana v. Constable Gunathilaka and 2.1. Others6

The petitioner (a three-wheel driver) complained that the respondents (police personnel attached to the Elpitiya Police Training College) had assaulted him mercilessly in public and had subjected him to inhuman and degrading treatment. The relationship between three wheeler drivers who used to park their vehicles at Katapola junction and officers of the Police Training

<sup>6</sup> SC (FR) 149/2006, SCM 05.04.2007.

College was not cordial. The reason for the strained relationship was because the police officers were in the habit of not paying the fares after hiring the three wheelers for their errands. On the day in question, seven of the respondents had assaulted the petitioner mercilessly and later taken him to the Training College, where he had been abused further. He was subsequently taken to the Elpitiya Police Station, where even his statement had not been recorded. Later, the petitioner was released to his mother, who had him admitted to the Elpitiya District Hospital. Later, on being examined by the District Medical Officer, the petitioner was transferred to the Karapitiya Teaching Hospital that night, where he was warded for treatment.

While the Medico-Legal Report demonstrated the severity of the injuries sustained by the petitioner, the identities of the assailants had also been adequately established by the petitioner. In so far as the respondents' version was concerned, it was the petitioner who had threatened them. No written complaint or entry in any Register or Book was produced in Court, though the same was said to have been recorded by two police constables. Although two of the respondents had raised the defence of *alibi*, no extract of any night duty order book was produced to sustain the same.

Petitioner's version accepted – A case of Police assault and abuse of power

On the aforesaid basic facts, the Court accepted the petitioner's as the more acceptable version. What is noteworthy in the judgment is how the Court responded to some of the defence arguments urged by the respondents.

Acting in Breach of Section 56 of the Police Ordinance constitutes culpable conduct that constitutes denial of equal protection

The respondents had urged that the petitioner had received injuries as a result of a fight that had ensued between some villagers and the three wheeler drivers. Responding to this contention, His

### Lordship Justice Dissanaike7 observed thus:

Assuming that the petitioner has been set upon by some villagers, it was the primary duty of the respondents as police officers to have used utmost efforts to prevent crimes or offences being committed. The respondents had not taken any steps to stop the assault on the petitioner or to apprehend the assailants and produce them before the Elpitiya Police.<sup>8</sup>

Adverting to Section 56 of the Police Ordinance which decrees that, for all purposes of this Ordinance, every public officer shall be considered to be always on duty to use best endeavours and ability to prevent crimes, offences and public nuisances, the Court held that such conduct was culpable and constituted a denial of equal protection.9

# Assault in public, in the presence of friends and colleagues – gross humiliation

This, as held by Court, was inhuman and degrading treatment violative of the petitioner's rights under Article 11. In addition, the petitioner's right to equal protection of the law under Article 12(1) had been violated.

### Court's order for compensation

Perhaps the most significant aspect of the Court's ruling lies in the order directing payment of compensation in a sum of Rs.25,000/-, as will be discussed in detail below.

8 At page 12 of the judgment.

<sup>9</sup> At p. 13, *ibid*.

<sup>&</sup>lt;sup>7</sup> With the Chief Justice and Justice Shiranee Tillekewardene agreeing.

# Vicarious Liability/Command Responsibility of the Officer in Charge

It will be noted that the officer-in charge had failed to record the petitioner's statement to the police. Had he not failed to do so and held an inquiry and, upon a finding adverse to the errant police officers, had he initiated suitable action, perhaps an order may not have been made. Consequently, the judgment of Justice Dissanaike stresses the public/police duty to record statements made by citizens and the consequences that would visit in the event of failure to do so.

Although the Court did not link the liability on the part of the officer-in-charge to the said lapse on his part, but rather linked it to the fact that the errant police officers were under his command, the said aspect as highlighted above may well serve as a pointer to future jurisprudence in the context of rights violations by the police. Had the officer-in-charge conducted a proper inquiry, the matter might well have been resolved between the parties.

# Only the IGP ordered to pay compensation - a concept of institutional liability

Although the Court held that the Officer in Charge and the IGP were liable for the actions of the errant police officers, it was only the IGP who was ordered to pay compensation, which must be construed as a principle based on a concept of institutional liability. It was perhaps due to the fact that the Officer-in-Charge had made an effort in the first instance to hold an inquiry that he escaped being ordered to pay compensation directly. The judicial message to the IGP was that if a disciplined police force is lacking, he will be held liable personally for errant police action and abuse of power.

# The errant police officers themselves not ordered to pay any compensation - A Socio-legal reality

This aspect of the judgment underscores a socio-legal reality that becomes discernible upon a reading between the lines of the case, as it were. True, the errant police officers had violated Article 11

and 12(1) of the Constitution. Yet the strained relationship between the three wheeler drivers and the police was a reality. Whoever had started the dispute on the ground, there was no justification for the errant police officers to have abused their power. Thus, they were held liable for the alleged violation on a balance of probabilities. However, to order them to pay compensation directly would be another matter, given the reality of the "chick and egg" situation<sup>10</sup> and the matter having to be decided on affidavits and therefore on a balance of probabilities. Thus, the Court's reluctance to order compensation against the errant police officers and the justifications for ordering the same only against the IGP for the reasons reflected above stands vindicated.

# 2.2 Dhanapala Maturage v. OIC (Special Crimes) Mirihana Police<sup>11</sup>

This is a case that may be compared with the case discussed earlier. The alleged violation in that case related to the manner in which some police officers had entered the petitioner's house, taken some items in the house into their custody (in his absence), later arrested him and after taking him to the Police Station had assaulted him severely in the police barracks. Within four days of this incident, the petitioner had been produced before the magistrate on a "B report". The Court found on the material before it that there had been no complaint of police assault and nor had the petitioner had been kept in police custody for the four days that had ensued.

On that material, Justice Rajah Fernando<sup>12</sup> held that no violation in terms of *Article 11* had been established.

In so far as the allegation based on illegal arrest was concerned, the Court found that the material before the Court was at variance

<sup>10</sup> Which was the thrust of the Respondent's Counsel's argument.

<sup>11</sup> SC (FR) 614/2003, SCM 20.03.2007

<sup>12</sup> With Justices A.W. Somawanse and J. Balapatabendi concurring.

in regard to the date of the arrest, which prompted the Court to hold that the petitioner had failed to establish a violation under Article 13(2) as well, by detaining the petitioner beyond the period established by law.

### Some Aspects in the Ruling that may warrant reflection

Regarding the alleged assault in the police barracks, a Medico-Legal Report had been produced by the petitioner. The injuries complained of by the petitioner, just four days after the alleged assault, were at variance with the injuries recorded in the Medico-Legal Report. But was that a reason for the Court to reject the complaint of assault perse? Is a complaint based on police assault to be rejected merely because discrepancies are found between what is stated in a complaint and the Medico-Legal Report, without a finding being made as to whether an assault perse in fact had taken place?

It is submitted with highest respect that this was an aspect in the case that their Lordships' Court could have gone into with more depth. After all, the fact remained that the petitioner had been assaulted by somebody and had sustained some injuries. Who had caused the said assault and/or how had the petitioner sustained injuries, as were revealed in the Medico-Legal Report? There is no finding by Court on that issue.

# Need to assess an allegation based on Article 11 as distinguished from Article 13

As revealed from the judgment, given the shortcomings of the allegation based on a violation of *Article 13(2)*, the ruling cannot be faulted. But what about the allegation based on police assault? Ought it to have been rejected on the basis that, at the stage of the "B Report", there was no evidence of a police complaint of assault?

<sup>&</sup>lt;sup>13</sup> Contra, the case of *Dharwardena* v. *Constable Mahinda & Others*, supra, n1 (where there had been a delay of 7 days).

In fact, such a complaint was before Court at the hearing of the application (and indeed, presumably at the Leave to Proceed stage, where the Court in fact had granted leave).

It is submitted with the highest respect that the foregoing aspects were not addressed by Court in holding that the allegation based on *Article 11* had not been made out.

- Re: Appointments, Promotions, Extension of and Retirement from Services in the Public Sphere
- 3.1 Lancelot Perera v. National Police Commission and Others<sup>14</sup> the case of an aggrieved SSP who was denied his promotion to the rank of DIG

The petitioner was recruited as a Sub Inspector with effect from 1966 and underwent basic training. Thereafter, he was attached to the police band, given his extensive qualifications in Western classical music, whilst both his contract and the relevant gazette required him to perform police duties as and when the occasion arose. Eventually he rose to the rank of SP while being designated as Director Music. Vacancies in the cadre of DIGs having arisen, the Respondent National Police Commission (replying to the petitioner's requests) called the petitioner, who was then the senior-most SSP, for an interview, departing from an earlier stated policy not to consider him for promotion beyond the said rank of SSP. The petitioner indisputably fared exceptionally well at the ensuing interview, ranking third on the marking scheme and thus over and above others selected.

However, the petitioner was not promoted, with the respondents going back to their earlier revealed policy not to consider him beyond the rank of SSP, which the petitioner had been specifically apprised of. Yet, even at an earlier stage of promotion to the rank of SP, the said policy had been revealed but not adhered to and

<sup>14 2007 (2)</sup> ALR 24

others acting in similar specialized fields like the petitioner, had been considered and appointed to the rank of SP and later DIG, as coming within the normal scheme of promotions.

Consequently, on the said material facts, the matter for determination by the Court was whether the respondents' decision not to promote the petitioner to the rank of DIG was arbitrary and offensive to his right to equality.

### The Supreme Court Decision

Writing for the Court, Justice Shirani Bandaranayake<sup>15</sup> established the following proposition that:

In as much as other specialized fields comparable with that of the Petitioner's had been considered as being within the normal scheme of promotions, denial of a similar opportunity in a similar field was unjust taken together with the fact that, the Petitioner was called for an interview and was qualified in terms of the scheme of marking, with the added fact that in addition to his music and he had been called for other police duties as well, thus creating a legitimate expectation in securing the promotion in question.

Analysis of the judgment and the principles, doctrines and reasoning ensuing there from.

Grievance of an SSP in being denied promotion to the rank of DIG vindicated

<sup>&</sup>lt;sup>15</sup> Justices N.E. Dissanayake and D. J. de S Balapatabendi agreeing.

The judgment of the Supreme Court handed down by Her Ladyship Justice Shirani Bandaranayake (Justices Dissanayake and Balapatrabendi agreeing) examines on an issue-related basis as to how statutory functionaries ought to function when wielding power which they hold in trust for the public. This brings into the fold of judicial scrutiny such conduct as discriminatory treatment, denial of legitimate expectations, arbitrary actions, etc, thrown against purported administrative policy.

### Why the decision to deny the SSP his promotion was discriminatory

As the facts reveal, the petitioner was Director of Music while holding the rank of SSP, having risen up to that rank from that of a Sub Inspector. Others holding SSP rank and performing functions relating to strictly non-police duties had been promoted to the rank of DIG. If so, why was the Petitioner singled out for differential treatment?

## Denial of legitimate expectations

The Petitioner was called for an interview, the purpose of which was to consider whether he ought to be promoted, and having ranked way above most of the interviewees who were subsequently given promotions, what was the justification to deny him a promotion?

### Administrative policy pursued and policy decision

The respondent's contention was that the petitioner had been involved in music and not strict police duties, even though he had been called for an interview based on his appeals. Therefore it was the policy that he could not be promoted beyond the rank of SSP notwithstanding the fact that, whenever he had been called to perform such "strict police duties", he had complied with the same as contemplated by his letter of employment and indeed as decreed in the Police Ordinance. The Court found the respondent's decision to be arbitrary and in violation of the right

to equality enshrined in Article 12(1) of the Constitution.

3.2 Sunil Abeyratne Munasinghe v. Vandergert and Others<sup>16</sup> — An Assistant Superintendent of Surveys complains on being retired from service

The petitioner had been retired from service on the ground of general inefficiency along with the decision to deduct one percent of his pension. The petitioner, who had commenced his career as an apprentice in the Surveyor General's Department, had been made permanent as a Surveyor and had subsequently received his promotions to the highest grade in Class III.

Having served 19 years in his chosen career, the petitioner was released to a Pilot Project in which he had served for four years. The project demanded precise technical handling and training was required to be provided for him by the authorities. However, no such training had been provided, resulting in the petitioner being unable to carry out the duties entrusted to him. After three years on the project, training had finally been provided, which he had successfully completed.

However, the petitioner was taken off the said project and thereafter, whilst he was serving as an Assistant Superintendent of Surveys on transfer to a Provincial Office, he was served with a show cause letter by the Public Service Commission (PSC) alleging inefficiency during the first three years of his work on the Pilot Project. The petitioner had replied to the said letter seeking an inquiry but was denied this request. He was subsequently retired, with the PSC further deciding to deduct one percent from his pension as well.

The Basis of the Petitioner's complaint and the Respondent's Counter

The petitioner relied on an impacting directive which stipulated

<sup>16</sup> SC (FR) 333/2005, SCM 03.08.2007.

that if a surveyor is inefficient he should be placed under the direct supervision of an Assistant Superintendent of Surveys. He also complained that there were similarly placed surveyors who had progressed less than 100 percent in their work and that the Petitioner had been singled out and given different treatment. The respondent's counter was that the Petitioner had demonstrably fallen short of the 100 percent progress required in his performance, though warned two years into the project in question, which had resulted in even his salary increments being deferred. In addition, strict reliance was placed on behalf of the PSC on a provision in the Establishments Code warranting the retirement of an officer for general inefficiency where warnings etc. had been given over a long period of time

## The Supreme Court Decision

In handing down the decision, Justice Shirani Bandaranayake<sup>17</sup> observed that where the requisite training had not been provided, the gradual progress that the petitioner had shown in his work performance (even though not 100 percent), had prompted the petitioner's supervising officer to recommend the petitioner's increments on the basis that his services were satisfactory. Thus, the grievance of the petitioner that the treatment meted out to him was arbitrary and discriminatory and the reasons themselves for such treatment were flawed, possessed sufficient merit.

Analysis of the judgment and the principles, doctrines and reasoning ensuing there from

Could the Petitioner have been faulted for the lapse on the authorities' own failure?

The facts having revealed that the reason why the petitioner could not achieve 100 percent progress in the project was because the authorities concerned had failed to provide him with the requisite

<sup>&</sup>lt;sup>17</sup> Justices N.E. Dissanayaka and Raja Fernando agreeing.

opportunities to achieve success, was it fair to find fault with the Petitioner?

Responding to that basic issue, Justice Shirani Bandaranayake premised her reasoning on several principles discernible from the judgment.

## Estoppel in the sphere of Administrative Law

The judgment proceeds on the principles and doctrines long established within the framework of equality, bringing into their fold the limits of administrative discretion and the need for judicial intervention where such limits were found to have been transcended. The judicial approach to the issue in question, in this writer's perception, does not end there, for the trappings of the principle of *estoppel* in the Public Law Sphere is implied in the said approach, though not articulated expressly in a crystallized form.

## The Role of the Public Services Commission

The judgment of the Supreme Court does not join issue with the manner in which the said Commission had approached the issue. It is submitted that the Court was obliged to comment on the conduct of the said Commission in the interest of good governance and public accountability. While the Court did not venture to do so, the said negative aspect of the judgment in failing to so comment stood further elaborated when the Court declined to order compensation and (even) costs in relation to the petitioner's fundamental right, which the Court found had been violated.

# The Issues warranting reflection in consequence of the Judgment

While acknowledging the decision of the Court determining that the petitioner's fundamental rights had been violated, the following aspects need to be reflected upon, given the fact that the Court had thought fit not to order compensation and costs.

### Costs must follow the event

It is an established principle in civil law that costs (an order in relation thereto) must follow the event with the attendant consequence. If a Plaintiff succeeds in an action, costs must follow. The Supreme Court decision in question marks a departure from the said civil law principle.

Thus, the question is posed as to whether such a departure is justified. It is submitted (with the highest respect) that it is not. In a context of litigation in the realm of private law, if a successful private party is entitled to costs, a fortiorari, a citizen in whom sovereignty resides in litigation with public functionaries must be ordered costs.

### Compensation - following the event

It is submitted that if a violation of a fundamental right is found, then *ipso facto*, it must necessarily result in an order for compensation (even as a token) being made. It may be questioned jurisprudentially as to why public functionaries who are found to have violated the law, indeed, the Constitution itself, should be absolved in that regard?

In the wake of the said approach, the following aspects need to be addressed. viz:

Where the Court finds a violation of fundamental rights, what criteria should govern the ordering, in consequence of such a finding, as to:

- i. Costs of litigation
- ii. Compensation for (in monetary terms) for the said violation?

# 1.3 Samaraweera v. People's Bank of Sri Lanka<sup>18</sup> Denial of Extension of Services

The petitioner was a Deputy (Audit) Manager who was granted an extension for one more year upon reaching the age of 55 years and his application for a second extension had been granted only for a period of two months and 10 days. The petitioner's contention was that, in Terms of Bank Circular No.323/2001 read with Public Administration Circular No.05/2002, he was entitled to a full annual extension until he reached 57 years and further up to the age of 60 years with the approval of the Appointing Authority on individual merit.

A preliminary objection on the time bar contained in Article 126(2) was overruled unanimously by the Court on two grounds 19, viz:

- I. That, the petitioner was within time having regard to the fact that the intimation regarding the period for which the Petitioner's extension had been granted, had not reached the petitioner and
- II. That, having regard to Section 13(1) of the Human Rights Commission Act of 1996 and to the fact that the petitioner had gone before the Human Rights Commission, the Court had proceeded to consider the case on the merits.<sup>20</sup>

The Court decided unanimously that the petitioner's rights had been violated. Accordingly, compensation was granted. However, some reflections are warranted in regard to the Court's ruling on account of the divergent approaches adopted by the majority

<sup>20</sup> The said grounds being already established law.

<sup>18</sup> SC (FR) 85/2004, SCM 24.07. 2007.

<sup>19</sup> Per Justice Raja Fernando (Justice N.E. Dissanayake agreeing).

decision<sup>21</sup> and the dissenting approach on the part of Justice Shirani Bandaranayake, which this writer feels obliged to comment and make an assessment thereupon.

## The majority approach

## a) The case based on Legitimate Expectations

The judicial reasoning thereto may be summed up as follows:

The Bank circular was clear that the retirement age was 55 years. Thus, if the petitioner sought exception thereto, it was his burden to satisfy Court. He had, however, not been able to satisfy the criterion of outstanding performance (linked as it was to the non-availability of staff) and his said failure to place such material defeated his claim based on legitimate expectation.

## b) Failure/refusal to give reasons to grant the extension

The majority judgment was that where an aggrieved party fails to establish a right based on legitimate expectation (viz: to show that he was entitled to the extension of service so claimed), there was no duty to give reasons for the refusal to grant the extension so claimed.

### c) Unequal Treatment and Discretion

The petitioner had contended that others who had not satisfied the criteria laid down in the said Bank Circular also had secured extensions but that he had been denied the same and that therefore his right to equal treatment had been violated. However, this did not entitle him to be granted an extension in as much as a legal right does not arise on an illegal grant to another.<sup>22</sup> Nevertheless, the majority opinion concluded that, by failing to apply the said

<sup>22</sup> This principle is established law.

<sup>&</sup>lt;sup>21</sup> Per Justice Raja Fernando (Justice N.E. Dissanayake agreeing).

circular in a uniform manner, granting favoured treatment to certain employees, the bank and its management had impugned the petitioner's right to equality and equal protection of the law enshrined in Article 12(1) of the Constitution. Consequently, while refusing to grant the extension directed,<sup>23</sup> the Bank was directed to pay the petitioner compensation in a sum of Rs.50,000/-, which conclusion, it is submitted with the highest respect, appears to be irreconcilable with the findings of Court that preceded that conclusion.

## The minority approach<sup>24</sup>

## a) Re: the plea based on legitimate expectations

The applicable circular which had exchanged the earlier policy of granting extension beyond 55 years to 60 years at the discretion of certain high ranking officers had taken several factors into consideration. While the petitioner had joined the Bank well before the said circular, he had been given extensions on more than one occasion in terms of previous circulars.

A promise (by past practice) and procedure (that still made provision for extension beyond 55 years) being established, Justice Bandaranayake held that the Petitioner had established a case for the extension sought (substantive legitimate expectation) and a right to consultation before she was denied the said extension (procedural legitimate expectation).

b) Re: Reasons for the decision denying the Petitioner's extension

The terms of the circular revealed that a separate report had to be submitted to the deciding authorities by the Petitioner's immediate supervisors giving reasons as to whether recommendations were

<sup>&</sup>lt;sup>23</sup>Under Article 126(4) of the Constitution.

<sup>&</sup>lt;sup>24</sup>Per Justice Shirani A. Bandaranayke.

being made or not regarding the extension. In this instance, the said recommendation had been strong and in the petitioner's favour.

Yet, the reasons for the ensuing negative decision regarding the extension by the Extension of Services Committee were (presumably) unfavourable to the petitioner. Thus, Justice Bandaranayake affirmed that:

the Bank owed a duty to ... Court to reveal ... denial of tendering reasons for their decisions to this Court undoubtedly (leads to the) ... inference that there were no valid reasons for the refusal of the extension.<sup>25</sup>

## c) Re: Unequal treatment and exercise of discretion

All those concerned were employees of the Bank to whom the same circular was applicable. The petitioner (who was refused an extension) fell into one class with no classification to distinguish between them. Accordingly, they had to be treated equally. What was then the basis to deny the petitioner the extension? Had the Bank exercised its discretion according to principles conceptualized in the context of Article 12(1)? The balancing considerations were formulated thus:

Although the Bank (being an institution of the state) undoubtedly should have its freedom to exercise its discretion in re-organizing their organization and for that purpose to limit the grant of extensions of service, this has to be carried out, without any infringement of the guarantees enshrined in Article 12(1) of the Constitution.

<sup>25</sup> Per Justice Bandaranayake, at p.9 of the judgment. Which have been seed to

Consequently, notwithstanding the fact that the petitioner's immediate supervisors had made favourable recommendations, and the Extension of Services Committee disclosing no reasons to Court as to why the petitioner's extension had been denied, it was concluded that the refusal of the extension of the petitioner's services was arbitrary and unreasonable and was violative of Article 12(1).

# 4. Relative Assessment of the Divergent Judicial Approaches

### The case based on Legitimate Expectations

Burden of Proof vs. A Doctrine of Legitimate Expectations per se (sans reference to any burden)

The age of 55 years being stated as the rule in the applicable circular, the burden was on the petitioner to place material before Court to show outstanding performance (linked as it was to the non availability of staff). The majority approach was that the petitioner's failure to do so defeated his claim based on legitimate expectation. But what was the basis to employ a criterion of outstanding performance to be cast as a burden on the petitioner? As against that approach, in her dissenting opinion, Justice Bandaranayke, construing the circular and the favourable recommendations made by the petitioner's superior officers, taken together with the fact that the petitioner had been granted extension beyond 55 years at a time when the applicable circular was not in operation taken cumulatively, established the violation based on legitimate expectations.

## The establishment of a principle in Fundamental Rights Jurisprudence

It is established law that in civil law, a party is obliged to prove his or her case on a balance of probabilities and in criminal cases, it is

the prosecution's burden to prove its case beyond a reasonable doubt.

The said principles have been established in our law through judicial interpretation over the years in the context of Section 3 of the Evidence Ordinance<sup>26</sup>, and the Supreme Court has, in the context of Fundamental Rights litigation, appeared to have proceeded on a criterion of balance of probabilities (justifiably perhaps by reason of the fact that no penal consequences flow from an alleged violation of Fundamental Rights).

Given the above, the minority approach in this case introduces a refreshing approach as to what a petitioner is expected to establish in relation to a claim based on legitimate expectations. That is, if the material before Court on pleadings and annexures in a Fundamental Rights Application disclose a case based on legitimate expectations, the Court must uphold such a case, sans any reference to such concepts as beyond a reasonable doubt or on a balance of probabilities (being concepts evolved through the conduit of Section 3 of the Evidence Ordinance (as judicially interpreted)).

Viewed from that perspective, it is submitted with respect that the minority approach to the concept of legitimate expectations by Justice Bandaranayake in the realm of Public Law is preferable to the majority approach. However, future jurisprudence in this regard awaits conclusive exposition on the aforesaid aspects, given the fact that Justice Bandaranayake's approach, in law, stands as a dissenting view in the context of judicial (binding) precedent.

The case based on the duty to give reasons (by public functionaries)
The majority judgment proceeded on the basis that the duty to
give reasons for the impugned decision was linked to the petitioner
being required to establish a case based on legitimate expectations.
Thus, according to the ensuing reasoning, the petitioner having

<sup>&</sup>lt;sup>26</sup> Which has no application to fundamental rights jurisdiction.

failed to establish the same, the question of a duty to give reasons did not arise.

The dissenting view, however, proceeded on the basis that a case of legitimate expectations had been made out, by reason of the fact that no reasons had been given for the impugned decision and therefore the decision stood vitiated.

On that issue, the minority opinion held thus:

Thus, it is apparent that, although there may not be a requirement for the Extension of Service Committee to give reasons for their decision to the Petitioner, the 1<sup>st</sup> Respondent Bank owed a duty to this Court to reveal the reasons for their decision.

Consequently, it would at first glance appear that the minority view was not prepared to transcend the boundaries laid down by the Supreme Court in *Karunadasa* v. *Unique Garments Ltd*<sup>27</sup>. In that case, the Supreme Court held that:

To say that Natural Justice entitles a party to a hearing does not mean merely that his evidence and submissions must be heard and recorded; it necessarily means that he is entitled to a reasoned consideration of the case which he presents. And whether or not the parties are also entitled to be told the reasons for the decision, if they are withheld, once judicial review commences the decision "may be condemned as arbitrary and unreasonable"; certainly, the Court cannot be asked to presume that they were valid reasons, for that would be to surrender its discretion. The 2nd Respondent's failure to produce the 3rd

<sup>27</sup> At page 9 of the judgment.

Respondent's recommendation thus justified the conclusion that there were no valid reasons, and that Natural Justice had not been observed.

- The fact that the 3rd Respondent held a fair inquiry and otherwise acted within jurisdiction does not excuse the failure to give reasons.
- While the mere fact that the 3rd Respondent held the inquiry does not vitiate the 2nd Respondent's order, the 2nd Respondent's failure to give reasons is all the more serious because it was not he who held the inquiry.

The minority opinion was to a similar effect.<sup>28</sup>

Why should failure to give reasons to a party affected per se not be amenable to judicial review?

Whether it be an application for an order in the nature of a writ or a fundamental rights application, it must be conceded that a party affected by a decision of a public functionary must, in the first instance, establish the right he is complaining has been violated or infringed upon, whether that right is substantive or procedural (such as a right to consultation or to make representations before a policy decision affecting his substantive existing right is implemented).

Once that is done, why should failure to give reasons to the affected party per se be not amenable to judicial review? How is that failure cured by disclosing the reasons to Court when the complaint of the party affected is the very fact of the public functionary's failure to disclose reasons to him or her? In the case of Fernando v. Peoples

<sup>28 [1997] 1</sup> SLR, 256.

Bank and Others, <sup>29</sup> the Court enunciated the principle that deferral of extension in employment must be for good and justifiable reasons which should be furnished to the employee in question. Denial of the same amounts to denial of his legitimate expectations and a violation of Article 12(1) of the Constitution.

However, in Lal Wimalasena v. Asoka de Silva, et al<sup>30</sup>, the majority<sup>31</sup> of the Court reverted back to the 'disclosure to court' principle<sup>32</sup>. In the instant case, Justice Bandaranayake appears to have herself opted for that restrictive principle, which seems to re-open the judicial debate on the duty to give reasons.<sup>33</sup>

## The ratio emanating from the majority judgment

The legal proposition established in the majority judgment is that the petitioner had failed to prove a legal right to extension of his services with the attendant consequences that the petitioner could not have any legitimate expectations and was not entitled to reasons for such refusal. Nevertheless, the Bank concerned had failed to apply the relevant circular in a uniform manner and had given favoured treatment to certain employees. Therefore, the said Bank and its management had infringed the right of the petitioner to equality and equal protection of the law, for which reason the petitioner was entitled to compensation.

<sup>&</sup>lt;sup>29</sup> SC (FR) 283/2004, SCM 08.07.2005, per Justice Udalagama (Shirani Thilakawardene, J. and Dissanayake, J. agreeing)—not cited in the instant case.

<sup>&</sup>lt;sup>30</sup> SC (FR) 473/2003, SCM 04.08.2005.

<sup>31</sup> Justice Raja Fernando (Justice Dissanayake agreeing).

<sup>32</sup> Justice Shirani Bandaranayake (dissenting).

<sup>&</sup>lt;sup>33</sup> See further in this connection, "In Pursuit of Justice", in *Judicial Response to the Concept of Sovereign Power of the People of Sri Lanka*, J. de Almeida Guneratne, The Kamalasabayson Foundation, 2008.

5.1 Wijebanda v. Conservator General of Forests and Others<sup>34</sup> — Denial of permit to quarry/mine silica deposits constituting a classic judicial exposition in a socio-economic context

In that case, the petitioner claimed that, although he had been denied a permit to mine the quarry of silica quartz deposits on the ground that it would be detrimental, *inter alia*, to the national reserves of the Minneriya, archaeological area around Sigiriya, wildlife water resources and water courses, another party (the 6<sup>th</sup> respondent to the application, hereafter 6R) had been granted a mining lease with respect to the same land.

It was found on the material disclosed to Court that the 6R had no environmental license as required by law and that the permit he had obtained, which was dependent on such a license, consequently was flawed. The 6R had also suppressed facts in regard to these material aspects.

Moreover, the Court found that the document relied upon as an environmental license had no nexus to the purported permit, particularly in regard to the validity period. In addition, several alterations had been made in that regard, which smacked of collusion between the 6R and some of the public authorities (respondents in the case). This, in turn, raised suspicion of mala fides against the 4th respondent, who had sanctioned such license. The license had been issued prior to the finalization of the survey inspection report, in violation of standard procedure.

The 6R's application for the permit to quarry quartz had sought to be justified on the basis of "reforestation with private sector participation", but the material revealed that he had failed to honour any of the undertakings relating to this purpose. All this showed that, instead of submitting a direct application for quarry mining to the relevant authority, the 6R had gained access to an

<sup>&</sup>lt;sup>34</sup> SC (FR) 118/2004, SCM 05.04.2007.

expanse of protected land under the guise of reforestation and conservation, while in fact the real purpose had been the exploitation of the land for commercial purpose, which had resulted in the land being adversely affected. The 6th respondent had failed even to make an effort to restore the land to its original position.

While the aforesaid synopsis of the facts may be regarded as the most material facts, it is proposed to reflect on the judgment of Justice Shirani Thilakawardene<sup>35</sup> in this case, focusing attention on the doctrines, values and principles emerging therefrom.

(a) The right of all persons to the useful and proper use of the environment and the conservation thereof - An Inherent Right under Article 12(1).

Given the 6R's conduct (wrought with misrepresentation and fraud as the Court holds), coupled with the actions on the part of public functionaries who had been privy to such conduct, the Court concluded thus:

The right of all persons to the useful and proper use of the environment and the conservation thereof has been recognized universally and also under the national laws of Sri Lanka. While environmental rights are not specifically alluded to under the fundamental rights chapter of the Constitution, the right to a clean environment and the principle of inter-generational equity with respect to the protection and preservation of the environment are inherent in a meaningful reading of Article 12 (1) of the Constitution.

Thus, the right to a clean environment and the principle of intergenerational equity were constitutionally recognized in this judgment.

<sup>35</sup> Chief Justice S.N. Silva and Justice Marsoof agreeing.

b) The significance of the Directive Principles of State Policy and their link to the concept of Good Governance — guiding factors in giving a meaningful reading to Article 12(1) (as being complementary).

The right to a clean environment and the principle of intergenerational equity declared as a constitutional right must now stand as a constitutionally established doctrine in Sri Lankan jurisprudence, *ipso facto*, through the Directive Principles of State Policy and the concept of good governance.<sup>36</sup>

Approached in perspective, therefore, it is submitted with respect that, given the fact that the 6R had misused the land in question, thereby flouting the environment (a natural resource that the State holds on behalf of the people in whom sovereignty resides)<sup>37</sup>, is the Court obliged to initiate an intervention in reference to Article 12(1) even if the petitioner fails to establish the violation of a personal right? Should such an intervention be made on the basis of the aforesaid principle of inter-generational equity?<sup>38</sup>

Construed in that way, the judicial approach adopted by Justice Thilakawardene (drawing from the Indian experience as she acknowledges)<sup>39</sup> must rank as an initiative in giving effect to the said Directive Principles of State Policy (though declared to be non-justiciable) per se,<sup>40</sup> which consequently stands as an alternative ground in entertaining and determining a petitioner's complaint in an appropriate case.

c) The Public Trust/Accountability doctrine and its application to the conservation of environment for inter-generational use.

<sup>37</sup> Article 3 of the Constitution of Sri Lanka.

<sup>36</sup> At page 16 of the judgment, supra.

<sup>38</sup> As Her Ladyship articulated, at page 16, supra (of the judgment).

<sup>At page 16 of the judgment, supra.
Article 27(11) of the Constitution.</sup> 

Though not expressly referring to past judicial precedents, it was articulated thus:

Courts in Sri Lanka have long since recognized that the organs of the State are guardians to whom the people have committed the care and preservation of the resources of the people. This recognition of the doctrine of 'public trust', accords a great responsibility upon the government to preserve and protect the environment and its resources.<sup>41</sup>

## The Court proceeded to proclaim thus:

The doctrine of public trust initially developed in ancient Roman jurisprudence, was founded on the principle that certain common property resources such as rivers, forests and air were held by the government in trusteeship for the free and unimpeded used of the general public.

Further principles in this regard are set out below.

### The exposition of the Public Trust/Accountability Doctrine

The application of this doctrine to the conservation of the environment, with the historical antecedents and content in society, speaks for itself without any need for elaboration. Some incidental remarks may however be opportune at this point.

"Ancient Roman Jurisprudence Re: the Development of the Public Trust Doctrine" – Sri Lanka - not far behind

Given the antiquity and the history of Roman life,42 the judicial

42 Page 17 of the judgment.

<sup>&</sup>lt;sup>41</sup> Premachandra v. Jayawickrama [1994] 2 SLR 90; Bulankulama v. Minister of Industrial Development [2000] 3 SLR 243.

observation referred to earlier is no doubt justified except that, at least, the seeds of that doctrine could be found in ancient Sri Lankan history and jurisprudence as well.<sup>43</sup>

### "Contemporary concerns of the State"

From the earlier traditional role of the bounden duty of a State to protect itself from foreign invasions, the said role had expanded to provide welfare measures to its citizens in consequence of "the modern welfare State" following in the wake of concepts such as "the Nation State" and the sovereignty of states, accentuated in historical sequence resulting from the industrial revolution.

Extended (protective) Role of the State in contemporary times
Granted that the said antecedent roles of the state are firmly established and the demand being far more, in the contemporary context of the ever emerging doctrine of Public Trust/Accountability, what this judgment emphasizes is the role of the State in contemporary times as being a protective role (qualitatively different from protecting against foreign invasions) but yet protective in being obliged to protect against environmental intrusions, bringing into focus another broader concern, viz, the concern of inter-generational equity.

Concept of intergenerational equity — Life, future life expectation interlinked to environment

Flowing then from the extended role that a State is contemporarily obliged to discharge (a sacred duty, as judicially labelled)<sup>44</sup> to provide an environment for future generations in trust, reminiscent and extended in its content per se to "life" as opposed to "future

44 Supra, at page 17 of the judgment.

<sup>&</sup>lt;sup>43</sup> Vide: Justice A.R.B. Amerasinghe, n41 supra and; The Legal Heritage of Sri Lanka, Vishva Lekha, 1999.

life,"45 this exposition must surely rank as setting a judicial precedent to be taken note of in the future jurisprudence of the country.46.

"Highest level of Accountability"

What is to be construed from the Court's reference to the *highest* level of accountability?

No doubt the fundamental jurisprudence of the country per se through its constitutional link to Article 140 of the Constitution, as articulated in W.K.C. Perera v. Prof. Edirisinghe, <sup>47</sup> is now established law, in that the conceptual link between Article 126(1) read with Article 126(3) and Article 140 through the conduit of Article 3 read with Article 4(c) and 4(d) stands firmly established. On those judicially established premises, what meaning could be given to the notion of a "highest level of accountability" as judicially asserted?

### Burden of Proof and Public Accountability

Public accountability is the golden thread that runs through the fabric of Public Law, whether it be in regard to exercise of statutory power or exercise of discretion, where a thin line may lie between power and duty, or in the matter of appointments, transfers or promotions.

In the context of Article 12(1), there is no doubt that a petitioner who comes before court must discharge his burden in regard to the alleged violation. In other words, the public functionaries against whom the allegation is made must be shown to have lacked accountability for their actions, resulting in the alleged violation.

47 [1995] 1 SLR 148.

<sup>&</sup>lt;sup>45</sup> See the case of Thalidomide children, C.G. Weeramantry, *The Law in Crisis*, at p.248, Cape Moss, London, 1975.

<sup>46</sup> Which in this writer's view must rank as an advance in the Human Right jurisprudence of the country.

What then is the burden on a petitioner where he alleges that the activity of a person (functionary) causes potential harm to the environment (as opposed to other matters coming under Article 12)? Certainly, the petitioner's burden is to place material before Court amounting to a prima facie<sup>48</sup> case, in the nature of an evidential burden (as opposed to a substantive burden).<sup>49</sup> The juridical burden, then, in approving such activity would lie on the public functionary concerned. As the Court held in this case:

The burden of proof in such cases is therefore placed firmly on the developer or industrialist....

# A classic judicial exposition in the context of Public Resources being at risk

It is submitted with respect that the Court's treatment of the facts in regard to acts on the part of public functionaries who, by their actions, expose public resources and the environment to irreversible harm affecting future generations, must rank as an imaginative and judicially initiated effort. It introduces a new dimension to the fundamental rights jurisprudence of the country in its approach to the concept of burden of proof where an allegation is made in the context of an Article 12(1) violation affecting (generally) public resources and (specifically) the environment, impacting on the concept of inter-generational equity<sup>50</sup>.

The Proposed construction of the judicial approach adding a new dimension to the Concept of Burden of Proof in Fundamental Rights applications in the context of Article 12 where public

50 As articulated in Her Ladyship's judgment, supra, referred to in this paper.

<sup>&</sup>lt;sup>48</sup> Compare where a party seeks an enjoining order or an interim injunction in a Civil Case.

<sup>&</sup>lt;sup>49</sup> Compare and contrast the law on the burden of proof in Criminal jurisprudence.

resources (generally) and the environment (specifically) are involved.

In civil cases, in an interim stage where a party seeks an enjoining order/interim injunction, s/he would be required only to establish principally a prima facie case, with no guarantee that such a party could succeed at an ensuing trial, unless, on a balance of probabilities (on evidence being led at such an ensuing trial), such party is able to establish the case.

In fundamental rights applications (including Article 12 allegations, where matters are determined judicially on affidavit and documentary evidence with no scope — at present — for adducing oral evidence), the standard in regard to the burden of proof has long been established as the civil standard of a balance of probabilities, which may not require even the citing of precedents.

In *criminal cases*, the onus in regard to the evidential aspects has been held to lie on the defence, which needs no elaboration in this paper.

It is in that background of the law relating to the concept of the burden of proof that it is proposed to reflect upon and attempt to construe the principal ratio and the antecedent principles emerging from this judgment, viz: the Court's reference to the notion of a highest level of accountability.

### Proposed construction of the Ratio in the case

Ordinarily in an Article 12 application, the burden to prove on a balance of probabilities lies on the party invoking the Supreme Court's jurisdiction under Article 126 read with Article 17 of the Constitution. However, it may now be contended that in a case where the issue is in regard to Public Resources (generally), and particularly in regard to the environment with its repercussions on inter-generational equity, a party-petitioner is required only

to place material before Court to establish a *prima facie* case, in the nature of a mere evidential burden. The onus would then lie on the respondent authorities to defend their actions to prove that they have not lacked in their accountability to the public.

## A brief final reflection on the judgment—future guidelines

It is submitted with respect that Her Ladyship's judgment provides guidelines as to how future Courts ought to approach issues impacting on public resources and inter-generational equity in the context of Article 12 applications and the law relating to burden of proof in that context.

## 5.2 Rodrigo v. S.I. Kirulapone and Others<sup>51</sup>

This is another judicial expansion within the framework of Article 12 of the Constitution, balancing security concerns of the State and citizen's rights.

Briefly, the material facts of the case were thus: the petitioner was stopped whilst driving his vehicle at a police checkpoint. Being asked to produce his driving license, the petitioner had produced a temporary driving license since the original had been lost and the duplicate was in the process of being issued.

Having failed to procure a bribe, the police officer concerned had abused the petitioner and asked him to leave immediately, whilst retaining the temporary license. On reporting the matter to a nearby Police Station, the petitioner had been asked to go back to the checkpoint, where he was verbally abused and then taken into custody on the basis that the documents pertaining to his temporary driving license were a forgery. He was later handed over to the Fraud Bureau, where he was detained overnight, produced before the Magistrate on a charge of possessing a forged temporary driving license and remanded.

<sup>51 2007 (1)</sup> ALR 1

The magisterial inquiry revealed that the said documents were genuine, and the petitioner was discharged. The petitioner invoked the jurisdiction of the Supreme Court under Article 126 on the basis that his fundamental rights under Article 12(1), 13(1) and (2) and 14(1)(h) of the Constitution had been violated. Having regard to the public interest involved in the matter in so far as the legality of permanent barriers on public roads and checkpoints were concerned, the Petitioner also moved Court for directions under Article 126(4) of the Constitution on certain specific issues touching such public interest.

At the hearing, the version of the main officer concerned (1st respondent), as against the petitioner's version of the facts, was rejected. Since directions on the basis of Article 126(4) had been sought by the petitioner (as recounted above), the Defence Secretary was made a party respondent by Court. On those material facts, the matters for determination by Court were:

- 1. On the specific issue of the alleged violation of the petitioner's fundamental rights, whether the petitioner was entitled to the declaration and compensation?
- 2. On the public interest issue, what directions Court would consider as being appropriate to make in terms of Article 126(4) of the Constitution?

### Propositions established in the decision

1. The petitioner not being stopped in connection with the commission of any offence, the basis for the arrest and subsequent detention ostensibly being for possession of a forged temporary driving license stood refuted having regard to Section 126(4) of the Motor Traffic Act on an assessment of the conflicting testimony. The conduct of the police officers concerned revealed a clear instance of abuse of power, rampant dishonesty, corruption and

misuse of the process of law that takes place at checkpoints; furthermore, the Frauds Bureau had endeavoured to perpetrate a fraud on the Court, thus entitling the Petitioner to a declaration that his fundamental rights guaranteed by Articles 12(1), 13(1) & (2) had been infringed.

- 2. An obstruction of a public road, which obstruction is not for maintenance or repair, would be violative of a person's right to freedom of movement guaranteed by *Article* 12(1).
- 3. Quite apart from the fact that the erection of virtually mobile police stations partly obstructing public roads was illegal, the material adduced by the respondent authorities revealed that operating permanent 'checkpoints' cannot serve any purpose from the perspective of national security and safeguarding public order, thus resulting in a futile exercise to delay and harass persons lawfully exercising their fundamental right to the freedom of movement on roads in the city of Colombo and the suburbs. Accordingly, in order to ensure preservation of national security against the intrusion of terrorist activity, the support of all residents irrespective of ethnicity must be enlisted by establishing citizen committees, shopkeepers' committees and so on, linked with the police and security personnel.
- 4. In terms of Section 166(1)(a) of the Motor Traffic Act, any prohibition or restriction of halting or parking of motor vehicles on the highway or part of the highway in any area has to be by order of the relevant local authority read with Section 164(1)(a) of the said Act, which empowers a police officer not below the rank of SP or ASP to affix traffic signs only for the "temporary regulation of traffic." Therefore, permanent boards seen in most streets purportedly "by order of SSP Traffic" are

patently illegal and deny to the people the equal protection of law guaranteed by Article 12(1) of the Constitution.

5. The obstruction of traffic on public roads and the consequential restriction of the freedom of movement would be an infringement of the fundamental rights of the citizens guaranteed by Article 14(1)(h) of the Constitution. Intermittent stoppage of traffic to permit "VIP (Very Important Persons) Movement" through such obstruction as constituting security measures taken to safeguard any person who is specially threatened should be effected with minimum inconvenience to citizens who are exercising the freedom of movement — which measures should in any event be avoided at peak hours in as much as they cause serious congestions, per se posing a threat to security.

Consequently, it is important to reflect on the primary concern of good governance, and how governance impacts on purported security concerns and connected socio-legal factors. The Supreme Court decision exposes a plethora of ways that Sri Lankan society suffers from the quality of governance.

a) Conduct of Police Officers in the case under consideration, Re: Check Points

Regarding the conduct of police officers, the Court held that the evidence, "revealed a clear instance of abuse of power, rampant dishonesty, corruption and misuse of the process of law that take place at checkpoints.' Is any further reflection needed?

b) The Frauds Bureau and its conduct

As the Court held the Frauds Bureau endeavoured to perpetrate a fraud on the Court. Is any further reflection needed?

c) Power of local authorities and limited nature of powers of SPs and ASPs on Principal roads — Impact of Article

# 12(1) of the Constitution

In terms of existing legislation, obstruction of a public road, is permitted for maintenance or repair, which can be decreed only by the relevant local authority for "temporary regulation of traffic". Yet we see permanent boards in many streets and need to ask if such action by SPs and ASPs – which is not for these stated purposes and which is not temporary – may be illegal and unconstitutional? The answer is provided in proposition 4 above by the Court itself. The Court found such action illegal. Is any further reflection needed?

d) Mobile Police Stations (illegal for the reason highlighted above) and what is done at checkpoints - Do they serve national security and public order interests?

The Court pointed out that what is being done does not satisfy the said interests, and results in the harassment of persons exercising their freedom of movement.

e) Terrorist Activity being a factor — how are the competing interests to be balanced?

The Court acknowledged the "presence of terrorist activity". What measures ought to be taken to counter or combat such activity?

f) Citizens Committees and shopkeepers' committees (irrespective of ethnicity)

The Court suggested the creation of the aforesaid, reminiscent of the Swiss model which, through the concept of direct people's participation in community concerns, has become a system muchadmired internationally. 52

g) Intermittent stoppage of traffic to permit "VIP

<sup>52</sup> See in this connection, The Swiss Constitution: Lessons for Sri Lanka, J. de Almeida Guneratne, CEPRA, 1995.

# Movement" - the balance to be struck

The Chief Justice decreed, in proposition 5 above, thus:
...since the obstruction of traffic on public roads and consequential restriction of movement would be an infringement of the fundamental rights of the citizens as a guaranteed by Article 14(1)(h) of the Constitution; intermittent stoppage of traffic to permit VIP Movement though such obstruction as constituting security measures taken to safeguard any person who is specially threatened should be taken with minimum inconvenience to citizens who are exercising the freedom of movement, which measures should in any event be avoided at peak hours in as much as they cause serious congestions per se posing a threat to security. [Vide: in consonance with recent judicial thinking in India]

5.3 Dissanayake v. General Manager Railways and Others<sup>53</sup>
 – Equal protection as opposed to equal violation of the law

The petitioner had complained that X, who had no claim to have participated at the level of National Sports (in as much as the Petitioner also had no claim), had been given a promotion which had been denied to the petitioner.

Was the Petitioner entitled to relief under Article 12(1) for promotion?

Citing past judicial precedents as well as high academic authority in relation to the concept of equality, the Supreme Court reiterated the principle that the Petitioner, who demonstrably had no *right* to promotion, could not sustain an application for relief on the basis that X, who had been promoted, also could not have secured the same.

<sup>53</sup> SC (FR) 256/2005, SCM 25.07.2007.

The Court invoked the principle that equal protection of the law does not "in terms of Article 12(1) ... provide for the equal violation of the law," 54 founded as it is on the manner in which the principle of equality has been approached and interpreted judicially across the globe over the years.

It is submitted with respect that the said enunciation stands on an unassailable footing. However, was not the Petitioner entitled to have X's promotion quashed in the context of Article 12(1)? Granted that Article 12(1) provides for equal protection but does not provide for equal violation of the law, though the petitioner was not entitled to a promotion, was not he entitled to have X's promotion set aside, as X was also not entitled to the same? Did not action on the part of the authorities concerned in granting a promotion to X, who was shown not to be entitled to the same, amount to arbitrary discrimination?, It is submitted that this reasoning is ingrained in the principle of equality, acknowledged by the Supreme Court itself when Justice Bandaranayake articulated thus:

The purpose of the concept of right to equality is to secure persons against intentional and arbitrary discrimination....<sup>55</sup>

Consequently, the issue proposed to be raised in this analysis, in the context of facts and the judicial approach in the instant case, is the need to redefine the concept of a Fundamental Right in the context of the Right to Equality in the first part of Article 12(1), which decrees that "all persons are equal before the law...".

The Nexus with Arbitrary Discrimination

Clearly, as the facts revealed in the judgment itself, the actions on the part of the authorities concerned were arbitrary in that, while

55At page 9 of the judgment.

<sup>54</sup>At page 9 of the judgment (per Justice Shirani Bandaranayake).

not granting a promotion to the petitioner, a promotion was granted to X, despite neither party being entitled to a promotion. If so, granted that under Article 12(1) the petitioner was not entitled to seek a promotion, was the petitioner not entitled under Article 12(1) to have X's promotion (which was flawed and arbitrary) set aside on the basis of reasoning linked to the Public Accountability/Public Trust doctrine?

6. Judicial Protection by the Court of Appeal in regard to rights pursued in the form of orders in the nature of writs

# A. Property Rights

Heenatigala and Another v. Moratuwa Municipal Council and the Urban Development Authority<sup>56</sup>

The petitioner had applied for approval of a plan to construct a boundary wall in the year 1987, which had been granted and extended thereafter from time to time until 1996. However, the application for further extension for the year 1997 was not granted, for the reason that the Council had passed a resolution to acquire a strip of land from the petitioner's land for road expansion, although this strip had not been acquired to date. The petitioner contended that it was unreasonable in the circumstances to refuse the permission which was sought to construct the boundary wall. Upholding this contention, the Court granted *Mandamus*, directing the Council to grant approval to build the said boundary wall, the same being her right to protect her land.

<sup>56</sup>CA 1246/1999, decided on 18.01.2007.

# The duty related right for Mandamus

In most cases, the Court has insisted upon the burden on a petitioner's part to show a statutory duty before seeking to vindicate the enforcement of a right through *Mandamus*. It is submitted with respect that this is an archaic view which has been departed from even in the United Kingdom, a rights stressed trend having been set in motion in several seminal House of Lords decisions such as *Ridge* v. *Baldwin*<sup>57</sup> and the *Anisminic Case*<sup>58</sup>. Moreover, in the specific context of *Mandamus*, as far back as the year 1762, Lord Mensfield had articulated thus:

Therefore it (Mandamus) ought to be used upon all occasions where the law has established no specific remedy and where in justice and good government there ought to be one ... if there be a right, and no other specific remedy, this should not be denied....<sup>59</sup>

Then again, in R. v. Hanley Barrister<sup>60</sup>, Darling, J. had advised:

Instead of being astute to discover reasons for not applying this great constitutional remedy for error and misgovernment, we think it is our duty to be vigilant to apply it in every case to which, by any reasonable construction, it can be made applicable.<sup>61</sup>

Reflecting upon those articulations in their judicial wisdom sensitive to people's grievances, is there justification or the need for judicial voyages of discovery to extract a duty on the part of a statutory public functionary once a property related right is shown to exist?

<sup>57 [1964]</sup> AC 40 (H/L).

<sup>58 [1969] 2</sup>AC 47 (H/L).

<sup>59</sup> R. v. Barker [1762] 3 Burr 1265 and 1267.

<sup>60 [1912] 3</sup>KB 518.

The need however to establish a right in the first instance — for what?

It is submitted that what an aggrieved party has to show is the existence of a right in him/her. And where would his/her right come from? The answer to that lies in his/her common law rights, utendi, abutendi, frutendi. <sup>62</sup> In the case under consideration, the petitioner had only to show that s/he still possessed that bundle of rights with no further onus to demonstrate a duty on the public functionary concerned in as much as the right being established, there was no further onus on the petitioner. The duty (so called) was to follow once the right was established.

Onus and Burden of Proof on a Statutory (Public) functionary — failure to discharge the same constituting a duty

It must follow then, that once a right is established, the onus must be on the public functionary to show there is some legal impediment to the vindication and enforcement of that established right through *Mandamus*. Thus, in the instant case, it is from the failure on the part of the Council to show that there was any impediment to the granting of approval to construct a boundary wall, that persuaded the Court to hold that:

As the I<sup>st</sup> Respondent (Council) has not shown any legal impediment to grant approval, it is the duty of the I<sup>st</sup> Respondent (Council) to grant approval to the petitioner to build the said boundary wall.<sup>63</sup>

Consequently, the upshot of the Court of Appeal decision, as perceived by this reasoning, is in harmony with the classical English judicial articulations referred to above, 64 accentuated further by

64 nn 51 and 52 supra.

<sup>&</sup>lt;sup>62</sup> To use, enjoy and destroy.

<sup>63</sup> Per Justice Sri Skandarajah, at p.2 of judgment.

the fact that the Court of Appeal is empowered to issue "orders in the nature of writs (and not the so called 'prerogative writs' known to the English law) flowing from the concept of sovereign power of the people," on whose behalf the Court of Appeal owes its constitutional existence.

# A case relating to land acquisition – Seelawathie v. Minister of Lands and Others<sup>66</sup>

Upon Section 2 notice and 38 proviso (a) order being published under the Land Acquisition Act, the petitioners (whose lands were sought to be acquired by a Municipal Council for the specified purpose of a 30 foot road expansion) were noticed to hand over possession.

The petitioner resisted the acquisition on the basis that, as the width of the main roads leading to and from the road which was to be expanded was far less than 30 feet, no purpose would be served by seeking to widen the road in question.

# Existence of public purpose — can the same be reviewed?

Having reiterated the well established principle that a court of law cannot question whether a land is needed for a public purpose, this being a matter of policy, the Court then added an implied rider in that perhaps such policy could be reviewed only if mala fides could be established. In the instant case, the petitioner alleged that the acquisition had been initiated by a resident of the area who was working with the Council, but the Court found that the petitioner had failed to enumerate in detail the part played by that person to influence the minister to acquire the land.<sup>67</sup>

The Court also found that the acquiring authorities had shown

<sup>67</sup> Per Justice Sri Skandarajah.

<sup>65</sup> Article 3 of the Constitution.

<sup>66</sup> CA 1622/2005, CA Minutes of 15.10.2007.

the urgency to acquire the land by plans and other means. Accordingly, the application for *Certiorari* and *Mandamus* failed.

**Employment Rights** 

The decisions selected for the purpose of this survey have enunciated several principles.

Fernando and Others v. Wayamba Development Bank and 69 Others<sup>68</sup>

The Bank, in terms of a pre-issued circular setting out the requisite criteria had called for applications for promotions. The petitioners had complained that marks for educational qualifications had not been given consideration and that if qualification had been considered; they would have scored demonstrably higher marks than some others who had been promoted.

It was also contented that the allocation of marks had departed from the terms of the said circular; the petitioners founded their case on the contention that allocation of marks at the interviews had been based on subjective factors.

The matters for determination and the ensuing propositions established in the decision may be reflected upon as follows.

# Potency of Circulars issued by Statutory Functionaries

The Court found that the Regional Development Bank Act No.06 of 1997 did not specifically provide for schemes of appointment or promotions. Thus, the circular issued was designed to facilitate the effective discharge of the functions of the Bank. Accordingly, the Court held that, without challenging the Circular itself, it was not open to the petitioner to fault the allocation of marks based as it were on subjective factors unless mala fides were alleged (which was not the petitioner's case).

<sup>68</sup> CA 2254/2004, CA Minutes of 16.01.2007.

<sup>69</sup> At page 4 of the judgment, per Justice Sri Skandarajah.

# Departure from the terms of the Circular

The petitioners challenged the appointment on the basis that the allocation of marks at the examination (100 marks each for the two written papers) was contrary to the published criteria in the Circular, which had provided for 120 and 80 marks respectively. On this, the Court held that the said departure applied uniformly to all the candidates<sup>70</sup> and no prejudice therefore could have been caused to any candidate by the departure<sup>71</sup>, prompting the Court to hold that "the departure of this circular cannot be considered ultra vires."

Equality provision in Article 12(1) in FR Applications and the judicial mind in the context of Article 140

The judicial approach adopted by Justice Sri Skandarajah in the context of Article 140 is reminiscent of how the Supreme Court may have responded to an application before it for an alleged FR violation under 12(1), which vindicates the judicial observation made by Justice Mark Fernando that, "by entrenching fundamental rights the scope of writs have been expanded made explicit in Article 126(3)."<sup>73</sup>

# One last Reflection

The Court of Appeal decision provides useful criteria in regard to the potency of circulars issued by statutory functionaries to facilitate the effective discharge of their functions. However, it would appear that one relevant issue addressed by Petitioners' Counsel<sup>74</sup> in regard to the petitioners' complaint was not dealt with in the judgment. This concerned the complaint that marks

<sup>&</sup>lt;sup>70</sup> At page 4 of the judgment, supra.

<sup>71</sup> Ibid.

<sup>72</sup> Ibid.

<sup>&</sup>lt;sup>73</sup> Supra, n 5p.

<sup>74</sup> Mohan Peiris, PC (Presently the Attorney-General Sri Lanka).

allocated for educational qualifications had not been given consideration, which affected the petitioners' relative scores, despite the fact that the circular in question had allocated 20 marks for educational qualification.<sup>75</sup>

# Principle of Collateral Attack upheld

In the case of Chaturanga v. University of Peradeniya and Others, 76 a Selection Committee (after interviews) recommended the appointment of the petitioner for the post of "Senior Lecturer – Grade 11". However, the University having verified the petitioner's requisite qualifications, the University Council decided not to approve the recommendation but to re-advertise the said post. The petitioner's appeal to the University Services Appeals Board (USAB) being successful, the petitioner sought Certiorari and Mandamus against the University when it refused to implement the USAB's decision.

On the facts, it stood revealed that the petitioner lacked the requisite qualification for the said post. Nevertheless, while the petitioner's counsel contented that the USAB's decision was final and binding, the University contended that, in as much as the USAB had failed to make a valid decision, the same was void in law. The question was whether the university was entitled to assail the USAB's decision collaterally without having sought to have it set aside, as the petitioner's application for relief was based on the due implementation of the USAB's decision. The Court answered this question in the affirmative, holding that the Court cannot issue a writ of *Mandamus* compelling the 1st respondent (University) to comply with an unlawful decision. His Lordship Justice Sripavan<sup>77</sup> observed thus:

<sup>75</sup> At p.5 of the judgment, supra. If Court had considered the same, could the decision have gone the other way?

<sup>&</sup>lt;sup>76</sup> CA 1722/2005, CA Minutes of 27.09.2007.

<sup>77</sup> With Justice Rohini Perera (agreeing).

As a general rule, the Court will allow the issue of invalidity to be raised in any proceedings where it is relevant. Void Acts and decisions are indeed usually destitute of legal effect; they can be ignored with impunity; their validity can be attacked, if necessary, in collateral proceedings; they confer no legal rights on anybody. No legally recognized rights found on the assumption of its validity should accrue to any person even before the act is declared to be invalid or set aside in a Court of Law.

# Effect of the Judgment

As would be seen from the judgment, it was the USAB's decision which ultimately stood reviewed, the petitioner's application for relief being disallowed in the process. The USAB was not a party to the proceedings. The case law in England<sup>78</sup> reveals that it is not an easy task to discern the type of cases where collateral proceedings ought to be permitted. While on the one hand, a decision may be challenged collaterally by way of a defence to a criminal charge or by way of a defence to a demand for some payment,<sup>79</sup> it has not been allowed where there is some unknown flaw in the appointment or authority of some officer or judge.<sup>80</sup> In the latter case, the acts of the officer or judge may be held to be valid in law even though his own appointment is invalid and in truth he has no legal power at all.<sup>81</sup>

However, the Court of Appeal ruling departs company with either of the aforementioned classes of case. There was no unknown flaw where his recommendation for appointment was concerned. He simply did not possess the requisite qualification. He had not

<sup>&</sup>lt;sup>78</sup> See, Wade and Forsythe, Administrative Law, (9th ed), Oxford University Press, 2005, pages 282-288.

<sup>79</sup> Ibid.

<sup>80</sup> At p.285, op.cit. Wade.

<sup>81</sup> Ibid, at pp285-286 where the law has been compelled to recognize a concept of officer or judge defacto.

assumed office in his new post. Thus, it was open for the University to challenge the USAB's decision collaterally, which it had ignored.

However, given the fact that, the USAB is a statutory authority established by Parliament, the University's decision to have ignored its ruling respectfully remains a matter for regretful reflection.

# Rights arising in a commercial environment

## Licensing cases

In Sunderakaran v. Bharathi<sup>82</sup>, the Supreme Court had held that "...a license has a money value and was a vested right in property." This principle has been applied to liquor licenses, gem licenses and the like. In CA 1447/2005<sup>83</sup> the Pradeshiya Sabha in question had, without even a prior hearing, purported to temporarily suspend and cancel the license granted to the petitioner to construct a transmission tower which the petitioner had obtained, having got clearance from all the requisite authorities. The letter from the Pradeshiya Sabha which purported to cancel the license had, however, stated that there had been a breach of the peace and a public outcry concerning the construction of the tower.

Justice Sri Skandarajah issued a writ of *Certiorari* quashing the said temporary suspension and cancellation of the license, having observed that a public outcry is not a ground on which a binding permit could be cancelled. He stressed the need for the petitioner to have been afforded a hearing before the said decision to cancel the petitioner's license (or permit).

# Customs Clearance of goods

Wasana Trading Lanka (Pvt) Ltd v. Jayathilaka, DG of Customs

83 CA Minutes of 16.10.2007.

<sup>82 [1989] 1</sup> SLR 46; per Justice A.R.B. Amerasinghe.

and Another84 concerned a case where the customs authorities had refused to accept the import documentation from the petitioner, who had imported a vehicle for commercial purposes. He had submitted the documents with a duly completed bill of entry (Customs Goods Declaration form (CUSDEC)) for payment of customs duty. Section 47 of the Customs Ordinance provides the particulars that are required to be furnished in the CUSDEC, which are not confined to the description of goods. Section 10 contemplates the requirement of Harmonized Commodity Description and Coding System (HS Code) in the CUSDEC for the purpose of classifying goods and determining duty. In as much as the aforesaid provisions revealed that the classification of goods under the HS Code is not an expression of existing facts but an opinion, the question was whether the Customs authorities could lawfully refuse to accept the bill of entry on the ground that they did not agree with the classification of goods made by the importer (declarant). Answering the said question, the Court 85 held the view that:

> ...the Director General (of Customs) or for that matter any other person cannot force the declarant to enter a different HS Code in the CUSDEC... he cannot refuse to accept the bill...<sup>86</sup>

# Extraction of a duty related right

The nexus between duty and right thus stood revealed in the case. Once the declarant submitted the relevant documents duly filled according to his opinion, he acquired a right imposing a duty on the Director General to accept the same.

# How was the duty leviable to be imposed?

Duty to be levied by the Director General of Customs being linked

<sup>84</sup> CA 1081/2005, CA Minutes of 20.09.2009.

<sup>85</sup> Per Justice Sri Skandarajah.

<sup>86</sup> At p.7 of the judgment.

to the HS Code, how then was the Director General to levy the requisite duty? Answering that question, the Court was of the view that, first, the declarant must be given a hearing (which had not been done) and second, once that procedural step had been complied with, the Director General by an order could ask the declarant (importer) to pay the duty corresponding to the HS Code determined by him.

The Court also noted that, "Even if a determination is made by the Director-General of Customs after giving a hearing the HS Code is different from the HS Code given in the CUSDEC the declarant cannot be asked to correct the CUSDEC to include the HS Code as determined by the Director General<sup>87</sup>.

It is for that reason that the Court at an interim stage had granted relief in the following terms:

Court issues an interim relief directing the 1st to 7th Respondents to accept the duty difference between the categorizations claimed by the Petitioner and the categorizations claimed by the customs authorities by way of an irrevocable bank guarantee acceptable to the customs.

Upon furnishing the required bank guarantee on the difference in the duty, the 1st to 7th Respondents are directed to release the vehicle.

# Customs Authorities coming under judicial stricture

The said logical and practical formula suggested by the Court (by its order) at that interim stage was disregarded by the customs authorities, viz:

The customs authorities acted in total disregard of this order, submitted in their objection at

<sup>&</sup>lt;sup>87</sup> For the declaration (CUSDEC) is the importer's expression of opinion.

paragraph 17 as follows.

That your Lordship's Court has made an order on 8.10.2005, ordering the release of the vehicle and directing the Petitioner to pay the difference between the amount claimed by the Petitioner as correct, and that claimed by the Customs Department. However, the Petitioner did not make the relevant declaration in order to clear the said vehicle. Without a CUSDEC being completed imported goods cannot be cleared.

# The Attorney-General's Department and its conduct

The Director General of Customs (as the judgment reveals) had been represented in Court by the Attorney-General. Objections in question surely were drafted and filed on behalf of the Director-General by the Attorney-General. Although the Court did not make a pronouncement to that effect, it should be clear that the Attorney-General's Department itself had acted in defiance of an order of a superior court of record in the country.

# Final Assessment of the Judgment

The judgment of His Lordship Justice Sri Skandarajah not only captures the letter and spirit of the provisions of the Customs Ordinance in relation to an importer's rights <u>vis-a-vis</u> corresponding duties devolving on the Authorities concerned (both procedurally and substantively) but also draws attention to the need for public functionaries to comply with Court orders.<sup>88</sup>

<sup>88</sup> See also to a like effect, the judgment of Justice Sri Skandarajah in CA 2093/ 2005, CA Minutes of 01.10.2007.

A case arising in the context of locally assembled vehicles using imported second hand parts

The petitioner company had entered into an agreement with the Board of Investment of Sri Lanka (BOI) to carry out a project to assemble vehicles by using imported second hand components duty free and for sale in the local market. There was, however, a registration fee for vehicles assembled locally utilizing new parts made by ministerial regulation, but not second hand parts. It was at a point of time when the petitioner was carrying out a project to assemble vehicles by using imported second hand parts for sale in the local market that the present dispute had arisen. In an earlier connected fundamental rights application, the Supreme Court had determined that, the petitioner's motor vehicles could be registered without an additional fee. The Minister (representing the government), having permitted the registration of locally assembled vehicles using second hand parts to any industry registered with the BOI or the Ministry of Industries, had sought to resile from that position by seeking refuge in a gazette regulation (P31). This, in effect sought to impose additional financial burdens on the class to which the petitioner had fallen on the strength of an earlier gazette regulation (P25), which had been a clear public assurance that vehicles could be assembled locally utilizing used components.

On these facts, the petitioner company had sought an order in terms of Article 140 of the Constitution against the said regulation contained in (P31).

# The Court of Appeal Response

In Her Ladyship's Justice Rohini Perera's judgment, 89 the reasons adduced and the attendant principles emanating therefrom granting the relief sought by the petitioner company are noteworthy.

<sup>89</sup> Justice Sripavan (P/CA) agreeing.

# The impact of the doctrine of legitimate expectations (per se)

By his earlier regulation (P25), the minister had held out that the petitioner could assemble vehicles using used parts and by the minister's subsequent regulation (P31) he had sought to resile from the same without any justification.<sup>90</sup>
Thus Her Ladyship holds:

Thus Her Ladyship holds:

The protection of substantive legitimate expectation is based on the notion of (un)fairness resulting from an abuse of power. Here too, what the respondents had engaged in was illegal.<sup>91</sup>

The Court found that, notwithstanding what had been held out in the earlier regulation (P25), in seeking to resile from it by way of a subsequent regulation (P31), the Minister had acted contrary to the petitioner's legitimate expectations, which Her Lordship holds amounted to an abuse of power. Even an executive fiat based on a change of policy cannot override a citizen's legitimate expectation.<sup>92</sup>

# The principle of Estoppel in public law — an interlink with the concept of legitimate expectation

Having noted that the doctrine of *estoppel* was applicable to public authorities although it cannot legitimate *ultra vires* action, the Court saw no basis to work on such a qualification, *viz:* as noted by Court:

By regulation P25, registration of locally assembled vehicles using second hand parts was permitted. Therefore, it implied that what was

91At page 13 of the judgment.

The reader will note therefore the arbitrariness of such decision.

<sup>92</sup> See judicial thinking at p.15 of the judgment.

registered was lawfully constructed. Consequently, the construction of that vehicle was impliedly recognized as legal. The regulation published by P31 made the construction of vehicles utilizing second hand parts illegal. The said regulation also denied the Petitioner the registration of locally assembled vehicles. Consequently, P31 breached the Petitioner's legitimate expectation that he could assemble vehicles locally utilizing used components and register such vehicles.

Consequently the Court issued Certiorari quashing the impugned regulation (P31).

#### Conclusion

In the context of the fundamental rights chapter, the following issues formed the core of the foregoing survey: use of natural resources and their impact on the national environment and intergenerational concerns; the manner in which statutory authorities ought to strike a balance between concerns of national security and citizen's freedom of movement; and good governance tenets that must be followed in the execution of statutory/constitutional authority in matters of appointment/promotion to public office.

In regard to Article 11 along with Article 13 issues read with Article 12(1), while the case of *Dharmawardene* v. *Constable Gunathilaka and Others*<sup>93</sup> is seen as making innovative judicial strides in a sensitive approach to socio-legal realities that exist on the ground, in casting liability for payment of compensation, linked to a concept of institutional liability. The case of *Danapala* 

<sup>93</sup> Supra.

<sup>&</sup>lt;sup>94</sup> Gives the practice of unregulated three wheeler traffic in busy areas and police response thereto.

Maturage<sup>95</sup>, in this writer's view, constitutes a decision (even though its treatment of the facts in regard to an allegation based on Article 13(2) is defensible) which falls short of assessing an allegation based on Article 11.

In so far as orders in the nature of writs are concerned, the survey reveals how existing property rights, other proprietary rights having money value, alleged claims relating to right to office and rights operating within the commercial environment have been responded to by the judiciary.

On a comparison of the matters dealt with by the Supreme Court within the framework of the fundamental rights chapter in the Constitution and the Court of Appeal in the context of orders in the nature of writs under Article 140, it can be seen that hardly any line of division in terms of the scope of judicial supervision of public authorities vested in the two highest Appellate Courts can be drawn. The Rule of Law provides the fundamental broad premise for judicial review, directly, under Article 12(1) of the Constitution in fundamental rights applications by the Supreme Court and indirectly by the Court of Appeal, by reason of the fact that, by entrenching fundamental rights in the Constitution, the scope of writs has been enlarged as made explicit in Article 126(3).97

It is noteworthy that the Court of Appeal (in an order handed down by Her Ladyship, Justice Rohini Perera) in the year under consideration, has taken judicial cognizance of the refreshing constitutional culture brought about by the link between fundamental rights and orders in the nature of writs in the Constitution of Sri Lanka, wherein Her Ladyship observed:

95 N 6, supra.

97 W.K.C. Perera v. Prof. Edirisinghe, supra, nn 5 and 73.

<sup>&</sup>lt;sup>96</sup> Subject however to the provisions brought under the 17th Amendment to the Constitution, for example, decisions of the National Police Commission and the Public Services Commission being taken out of the jurisdictional purview of the Court of Appeal.

And now it is accepted that judicial review is not founded on the doctrine of ultra vires alone, but is premised on the Rule of Law. 98

What, then, does the Rule of Law decree? To start with, it presupposes the Rule of Reason. Consequent thereto would follow the Wednesbury Rules relating to reasonableness, transparency and good governance, absence of arbitrary and abuse of power and/or discretion.

Consequently, it is a matter for forensic lament should the Court of Appeal ask, in an application for an order in the nature of a writ, what statutory provision is being relied upon to support a case based on unreasonableness? Likewise, if the Court of Appeal were to ask for a link to be established between a statutory right on which a case based on legitimate expectation? A petitioner would not be able to do so. His or her premise would be the Rule of Law and its concomitants.

These concerns are being raised on account of some recent decisions of the Court of Appeal.<sup>99</sup>

One final reflection in the conclusion is warranted. This concerns the manner in which statutory authorities who are presumed to hold office in trust for the public have been discharging that trust during the year in review.

## The Police

His Lordship the Chief Justice, in *Rodrigo* v. *SI Kirilapone*, 100 observes in regard to the conduct of certain police officers thus:

<sup>&</sup>lt;sup>98</sup> Vide CA 944/2006 (writ), CA Minutes of 28.09.07 (with His Lordship Justice K. Sripavan P/CA, as His Lordship then was concurring).

<sup>&</sup>quot;Which have not been commented upon here for the scope of this paper is confined to the year 2007.

<sup>100</sup> Supra, n. 43.

Having got the petitioner within their full control, they obviously decided to teach the petitioner a lesson by concocting a charge of using as genuine a forged document and referred the matter to the fraud Bureau for further harassment. 101

In the same case, His Lordship had this to say in regard to 'checkpoints' that have come up in the name of national security. "The facts presented to us reveal a clear instance of the abuse of power, rampant dishonesty and corruption and also misuse of the process of law that take place at 'checkpoints' that have sprouted up". 102

#### The Frauds Bureau

Moreover, as His Lordship noted, "it appears that, the Frauds Bureau has acted true to its name and has endeavored to perpetrate a fraud on the Court." 103

Certain Police Officers' conduct was yet again a matter for judicial comment in *Dharmawardana* v. *Constable Gunatithilake and Others*, in the judgment handed down by Justice N.E. Dissanaike<sup>104</sup>.

# Several Public Functionaries who are obliged to conserve the Environment

Her Ladyship Justice Tillekewardene's judicial exposition in Wijebanda's Case<sup>105</sup> questions the conduct of several statutory functionaries and how they have been derelict in regard to the public trust they are charged with.

Customs Authorities - And the Attorney General's Department? Then again, the Court of Appeal in its judgment handed down

<sup>101</sup> At p.11, 2007 (2) ALR.

<sup>102</sup> At p.12, ibid.

<sup>103</sup> At p.11 of the Report, supra.

<sup>104</sup> Supra.

<sup>105</sup> Supra, n 34.

by Justice Sri Skandarajah in the Wasana Trading Lanka Case<sup>106</sup> saw occasion to admonish the Customs authorities for having acted in total disregard of an interim order made by the Court.<sup>107</sup> Given the fact that the objections filed by the Director General of Customs had demonstrably been filed on his behalf by the Attorney-General's Department, that professional disregard to the Court's order must fall fairly and squarely on the said Department as well.

# Whither the state of Human Rights, Good Governance and the Rule of Law?

These regretful features in the fabric of administrative governance in the country must be addressed sooner than later. True, hopefully, the judicial march in regard to protection of human rights will continue, though (respectfully) even the said march may require more proactive and 'rights-conscious' initiatives if one were to read between the lines in some of the decisions surveyed in this paper. But, the immediate concern is for a clarion call to improve the quality of administrative and/or executive governance, for otherwise, the judicial march in protecting human rights might well be rendered a matter reduced to mere paper, as has been the case in recent times where even Court orders have not been complied with. Should this trend continue the Rule of Law would stand replaced by Rule of Executive arrogance, like rock being reduced to sand.

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<sup>106</sup> Supra, n. 76.

<sup>107</sup> At p.9 of the said judgment, supra.

# ENFORCED DISAPPEARANCES: THE LEGITIMACY OF THE LAW IN GRAVE HUMAN RIGHTS VIOLATIONS

Kishali Pinto-Jayawardena

#### Introduction

For decades, the basic concept of the legitimacy of the law in enforcing the accountability of the Sri Lankan State has been severely undermined by a persistent political rationale that has unequivocally rejected the notion of legal accountability, both during emergency as well as during periods of relatively normal functioning. While ad hoc and emergency powers of state agents have often extended beyond the acceptable norm, the framework of accountability (investigative, prosecutorial and legal) has remained stubbornly pre-colonial and wholly unable to deal with endemic patterns of abuse of power. Advanced concepts such as command responsibility and victims' participation in trial processes that have come to be accepted as sine qua non by trial systems dealing with complicated questions of service responsibility during times of war, are yet completely alien to Sri Lanka's domestic legal system.

Two youth insurrections in the South and an ongoing conflict in the North/East provided an easy justification for successive

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governments to maintain that a state of emergency is absolutely necessary in dealing with threats to the State. Post independence, emergency laws have restricted the right to life and personal liberties, the right to conduct public meetings as well as imposed severe press censorship and curtailed the rights to assembly and association of trade unions. Framed within a pervasive culture of impunity for state agents who commit violations under cover of the emergency regime, the resultant impact of such terror and counter-terror on thousands of Sinhalese, Tamils and Muslims has been great. In particular, the enforced disappearances of individuals have been a singular phenomenon.

Thus, the imbalance between powers exercised by the State on the one hand and the absence of legal accountability on the other has resulted in a profound failure in securing justice for victims of human rights violations in Sri Lanka. The cynical political subversion of constitutional mechanisms established to restore public confidence in the independence of key monitoring bodies such as the National Human Rights Commission (NHRC), the National Police Commission (NPC) and the Judicial Service Commission (JSC)<sup>1</sup> has meanwhile taken away even the proverbial

<sup>&</sup>lt;sup>1</sup> The 17th Amendment to the Constitution, passed unanimously in Parliament in 2001, attempted to redress a heavily politicised process of appointments to important posts in the public service, including that of the Inspector General of Police, the Attorney General and the Chief Justice as well as a number of constitutional commissions. It was mandated that the appointments be made by the President but subject to the nominations being approved by a ten member Constitutional Council (CC) consisting of eminent non-political public personalities as well as political leaders from the government and the opposition. The CC functioned during its first term only (2002-2005) and was unable to set up the new Elections Commission due to inability to agree with then President Chandrika Kumaratunge on the choice of its Chairman. In 2005, the CC became wholly non-functional due to a virtual political conspiracy between members of the smaller political parties refusing to agree on one remaining nomination to the CC and President Mahinda Rajapakse refusing to make the appointments of the nominations already sent to him until this one remaining member was also nominated. A strong argument by constitutional experts that the quorum of the CC was already satisfied and the spirit of the constitutional amendment ought to be adhered to by bringing the CC into being was ignored by President Rajapakse. who thereafter made his own appointments, consisting, for the main part, of personal friends and political loyalists who had little human rights standing in the community.

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fig leaf of adherence to constitutional norms. When such manifest contempt for the Constitution is exhibited by political rulers, how can the country place any faith in the relevance of the rule of law to their lives? How can the people continue to have confidence in legal and prosecutorial processes in respect of even ordinary violations of human rights, leave aside extraordinary violations such as enforced disappearances? On an eminently practical level, moreover, the capacity of the NHRC and the NPC (who should have played a vital role in preventing gross human rights violations in the current intensification of the conflict) to deal with their constitutional and statutory mandates has been diminished by the members lacking constitutional validity in their appointments.

From an allied perspective, the increased conservatism of judges in recent times, their rejection of those same international standards of rights protection that were once fairly consistently incorporated into domestic law as part of a liberal jurisprudence on rights by their judicial predecessors<sup>2</sup> and indeed, the erosion of the independence of Sri Lanka's judiciary,<sup>3</sup> has resulted in the negation of even the small victories that were won earlier in the name of justice. Overall, this has resulted in the turning away of victims from formal mechanisms of legal accountability which have

<sup>3</sup> See report by the United Nations Special Rapporteur on the Independence of the Judiciary in April 2003 to the UN Commission on Human Rights (E/CN.4/2003/65/Add.1 25, February 2003) and among several relevant press releases of the Special Rapporteur, see releases dated 27 February 2003 and 28 May 2003. See also Report of the International Bar Association, 2001, "Sri Lanka: Failing to

protect the Rule of Law and the Independence of the Judiciary."

<sup>&</sup>lt;sup>2</sup> Nallaratnam Singarasa v Attorney General and Others, S.C. SpL (LA) No. 182/99, SCM15.09.2006, judgment of Chief Justice Sarath N. Silva declaring that the Presidential act of accession to the First Protocol to the International Covenant on Civil and Political Rights was an unconstitutional exercise of legislative power as well as an equally unconstitutional conferment of judicial power on the Committee, which was thereby conferred the power to determine rights violations in individual communications. The views of the Committee in this regard were determined to be of no force or effect within Sri Lanka. This decision of the Court has proved to be extremely inimical to the domestic impact of the Committee's decisions and reduces rights of the individual in favour of an obsolete notion of state sovereignty.

failed, by and large, to give them justice. In turn, this has created a vacuum of public confidence in institutions meant to protect the rule of law and aggravated a dangerous sense of individual and collective isolation.

Keeping these preliminary reflections in mind, this chapter examines the manner in which the Sri Lankan legal system has failed in its responses to securing accountability for grave human rights violations. It pursues the need for the legal recognition of the right to life and an incorporation of the crime of enforced disappearances. Particularly (and for the first time in legal writings in this country) it analyses specific judgments of the High Court handed down in regard to prosecutions for enforced disappearances and uses this analysis to illustrate overall deficiencies in the relevant legal framework as well as prosecutorial policy.

The common factor in relation to all these processes has been the inability to offer reconciliation for victims. The absence of a constructively interlinking relationship between the law/formal legal bodies and commissions of inquiry set up ostensibly to inquire into such violations is singular in this regard.

# Sri Lanka's Obligations in terms of International Law Standards

"Enforced disappearance" is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the

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disappeared person, which places such a person outside the protection of the law.

The comparative definition in the Rome Statute has an additional element in that it applies to the acts of a political organisation as well as that of the State. Commenting on this departure, the Working Group (WG) on Disappearances has established that, for purposes of its work, enforced disappearances are only considered as such when the act in question is perpetrated by state actors or by private individuals or organized groups (e.g. paramilitary groups) acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government.

In so far as Sri Lanka is concerned, the accession to the

5'Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.' Article 7, paragraph 2 (i) of the Rome Statute of the International Criminal Court (hereafter the Rome Statute). Text of the Rome Statute circulated as document A/CONF.183/9 of 17 July 1998 and corrected by procès-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002.

<sup>6</sup> See General Comment of the WG.

<sup>&</sup>lt;sup>4</sup> Article 2 of the International Convention for the Protection of all Persons against Enforced Disappearances, adopted on 29 June, 2006. The Convention reflected settled international law in this regard. See the assertion that enforced disappearances "constitutes an offence to human dignity, a grave and flagrant violation of human rights and fundamental freedoms [...] and a violation of the rules of international law" in Resolution 49/193 of the General Assembly, adopted 23 December 1994 and also resolutions 51/94 of 12 December 1996 and 53/150 of 9 December 1998. See article 1, paragraph 2 of the UN Declaration on the Protection of All Persons from Enforced Disappearances, G.A. res. 47/133, 47 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/47/49 (1992), adopted by General Assembly resolution 47/133 of 18 December 1992 (hereafter the Declaration) and in particular, the Inter-American Court of Human Rights, decision dated 14 March 2001, in the Case of Barrios Altos (Chumbipuma Aguirre and others v. Perú), paragraph 41.

International Covenant on Civil and Political Rights (ICCPR)<sup>7</sup> has meant that the prohibition imposed by this treaty against enforced disappearances applies directly to state obligations in international law. Enforced disappearances represent a clear breach of various provisions of the Covenant, including the right to liberty and security of person (article 9), the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (article 7), and the right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person (article 10). It also violates or constitutes a grave threat to the right to life (article 6).<sup>8</sup>

According to the jurisprudence of the Committee and that of the Inter-American Court of Human Rights, the State party has a responsibility to investigate the disappearance in a thorough and effective manner, to bring to justice those responsible for disappearances, and to provide compensation for the victims'

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<sup>&</sup>lt;sup>7</sup> Sri Lanka acceded to the International Covenant on Civil and Political Rights (referred to hereafter as the Covenant or 'ICCPR') on 11 June 1980 (entry into force on 11 September 1980) and the First Optional Protocol to the ICCPR on 3 October 1997 (entry into force on 3 January 1998).

<sup>&</sup>lt;sup>8</sup>Celis Laureano v. Peru, Case No. 540/1993, Views adopted on 25 March 1996. Also, Bleier Lewhoff and Valiño de Bleier vs. Uruguay Case No. 30/1978, Views adopted on 29 March 1982 and the Concluding Observations of the Human Rights Committee - Burundi, of 3 August 1994 (United Nations document CCPR/C/79/Add.41, par. 9).

families. In one Communication of Views against the Sri Lankan State, the principle that the army is indisputably an organ of that State and an enforced disappearance at the hands of any member of the army is imputable to the State party, was affirmed by the Committee in no uncertain terms. The petitioner argued that the State party had failed to investigate effectively its responsibility as well as the individual responsibility of those suspected of the direct commission of the offences. It had given no explanation as to why an investigation was commenced some ten years after the

<sup>9</sup>Sanjuan Arevalo v. Colombia, Case No. 181/1984, Views adopted on 3 November 1989; Avellanal v. Peru, Case No. 202/1986, Views adopted on 28 October 1988; Mabaka Nsusu v. Congo, Case No. 157/1983, Views adopted on 26 March 1986; and Vicente et al. v. Colombia, Case No. 612/1995, Views adopted on 29 July 1997; see also General Comment No. 6, HRI/GEN/1/Rev.1 (1994), para. 6. See also, Concluding Observations of the Human Rights Committee on the third periodic report of Senegal, 28 December 1992, CCPR/C/79/Add.10; see also Baboeram v. Surinam, Case No. 146/1983, Views adopted on 4 April 1985 and Hugo Dermit v. Uruguay, Case No. 84/1981, Views adopted on 21 October 1982.

10 The Human Rights Committee has, up to date, delivered eleven communications of views against the Sri Lankan State; Anthony Michael Emmanuel Fernando v Sri Lanka, CCPR/C/83/D/1189/2003, adoption of views, 31-03-2005; Nallaratnam Sinharasa v Sri Lanka, CCPR/C/81/D/1033/2001, adoption of views, 21-07-2004; S. Jegatheeswara Sarma v Sri Lanka, CCPR/C/78/D/950/2000, adoption of views, 16-07-2003; Jayalath Jayawardena v Sri Lanka, CCPR/C/75/D/916/ 2000, adoption of views, 22-07-2002; Victor Ivan Majuwana Kankanamge v Sri Lanka, CCPR/C/81/D/909/2000, adoption of views 27-07-2004 and Sister Immaculate Joseph and 80 Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka v Sri Lanka, CCPR/C/85/D/1249/2004, adoption of views, 21-10-2005. Sundara Arachchige Lalith Rajapakse v Sri Lanka, CCPR/C/87/D/1250/2004, adoption of views, 14-07-2006, Raththinde Katupollande Gedara Dingiri Banda vs Sri Lanka, CCPR/C/D/1426/2005, adoption of views 26-10-2007, Dissanayake Mudiyanselage Sumanaweera Banda v Sri Lanka CCPR/C/93/D/1373/2005, adoption of views 22-7-2008, Vadivel Sathasivam and Parathesi Saraswathi v Sri Lanka CCPR/C/93/D/1436/2005, adoption of views 8-7-2008, Soratha Bandaranayake v Sri Lanka CCPR/C/93/ D/1376/2005, adoption of views 24-7-2008. However, there has been no implementation of these Views by the Sri Lankan Government.

<sup>11</sup>Sarma v Sri Lanka, Case No 950/2000, Views adopted on 31, July 2003, approving of the Velasquez Rodriguez Case (1989), Inter-American Court of Human Rights, Judgment of 29 July 1998, (Ser. C) No. 4 (1988). The case concerned a complaint filed by a father from Trincomalee, whose son had disappeared in army custody in 1990. The facts before the Committee were declared to disclose a violation of Articles 7 and 9 of the ICCPR with regard to the petitioner's son and

article 7 of the ICCPR with regard to the petitioner and his wife.

disappearance was first brought to the attention of the relevant authorities. Moreover, the investigation did not provide information on orders that may have been given to the low ranking officers regarding their role in search operations, nor did it consider the chain of command.

It had not provided information about the systems in place within the military concerning orders, training, reporting procedures or other process to monitor the activity of soldiers which may support or undermine the claim that the superior officers did not order and were not aware of the activities of their subordinates. It was alleged that there were striking omissions in the evidence gathered by the State party. Thus, the records of the ongoing military operations in this area in 1990 had not been accessed or produced and no detention records or information relating to the cordon and search operation were adduced. Even though indictment was filed against the junior army officer found responsible, key individuals were not included as witnesses for the prosecution, despite the fact that they had already provided statements to the authorities and could have provided testimony crucial to the case.

In counter, the government contended that this disappearance was an isolated act initiated solely by a minor officer without the knowledge or complicity of other levels within the military chain of command. This was a position that was rejected by the Committee. <sup>12</sup> Further, it was opined that it is implicit in article 4

who uses his or her position of authority to execute a wrongful act, the violation is imputable to the State (see Caballero Delgado and Santana Case, Inter-American Court of Human Rights, Judgment of 8 December 1995 (Annual Report of the Inter-American Court of Human Rights 1995 OAS/Ser.L/V III.33 Doc.4); Garrido and Baigorria Case, Judgment on the merits, 2 February 1996, Inter-American Court of Human Rights) even where the soldier or the other official is acting beyond his authority, if it provided the means or facilities to accomplish the act. Even if, and this is not known in this case, the officials acted in direct contravention of the orders given to them, the State may still be responsible. Timurtas v. Turkey, European Court of Human Rights, Application no. 23531/94, Judgment of 13 June 2000; Ertak v. Turkey, European Court of Human Rights, Application no. 20764/92, Judgment of 9 May 2000.

(2) of the Optional Protocol that "the State party has the duty to investigate in good faith all allegations of violation of the Covenant made against it and its authorities."13 The State party was directed to expedite current criminal proceedings against individuals implicated in the disappearance and to ensure the prompt trial of all persons responsible for the abduction. It was also put under an obligation to provide the victims with an effective remedy, including a thorough and effective investigation into his disappearance and fate, his immediate release if he is still alive. adequate information resulting from its investigation and adequate compensation for the violations suffered by him and his family. An interesting part of the Committee's decision was the reiteration of an earlier held view that the enforced disappearance in issue amounted to a violation of Article 7, ICCPR, namely the right to freedom from torture or to cruel, inhuman or degrading treatment or punishment.14 In addition, the violation of Article 7 of the Covenant in respect of the parents themselves centered on the "anguish and stress" that they had suffered as a result of his disappearance and the continuing uncertainty concerning his fate and whereabouts. 15

Concerns have also been expressed in the treaty based periodic reporting procedures regarding inaction by the Sri Lankan State, or its inability, to identify the perpetrators responsible for the large numbers of enforced or involuntary disappearances of persons. Taken together with the reluctance of victims to file or pursue complaints, this has been observed 'to create an environment that

<sup>&</sup>lt;sup>13</sup> Bleier v.Uruguay, Case No. 30/1978, adopted on 24 March 1980, para 13.3. In regard to the continuing nature of the act, it was pointed out in Sarma that enforced disappearances "shall be considered a continuing offence as long as the perpetrators continue to conceal the fate and whereabouts of persons who have disappeared and these facts remain unclarified." Article 3 of the Inter-American Convention on the Forced Disappearance of Persons, which states that the offence of forced disappearance "shall be deemed continuous or permanent as long as the fate or whereabouts of the victim has not been determined," was also referred to.

Quinteros v. Uruguay, Case No. 107/1981, Views adopted on 21 July 1983.
 ibid. In Quinteros, the Committee considered that the family members of the disappeared were also victims of all the violations suffered by the disappeared, including Article 7.

is conducive to a culture of impunity.' 16

# 3. The Crime of Enforced Disappearances in International Law

Article 4 (1) "All acts of enforced disappearance shall be offences under criminal law punishable by appropriate penalties which shall take into account their extreme seriousness." 17

The criminal offence in question starts with an arrest, detention or abduction against the will of the victim, which means that the enforced disappearance may be initiated by an illegal detention or by an initially legal arrest or detention. That is to say, the protection of a victim from enforced disappearance must be effective upon the act of deprivation of liberty (whatever form such deprivation of liberty takes) and must not be limited to cases of illegitimate deprivations of liberty. The emphasis on the need for disappearances to be recognised as a crime is reflected in other

<sup>&</sup>lt;sup>16</sup> In Concluding Observation No 10 of the UN Human Rights Committee (CCPR/CO/79/LKA) Human Rights Committee, seventy ninth session, November 2003. Though the Committee directed that Sri Lanka should respond on this particular question together with three other questions considering to be of overriding importance within one year, namely by October-November 2004, there has been no perceptible adherence by the government to this direction. In this same context, see also Committee Against Torture, Concluding Observations on Sri Lanka in 2005, (CAT/C/LKA/CO/1/CRP.2. 7-25 November 2005) at paragraph 12.

<sup>17</sup> UN Declaration on the Protection of All Persons from Enforced Disappearances, G.A. res. 47/133, 47 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/47/49 (1992), adopted by General Assembly resolution 47/133 of 18 December 1992 (hereafter the Declaration) The UN General Assembly, in adopting the Declaration emphasized the importance of devising "an instrument which characterizes all acts of enforced disappearance of persons as very serious offences and sets forth standards designed to punish and prevent their commission". Resolution 47/133 of 18 December 1992. Also of interest are Resolution 49/1993 of 23 December 1994. Resolution 51/94 of 12 December 1996 and Resolution 53/150 of 9 December 1998, which emphasized that enforced disappearances is a crime that attracts criminal sanction.

international instruments as well.18

 Analysis of Criminal Responsibility, the Absence of the 'Crime' of Disappearances in Sri Lankan law and relevant Prosecutorial Processes.

A notable feature in the criminal process had been the convoluted and often tortuous recourse to ordinary penal provisions relating to the many cases of disappearances in the absence of a specific 'crime' of disappearances.<sup>19</sup>

In this regard, the Sri Lankan criminal law is itself a first offender of the international law principle enunciated in the preceding

18 See Article III (1): "The States Parties undertake to adopt, in accordance with their constitutional procedures, the legislative measures that may be needed to define the forced disappearance of persons as an offense and to impose an appropriate punishment commensurate with its extreme gravity. This offense shall be deemed continuous or permanent as long as the fate or whereabouts of the victim has not been determined." Article IV (1): "The acts constituting the forced disappearance of persons shall be considered offenses in every State Party." The Inter-American Convention on Forced Disappearance of Persons. See also the observation of the Human Rights Committee in Concluding Observations - Honduras" UN Doc CCPR/C/HND/CO/1 of 13 December 2006, paragraph 5: "The State party should amend the Criminal Code in order to include the crime of enforced disappearance. It should also ensure that the cases of enforced disappearance are duly investigated, that those responsible are prosecuted and, where appropriate, punished and that the victims or their relatives receive fair and adequate compensation."

19 Provisions of the Penal Code under which persons may be punished for transgressions of physical security and personal liberty, include for example, culpable homicide (Section 293), murder (Section 294), death by negligence (Section 298), attempt to murder (Section 300), attempt to commit culpable homicide (Section 301), hurt to extort confession (Section 322), wrongful restraint (Section 330), wrongful confinement (Sections 331, 334, 335), and criminal force and assault (Sections 340-9). Provisions commonly utilised in cases of enforced disappearances are 355 (kidnapping or abduction in order to murder), 356 (kidnapping or abduction with intent to cause that person to be secretly and wrongfully confined), 335 (wrongful confinement), 32 (common intention) and conspiracy (Section 113(B) and abetment (Section 102). Section 82 of the Police Ordinance makes it an offence for a police officer to knowingly and willfully exceed his powers or to

offer any unwarrantable personal violence to any person in custody.

analysis: namely, that the act of enforced disappearance must be criminally defined in such a way that is clearly distinguishable from related offences such as abduction and kidnapping. This lacunae has not been sought to be addressed even in the more recent statutes such as the International Covenant on Civil and Political Rights Act No 56 of 2007 which, in the minimum, also does not include the right to life among the rights that it confers protection, on the faulty reasoning that this is not necessary given that the right to life has been implied into the existing constitutional provisions by the Supreme Court.<sup>20</sup>

Given these extreme deficiencies in the legal framework, it is not surprising that few criminal prosecutions have been successfully brought to a close at the original and appellate process. Two such high profile prosecutions are the *Embilipitiya Case* and the *Krishanthi Kumaraswamy Case*. <sup>21</sup> This startling statistic, by itself, confirms the failure of the criminal law, the prosecutorial process and indeed, the judicial system in the country. Some reflections on these two cases are relevant to the discussion.

# The Krishanthi Kumaraswamy Case

The abuses committed on both sides during more than two decades of conflict in the North/East between government troops

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<sup>&</sup>lt;sup>20</sup>Sriyani Silva vs Iddamalgoda [2003] 2 Sri LR 63, Wewalage Rani Fernando case, SC(FR) No 700/2002, SCM 26/07/2004. The Court inferred a limited right to life from Article 13(4) of the Constitution which states that 'no person shall be punished with death or imprisonment except by order of a competent court made in accordance with procedure established by law.' Dependants, next-of-kin and intestate heirs were declared to possess the right to invoke the jurisdiction of the Court for relief when a family member dies due to torture at the hands of state officers.

<sup>&</sup>lt;sup>21</sup> Ratnapura High Court, Case No 121/94. Judgment delivered on 23/02/1999 – concerning the enforced disappearances of more than fifty schoolchildren in the South during the nineties.

and the Liberation Tigers of Tamil Eelam (LTTE)<sup>22</sup> had progressively resulted in the deaths, disappearances and other grave human rights violations of thousands of civilians living in these areas. Gender based violence had been a particular feature of these crimes.<sup>23</sup> The rape of an eighteen-year-old school girl, Krishanthi Kumarasamy,<sup>24</sup> by eight soldiers and a police officer on duty at the Chemmani checkpoint, who then killed her as well as her mother, brother and neighbor who had come to look for her, marked a specially horrendous instance of such barbarity during late 1996. The accused in this case were convicted in the Sri Lankan High Court *inter alia* of offences under Section 357 (abduction with intent that the victim may be compelled or knowing it to be likely that she will be forced or seduced into illicit sexual intercourse), Section 364 (rape) and Section 296 of the Penal Code (murder).<sup>25</sup>

<sup>&</sup>lt;sup>22</sup> From the targeting of civilians in the South and the systematic assassination of the Sinhala political leaders, the LTTE has progressed to the committal of mass crimes and the manifestation of extreme intolerance of contrary opinions which has resulted in the ruthless terrorizing of the Tamil people and the killing of intellectuals as well as ordinary people perceived as traitors, purely for differing with the ideological line espoused by the movement. However, issues of non-state responsibility are not the focus of this paper though they remain important as contextual background. The self-evident rationale enforcing responsibilities of a law abiding State towards its citizens differs from that which is expected from a terrorist organization.

<sup>&</sup>lt;sup>23</sup> Report of the Expert Group Meeting on Gender and Racial Discrimination convened by the United Nations Division for the Advancement of Women, the Office of the High Commissioner for Human Rights and the United Nations Development Fund for Women United Nations Division for the Advancement of Women, at <a href="http://www.un.org/womenwatch/daw/csw/genrac/report.htm">http://www.un.org/womenwatch/daw/csw/genrac/report.htm</a>. Also, Women and Media Collective, Women's Rights Watch 1998, Colombo 1999, p. 22. <sup>24</sup> At the time of the incident (7 September 1996) Krishanthi Kumaraswamy was studying for her A Levels at Chundukuli Balika Vidyalaya and had already sat for two papers in two subjects together with one paper in another subject. She lived along with her mother and her brother in the southern part of Kaikadi and was, by all accounts, an extremely bright student, obtaining seven distinctions and one credit in her O Levels.

<sup>&</sup>lt;sup>25</sup>High Court of Colombo, Case No 8778/97, Bench of Three Judges, Analysis of judgment of Judge Gamini Abeyratne, High Court Judge Negombo, 1998.07.03. Their appeals against the convictions were dismissed in the appellate process.

Their prosecution marked an exceptional departure from the normal lackadaisical approach to accountability in regard to such cases. Analysis of the High Court judgment reveals interesting facets of the prosecution strategy. The prosecution presented its evidence with regard to the said charges against the accused in a systematic manner, relating specifically to the element of common intention on the part of the accused to the offence of abducting Krishanthi Kumaraswamy with the intention of subjecting her to unlawful intercourse, raping her systematically and (with the intention of covering up the crime), murdering four persons thereafter.<sup>26</sup>

Vital elements of the offence as defined thereto included the absence of consent, the kidnapping/abducting of the female and/ or the presence of intent or knowledge that she will be reduced or subjected to illicit intercourse. The prosecution was also required to prove in regard to the crime of rape, that the accused put Krishanthi Kumaraswamy in fear of death or serious hurt and opposing her consent or without her consent, subjected her to illicit sexual intercourse. In so far as the crime of murder was concerned, it had to be proven that the deaths of Rasamma, Krishanthi, Pranawan and Siddambaram were caused round about the seventh day of the ninth month of the year 1996, that these murders were as a result of illegal acts, that these illegal acts were committed by the accused and that these murders were committed with the requisite murderous intention. <sup>27</sup>

<sup>&</sup>lt;sup>26</sup> The elements of each of these crimes are set out in the provisions of the Penal Code. The crime of abducting or kidnapping a woman with intent or knowing that it is likely that she will be forced or seduced to illicit sexual intercourse is defined in Section 357 of the Penal Code.

In proceeding with the case, it is important that the court decided to first evaluate the evidence against the accused relating to the charges of murder, in order to clarify the context within which the charges against the accused of formation of an unlawful assembly towards the abduction of Krishanthi Kumaraswamy with the intent to force or seduce her to illicit intercourse, subsequently raping her and killing four individuals, with the requisite common intention. The evidence relating to the charge of murder first was therefore dealt with first.

At all levels, endeavours of the prosecution to call evidence on behalf of the murdered girl and the others who were also killed thereafter and the willingness of their relatives to give evidence, differentiated this case from other prosecutions. The diverse nature of persons who gave evidence, including Krishanthi's friend Saunderam Gautami (with whom she had left a funeral house at about 12.30 that afternoon) and Krishanthi's uncle and aunt, namely Sivapackiam Navaratnam and Buveneswari Suppiah, another relative by the name of Buveneswari Arumuganadam and by another witness called Kudeshwaran, was a special factor. Others also gave evidence, including the principal of Charles School (who functioned as the chief invigilator at the A Levels examination which Krishanthi was sitting for at the time of her death) and Sivanesan, a trustee of the Ariyalai temple.

The inclusion of the evidence of one army soldier who testified that he had attempted to free Krishanthi as well as Rasamma, Pranawan and Kirubamoorthy from their detention at the Chemmani checkpoint was important. This army soldier, Corporal Ajith Asoka, had been in charge of one bunker in that area while the 1st accused was in charge of the bunker situated in the direction towards Chavakachcheri on the Jaffna Road, at a place called Ariyalai, at a third checkpoint situated at a place called Aarakku Point on the road to Kaikadi. Corporal Asoka had known the 1st accused for about six years, and testified that he had gone with Samarawickreme to the Chemmani checkpoint and that both of them had tried to free the said four individuals from their captivity.

His request was turned aside by the 1" accused. Interestingly, his dilemma thereafter became acute. He stated that he was unable to inform any of his superiors regarding the said detention of the four accused as the 1" accused had informed him that the said detention was consequent to headquarters being informed. In so far as the murder of the others were concerned, the court heard evidence to the effect that a middle-aged female and two individuals corresponding to their descriptions had come to the

checkpoint. The photographs of Rasamma, Pranawan and Kirubamoorthy had been identified by the witness Samarawickreme as that of persons being detained at the checkpoint during this time. Meanwhile, a Singapore gold chain (identified as belonging to Rasamma) was discovered in the possession of the 1st accused and was held to establish clearly the fact that this was Rasamma's chain, which was transferred to the hands of the 1st accused after her grisly death.

Most crucial of all was the testimony called of an independent witness, Samarawickreme. Samarawickreme testified that the first accused had summoned him to the bunker where a young girl was detained. After taking off the cloth bound round her mouth, the first accused had asked Samarawickreme to question her to find out whether she was a Tamil Tiger. She had answered that she had obtained seven distinctions and one credit at O-Level and had gone on to ask why this injustice was being committed. Samarawickreme had identified the girl in question as being none other than Krishanthi Kumaraswamy through a photograph, which has been positively identified as being that of her. His evidence was not weakened by any contradictions and withstood the searching cross examination of all counsel for the nine accused.

It is noteworthy that when evaluating the medical evidence relating to the deaths of Krishanthi and Kirubamurthy, the prosecution was unable to put forward forensic evidence due to the advanced state of decomposition of both bodies. Instead, it relied on all the evidence, verbal and written, the credibility of that evidence and the context in which such evidence was given, to successfully urge a finding against the accused. The digging up of four bodies at a spot past the Chemmani checkpoint, one and a half months later (on 22.10.1996) and the simultaneous discovery of a mudspattered and tattered striped uniform of the Chundukuli girls school, underclothes, a pair of socks and a red and white tie, which tallied with the description given of what Krishanthi Kumaraswamy had been wearing, was relevant in this regard.

This evidence was buttressed by the confessions of the 1st, 2nd, 3rd, 4th, 7th and 8th accused, all of which were tested carefully by court for their voluntary nature. The confessions were to the effect that the rape of the girl Krishanthi Kumaraswamy had been followed by the deaths of these four persons which were caused by ropes being tightened round their necks and depriving them of the ability to breathe. The 6th accused stated that he had guarded Krishanthi and also buried the body of her mother, Rasamma. It was moreover established by the evidence of the police, as well as the military police, that the bodies that were dug up, had been discovered very close to the Chemmuni checkpoint and in fact, behind the checkpoint. These bodies were discovered as a consequence of statements made by the 1st, 2nd, 3rd and 4th accused under Section 27 of the Evidence Ordinance, which indicated that the accused knew where the bodies that had been buried. As a cumulative result of this evidence, the court decided that it had been proved beyond all reasonable doubt that the deaths of the victims were caused by violent acts by the 1st, 2nd, 3rd, 4th, 7th and 8th accused.

# 4.1 Prosecutorial Strategy

As analyzed above, a skilful prosecution strategy as well as the willingness of witnesses to testify in the Krishanthi Kumaraswamy case resulted in a conviction of the accused. International and domestic pressure brought to bear in regard to the case was also a factor.<sup>28</sup> This case was exceptional in this regard. Despite other cases of rape and murder of women by the army and the police in

<sup>&</sup>lt;sup>28</sup> Judicial reasoning was to the effect that the guilt of the accused will be judged 'by the evidence and the evidence alone.' In response to the assertion of the Deputy Solicitor General leading the prosecution team that this was "a heinous crime that has come in for international condemnation," was pointed out that "the court cannot take cognizance of international condemnation occasioned by this incident as to do so would mean that the court would be embarking on a process whereby the judgment of this court will be based on air and not on concrete evidence and findings."

the North, which were also brought before court, none of these other cases were prosecuted as vigorously or as carefully as the Krishanthi Kumaraswamy case due to this fortuitous combination of prosecutorial determination and activist pressure being absent. In sum, the Krishanthi Kumaraswamy prosecution was a triumph in that the killers of four innocent persons were brought to justice. However, the case illustrates the isolation of such successful prosecutions and helps to demonstrate why prosecution strategy in such cases must be premised on a different footing than that of a normal case treated in the normal manner of criminal cases. It also illustrates the importance of the pressure of public opinion, which was clearly a factor in the success of the Krishanthi Kumaraswamy prosecution.

In the *Embilipitiya case*, the prosecutorial dynamics were somewhat different. Though some of the accused were convicted, there was widespread dissatisfaction due to the fact that these were all relatively junior officers<sup>29</sup> and that that they received inadequate sentences.

A specific factor of the prosecutorial policy in this case was that the accused had been indicted only in twenty five cases of disappearances whilst the actual number of children who had been disappeared was much more than this. The deep sense of individual grievance suffered by the parents and family members of the missing children whose cases had not been included in the indictment was expressed to the 1994 Western, Southern and Sabaragamuwa Disappearances Commission established to inquire into, inter alia, enforced disappearances during that period. The Commission recommended that the Attorney General frame indictments in respect of the remaining cases but this was not done. Indeed, none of the recommendations in this

<sup>&</sup>lt;sup>29</sup> The absence of the doctrine of command responsibility in the criminal law remains of significant concern.

<sup>&</sup>lt;sup>30</sup> Final Report of the 1994 Presidential Commission of Inquiry to investigate the Involuntary Removal or Disappearances of Persons in the Western, Southern and Sabaragamuwa Provinces, Sessional Paper No V – 1997.

Commission of Inquiry Report have yet been implemented, nor those in Reports of other Commissions of Inquiry<sup>32</sup> that were made with the intention of reforming the criminal justice system in order to more effectively deal with grave human rights violations.

The inaction of the Attorney General in this respect may well have been due to the difficulty of establishing a prima facie case in regard to penal culpability of the perpetrators within the ambit of the general criminal offences on which the indictment proceeded, namely Penal Code, sections 355 (kidnapping or abduction in order to murder), 356 (kidnapping or abduction with intent to cause that person to be secretly and wrongfully confined), 335 (wrongful confinement), 32 (common intention), 113(B) (conspiracy), and 102 (abetment). This amply demonstrates the essential problem in the lack of a crime of disappearances in the penal law and the absence of any legal mechanism whereby the State could be held accountable even where individual culpability may not be proved on the evidence. Given the extraordinarily secret nature of these crimes, proving individual responsibility in many cases is difficult if not impossible. Efforts to use the concept of culpable inaction in other contexts of grave human rights violations within the scope of the criminal law have not been successful.<sup>33</sup> It is notable, however, that, in contrast, the Supreme

33 The Binudunuwewa case - S.C. Appeal 20/2003 (TAB) H.C. Colombo No. 763/2003 SCM 21.05.2005).

<sup>32</sup> See in particular, the three Commissions appointed on 30 November 1994 by the President in terms of the Commissions of Inquiry Act, No. 17 of 1948 to inquire into, inter alia, the involuntary disappearance of persons after January 1, 1988, the persons responsible, the legal proceedings that can be taken, the measures necessary to prevent the re-occurrence of such activities, and the relief, if any, that should be afforded to the family members and dependants of the disappeared. The Interim and Final Reports of the three Commissions are as follows: Interim and Final Reports of the Western, Southern and Sabaragamuwa Provinces, respectively Sessional Papers No 11 and No V – 1997; Interim Report/Final Report/the Report containing the Annexures of the Central, North Western, North Central and Uva Provinces, respectively Sessional Papers No III and VI – 1997; and Interim and Final Reports of the Northern and Eastern Provinces, respectively Sessional Papers No 11 and No V – 1997. See also Final Report of the All Island Commission (March 2001), Sessional Paper No 1-2001

Court has developed and expanded the doctrine of vicarious liability for human rights violations.<sup>34</sup> A useful analogy may also be drawn with developments in the fundamental rights jurisdiction of the Supreme Court where the Court has held that even if the responsibility of an individual officer for acts of torture cannot be proved, the State is held liable if the torture is proved to have been practiced against the petitioner.<sup>35</sup> While it is acknowledged that there are difficulties in incorporating these concepts within the four corners of the criminal law (given particularly, the necessity to prove criminal intention), surely the creation of a *sui generis* offence cannot be dismissed out of hand? If the decades of enforced disappearances and extra judicial executions cannot compel the Sri Lankan State to do at least this much, then the failure is of the State and the State alone.

# 4.2 Lack of political and prosecutorial will

It must also be said, however, that the question of accountability in terms of the criminal law extends beyond the mere absence of a statutory offence of enforced disappearances. Even where a statute has been relatively sophisticated in its substance such as the Convention Against Torture and Other Inhuman and Degrading Punishment Act No 22 of 1994 (hereafter the CAT Act), its actual

<sup>34</sup> Sriyani Silva vs Iddamalgoda [2003] 2 Sri LR 63, Wewalage Rani Fernando case, SC(FR) No 700/2002, SCM 26/07/2004.

Wagaachige Dayaratne vs IGP and Others SC (FR) 337/2003 SCM 17.5.2004, judgment of Justice CV Wigneswaran. "The responsibility for the acts collectively performed by the police officers who gathered at the scene of the incident, thereafter forcibly arrested and took the petitioner to the police station at Bambalapitiya and then detained him, must fairly and squarely be placed on the State. The State is responsible for the actions of its officers," at page 24 of the judgment. See a reiteration of the equally well established principle that the State will be held responsible for the disappearance of the corpus in the absence of identification of individual responsibility in the context of habeas corpus applications in the Machchavallavan Case, (Kanapathipillai Machchavallavan vs OIC, Army Camp, Plantain Point, Trincomalee and Others (SC Appeal No 90/2003, SC (Spl) L.A. No 177/2003, SCM 31.03.2005).

impact upon society has been minimal due to poor prosecutorial processes and the lack of political will to bring about substantive changes. For example, though the CAT Act became part of Sri Lanka's law in 1994, not a single conviction was evidenced in terms of this Act for ten years thereafter. From 2005, there have been only three convictions handed down by the High Courts<sup>36</sup> whereas there have been more than seventeen acquittals.<sup>37</sup>

Undeniably this is not a success rate that prosecutors could be proud of. Defensive reasons have been advanced in this regard, including the perennial problem of the absence of a comprehensive

<sup>36</sup> Republic of Sri Lanka vs Madiliyawatte Jayalathge Thilakarathna Jayalath HC Case No: H.C 9775/99, Colombo High Court, HC Minutes, 19.01.2004; Republic of Sri Lanka vs Edirisinghe HC Case No; 1392/2003, Colombo High Court, HC Minutes 20.08.2004; Republic of Sri Lanka vs Selvin Selle and Another HC No; 966/2002, Colombo High Court HC Minutes 20.07.2007.

<sup>37</sup> Republic of Sri Lanka vs Suresh Gunasena and Others, HC Case No 326/2003, High Court of Negombo, HC Minutes 02.04.2008; Republic of Sri Lanka vs Nanda Warnakulasuriya and Others, Case No 119/2003, High Court of Kurunegala, HC Minutes 25.06.2007, Republic of Sri Lanka vs Havahandi Garwin Premalal Silva, HC Case No. 444/2005 (HC), High Court of Kalutara, HC Minutes, 19.10.2006; Republic of Sri Lanka vs Senaka Abeysinghe Samarasinghe, HC Case No 276/03, High Court of Kalutara, HC Minutes 22.08.2006; Republic of Sri Lanka vs Wanrnakulasuriya Mahawaduge Rohan Prasanga Pieris, HC Case No 259/2003, High Court of Negombo, HC Minutes 09.10.2008; Republic of Sri Lanka vs Priyadarshana, HC Case No; 294/03, High Court of Kalutara, HC Minutes 18.01.2006; Republic of Sri Lanka vs Sathisgamage and others, HC Case No; (indistinct), High Court of Galle, High Court Minutes 04.05. 2007; Republic of Sri Lanka vs Mohammed Jiffry, HC Case No; 1789/03, High Court of Vavuniya, High Court Minutes 29.05.2006; Republic of Sri Lanka vs Sanidu Lebe Mohammed Sanoon, HC Case No 798/03, High Court of Ampara, HC Minutes 05.10.2004; Republic of Sri Lanka vs Gunewardene and others, HC Case No801/03, High Court of Ampaera, HC Minutes 05.10.2004; Republic of Sri Lanka vs Sanidu Lebe Mohammed Sanoon, HC Case No;848/04, HC Minutes 13.12.2005; Republic of Sri Lanka vs Fernando and others, HC Case N;849/04, High Court of Ampara, HC Minutes 25.07.2005; Republic of Sri Lanka vs Wijegunewardene and another, HC Case No; 464/05, High Court of Kalutara. HC Minutes 18.01.2006; Republic of Sri Lanka vs Udugama, HC Case No;843/05, High Court of Balapitiya, HC Minutes 24.07.2006; Republic of Sri Lanka vs Antony, HC Case No; 173/04, High Court of Chilaw, HC Minutes 28.11.2006; Republic of Sri Lanka vs Prasanna Hearth and others, HC Case No; 342/06, High Court of Polonnaruwa, HC Minutes 28.09.2006; Republic of Sri Lanka vs Ramyasiri and others, HC case No; 2854/06, High Court of Galle, HC Minutes 10.12.2007.

witness protection scheme, resulting in witnesses dropping out of protracted trials due to intimidation by the perpetrators, unsympathetic trial processes and even an argument that the harsh imposition of a minimum sentence of seven years has made judges reluctant to convict. However, the truth is that these arguments only illustrate the essential weakness of the system and, consequently, the failure of the State to remedy these lacunae and put into place a working and efficacious trial process.

The above reasoning goes to the argument sought to be made out in this paper that the failure of Sri Lanka's prosecutorial and legal processes cannot be limited to extraordinary crimes during times of emergency; rather, they manifest a pervasive problem with inadequate legal mechanisms that are in force in times of peace as well as in times of war, though obviously in a more aggravated manner.

# High Court acquittals in prosecutions relevant to enforced disappearances

Detailed analysis of judgments of Sri Lanka's High Courts relating to acquittals in prosecutions launched consequent to the findings of the 1994/1998 Disappearances Commissions comprises an important part of this chapter. As at 2004, the number of discharges and acquittals by the High Court stood at 123 and the number of convictions stood at 12, as disclosed in data submitted by the Government to the Committee against Torture. At that time, a total of 376 prosecutions had been launched in the High Court, of which 135 cases had been concluded. Given the difficulties of access to court records, more up to date information cannot be included. However, the total number of convictions and acquittals recorded reflects an extremely poor conviction rate, which can reasonably be assumed to be a continuing reality.

<sup>&</sup>lt;sup>38</sup> See United Nations Committee against Torture, Second Periodic Report, CAT/C/48/Add.2 06/08/2004, at paragraph s 63 and 64..
<sup>39</sup> ibid.

Given the overriding importance of these High Court prosecutions, analysis of a sample selection of the acquittals in these cases<sup>40</sup> illustrates the need for substantive changes to the law as it currently stands.

# 5.1 High Court Hambantota No. 94/99<sup>41</sup>

This was a case based on abduction and unlawful detention coupled with unlawful assembly and common object, with the requisite punishment being in terms of Section 140 of the Penal Code and where the defence on behalf of the accused was called for under Section 200 of the Code of Criminal Procedure Act.

The gist of the prosecution case was that on 28.04.1990 two or three persons had come to the victim's house and had an altercation with him in consequence of which the victim had run away. Immediately thereafter, police had arrived at the house and had given chase. Later, the victim was said to have been seen in a police jeep, the 2<sup>nd</sup> accused saying to the victim's sister (prosecution witness): "Problems of your brother are over – give the 7 day's alms giving." <sup>42</sup>

Three witnesses (all sisters of the victim) and the CID Inspector who conducted investigations in 1998 gave evidence. The witnesses never saw their brother (the victim) after the date of the incident.

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<sup>&</sup>lt;sup>10</sup>some of which have been pending in appeal against the acquittals before the Court of Criminal Appeal for the past several years.

<sup>&</sup>lt;sup>41</sup> HC Minutes 42/2004, per (as he then was) High Court Judge Sarath de Abrew <sup>42</sup> at page 4 of the judgment. The mention of the 7 day alms giving is a reference to a customary Buddhist ritualistic practice.

# 5.1.1 Summary of the evidence as recounted by Court regarding the identity of the accused

- i. That none of the witnesses (three sisters of the victim) had seen the two accused who came initially to the house, though the victim had run away when he realized it was the police.
- ii. That, one witness claimed to have identified the victim by his legs hanging out from the jeep at a subsequent stage, while the 2<sup>nd</sup> accused (who had made the statement about the 7 day's alms giving) and the 1<sup>st</sup> accused had both been seen in the jeep by two of the sisters (witnesses).
- iii. That the witnesses who claimed to have identified the accused (as being the abductors) saw them again only in the dock when giving evidence in the court and there had been no identification parade at any stage

# 5.1.2. Rejection of the case for the prosecution and the reasons found in the judgment resulting in acquittal

- Failure to establish identity of the abductors: Regarding the <u>nature of the</u> evidence as recounted at paragraph 5.1.3. (i) to (iii) above, the Court took the view that it could not rely on the evidence of the prosecution witnesses;
- ii. Time lag between the alleged incident and complaint to police: The alleged incident took place in April, 1990. The first complaint to the police (CID) in regard to the incident, as put before court, was in February, 1998. Accordingly, it was judicially opined that reliable evidence was not established (in effect) in regard to several details concerning the incident itself. In taking that view, the

Court followed legal precedent<sup>43</sup> wherein it had been held that, given the fact that normalcy prevailed in the country by 1991, it was not reliable to act on a complaint made in 1995 regarding an alleged incident of enforced disappearance in 1989. In Sumanasekara v AG,<sup>44</sup> it had, however, been stipulated that if a valid reason is given for the delay, this must be accepted. In the instant case, applying the judicial rationale in Sumanasekera rigidly, the High Court found that no valid reason had been given and consequently found against the complainant on that point.

- 5.1.3. Relevance of the findings of the Commissions of Inquiry appointed to inquire into involuntary removals and disappearances (between January 1988 and 1994)
  - i. The alleged incident in the case under consideration had taken place in April 1990, falling fairly and squarely within the mandate of the 1994/1998 Disappearance Commissions. The reason why such commissions had been appointed was precisely because there had not been a conducive atmosphere for any complaint to be made to the police or any state-linked authority, given the fact that the complaint would have been against the state or state's agencies. The 1994 Western, Southern and Sabaragamuwa Disappearances Commission had specifically noted this fact.
  - ii. Consequently, it is to be regretted that neither this aspect nor the fact that the first complaint and investigations ensuing thereupon, which had been launched in the wake of the findings and the recommendations of the said Commissions, had been placed by way of evidence before

44 1999, (3) SLR, 137

<sup>&</sup>lt;sup>43</sup>Jayawardene v the State CA No 98-100/97; 2000(3) SLR 192

Court.

- iii Would the Court have regarded the findings and the recommendations of the said Commission particularly the reason for the absence of a prompt first complaint as a valid reason for the delay in making the same? This question is pertinent in consideration of whether a material if not serious lapse on the part of the prosecution was manifest in not having led evidence in regard to the findings and recommendations of the said Commission of Inquiry.
- iv. It is to cater for such eventualities (including possible lapses such as articulated above) that it is recommended in this Opinion that a complaint made in regard to an alleged incident of enforced disappearances (or involuntary removals) to any Commission of Inquiry appointed under Act No. 10 of 1948 must be deemed to be a first information (or complaint) with the necessary amendments to the existing law, both to the Code of Criminal Procedure Act, No. 15 of 1979 (as amended) as well as to the Commissions of Inquiry Act, No. 10 of 1948.45
- v. This amendment of the law would then not only substantively cater for the requirements of a first information but also procedurally oblige the prosecution to lead the same in evidence. This would overcome the problem of "belated complaints" which the Court finds as an inhibiting factor in the acquittals of all the cases under consideration in this regard, as would be further seen.

<sup>&</sup>lt;sup>45</sup> This may indeed be a salutary amendment to the law, taking into account the socio-political context of enforced disappearances in Sri Lanka and considering also, the extensive findings of numerous Commissions of Inquiry into Enforced/Involuntary Disappearances.

The said inhibition is clearly reflected when the High Court holds thus:

- i. That assuming (the victim) was abducted, it has not been proved beyond a reasonable doubt that the accused had been identified and was among the members of the unlawful assembly.
- ii. That even assuming that the victim had been so abducted, it has not been proved beyond a reasonable doubt that it was done with the common object of detaining him.
- iii That assuming the victim had been abducted and thereafter detained unlawfully, there was no evidence forthcoming to establish the same, such as that he had been held at a police station or elsewhere.

# 5.1.4 Defective Charge

Apart from the above, the indictment being based on <u>Section 356</u> of the *Penal Code*, the Court holds that, "It is clear that the charge should have been <u>under Section 355</u> (kidnapping or abducting with intent to murder) and not under Section 356 (kidnapping or abducting with intent to secretly and wrongfully confine a person." This observation is occasioned by the fact that the abductors were in police uniform, thus (in the eyes of the Court) taking away the necessary elements of the crime of kidnapping/abduction to secretly/wrongfully confine. Yet, even if the position of the court is to be accepted, the law gives discretion to the trial judge to amend the indictment or the charges at any time before judgment is pronounced in terms of <u>Section 167(1)</u> of the *CCP Act* which reads as follows:

<sup>46</sup> at page 5 of the judgment

"Any court may alter any indictment or charge at any time before judgment is pronounced or, in the case of trials before the High Court by a jury, before the verdict of the jury is returned."

The words employed therein are that, "any court may ......" thus prima facie vesting discretion in the court itself to ex moro motu direct the indictment to be amended (which it is empowered to do so at any time before the judgment). The failure of the Court to do so in this instance is deplorable.

There is no doubt, however, that if the Attorney General (conducting prosecution) had made an application to amend the indictment<sup>47</sup> to bring the charge in line with the evidence, the Court would have been obliged to respond to the same, for otherwise, if the Court had refused such amendment, it would have amounted to wrongful exercise of judicial discretion. In the Krishanthi Kumaraswamy case looked at above, the authority of the Attorney General to amend the indictment after commencement of trial on the motion of the prosecuting counsel<sup>48</sup> was challenged as a ground of appeal on behalf of the accused appellants. This ground of appeal was dismissed by a Divisional Bench of the Supreme Court which stated that it was 'absurd' to assert that the prosecutor had not such power in the light of Section 167 and Section 160(3) of the CCP Act. <sup>49</sup>

It may therefore be observed that the Attorney General has been wanting in his public duty to move court appropriately in the circumstances of the case.

<sup>&</sup>lt;sup>47</sup> Section 160(3) of the CCP Act provides that the Attorney General has the power to substitute or include in the indictment any charge in respect of any offence which is disclosed in evidence.

<sup>&</sup>lt;sup>48</sup> To add the charge of rape to the indictment which was not on the indictment before the Chief Justice, on the basis of which a Trial-at-Bar was directed to be constituted.

<sup>&</sup>lt;sup>49</sup> At page 34 of the Supreme Court judgment, SCM 03.02.2004, discussed at segment 4.2.1. above.

#### 5.2. H.C/ Hambantota 14/200150

This was a prosecution based on Section 356 read with Section 32 (common intention) of the Penal Code.

The gist of the prosecution case was that on 28.12.1989 the victim (a young boy) had been removed by the police officers in a tractor. This evidence was given by the mother of the victim, who had been told about this enforced disappearance by another villager, (Nicholas), the evidence thus constituting hearsay. Nicholas gave evidence to the effect that he had seen the victim with two other boys in a tractor accompanied by two police officers attached to the police station in question. The tractor driver, who was also called as a witness, had not been able to identify those driven by him as being the said boys (including the victim) and had not been able to confirm whether the others were police officers or not. Both the mother of the victim (in her evidence) and witness Nicholas had deposed to the fact that they had repeatedly been denied access to the police station in question after the incident.

The accused made a dock statement denying the charges. In addition, he called the Registrar of the Magistrate's Court, through whom a statement made to the police – by a brother of the victim who was in the police service – to the effect that, the incident had been perpetrated by the Janatha Vimukthi Peramuna (JVP) was marked by the defence.

#### Analysis of relevant judicial reasoning

i. The complaint to the police by the mother of the victim being in 1998 (nine or ten years after the incident), the belatedness of the complaint was ruled against the prosecution. Apparently, as revealed from the judgment,

<sup>50</sup>HC Minutes 25.08.2003, per (as he then was) High Court judge Sarath de Abrew

the prosecution had failed to adduce evidence as to the reason for the belated complaint.

- ii. The mother's evidence was hearsay
- iii. Although access to the police station had been denied to both the victim's mother and Nicholas (witness) after the incident, a PC at the station had admitted that the abductee was in the station and driven away, the witness abusing them in filth, "that was all. There was no evidence of abduction by police."51
- iv. Although witness Nicholas maintained in his evidence that he had seen the victim and two other boys, together with six police officers (including the accused), being driven in a tractor to the police station in question, "there was no corroborative evidence of the witness's evidence that (victim) was seen in the tractor and was taken to the police station."52
- v. In any event, Nicholas's evidence being that the boys' faces had been covered when he "saw them," the Court posed the question, " How could he have seen them?" 53
- vi. Furthermore, it is asked in a good instance of judicial stubbornness to acknowledge the impunity with which atrocities were perpetrated during the period in question: "If the boys were forcibly abducted, would they have been so taken in an open truck for every one to see?" 54

Re: belatedness of the complaint to the police: neither reasons for the belatedness of the said complaint nor the intervention of the Commissions of Inquiry appointed to inquire into incidents and

<sup>51</sup> at page 5 of the judgment

<sup>52</sup> ihid

<sup>53</sup> at page 6 of the judgment

<sup>54</sup> ibid

their findings and recommendations and the purpose behind their appointments, had been placed (apparently) before court for consideration.

Re. lack of evidence of abduction for want of corroborative evidence: was there a case on the evidence at the trial for an amendment of the indictment/charge?

- The Court's rejection of the prosecution's case was based on two principal reasons, viz.
  - a. the belatedness of the first complaint to the police (CID) and;
  - lack of corroborative evidence in regard to the offence of abduction with intent to secretly and wrongfully confine a person (under Section 356 of the Penal Code),

The evidence led on behalf of the prosecution, if objectively construed, would suggest that the abductee was held in detention or confinement at the police station in question, as admitted by the PC at the gate of the station when the victim's mother (witness) and Nicholas (witness) had gone to the station in their quest to see the victim. Although the Court rejected the prosecution case based on abduction, there was no specific judicial view expressed in regard to the corpus being held in custody at the relevant police station. The Court of Appeal decision in *Leeda Violet's case*<sup>55</sup> which imposed state responsibility in respect of *habeas corpus* applications if the victim was found to have been disappeared while in state custody is relevant at this point.

<sup>55</sup>ie; Leeda Violet & Others v Vidanapathirana & Others, (1994) 3 Sri LR, 277 (habeas corpus) where the State was held liable if custody on the part of state officers is proved and the corpus is 'disappeared' thereafter even if the individual responsibility of state officers cannot be established.

The question of individual penal responsibility in that regard (as opposed to state responsibility in habeas corpus applications) is, of course, a different issue. The need to reaffirm criminal responsibility of the officer in charge of the relevant police station or the commanding officer in respect of a detention centre manned by the services is unequivocal. While the absence of the doctrine of command responsibility in the criminal law has precluded the direct application of this principle, as will be seen later on in this analysis, there have been some judicial efforts to bring this principle in through the existing provisions of the penal law. In the acquittals under examination, however, there appear to have been no judicial initiatives taken to impose criminal responsibility.

# 5.3. H.C /Hambantota /24/2002<sup>56</sup>

This was also another case based on <u>Section 356</u> read with <u>Section 32</u> of the *Penal Code*, the facts and circumstances of which are reminiscent of the preceding cases analysed in this segment.

The Court rejected the prosecution case on the following grounds:

i. The proof of identity of the accused was not established; father of the victim claimed to have seen the accused coming to their house in police uniform at around midnight on 6.10.1990 along with other unidentified persons and was able to identify the accused only after approaching the dock and stating that, "like him, but difficult to say in detail" 57 after also admitting that his eyesight was weak. However, the second witness (brother of the victim) unequivocally stated that the accused was among the abductors, stating that he had made the accused out by torch light and later came to know his name from villagers. Applying the standard of proof of beyond

<sup>\*</sup>HC Minutes 19.06.2003, per (as he then was ) High Court judge Sarath de Abrew 57 at page 5 of the judgment

reasonable doubt, the Court concluded that the identity of the accused had not been established; this conclusion was reached on the basis that, if the brother (witness) made out the accused by torch light but the father could not make that same identification and did not make a statement about being able to see by torchlight, the evidence of the father (witness) and the victim's brother (witness) were mutually contradictory. Further, even if the evidence of the brother is taken at face value, this amounts to uncorroborated testimony. The fact that (as led by the defence) the father of the victim had stated to the secretary of the local government body (*Pradeshiya Sabha*) that the abductors were unidentified persons when receiving government offered compensation was also used against the prosecution.

ii. Belatedness of complaints to police and deficiencies in showing custody at time of disappearance;

Complaint (statement) to the police where the identity of the accused had been categorically stated was made only seven years after the incident and therefore, being belated, was not reliable to act upon.

#### iii. Misconceived charge under Section 356

The Court also held that the evidence for the prosecution being that the accused had come in police uniform and abducted the victim, then a charge under Section 356 could not have been sustained and that the charge ought to have been based on Section 355. This reasoning is, however, subject to the critique as to why (as commented above in relation to the decision in HC Hambantota 94/99) the Court did not see fit to take upon itself, the authority to amend the indictment/charges as provided for by law.

iv. The Daily Information Book and Information Book on Disappearances.

In the sub inspector's evidence (called by the prosecution), the production of the Daily Information Book revealed that the accused had been on official surveillance duty in the town and the evidence of the Inspector of Police called by the defence revealed (by the production of the Information Book on Disappearances) that there was no mention therein regarding the name of the accused as an abductor.

The credibility to be attached to the "Daily Information Book" and the "Information Book on Disappearances" is, of course, marginal. Given the fact that the allegation was against the police, what reliance could one place on these documents when the prosecution's lament was that the police had refused to record a statement in the first instance, in or around the time of the incident when it was sought to be made? During normal times such information books would no doubt throw light on a disputed incident, where relating to a time, place or a person etc. But, could they be relied upon during abnormal times, when the label "Information Book on Disappearances" itself provides evidence of such abnormality, particularly when the allegation of disappearance is against the police itself?

### 5.4. H.C/ Galle/ 2073 59

This was yet another case based on unlawful custody at a police station and subsequent disappearance. In the process of acquitting the accused, an OIC of the Station in question, the judgment and reasoning follows the same lines of the judgments reflected upon

<sup>&</sup>lt;sup>58</sup>Curiously, one is familiar with the Grave Crimes Book, the Minor Crimes Book and the Information Book etc. but not an Information Book on Disappearances!
<sup>59</sup>HC Minutes 29.07.2004 per (as she then was) High Court Rohini Perera

earlier in this paper. The incident took place on 24<sup>th</sup> December, 1989, during what has been described as a period of insurrectionist terror.

Evidence led on behalf of the prosecution - The principal witness, mother of the abductee, who was a Registrar of marriages, births, and deaths, had stated in her evidence (as ascertainable from the judgment) that on account of the office held by her, the OIC who was responsible for the incident was known to her and that the victim had been abducted from the house of another person also known to her, She saw the victim held in custody at the police station and had even spoken to him while the latter was in confinement there.

#### 5.4.1 Belated complaint to the Police

Judicial reasoning thereon is extremely problematic. The Court observes that the witness had narrated the incident without "any contradiction" 60 but that if she knew the perpetrator well and the particular police station was familiar ground to her, there was no reason why she could not have complained to another officer against the OIC and why she should have procrastinated until 15th October 1994 - a delay of five years, although the witness had clearly said that the delay was due to the terror atmosphere that prevailed in the country. 61 However, the Court states that this reason is not acceptable since normalcy had returned to the country by the year 1991. 62

# 5.4.2. Failure to name the accused in the first complaint

Apart from that, the witnesses had not made any accusation against the accused in regard to the incident even in the said complaint

<sup>60</sup> at page 5 of the judgment

<sup>61</sup> ibid

<sup>62</sup> ibid

made after 5 years which, the Court opined, showed that the witness's evidence lacked consistency and was therefore unreliable. The evidence of the witness that she had explained this lapse on her part in the two subsequent complaints made to the police and CID in 1996 and 1998 respectively was held not to be substantiated from the said two subsequent complaints.

#### 5.4.3. Re. the abduction

The evidence led on behalf of the prosecution and the evidence of the accused was that on the relevant date, he had been at the station throughout the day and had not been involved in any cordon operations. Further, the defence took the position that it had only been suggested that the accused had left the station without recording a note in the outgoing book (which the accused had successfully met in cross-examination). Therefore, the Court concluded that the accused was a person who had no knowledge of the abduction.

# 5.4.4. Re. Unlawful detention and subsequent disappearance

The charges based on kidnapping with intent to confine (Section 356 of the Penal Code) and subsequent disappearance thereafter, (Section 356 of the Penal Code and as per judicial reasoning in Leeda Violet's case cited above) do not appear to have been substantively addressed by the Court. Witness Nihal, (whom the accused admitted as being a person who had been arrested and held in police custody in connection with a charge of robbery during the relevant period), giving evidence for the prosecution, stated that he had been in the cell at the police station with the victim. The victim's mother's evidence was that she had visited the victim at the police station and had spoken with him several times. The Court did not find fault with that evidence of either of those witnesses which therefore suggests that a charge of

unlawful detention had been established. However, this evidence was not judicially employed to establish criminal culpability on the part of the accused.

#### General Reflections on the Acquittals

In all the cases examined above, the case for the prosecution was rejected on the following broadly categorized lines:

- Lack of corroborative evidence in regard to the fact of the abduction, the witness's evidence constituting hearsay;
- ii. The first complaint against the accused being belated;
- iii. Consequently, the prosecution failing to prove its case beyond a reasonable doubt.

The philosophy and the theory behind a court being obliged to hold the scale even and balance the conflicting interests, is clear. On the one hand, the family members of the victim come to court as witnesses and articulate their grief that the accused had perpetrated the crime in question, which evidence is corroborated at least to the extent that the victim was seen at the police station in question, where the accused was on duty or was the officer in charge. On the other hand, if there was a doubt in any material aspect of the prosecution case, the defence was entitled to the advantage flowing from it on the strict standard of proof beyond reasonable doubt.

However, the foregoing aspects in the cases, as highlighted, indicate the judicial bypassing of the fact of custodial detention and show, consequently, the need for the statutory recognition of not only an offence based on enforced disappearance per se but also the incorporation of the concept of command responsibility in the criminal law. Apart from that, as in the cases analyzed, the High Court makes no mention of the work and the recommendations of the Commissions of Inquiry, at whose

initiative investigations into the alleged incident had been launched leading to the ultimate indictment.

There is no doubt that if these findings had been taken more fully into account, matters such as the mental trauma that a mother of a disappeared son may have been undergoing for years may have provided an explanation or reason for the belated complaint bringing the decision within *Sunamansekera's case* (above) and could well have changed the verdict in the prosecution's favour.

# High Court convictions in prosecutions relevant to enforced disappearances

# 6.1. High Court Kandy case No.1284/9963

The gist of the prosecution case was that the accused, a police constable attached to the police station in question along with unidentified persons, had abducted the victim on 30<sup>th</sup> December, 1988 from his house. A common scenario during those times, three of the abductors had been in uniform and the other two had been in civilian dress. The accused was not a person from the same village as the victim. This evidence had been given by the victim's cousin (S.K.), the only witness who had seen the alleged abduction. The father of the victim, being informed of the incident by (S.K.) had gone to the police station in question the following day, on which occasion he had been told by a sergeant attached to the said station that the witness could not be allowed to see his son but that his son will be produced in court the following day.

The witness had not been allowed to go past the gate on the next day when he had gone to the said station but had been told by a policeman that the victim had been taken to another named police station. In so far as the allegation of abduction was concerned,

<sup>&</sup>lt;sup>63</sup> CA Minutes 30.08.2000. per (as he then was ) High Court Judge Samith de Silva. The decision was affirmed in appeal by the Court of Appeal in CA No 83/2000, CA Minutes 24.11.2006 and has presently been appealed from to the Supreme Court.

another person known to the victim's father had deposed to the fact that he too was a witness to the said abduction and that the accused had been among the abductors. The evidence of another witness, an A.S.P. who headed the investigations commencing in January, 1996, established the fact that the accused was an officer attached to the said police station at the relevant time, that the victim had been taken to the said police station though there was no trace of the victim being held in detention there, as revealed in the police books. Yet another witness called by the prosecution was allowed by the court to be treated as an adverse witness.

Examination of this judgment reveals the different attitude taken by this trial judge in relation to the very same issues of belated complaint and ostensibly inconsistent testimony that were utilized by other trial judges to acquit the accused in the cases examined earlier. In this instance, however, the conviction was entered despite these purported obstacles and on the basis that the case for the prosecution has been established beyond a reasonable doubt.

In illustration, the oral evidence led by the prosecution revealed that the first ever complaint made to the police had been after a lapse of four years, which complaint itself was not produced at the trial. Thus on record, the first information, as statutorily contemplated by virtue of Section 146(1) of the Code of Criminal Procedure Act (CCP Act) (as amended), was the information lodged in the Criminal Investigation Department (CID) as a result of the recommendations of the 1994 Disappearances Commission of Inquiry, which was after a lapse of eight years. The prosecution witness (the victim's father) had deposed to the fact that he had sought to make a complaint at the police station but that he had not been allowed to do so, though the exact reason as to why such a complaint could not be made was not stated. Thus the prosecution case was strikingly similar to other cases that had resulted in acquittals as examined previously. However, these procedural infirmities were not regarded by the High Court in this case as weighing in the balance against the prosecution case,

given the extraordinary times in which the alleged abduction (enforced disappearance) had occurred.

The trial judge in this case specifically adverts to the fact that the victim's father had stated that he had given evidence before the 1994 Central, North Western, North Central and Uva Disappearances Commission. The approach adopted by the Court is commendatory. However, given the fact that the said approach stands in contrast to the cases discussed hereinbefore (all of which had resulted in acquittals predominantly on the basis of a purported belated application), it is clear that the relevance afforded to such commission inquiries should not be left to depend on sheer judicial discretion alone. Hence the legal reforms suggested in this Opinion may go a long way in addressing this problem.

Similarly, minor inconsistencies in the evidence being adduced by witnesses for the prosecution were held not to detract from the overall credibility of the prosecution case. Some of these inconsistencies were that the witness's father, in his evidence, had stated that he had gone to the particular police station at 2.30 p.m. on the very day on which he had been told by the witness's cousin (S.K.) that his son had been abducted (involuntarily removed) between 12 noon and 1 p.m. only to state later (apparently in cross-examination) that it had been 5.00 p.m.

Other aspects that were taken into consideration in the conviction were:

#### (i) The relevance of the dock statement

The accused in his dock statement had stated that he had gone on a cordon and search operation on the day in question on the orders of the OIC and that he may have taken the victim into custody and detained him in a cell at the police station. The Court consequently held that, if so, then the police Information Book, should have

reported the same, which was not produced at the trial. It was then pointed out that, if on the accuser's own admission the abductee may have been taken into custody and detained subsequently in the police cell, the accused was obliged to explain to the court as to the whereabouts of the abductee thereafter, in which regard the accused had not offered an explanation. The Court posed the question thus:

"if he (the accused) had taken the victim into custody, it was his obligation to produce him in court which (on the evidence before court) he had failed to do"

Consequently, the accused is found to have been at fault in which regard, judicial precedents are relied upon.<sup>64</sup>

ii) As noted earlier, the Court adverted to the fact that the defence version was not reflected in the Police Information Book (which as earlier noted, was in any event not produced by the defence). The victim's father's (prosecution witness) evidence that the accused had informed him (when he had visited the police station) that, "Look here for the last time, you will not see him again," is unequivocally accepted. The Court held that, the initial abduction being established (on the evidential aspects as recounted above), given the fact that the victim had not been found thereafter, was sufficient to sustain the charge based on section 356.

The High Court order was upheld in appeal by the Court of Appeal. Importantly, the defence of superior orders reiterated at the appellate stage was rejected. Thus:

65 at page 9 of the judgment

<sup>&</sup>lt;sup>64</sup>viz. the case of King v Peiris Appuhamy (43 NLR 412) and Premathilaka v the Republic of Sri Lanka (75 NLR 506)

"That cannot be held as a valid defence. If the policeman breaks the law even under the orders of his superiors, he has to suffer the consequences. Even if (the) accused (acted, sic) on the orders of a superior, the burden would be on him to prove it on a balance of probability." 66

# 6.2 High Court Galle No. 1947<sup>67</sup>

The gist of the prosecution case was that the first six defendants (all police officers) were indicted under Section 356 read with Section 32 of the Penal Code and the seventh defendant, the OIC of the police station in question was charged under Section 359 of the said Code (viz; wrongfully concealing or keeping in confinement, a kidnapped or abducted person). They were alleged to have abducted three persons and later caused their disappearance. The interesting aspect of this case is the conviction of the officer in charge (OIC) of the relevant police station for having allowed unlawful detention of the corpus at his police station.

Non-identification of specific police personnel as abductors - Four of the prosecution witnesses stated that officers attached to the police station in question had abducted the three victims. Two of the witnesses had identified two of the accused as being among the persons who had abducted one of the victims and another had identified the first five of the accused as being among those who had abducted yet another of the victims. Three of the said witnesses had known the said abductors as the officers attached to the police station for over five years. However, this evidence was rejected upon the defence marking the 1st accused's personnel file, through which it was established that he had joined the police service itself only six months prior to the date of the incident and had been

<sup>66</sup> at page 5 of the Appeal Court judgment

<sup>&</sup>lt;sup>67</sup> CA Minutes 01.08.2003. per the late High Court Judge Sarath Ambepitiya. The judgment is presently under appeal.

attached to the police station in question just ten days prior to the incident.

In so far as the second accused was concerned, the Court noted discrepancies in relation to the attire that he dressed in, leading to doubts as to his involvement in the abduction in issue. In regard to the fifth accused, though the mother of one of the victims (witness) had stated in examination in chief that the said accused had been among the abductors, she had changed her stance in cross-examination. Evidence was also led by the defence to establish that, on the relevant date, the said accused had been involved in activities held elsewhere. On the witness's admission that her son had gone to some other town and thereafter disappeared, it was determined that the charges against the third and fourth accused were also not established. Consequently, the Court held that the identities of the five accused had not been established. Further, given the infirmities of the prosecution witness's evidence, the sixth accused was also exculpated.

Failure to conduct proper identification parade - The Court expressed regret at the fact that no proper identification parade had been conducted by the police officers who had carried out investigations into the incident in question.

What is however interesting in this decision is the conviction of the 7<sup>th</sup> accused - OIC of the relevant police station - on the basis that, being aware of abductions of the three victims, he had unlawfully detained them at the police station in question. The principle adopted by the judge in concluding that the said charge against the 7<sup>th</sup> accused had been established, may be summarized as follows:

i. The inability to accept the prosecution witnesses' evidence was confined to the weakness in relation to establishing the identities of the six accused and not because they were untruthful witnesses; whatever may have been the earlier law, the present legal position is that, even if the Court

cannot rely on the evidence of a witness on a given aspect, it will not preclude the Court from placing reliance on some other aspect of the evidence given by some witnesses;

ii. Given the fact that the belatedness of the police complaint was not a decisive factor and given that police investigations into the incident in question (which occurred in 1990) had taken place only in 1997, it was not inconceivable that there would have been confusion in seeking to establish identities of alleged perpetrators;

The evidence of the prosecution witnesses who deposed to the fact that they had seen the abductees being held in detention at the police station in question (one of the witnesses, in fact, giving detailed evidence) was fully supported by a totally independent witness, namely, a member of the local government body (*Pradeshiya Sabha*). The local government member stated in his evidence that the 7th accused (OIC) had informed him when he visited the police station at the request of the wife of one of the abductees, that the "detainees" would allowed to return home after recording some statements.

On the subsequent visit made by this witness, in the course of which he had not seen "the detainees", the 7th accused had informed him that they had been released on bail, in regard to which the 7th accused failed to adduce any evidence in a bid to substantiate the same. It was held that the evidence of unlawful detention remained unassailed. Moreover, the defence had been remiss on its part in that the tenor of the evidence led had been on the aspect of abduction and not (materially) on the allegation of unlawful detention, except to undermine the evidence of one of the prosecution witnesses (himself a detainee) on some previous occasion, who had deposed to the fact that he had seen the victims being detained in a shack at the police station in question.

Consequently, the Court rejected the defence contention and

- The victims had been unlawfully detained at the police station;
- The victims could not have been so detained without the knowledge of the accused who was the O.I.C of the said police station;
- If the victims had been so detained unlawfully, it must be concluded that they had been unlawfully abducted;
- 4. Accordingly the case against the 7th accused, based on Section 359 (wrongfully concealing or keeping in confinement, a kidnapped or abducted person) read with Section 356 of the Penal Code, was proved beyond reasonable doubt

#### Three significant features surface from the judgment:

- First, the acquittal of the six policemen allegedly named as the abductors was on the account of the paucities of the prosecution evidence in regard to the identity of the alleged abductors and not as a result of the problem of belated complaints which had loomed so large in the cases reflected upon previously that had resulted in acquittals ad nauseum;
- 2. Secondly, although it would not be possible to act upon an aspect of a witness's evidence in relation to a charge on the strict proof of beyond reasonable doubt in a criminal case (viz. abduction based on Section 356 read with Section 32 of the Penal Code). that would not preclude the Court from accepting the evidence of the same witness on another aspect in the overall context of the case (viz. unlawful detention based on section 359);

3. Thirdly, such evidence on another aspect, if accepted as credible, would in effect ground a *prima facie* case which, if the defence failed to counter by acceptable evidence, would stand established.

This judgment is of extreme important in regard to the indirect manner in which it brings in the concept of responsibility applicable to a superior officer, where he keeps a person in wrongful confinement with knowledge that the person has been abducted or kidnapped.

# Inadequate Sentences and Problematic Sentencing Policy

A further relevant concern relates to the inadequacy of the sentence imposed in the convictions imposed for prosecutions for grave human rights violations. In regard to the convictions imposed on the accused in the two High Court cases discussed immediately above, the sentences were five years<sup>68</sup> and seven years rigorous imprisonment<sup>69</sup> respectively.

#### 7. Conclusion

This chapter stresses the point that the failure of legal/judicial/ prosecutorial processes has been evidenced not only in relation to extraordinary crimes committed when emergency law was in force but also in relation to the normal maintenance of law and order. For example, the often insurmountable difficulties that victims of torture experience in securing justice during the periods when there was no conflict, have much in common with the trauma of those who had been involuntarily disappeared during times of internal conflict. Understanding the comprehensive and continuing failure of legal and prosecutorial policy in both contexts

<sup>&</sup>lt;sup>68</sup>High Court Kandy case No.1284/99; the accused was also imposed a fine of Rs 2500/= and in default, six months imprisonment was imposed.

<sup>&</sup>lt;sup>69</sup> HC (Galle) 1947; the accused was found guilty on three counts and a sentence of seven years was imposed on each count, the period to run concurrently.

is fundamental in trying to secure justice, truth seeking, reparations, dignity for victims, reform and deterrence in a manner that goes beyond isolated legal triumphs.

In regard to specific constitutional reform, there is no doubt that the right to life and the prohibition against extra judicial killings/enforced disappearance should be reflected in the constitutional document. Currently, as discussed in this study, the Constitution does not include the right to life as a specific fundamental right, though in some isolated and limited cases, the Supreme Court has brought in an implied right to life. Sri Lanka should be urged to ratify the Convention against Enforced Disappearances as well as the Optional Protocol to the Convention Against Torture and should be further urged to give domestic effect to the ratification of international conventions and their supervisory mechanisms, particularly the individual communication procedures in the context of the recent Singarasa judgment of the Supreme Court.

The analysis has clearly set out the need for a specific <u>crime</u> of disappearances, incorporating *inter alia* the doctrine of command responsibility and the impermissibility of the defence of superior orders. It has called for consequential amendments to the criminal procedure laws in order that victims of grave human rights violations who justifiably delay in making the first information to the police are not penalised in that regard. Importantly, the full scope of liability for prosecution should apply in these cases and statutes of limitations should not apply to the offence of enforced disappearances. Immediate enactment of a witness protection law that conforms to international standards is a must.

Changes to the law would, however, be to no avail if there is no state will to effectively prosecute and punish perpetrators of grave human rights violations. Unfortunately, we see no such intention manifested. Public agitation in this regard is therefore imperative if we are to return to the concept of <u>legal</u> accountability for rights violations which should surely be the foremost imperative of our prosecutorial/judicial systems.

# INTERNAL DISPLACEMENT AND HUMANITARIAN CONCERNS: HUMAN RIGHTS IN THE CONTEXT OF THE CONFLICT

อัน เอสุดอนุกระทั่ง ค่า ที่สมมาร์สถามทุกขนาดของสมมารถทำใหม่ กระทำ โดยมีที่ ซึ่

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#### Introduction:

The human rights framework on internally displaced persons takes into account multiple causes as well as multiple expressions of displacement within the borders of any nation state that is experiencing a conflict or a natural disaster, or is engaged in infrastructure development that calls for the relocation of populations. The Guiding Principles on Internal Displacement were created in 1998 as an initiative designed to create a framework of protection that would apply to all internally displaced persons (IDPs) in a situation in which national legal frameworks were proving to be grossly inadequate to deal with the problems of displacement that were confronting states in ever increasing number. Since then the Guiding Principles have been applied to many diverse situations of displacement including in situations of conflict and of natural disaster, focusing on protecting the rights of IDPs, in particular their right not to have their freedom curtailed due to displacement and their right to participate in decision-making regarding their future.

Executive Director INFORM Human Rights Documentation Centre

A focus on the linkage between human rights and humanitarian issues is another aspect of the contemporary human rights agenda that is increasingly emerging in all countries where there is an ongoing conflict. Traditionally there is a difference in the obligations of the state under human rights and humanitarian law, as well as differences in conceptualizing the parameters of 'protection'. Modern conflicts, whether they be internal or international, tend to generate crises in human rights protection as well as in humanitarian protection concerns that create a growing interaction between the two arenas. This creates its own particular nexus for dealing with issues of justice and protection from human rights and humanitarian perspectives in a conflict situation. In Sri Lanka, too, the current conflict has seen the narrowing of gaps between human rights defenders and humanitarian actors, who unite in coping with the erosion of democratic freedoms and norms in the context of the conflict as well as in responding to the needs of communities of civilians affected by the conflict.

#### The Sri Lankan scenario: 2007

This report covers the year 2007, a period of Sri Lankan history which saw an unprecedented increase in the conflict in the North and East of the island, with a range of violations of internationally accepted human rights and humanitarian norms and standards. Inevitably the conflict generated the largest numbers of internally displaced persons. In addition, there was displacement because of the construction of the Southern Expressway in the southern parts of the island, and small numbers of persons who were temporarily displaced due to flooding in several districts in the central parts of the island. However, the figures of development-related and disaster-related displacement in 2007 are small to the point of being insignificant when compared to the large number of persons displaced by the conflict, especially in the east of the island. The situation of internal displacement was made more complex by the existence of communities who were displaced by earlier fighting,

by internally displaced persons (IDPs) displaced by the tsunami of 2004 and by IDPs who remain unable to return to their homes because their homes and lands remain inaccessible due to security considerations.

The intensification of the conflict between the government of Sri Lanka and the Liberation Tigers of Tamil Eelam (LTTE) in 2007 made the Ceasefire Agreement (CFA) of 2002 untenable and rendered the conditions of life of the people living in the north and east of the island intolerable by any standard. The civilian population of the areas affected by the conflict found themselves caught in between the warring parties and uncertainty, fear and tension became a part of their daily lives.

No initiatives for a negotiated resolution of the conflict in Sri Lanka were a part of the dominant political discourse at any level and within any political party or community. The All Party Representatives Committee which was supposed to come up with a consensus document on a political solution to the ethnic conflict limited its discussions to issues of maximum devolution under the 13th Amendment to the Constitution, and sat without the participation of key political actors including the main Sinhala opposition party the UNP, the main Tamil political party in Parliament, the TNA (Tamil National Alliance) and the JVP (Janatha Vimukthi Peramuna) another key southern political actor.

As the conflict intensified in 2007, a split occurred within the breakaway group from the LTTE, the TMVP (Thamil Makkal Viduthalai Pulihal) with tensions emerging between the leader Karuna and his deputy Pillayan. This created further complications for the Tamil civilians living in the East since it added another dimension to the militarization of their communities as well as heightened the climate of fear.

This environment resulted in the ethnicization of the humanitarian crisis as well as the ethnicization of the delivery of

relief and aid to affected communities, with disastrous consequences for those affected and displaced by the conflict. While there is no doubt that the government of Sri Lanka has faced serious threats to its security due to the actions of the LTTE, it has not paid sufficient attention to its obligations under international humanitarian law to protect civilians caught in the conflict. Suspicion that every Tamil affected by the conflict must necessarily be an LTTE sympathiser or supporter has coloured delivery of relief by government authorities while all those who have tried to defend the rights of this group of civilians or who have tried to deliver relief and assistance have been vilified as LTTE supporters and sympathizers. A study by Tufts University commented that 'Local political interests relating to the prosecution of the war between the LTTE and the GOSL were found to inform popular perceptions of the relationship between terrorism and international humanitarian involvement'1. The systematic reiteration of this linkage between humanitarian assistance and terrorism by certain sections of the media and by high-level government officials and politicians of the ruling coalition (the United People's Freedom Alliance - UPFA) has endangered the lives of aid workers and hampered effective delivery of assistance to people who need it the most.

The climate of impunity within which widespread abductions, including of children, disappearances and extra-judicial executions in the North and East have continued to occur throughout 2007 has heightened the climate of fear and terror that prevails in these areas.

The office of the National Human Rights Commission in Jaffna reported 87 youths either abducted or disappeared in the first 69 days of 2007, including 37 in January, 35 in February and 15 in the first ten days in March in the peninsula alone. On April 20, 2007, the ICRC said 58 abductions had been reported to it in the 4 weeks from March 22 onwards. In the week of June 11-17, the

<sup>&</sup>lt;sup>1</sup> Sri Lanka Country Study of the Humanitarian Agenda 2015: Feinstein International Centre, Tufts University; Oct 2007

Sri Lanka Monitoring Mission<sup>2</sup> reported 34 abductions in the East alone, 17 in Batticaloa, 14 in Amparai and 3 in Trincomalee. Since these reports only focus on the numbers that are reported to the Police, to the Human Rights Commission, to the Civil Monitoring Committee and other institutions, it is estimated that the real figure exceeds these numbers. In Colombo there have been several instances in which businessmen have been kidnapped and released after payment of ransom, and no complaint is ever filed regarding this incident by the businessman or his family. On March 10, UNICEF3 said that their records showed a total of 6,241 children reported as abducted as of January 2007. Of these, there are 1879 abducted children still with their captors, with the LTTE having 1710 and the TMVP holding 169. In July 2007, the Mahanama Tilakaratna Commission of Inquiry into abductions, disappearances and killings from Jan 01, 2006 to February 25, 2007 found that police were in a 'deep slumber' and called for tough action against lethargy in the Police force. The ICRC on September 4 reported 34 abductions in 3 weeks in August 2007, and the SLMM report of September 20 noted an increase in number of assassinations, abductions and disappearances in Jaffna.

In this environment, as the conflict intensified, first in the East and then in the North, literally hundreds and thousands of civilians fled their homes and villages in search of safety and refuge in 2007. Most of them moved to areas perceived to be 'safe' within their own district or in other districts, while a substantial number also fled to South India. While the conditions of flight exposed displaced communities to danger, the conditions they encountered in the areas which they relocated to also fell far short of acceptable standards in terms of minimum humanitarian requirements. The provision of adequate accommodation for the IDPs remained an issue, with many school buildings being occupied by IDPs, creating a crisis in the education system as more schools were closed and

<sup>&</sup>lt;sup>2</sup>The Scandinavian mission set up to monitor the implementation of the Ceasefire Agreement

<sup>&</sup>lt;sup>3</sup> As the lead agency of the Task Force on Monitoring and Reporting under Security Council Resolution 1612 on Children and Armed Conflict

others had to run double sessions each day.

The increased hostilities and the general climate of fear and insecurity has not only resulted in displacement but has also affected all communities living in the North and East and surrounding areas. Restrictions imposed by the security forces on movement of people and transport of essential items including food, drugs, fertilizer, fuel and vehicle spare parts have seriously affected livelihoods such as fishing and farming, which are the primary forms of employment of the majority of the people in the conflict-affected areas. Scarcity of goods and lack of access to markets combine to create an economic crisis throughout the North and East, and the steep rises in the cost of living have led to an increase in poverty and malnutrition in these areas. The closure of main roads such as the A-9 (from Colombo to Jaffna) and other subsidiary roads that give access to LTTE controlled territory in the Northern Province areas have gravely affected the lives of people living there causing both physical and psycho-social harm.

As the conflict continued throughout the year under consideration, the processes of displacement were also continuous, and often cyclical, with groups of people moving further away from the fighting as the fighting progressed. The capture of LTTE-controlled areas of the East including Vakarai and Batticaloa West by the state security forces led to a cycle of resettlement in some parts of the Eastern province in 2007. Concerns were raised by humanitarian and civil society organizations together, regarding the voluntary nature of this resettlement, and led to reconsideration of some practices.

The humanitarian situation generated by this level of large-scale displacement assumed crisis proportions and led to a great deal of concern within and outside the country. The UN initiated a Common Humanitarian Action Plan (CHAP) Appeal for Sri Lanka in 2007. Sir John Holmes, Coordinator of UN Emergency Relief and Under Secretary-General for Humanitarian Affairs, visited Sri Lanka from 6 to 9 August on an official visit including

to conflict-affected areas of the island. The response of the government to some comments attributed to Sir Holmes at the end of his visit regarding the safety of humanitarian workers in Sri Lanka caused a furore within the country, with senior members of the government accusing him of being an LTTE sympathizer. Amidst allegations of an 'international conspiracy' against the government of Sri Lanka, UN Secretary General Ban Ki Moon affirmed the UN's support for the work of Sir Holmes and called the comments calling him a 'terrorist' unwarranted and unacceptable. Mr. Moon called on the government to be more responsive to comments made in the best interests of a country, and of its people.

The resistance to international scrutiny of the impact of the conflict on the civilian population of the north and east and to the facilitation of any process for peace by agencies outside Sri Lanka was reflected in mainstream Sinhala political debates. Throughout 2007, there were charges of 'international interference' and 'partiality to the LTTE' coming from both the extremist Patriotic National Movement (PNM) and by government spokesman Keheliya Rambukwella. In addition, at a meeting held to commemorate the adoption of the 1977 Additional Protocols to the Geneva Conventions, organized by the ICRC in Colombo, Deputy Solicitor General Shavindra Fernando went on record as saying that 'Sri Lanka is often bullied into signing and ratifying international Conventions' confirming the government's attitude that it could renounce its obligations under international human rights treaties that it had signed and ratified with impunity.

## Facts and Figures regarding Internally Displaced Persons in Sri Lanka in 2007:

Walter Kalin, Representative of the UN Secretary General on IDPs, visited Sri Lanka from the 14th to the 21st of December 2007.

In his report<sup>4</sup> he refers to a government estimate of 577,000 IDPs in Sri Lanka at the time. The escalation of the conflict in mid 2006 had created 308,000 new IDPs, while 312,000 were recorded as displaced by the conflict in the period before the CFA of 2002. There had been several processes of resettlement of IDPs in 2007, which led to a fluctuation in the figures. Kalin's statement that 'Displacement in Sri Lanka is characterized by its fluidity and unpredictability' bears witness to the complexity of the issue.

In April 2007, the Internal Displacement Monitoring Centre of the Norwegian Refugee Council had estimated 301,000 persons displaced because of the new round of fighting between the LTTE and the government forces since March 2007. By September 2007, the IDMC estimated that 101,000 of these IDPs had been resettled and had returned to their homes and villages. In the East, 3000 remained in transitional shelter awaiting relocation. In August 2007, the International Organization of Migration (IOM) reported approximately 11,000 tsunami-displaced persons still awaiting resettlement. These were the persons who had not OWNED homes or properties that had been destroyed by the tsunami, and had therefore not been entitled to receive the replacement housing and land allocations assigned by the government.<sup>5</sup>

The figures of displacement in Sri Lanka for 2007 are not absolutely accurate because of the range of problems relating to registration of IDPs. While both the state and international agencies charged with providing assistance and aid to displaced communities have various processes of registration of recipients of relief packages, there are many IDPs who slip through the cracks in the system, some for example because they have opted to live

<sup>&</sup>lt;sup>4</sup> Report of the Representative of the Secretary General on the Human Rights of Internally Displaced persons, Walter Kalin: Mission to Sri Lanka: UN doc. A/HRC/8/6/Add.4, May 2008

<sup>&</sup>lt;sup>5</sup> Civilians in the way of Conflict: Displaced people in Sri Lanka: 26 September 2007: IDMC; updated country profile available online at <a href="https://www.internal-displacement.org">www.internal-displacement.org</a>.

with family members or to rent out their own homes in the places of temporary relocation. Also missing in the official figures are those who seek shelter in public buildings such as schools and places of worship during the night due to their sense of fear and who return to their homes during the daytime. This specific group, known as 'night time IDPs' is not counted as displaced, and there is no arena in which the problems they face due to their peculiar form of displacement can be addressed. In addition, in some cases, the circumstances of displacement led to separation of families.

In some studies on the situation of IDPs, such as one done by Bhavani Fonseka of the Centre for Policy Alternatives<sup>6</sup>, we can see that there are different levels of understanding regarding the identification of a person as an IDP which also have an impact on the processes of enumeration and registration. In some cases, the IDP herself may not wish to refer to herself as a displaced person, due to issues of dignity, or due to security concerns. Some long-term IDPs who have been absorbed into host communities sometimes resist classification as IDPs and instead affirm their belonging to the place of relocation and their desire to remain there. This is particularly so of Muslim and Sinhala IDPs.

The figures of displacement in Sri Lanka also include approximately 60,000 Muslims who were expelled from the Jaffna peninsula and other parts of the north by the LTTE in 1990 and who have been living as IDPs in and around Puttalam in the southwestern part of Sri Lanka in 140 welfare centres and 60 relocations sites for the past 18 years. The numbers of Sri Lankan Tamils seeking refuge in South India have also increased as a result of the intensification of the conflict, in spite of the fact that the trip is extremely hazardous and illegal. According to figures given by the UN High Commissioner for Refugees (UNHCR) as at

<sup>&</sup>lt;sup>6</sup> Bhavani Fonseka, "A Profile on Internally Displaced Persons Living with Host Families", at www.cpalanka.org

<sup>&</sup>lt;sup>7</sup> Hasbullah, S.H. 2001. Muslim Refugees: The forgotten people in Sri Lanka's ethnic conflict. Noraicholai: Research and Action Forum for Social Development.

November 30 2007, there were 131,469 Sri Lankan refugees in Southern India. Of them, 111,269 had been there before 2002.

In his report to the UN Human Rights Council in May 2008, Walter Kaelin focused his attention on 6 communities of IDPs in Sri Lanka:

- 1. The IDPs in the Eastern Province (Trincomalee and Batticaloa Districts) who were displaced between April 2006 and April 2007;
- The IDPs from the East and North who were unable to return to their homes and lands because of the declaration of those areas as High Security Zones, because the de-mining was not complete or because their homes and land were occupied by the security forces;
- 3. The newly displaced in Mannar and other parts of the Northern Province:
- 4. The civilian population trapped by the conflict within the Vanni in the Northern Province and in imminent danger of being displaced;
- 5. The IDPs who are victims of protracted displacement, for example, the 60,000 Muslims in Puttlam;
- 6. The IDPs who were displaced by natural disasters including the tsunami.

With regard to the approximately 60,000 northern Muslims displaced from Jaffna and Mannar in 1990, in 2007 the World Bank approved a 32 million dollar housing project for 7,500 houses. While only a selected 40% will get support for housing, the project would also provide infrastructure and water systems that would also benefit host communities as a measure to prevent tensions from crupting between the IDP and host communities.

# Chronology of events related to displacement and resettlement in 2007

2007 began with aerial bombing of the LTTE controlled areas in Padahuththarai in Iluppaikadavai GS area, Mannar which resulted in the deaths of 15 persons, 7 of them below the age of 9.8 This was a small community of 46 fisher families who had been displaced in 1995 from Navanturai and other coastal villages in Jaffna. UN Assistant Secretary-General for Humanitarian Affairs Margareta Wahlström, in a statement issued on January 3, said the aerial bombardment was a "source of deepest concern."

On January 8, the UN stated that according to Government estimates, 15,000 people were isolated without access to food or basic supplies in Vakarai since the last relief delivery on November 29, 2006. The majority of them were housed in and around the settlements of Kadiraveli, Paalchenai, Vammivedduwan, Kandalady and Vakarai. On January 18th, shells fell on the Vakarai hospital around which at least 4000 people were gathered and precipitated the last outflow of civilians from Vakarai to the Kajuwatta army camp. By January 21 or so, there were no more civilians left in Vakarai and there were at least 70,000 IDPs in Batticaloa.

By early February 2007, the military offensive against the LTTE in areas of Batticaloa West was advancing and over 10,000 people had been displaced from their homes in LTTE-controlled areas of Kiran, Chenkalady, Vavunativu, Kokkadicholai, Vellaveli, Karaidyanaru and Toppigala.

As the newly displaced from Batticaloa West began to move into Batticaloa East, the government speeded up the resettlement of over 44,000 IDPs from welfare centres in Batticaloa to Vakarai and locations in Trincomalee East. This process was overseen by the security forces and local government officials. The process was carried out in a manner that did not adequately respect international humanitarian guidelines that have been created especially for situations of resettlement. Issues of participatory decision-making, consultation and informed consent were not the focus of the resettlement process; the 'go and see' visits that are an essential part of such processes of resettlement never took place.

http://www.tamilnation.org/indictment/shadow\_war/070102padahathurai.htm.

There were no guarantees that the essential infrastructure such as drinking water, electricity and telecommunication were available, or that de-mining had been completed at least in the areas into which people were being asked to return. The initial stages of the resettlement process took place under the supervision of the military, with little participation by international or local humanitarian agencies and minimal participation by the District administration. Denial of access to Vakarai beyond the Mankerny checkpoint to all except the military and a restricted number of government vehicles during the process of return and for the first week or so after resettlement made the situation of the displaced communities even more difficult. When the first bus loads of resettled persons going to Trincomalee East turned up at a transitional shelter site in Kiliveddy, on March 12, there was no proper reception arranged for them and there were reports that their first night was spent under trees.

The Ministry of Reconstruction and Rehabilitation cited figures of 34,927 families consisting of 127,134 persons in 88 Welfare Centres in Batticaloa by end of March 2007. These IDPs were from Vavunativu, Karadiyanaru and Tharavikulam areas as well as from Kiran and Chenkalady. The disregard for the sensitivities of the IDPs on the part of the authorities was once more demonstrated by the allocation of over 500 persons from Vavunativu division who were lodged at a temporary camp at Kokuvil in Sathurukondan which was located on the site of an old cemetery.

UNHCR figures for the week ending April 19 reported 301,879 IDPs island wide, with 142,310 in Batticaloa, 46,179 in Kilinochchi, 30,152 in Mullaitivu, 14,896 in Mannar, 7,995 in Vavuniya, and 7,556in Trincomalee.

In Mannar, over 8,000 IDPs sought refuge in the grounds surrounding the Church of Our Lady of Madhu as they fled fighting between the army and the LTTE.

By May 2007, over 5000 IDPs who fled their homes due to the

military offensive carried out by the Sri Lanka military in Trincomalee East in August 2006 were still living in 26 welfare centres in Trincomalee in poor conditions. The delay in resettlement was due to the fact that the majority of Tamil IDPs remained reluctant to return to their original homes because of the prevailing situation of insecurity. Most Muslims who were displaced from their homes in Mutur West in July/August 2006 had however already returned to their homes.

On July 12, the government formally announced the 'capture' of the Thoppigala area in Batticaloa West and the 'expulsion' of the LTTE from the East. This 'victory' was celebrated on July 19 in Colombo and elsewhere. A new 'development campaign' called the Nagenahira Navodaya (the new Dawn of the East) was launched and many pledges were made as to the restoration of 'normalcy' to the eastern region. Quite soon afterwards the government began a programme of resettling IDPs in Batticaloa West, starting off in the Porativu pattu area. However, the continued presence of the army and the STF in the resettlement areas, fulfilling the roles that would normally have been played by officials of the civilian administration, as well as the restriction of access to civil society groups and NGOs to resettled communities, presented a major challenge to the rhetoric of 'normalization'. In addition, tensions between Tamil armed groups associated with the government in the East9 as well as the growth of armed militancy within the Muslim community10 added to the sense of insecurity. In many resettlement sites, issues of security and safety continued to surface, with several abductions and killings being reported from resettlement communities in Batticaloa West.11

11www.tamilnation.org/conflictresolution/Tamileelam/cjpd/ Seminar Humanitarian Action/Sunila Abeysekera.

Report of the fact finding mission to Batticaloa to assess the resettlement process in Vellaveli (Porathivu Pattu D.S. Division) in Batticaloa West carried out by a team from the Centre for Policy Alternatives (CPA), INFORM Human Rights Documentation Centre, the International Movement Against Discrimination and Racism (IMADR) and the Law and Society Trust (LST) from May 17-18 2007 10 Sri Lanka's explosive Muslim factor by Sudha Ramachandran's http:// www.atimes.com/atimes/South Asia/EI18Df01.html

Humanitarian agencies coming together under the banner of the Inter-Agency Standing Committee (IASC)<sup>12</sup> went on record as saying that armed groups were disrupting humanitarian work in the Amparai District.<sup>13</sup>

By the end of the month of July, the state-owned *Daily News* reported that over 95,000 had already been resettled in the East with only 37,000 more persons to be resettled and said that the government hoped to complete the resettlement process soon. The processes of resettlement were fraught with problems, largely due to the inadequacy of facilities to support resettlement and to guarantee the security of resettled communities.

In Trincomalee District, the declaration of some parts of Sampur-Eachilampattu area as a High Security Zone meant that over 300 families who had been displaced could not return to their places of origin and had to remain in grossly inadequate transitional shelters in Kiliveddy. On July 17, a case filed by the Centre for Policy Alternatives (CPA) challenging the gazette notification this High Security Zone was dismissed by the three-member bench chaired by Chief Justice Mr. Sarath N.Silva without taking it for consideration. In the Mutur area about 126 Tamil families, who had been resident in the Vinayakar Maha Vidyalayam in Aalangkerni and Vipulananda Vidiyalayam in Eachchantivu were resettled in Ralkuli in early July and the ferry service between Ralkuli and Mutur was resumed. Over 3000 persons were resettled in their original villages, in and around Eechilampattu. For example, on July 24, 160 families (570 persons) who had been displaced from Eachchilampattu, Muhaththuvaram and Kalladi in Mutur returned to their homes on buses through Verugal and Vakarai.

<sup>&</sup>lt;sup>12</sup> The Inter-Agency Standing Committee (IASC) consists of: <u>full members</u>: FAO, OCHA, UNDP, UNFPA, UNHCR, UNICEF, WFP, WHO; Observers: ICRC, IFRC, IOM, World Bank, ILO, OHCHR, UN DSS, CHA, FCE, Sarvodaya, Sewa Lanka, Oxfam, FORUT, CARE, World Vision, ACF, ZOA, Solidar, Save the Children, WUSC, ECHO, DRC, UNOPS

<sup>13</sup> Daily Mirror, p. 1, November 26, 2007

The resettlement process in Batticaloa West commenced in August 2007, again with many concerns expressed regarding lack of security for the returning villagers. Vavunativu Divisional Secretary K. Vimalanathan reported problems due to lack of repairs to infrastructure, and due to lack of funds to support villagers to resume economic activities. He stated that 4294 houses in Vavunativu alone had been damaged due to war, and due to attacks by wild elephants after the owners had abandoned their homes.

Clashes between the LTTE and the security forces also continued in some parts of the East. Delays in the re-establishment of a civil administration continued to create an uneasy situation, and the opening of several Police Stations did not result in the reduction of a military presence in Vakarai and Batticaloa West.

The arena of the conflict shifted in July from the east to **the Vanni**. Clashes between the LTTE and the government forces were accompanied by constant shelling of the Vavuniya-Mannar border areas with little regard for civilians living in those areas. On July 11, 2 civilians including a school boy were reported killed and 9 others injured in Alambil, in Mullaitivu, following such an air attack. Clashes between the security forces and the LTTE continued, forcing the ICRC to withdraw from its positions at several points in the Northern Province, creating major difficulties for travellers.

Delays in issuing permits for fuel to vehicles of the UN agencies working in the Vanni created another range of problems, since the fuel was used not only to operate vehicles but also to operate generators which power freezers storing life saving vaccines and other medicines

On August 1, the World Food Programme said it was providing

<sup>&</sup>lt;sup>14</sup> Tamilnet, 11.07.2007

dry rations to 140,000 resettled persons and other IDPs in the Batticaloa District. According to ICRC figures, there were 48,000 IDPs in Batticaloa by mid-August 2007.

Reports of confusion regarding the resettlement process in Trincomalee filtered back to the IDPs awaiting resettlement. On August 14, there were reports that civil authorities in the Districts of Trincomalee and Batticaloa had been directed to halt the issue of food rations and other relief packages to IDPs from Mutur East and Eachchilampattu who refused to be relocated in the new land allocated to them by the government in other parts of the Trincomalee district, following the HSZ demarcation.

Throughout this period IDP families who had been displaced from Mutur and Ecchilampattu over 12 months previously were brought back from the various temporary camps that they had been sheltering in, in Ariyampathy, Manmunai north, Chenkalady, Kiran and Batticaloa town, in Batticaloa District. IDP families who returned from Batticaloa and who could not return to their homes and places of origin due to delays in mine-clearance and other security consideration were housed at the transit shelters in Kiliveddy, which accommodated 883 families and Padiththidal, which accommodated 378 families by the end of August 2007. On September 6, the last group of Tamil IDPs, consisting of 1150 persons, who had fled their villages in and around Eechilampattu in Trincomalee East returned from Batticaloa via Vakarai. The majority of them joined the group of IDPs already in the transitional shelters in Kiliveddy and Padiththidal, since the security forces had not yet cleared their resettlement. Many reports stated that the Kiliveddy site was over-crowded and conditions were very poor, with severe shortages of clean drinking water, and difficulties in preparing food due to shortage of firewood and kerosene.

On August 12, the army attempted to remove almost 100 Muslim families from Arafat Nagar, located close to the Kattaiparichchan army camp in Mutur, by force, on the grounds that this area came under the HSZ. These villagers had been displaced to Kantalai in

August 2006 and resettled with government assistance in March 2007. The Assistant Divisional Secretary Mr Sharif clarified that resettled families had started to clear the area and cultivate crops prior to the Gazette notification declaring the area a HSZ. Following the army intervention, the villagers sought refuge in schools and in the houses of relatives in other parts of Mutur town. The army then announced that they would allow the people to continue farming their land in the HSZ until a firm decision was taken in this regard. But the army was clear that people could not rebuild their homes and start living in that area. The villagers were told that they would be offered alternative land elsewhere in the District. 15

Controversy also arose regarding the resettlement of IDPs in Trincomalee as hundreds of farmers in Kinniya, primarily Muslims, were blocked from cultivating nearly 4,000 hectares of paddy fields lying in Theeneri and Kandalkadu on the basis that this was a part of the HSZ.

On September 6, TNA MP Thurairatnasingham reported that about 70 families from Verugal (Eechilampattu) had been taken by the army to an area covered with jungle in Sinnakkulam and resettled there. Although the IDPs had been given tents, nothing else was provided, and families were forced to shelter under the trees. In the same way, other families from Mutur East were being resettled in Manalchenai, where again there were no basic facilities, and in fact a severe lack of security.

A further point of tension in the resettlement process was that the government authorities included IDPs who had been displaced due to the conflict in earlier periods in the current resettlement programme. For example, about 500 Tamil and Muslim families displaced from Upparu, in Kinniya, by military operations in the 1990s, and who had been living in temporary structures at Aalankerni and Maharuf Nagar in Kinniya were part of the

<sup>15</sup> http://www.topix.com/forum/world/sri-lanka/TVC0BRB7LJH9MRI46.

resettlement programme in 2007. During their absence some of their land had been taken over and farmed by Tamil families who had continued to live in the area. This was a commonplace situation throughout the East. The return of the original Muslim inhabitants created additional tensions between the Muslim and Tamil communities as a consequence of the poor management of this process by the authorities involved. Given the various tensions between the two communities that had emerged in a variety of ways during the displacement from Mutur in 2006, there were some commentators who felt that the situation had been manipulated by political actors of all communities.

In October, resettlement of civilians from the areas formerly occupied by the LTTE along the A5 route from Maha Oya to Chenkalady took place. In October 2007, the Foreign Ministry report stated that over 108,000 IDPs had been resettled in the Eastern Province and that a further 50,136 people are yet to be resettled in their original homes. The Shelter for East programme of the Nagenahira Navodaya (East is Rising) was due to construct 200,000 housing units at a cost of Rs. 36.4 b. under the National Housing Development Authority (NHDA).

From November onwards intensification of military operations in the Mannar District saw heightened movement of civilians. While some civilians fled from the fighting in the LTTE controlled areas of the Vanni into the Mannar District, others fled still deeper into LTTE controlled territory. In the first week of September, over 4500 civilians were forced to flee Musali division in Mannar when the army moved into the area located south of Mannar-Medawachchiya Road. 5864 persons, among them 1644 Muslims, were registered residents of the division, according the statistics from the divisional secretariat in 2006. Some IDPs were reported to have complained of harassment by soldiers as they tried to flee. By the 10th of September, there were 327 IDP families (1136 persons) at the Nannaddan MV school and 99 families at the Don Bosco Technical College. Others were reportedly living with friends and families in and around Mannar town. A group of over 500 Tamil civilians were reported to have been trapped in the village of Mullikulam since September 1, when the army encircled the area in which their village was located and blocked off their exit route via Silavaturai. Serious concerns emerged regarding the situation of these civilians and many different attempts were made to send supplies and provide transport to enable them to leave the area. However for almost a week this situation was not resolved, despite repeated appeals by the Bishop of Mannar. It was only on September 8 that the residents of Mullikulam could leave their village, walking over 20 km to Silavaturai and then being transported by whatever transport was available to the Maha Vidyalaya in Murunkan. The killing of Jesuit priest Fr. Packiyaranjith at the end of September in an LTTE-controlled area of the Vanni made the precarious nature of the inhabitants of this part of the island even more obvious.

The restrictions on travel from the Vanni in ambulances that was imposed by the security forces in late November caused great inconvenience and grief to those who were seriously ill and requiring specialized medical treatment, and to members of their families. According to these regulations, ambulances carrying patients from the Vanni to Vavuniya hospital were stopped at Omanthai checkpoint, patients forced to get down, subjected to rigorous checking, and then transferred to ambulances operated by the security forces for the last leg of their trip to Vavuniya.

Despite the government's assurances that the East had been entirely 'liberated' from the LTTE, there continued to be attacks on individuals associated with the government and with the TMVP that led the residents of the East to remain uneasy regarding the presence of the LTTE in their midst. The at least partial success of a 'hartal'(strike) suspected to be called by the LTTE in the Ariyampathi Manmunai areas of Batticaloa on September 21 was understood by residents as an attempt by the LTTE to demonstrate their presence in the area.

In December, the LTTE ordered all international humanitarian agencies to move out of Mullaitivu and Kilinochchi in the Vanni,

where the fighting was intensifying. While some INGOs took this as an indication that the situation would worsen in the new year, many of them began to take extra precautions. Many international actors and agencies withdrew staff from areas inside the LTTE-occupied areas of the Vanni where they had been operating. Among them were UN agencies such as the World Food Programme and UNICEF, international NGOs such as CARE, the German Red Cross and Forut and national organization, Sewalanka. This gave rise to concerns regarding the plight of civilians in the Vanni and an impending food shortage due to lack of new stocks of essential food items being brought in to the Vanni. The World Food Programme ceased activities for a few weeks and returned to work in the Vanni by the end of December. However, the heavy fighting in the Mullaitivu area left approximately 32,000 IDPs without access to any humanitarian assistance.

On December 12, at midday, Kfir jets belonging to the SL Air Force launched a series of three attacks on various locations in Mullaitivu including Alampil and Chemmalai. The fact that this was during the time when students were sitting their GCE O.L examinations meant that in some schools the exam was interrupted while children sought shelter in bunkers. Two civilians, M. Kesavan (33) and S. Mathavan (19) were reported to have been injured in the attack on Alampil.

On December 21, after almost twenty years, the sector of the A 15 road that links Kinniya to Mutur along the main Trincomalee – Batticaloa road was reopened for public use from 8 a.m. to 5.30 p.m. every day. This meant that the ferry services that connect the three causeways - Upparu, Gangai and Raalkuli - that separate Mutur and Kinniya also began operations. The reopening of this road provides relief for resettled IDP communities needing to travel between Trincomalee and Mutur, because the sea transport between these two points has been seriously affected in the past weeks, due to the breakdown of one of the vessels that ply the sea route, Seruvila-2.

### 4 Nature of Displacement

As the foregoing chronology of events demonstrates, the nature of conflict-related displacement in Sri Lanka is shaped by the nature of the conflict. While the conflict remains the most critical factor in terms of displacement and humanitarian assistance in Sri Lanka, throughout the period under question, a series of natural disasters that affected specific parts of the island have also resulted in displacement, which has been very short-term.

Since however, the figures of the conflict-displaced population in Sri Lanka is higher by far than of those displaced by natural disaster or by development projects, this paper concentrates on defining the nexus between the conflict, displacement and humanitarian assistance on the understanding that this is most crucial in terms of a human rights perspective on displacement in Sri Lanka in the year 2007.

The ethnicised nature of the conflict leads to a disproportionate number of Tamils being displaced, since the conflict is localized in the Northern and Eastern Provinces of the island where the majority of the population is Tamil. To a lesser extent, it has also led to the displacement of Muslims, and to an even lesser extent, to the displacement of Sinhala communities.

In addition, the ethnicised nature of the conflict leads to different responses in terms of security considerations and in terms of humanitarian assistance. In the case of Tamils who are displaced due to the conflict, their life as IDPs is fraught with varying levels of discrimination and violence because of their ethnicity. Tamil IDPs have often faced an additional level of security checks especially if they have moved out of, or through, LTTE-controlled territory in the course of displacement. In addition to this mistrust from state authorities and security forces, they also confront hostility from armed Tamil groups that operate with the tacit support of the government. Muslim IDPs faced harassment by

the LTTE in the course of displacement from Trincomalee East in 2006. The Sinhala IDPs during this period of the conflict have come primarily from the North Central Province (Anuradhapura and Pollonnaruwa Districts) that borders on the Northern and Eastern Provinces. They have been victims of attack and harassment by the LTTE and have become the principal cohorts of the village-based Civil Defence Squads<sup>16</sup> set up to assist the security forces in their work.

The nature of the conflict also creates a situation in which women and children, the elderly and the disabled and ill are disproportionately affected by displacement. This is due to the fact that the situation of conflict in the North and East has led to the absence of men, especially those between the ages of 16 and 35. Many have fled to other parts of the island or abroad due to fear of persecution, others have been detained, abducted or disappeared, and yet others have joined the LTTE or other armed groups.

In the year 2007, as the conflict moved from Trincomalee to Batticaloa and then to Mannar, we see a process of shifting displacement and resettlement. Many displaced communities also experienced displacement several times, due to their moving multiple times within the Eastern province in order to be ahead of the conflict.

Examining reasons for displacement show that many chose to move away from their homes and villages not only when they faced direct consequences of the conflict, but when they felt that they were at risk and under threat. Thus for every instance in which some conflict-related attack or confrontation took place, hundreds of families were displaced, due to threats to their security.

The manner in which the conflict had defined certain parts of the North and East as 'LTTE-controlled areas' especially in the wake

<sup>16</sup> Formerly referred to as Home Guards

of the 2002 Ceasefire Agreement (CFA) meant that hundreds of thousands of Tamils had spent several years living under the LTTE's authority with no real choice in the matter. However, when they were displaced and moved into areas brought under control of the security forces, they found themselves under suspicion for being LTTE sympathizers or supporters. The inability of the government and of the security forces to define an appropriate method for investigating IDPs from LTTE controlled areas without harassing the entire IDP population led to many difficulties for these IDP communities and created further distance and mistrust between the ordinary Tamil population and the government.

In addition, the government's decision to assign certain parts of Trincomalee East, around Sampur as a High Security Zone, the definition of almost all the coast-line as a High Security Zone and intensive mining in conflict-affected areas by both the government forces and the LTTE created many situations in which resettlement in their places of origin was not possible for some displaced communities. The occupation of homes and land by the security forces with no payment of rent or any guarantee against destruction of the premises is also a common feature throughout the North and East which has created another layer of displaced persons who cannot return to their own homes.

The conclusion of the military operations against the LTTE in the East in August 2007 was an intensely politicized moment in modern Sri Lankan history. The creation of several special programmes for the reconstruction of the East by the government and by Sinhala extremist political groupings generated much anxiety among the Tamil communities living throughout the East because of fears that there would be resettlement programmes that benefited Muslim and Sinhala communities of the East disproportionately.

### Institutional and Legal Framework for protection of the rights of IDPs

Sri Lanka has no specific law that protects the rights of internally displaced persons. However, the Constitution of Sri Lanka guarantees the rights of all citizens to enjoy equality, and includes a fundamental rights chapter that protects the rights of all citizens including the right to equal protection, freedom of movement, right to choose one's residence, freedom of expression, freedom from cruel, degrading and inhuman treatment, to name a few. These rights can be restricted in certain situations including in the interest of national security and public order, by invoking the Public Security Ordinance (PSO), which empowers the President to declare a State of Emergency and adopt Emergency Regulations, if s/he believes they are necessary. Sri Lanka has been continuously governed under Emergency Regulations throughout 2007. Special Emergency Regulations promulgated in 200717 restricted the freedom of expression and enabled the arbitrary arrest and detention of persons under suspicion of involvement with acts of 'terrorism'.

In February 2006, the government of Sri Lanka adopted the Geneva Conventions Act No. 4 of 2006, described as an Act to give effect to the First, Second, Third and Fourth Geneva Conventions on Armed Conflict and Humanitarian Law. The Act acknowledges that the four Geneva Conventions of 1949 entered into force with respect to Sri Lanka on 28 February 1959. However, since the Act does not include the three Additional Protocols to the Geneva Conventions that have come into effect since the end of World War II, it falls short of what would be required to indicate that Sri Lanka takes its obligations under international humanitarian law seriously.

<sup>&</sup>lt;sup>17</sup> Gazette Extraordinary No 1518/8 October 2007 – Amendment to Emergency (Prevention & Prohibition of Terrorism & Specified Terrorists Activities) Regulations, No 7 of 2006 published in Gazette Extraordinary No 1474/5 of December 2006

Both the government and the LTTE have at different times during the conflict declared themselves to be bound by the four Geneva Conventions of 1949 and by the Additional Protocols of 1977 which provide the basis for the protection of civilians, humanitarian, medical and religious actors during conflicts. It is this framework of international humanitarian law that enables the continuous and unhindered work of humanitarian agencies in conflict situations including the establishment of peace zones and humanitarian corridors for the provision of relief and assistance.

Although there is no specific international legal framework that provides specifically for the protection of the rights of IDPs, it is generally accepted that the key principles of internationally accepted human rights and humanitarian law provide a broad framework for the protection of the rights of IDPs. In addition to the principles of equality and non-discrimination, international human rights and humanitarian law provides for specific recognition of groups with special needs including women and children, unaccompanied minors, expectant mothers, mothers with young children, female heads of household, persons with disabilities and the elderly during times of conflict and displacement.

Although Sri Lanka is a signatory to most international human rights treaties including those that could provide protection for IDPs, such as the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic Social and Cultural Rights (ICESCR), the Convention on the Elimination of All forms of Discrimination against Women (CEDAW), the Convention on the Rights of the Child (CRC) and the Convention against Torture (CAT), the process of incorporating the principles enshrined in these treaties into national law has proceeded slowly and with many caveats that undermine the original intent of the international laws.

The advances made in terms of defining internationally accepted norms and standards for the protection of the rights of internally

displaced people such as the Guiding Principles on Internal Displacement 18 the Pinheiro Principles on Housing and Property Restitution for Refugees and Displaced Persons19 and the Humanitarian Charter and Minimum Standards in Disaster response of the Sphere Project (known as the SPHERE Guidelines) 20 are all known and used, to greater and lesser extent, by humanitarian agencies working in Sri Lanka including by the authorities. However, the creation of a national legal framework that would provide the protection IDPs need has been extremely slow. In 2007, the Ministry of Human Rights and Disaster Management led an initiative to draft a law to protect IDPs. The initial draft which was presented to the CCHA and other concerned groups was criticized due to its failure to focus on the protection of 'rights' of IDPs and to base itself fully on the Guiding Principles on the Treatment of Internally Displaced Persons which represents the highest internationally recognized standards with regard to IDPs.

In March 2007, the Government of Sri Lanka passed the Resettlement Authority Act No 9 of 2007, creating an Authority vested with the power to formulate national policy and to plan, implement, monitor and coordinate the resettlement of internally displaced persons and refugees. The Act sets out in detail the ways in which the Authority will formulate, coordinate and implement various programmes to 'assist' IDPs. Article 13 states one of its objectives as being 'to ensure resettlement or relocation in a safe and dignified manner of all internally displaced persons and refugees AND to facilitate the resettlement or relocation of the internally displaced persons and refugees in order to rehabilitate and assist them by facilitating their entry into the development process'. Article 14(j) states that it will facilitate the restoration of basic human rights including cultural rights to empower IDPs. However, at no point does the Act refer to the participation or

19 See, www.cohre.org.

<sup>18</sup> See, Guiding Principle 10 on IDPs at www.internal-displacement.org.

<sup>&</sup>lt;sup>20</sup> See, www.sphereproject.org.

involvement of IDPs in the process of decision-making regarding their own future, which is a key principle established in the international frameworks relating to IDPs. In addition, the definition of the powers of the Authority are extremely broad, leaving it open to interpretation that the main focus of the Act is in fact to create a legal framework that facilitates the acquisition of land and property in conflict-affected areas and that enables 'development' projects to be implemented without references to communities including the displaced. Article 29 offers protection for action taken under this Act or on the direction of the Authority. The Resettlement Authority was established in 2007, following the adoption of the Act.

## National mechanisms and institutions mandated with paying attention to the internally displaced

There are several institutional structures and mechanisms in Sri Lanka that provide for the provision of assistance and relief to the internally displaced. A major issue that has emerged is that the proliferation of Ministries, Authorities and Government agencies that all have a mandate for the provision of relief and assistance to IDPs and the lack of coordination between these agencies has led to duplication of responses and reduces their effectiveness. Despite the many institutional mechanisms, however, key decisions with regard to the internally displaced population have continued to be made by the Ministry of Defence, with a centralized process of decision-making and lack of clear channels through which these decisions could be communicated to the Provinces and in particular to the security forces working in each province and District.

The Ministry of Human Rights and Disaster Management takes the lead on issues related to IDPS when it comes to the international arena, dealing with international human rights bodies such as the UN High Commissioner for Refugees (UNHCR), the Office of the High Commissioner for Human

Rights (OHCHR) at both the national and international level as well as representing the government in international arenas such as the UN Human Rights Council. The Ministry is also engaged with the Consultative Committee of Humanitarian Agencies (the CCHA) which was established to address the increasing humanitarian crisis in Sri Lanka. The CCHA includes the Commissioner General of Essential Services, the Secretary to the Ministry of Foreign Affairs, the Secretary of Defence, UN agencies, some of the key humanitarian agencies working in the conflict affected areas and a number of key Ambassadors. It was created as a forum that provides space for dialogue between humanitarian actors and senior government officials. However, the mechanism failed to live up to its expectations throughout the humanitarian crisis of 2007 especially since it did not challenge the tensions between the government's anti-terrorism actions and the humanitarian need to protect the rights of civilians caught up in these military actions.

The Ministry of Human Rights also coordinates an IDP Working Group for the consultation of drafts of the legal framework for the protection of IDPs, that is currently still under discussion. This mechanism was complemented by a separate forum called IDP coordination meetings, which has been an arena for the discussion, dissemination and exchange of information regarding the situation of IDPs.

Other actors that play a key role in relief, resettlement and reconstruction initiatives that have an impact on the lives of internally displaced women, men and children are the Minister of Human Rights and Disaster Management, the Ministry of National Building and the Ministry of Resettlement and Disaster Relief Services and the Resettlement Authority established by the Resettlement Authority Act No. 9 of 2007<sup>21</sup>.

<sup>&</sup>lt;sup>21</sup> An Act to provide for the establishment of an Authority to be called the Resettlement Authority; to vest the Authority with the power to formulate a national policy and to plan, implement, monitor and coordinate the resettlement of internally displaced persons and refugees

In addition, since the tsunami of 2004, there has been an IDP Unit housed within the National Human Rights Commission. Although the crisis of legitimacy of the Commission has created several obstacles to the work of all its Units, the IDP Unit has continued to function throughout 2007. While the fact that the NHRC has regional offices including in some areas of the North and East including in Batticaloa, Amparai, Trincomalce and Jaffna has enabled the regional offices to become repositories of a range of information regarding the situation of civilians caught up in the conflict, the lack of public accountability on the part of the NHRC has meant that this information remains unpublished and therefore cannot lead to any analysis of the situation or to the design of effective responses.

The UN and other international humanitarian agencies have also created several mechanisms for the sharing of information and strategizing on responses to the humanitarian crisis that dominated their agenda throughout 2007. Key among them were the Inter-Agency Standing Committee (IASC) and the IDP Working Group coordinated by the UNHCR. In addition the Consortium of Humanitarian Agencies (CHA) continued to hold weekly meetings for the exchange of information.

In 2007 the international community led by UN Office for the Coordination of Humanitarian Affairs (OCHA) fielded a Common Humanitarian Action Plan (CHAP) for soliciting funding from the international community for relief and assistance to IDPs and war-affected communities in Sri Lanka.

Throughout the year 2007, the crisis of providing effective and appropriate support for IDPs continued to be a critical issue. The security situation created an environment in which decisions regarding the allocation and delivery of relief was dictated by the security forces, and the international agencies charged with providing assistance to IDPs found themselves unable to move personnel to transport essential items to the conflict-affected areas. The security situation also meant that issues relating to the security

of IDPs under the protection mandate of the UNHCR and many other international humanitarian agencies were often not addressed in a way that could guarantee the safety and security of IDPs.

Following the process of resettlement in the East, the CCHA came out with a post-resettlement development plan for the East that focused on three areas: security, immediate development (giving priority to the re-establishment of the civilian administration) and long-term development. However, this process was juxtaposed against an announcement made by military officials in charge of the East that all reconstruction and other activities carried out with resettled communities by local and foreign NGOs would be subject to the scrutiny of the military as well as of officers linked to the civilian administration structures. This set alarm bells ringing regarding the control and restriction of NGOs, especially those working in the conflict-affected areas. It also resulted in further delays to humanitarian initiatives designed to support resettled communities.

The issue of regular dry rations was an issue in all resettlement areas, with lapses of weeks, sometimes taking place due to lack of coordination between the various state and non-state agencies mandated with the delivery of food relief and emergency assistance.

The case in which 5 individuals including public officials at the Agrarian Insurance Board were charged with a massive fraud regarding payment of compensation to farmers who had suffered crop loss due to the closure of the Mavilaru anicut in 2006 was brought up before the Colombo Magistrate's Court in November 2007 and given a calling date in 2008. This case is one of the few in which mismanagement of relief and assistance supposed to be received by IDPs has been brought to public notice. The fact that the victims were Sinhala farmers in and around Kantalai, and that the closure of the water canals and the subsequent clash between the LTTE and the security forces in that area was the subject of

intense politicization by the JVP and by extremist Sinhala political actors is perhaps responsible for this exposure. Other complaints about fraud and misappropriation of funds allocated to IDPs as well as complaints of various forms of intimidation and extortion from IDPs by officials have never been investigated.

# Key issues regarding the situation of IDPs in 2007:

# 7.1 Registration and definition:

Anomalies relating to the registration of IDPs has meant that throughout this period, the numbers of IDPs that have been formally registered are less than the actual number. Among the agencies that gather information regarding IDPs are those charged with the provision of relief and assistance such as the Government Agent for the District and his officers, the UNHCR, the IDP Unit of the National Human Rights Commission and international humanitarian NGOs. Figures could easily be obtained from any of these offices until mid-2007, and from then onwards security concerns made access to information as well as access to resettlement areas more difficult.

The registration of the IDPs was traditionally the responsibility of local government authorities from the Grama Sevaka upwards to the Government Agent. In the case of the displacements from Vakarai, this process was interrupted by the arrival of officials from the National Data Collection Centre of the President's Office who summoned three Divisional Secretariat Officers and asked to submit basic information; some were also photographed and fingerprinted. In some cases IDPs were asked to go to the Police Station in order to be photographed. This process heightened their sense of insecurity and suspicion regarding the intentions of the registration. The fact that this is not a 'universal' registration — it does not cover those IDPs living outside the welfare centres nor

does it record children under 10 – has also contributed to the sense of unease regarding the process.

In the process of resettlement IDPs were issued with individual and family IDs with photographs, by the military. The process of issuing Military IDs was first introduced in the resettlement process for Vakarai in Batticaloa East and then became more institutionalised in the resettlement of Batticaloa West. The IDPs from Vakarai and Mutur/Sampur were asked to bring their own photographs and get the forms certified by their village official (Grama Sevaka). Each person was required to submit two photographs of themselves and five copies of the application form. In addition, they were required to submit 2 photographs of their family along with six copies of another application form. All members of the family who appeared in the photograph were required to be present at the time of submission of forms and photographs. This process was expensive and time-consuming for the IDPs. In the resettlement to Batticaloa West, the army brought in a team of photographers and coordinated the registration process in a more systematic manner so that individual IDPs and IDP families did not have to go through as many difficulties as had been faced by the IDPs from Vakarai and Trincomalce.

While access to the resettled areas for non-residents was tightly controlled in the early phases of the resettlement process, movement in and out of the resettled areas by the returned IDPs was controlled through scrutiny of these IDs at checkpoints set up at all the roads and bridges that give access to these areas. The family ID in particular created problems for those family members who had not been present during the photographic session who had then to take extra steps to prove that they were indeed members of that family.

IDPs who remained with host families, or who had rented their own accommodation, remained outside of this circle and their process of resettlement was fraught with an extra number of steps

they had to take in order to prove their displacement and their entitlement to return to their homes.

### 7.2 Protection and Security:

The Guiding Principles on Internal Displacement and other international humanitarian norms establish standards of protection of IDPs that are applicable without discrimination on any grounds. These norms have been disregarded by both the government and the LTTE throughout the situations of displacement that took place in 2007. There are many cases of abuse and violence that have taken place within welfare centres and transitional sites as well as cases of involuntary resettlement, in the East. These situations were created partly by the fact that many of the welfare centres and transitional sites were located in isolated areas; there was no perimeter fencing and no lights that burned all night in strategic places within the sites. While the security of different sites was handed over to official agencies, in some places the Police and in other places the army, in many cases this was a daytime arrangement and the security detail was not present during the night. This made the sites open to intrusion by outsiders including armed actors, who engaged in intimidation and extortion. In addition, in and around Valaichchenai and Batticaloa, armed paramilitary groups, the EPDP and the TMVP, assumed the role of security officers in some of the IDP sites and were also reportedly engaged in extortion and intimidation. The state did not respond to reports and complaints of this situation.

The resettlements in the Eastern province, to Vakarai and Mutur/Sampur areas in March/April 2007 and to Batticaloa West in September/October 2007 were done in circumstances that did not allow IDPs to make visits to their homes prior to resettlement so that they could assess the damage and needs. No arrangements for them to resume their livelihoods were made, and de-mining was not completed in some areas by the time the resettlement process began. The resettlement commenced in a coercive

operation that saw IDPs being literally forced onto buses by the security forces, leaving them without any choice in terms of their return. Following the first round of forced resettlement and as reports of the dismal circumstances in the resettled areas began to filter back to the Batticaloa town, the IDPs who were still awaiting resettlement refused to return. The response of the authorities to this resistance was to set up deadlines for the issue of dry rations to the centres and use other forms of intimidation. Charges of 'forced return' were made by civil society groups that were trying to monitor the process, and were officially rebutted by the state. However, first-hand reports left no doubt that the first phase of resettlement was carried out with coercion and with little consultation with the IDP communities.

The fact that the military denied access to the resettled areas to local and international NGOs and even to some government authorities for at least one week after the resettlement commenced made the situation even more difficult for the IDPs and meant that no information regarding the situation inside the resettled areas was easily available.

Following resettlement, the IDPs faced life under the strict scrutiny of the security forces. The presence of armed Tamil groups in the areas where resettlement was taking place and the sometimes unclear borders between the state security forces and the paramilitary groups created further insecurity for the returning IDPs since they were never quite sure as to which group was conducting a search of their houses or interrogating them at a checkpoint.

On July 11, Batticaloa District MP for the TNA, Mr. Ariyanarenthiran, told the media of several different incidents of murder, and one incident of rape which had taken place in and around Kokkadichcholai in Batticaloa West. He said that as a result people who had been resettled there were once again on the move. These concerns were echoed by TNA MP for Batticaloa, Ms. T. Thangeswary, who said she had received complaints of harassment,

arbitrary arrest and detention and disappearance from resettled communities in and around Paduwankarai region. She pointed out that the regular cordon and search operations were causing great hardship to the resettled people, and presented two cases of missing persons, Rajendram of Maavadi, missing from June 4 and Manikkapody from Swamimalai, missing from June 10. She also drew attention to the case of Thavamani Balasunderam, who was abducted from her home and later found raped and murdered. She pointed out that women in the resettled communities had special concerns regarding their own safety in these circumstances.

The incorporation of members of armed groups to conduct interrogations of IDPs leaving LTTE-controlled areas during the military operations has been a particular feature of the Eastern military offensive of 2007 that created extreme discomfort and often inspired terror in the IDP community. Permitting armed groups, the TMVP in particular, to carry out surveillance and 'security' checks inside IDP Welfare Centres was a feature of IDP life in Batticaloa that contributed to high levels of anxiety among the IDP population. The establishment of an office of the TMVP (Karuna faction) in Valaichchenai had heightened the vulnerability of the IDP population in particular, as demonstrated by the claymore mine explosion attack targeting a TMVP office at Vinayagapuram that injured 4 IDPs at the Welfare Centre next to the Vinayagapuram school. The civilian death toll of the military operation in Vakarai was a matter of contestation between the state and civil society organizations monitoring the situation since late 2006.22

<sup>&</sup>lt;sup>22</sup> In spite of documentary evidence that 42 persons including 6 infants below the age of 6 months who had been displaced from Mutur and were sheltering at the Kathiravely Vigneshwara Vidyalaya in Vakarai were killed in shelling on November 8 2006, that a displaced woman and a child wounded in the shelling died on the way to hospital in Valaichchenai and at least 15 persons drowned due to the boat overturning while they were in flight from Vakarai to Pethalai, the state continued to deny these incidents and declare that no civilian deaths had occurred during the Vakarai operation.

# 7.3 Consultation and Participation of IDPs in decision-making:

A key issue that emerged during the entire process of displacement and resettlement throughout 2007 was the consistent lack of consultation with IDP communities regarding their preferences as to administration and organization of welfare centres and transitional shelters, especially when it came to issues of security. The process of resettlement was also marred by situations in which, for example with the Batticaloa West returns, IDPs were simply informed that they would be returned without any consideration for their own wishes and concerns. There was no systematic mechanism put in place for sharing information with IDPs with regard to their rights and entitlements in the resettlement process and this led to a great deal of confusion and mistrust developing within the IDP community.

There are many factors which were a result of the poor conditions in welfare centres and transitional sites that created an environment in which the IDPs were willing to return to their places of origin. The authorities in charge of administering these IDP sites did not pay that much attention to issues of overcrowding, poor sanitation and garbage disposal systems and flooding during rains since it was clear that their chosen option was to focus on the early return of IDPs rather than improving their living conditions within the IDP sites.

#### 7.4 Restrictions on movement

There were concerns regarding limitations placed on the mobility of IDPs in many situations in the East. On the one hand, while they remained in the welfare centres and transitional sites, there were rather ad hoc and unsystematic processes of reporting attendance. Since most of the IDPs had lost their identification documents during flight, their capacity to leave the camp

overnight, or to travel outside of the District, even for emergencies, depended on their ability to obtain temporary documents and permission from the authorities, which was sometimes complicated. In the resettlement process, the identification papers issued by the military became critical for movement in and out of the resettled areas since the roads and bridges leading to these areas were tightly controlled by the military.

In both the East and in the North, during the initial military operations that pitted the security forces against the LTTE in LTTE-controlled areas, the LTTE attempted to use the communities living in those areas as human shields, and imposed restrictions on movement outside of the areas they controlled. However, this strategy was not a success in the East and the majority of people who had lived under LTTE control in Vakarai and in Batticaloa West quite quickly fled into the areas of Batticaloa that were controlled by the government. In the Vanni and in Mannar the situation was slightly different, and up to the end of 2007, IDP communities were the subject of 'push and pull' interventions by both the LTTE and by government forces. The process has clarified that both parties to the conflict are not averse to using displaced communities as pawns in the conflict and impose limitations on mobility and on transport of goods and people as a form of exerting pressure on each other. Imposition of restrictions on the movement of national and international humanitarian agencies also created a range of hardships of IDP communities whose daily survival, especially in terms of provision of food and water, was to a great extent dependent on the relief and assistance provided by these agencies. The creation of new protocols for issuing visas to non-Sri Lankans working with international NGOs including with humanitarian agencies, new security measures at the checkpoints on all major roads leading in and out of the North and East and embargoes on the transport of fuel, drugs and other essential items to the North were all factors that increased the hazards and difficulties of life for IDP communities.

Imposition of restrictions on access to land and sea by the military due to security considerations also created many difficulties for IDPs when they resettled. Throughout the East the coastline was declared a High Security Zone and access was limited and regulated by the security forces. While fisher communities relocated to areas away from the coast in many situations, they still had to negotiate access to the coast for fishing purposes and the limitations on time, power of engines, and distance from the shore made it almost impossible for many of the fishermen to engage in their traditional livelihood in a way that made it possible for them to support themselves and their families. The situation was the same for many farmers in the East. Some of the land was mined and unsafe for farming, while some tracts of land that had previously been farmed was declared as High Security Zones because of their close proximity to army camps. In all such situations, access of farmers to their land was limited and again created many problems for the farming community of these areas. Passes had to be obtained from the Special Task Force camps even for farmers to go and work in nearby villages, for example in Iluppaiyadichenai and Karadiyanaru etc. The pass system also restricted access to the forest areas. All this had an adverse impact on the livelihoods and consequently on the sustainability of the resettlement.

In 2003 the Jaffna HSZ was challenged in the Supreme Court by a petition filed by TNA MP Mavai Senathirajah and others. The case is still pending though the Chief Justice has requested that an arrangement is reached with the military commander of the area and the Government Agent in Jaffna to ensure that the HSZ is reduced and some of the land returned to the civilians.

## 8. Militarization

The intensification of the conflict led to increasing control over the North and East by the military, including over the civilian administration. All access to the North and East was under the

purview of the Ministry of Defence, which set up a system for prior permission for journalists and for members of foreign missions in Sri Lanka. The increased military presence in these areas, as well as their enhanced powers over the people living there, heighten concern regarding what the future holds in store for these communities.

In October, controversy emerged regarding a visit by the Counsellor of the Foreign Ministry of Iceland to the Vanni which had not received formal clearance from the Ministry of Defence. As a result, the military stepped up checks on vehicles belonging to diplomatic missions, INGOs and even the SLMM at Omanthai.<sup>23</sup>

In the East, the process of resettlement to Batticaloa west was overseen by Eastern Province Governor, Rear Admiral Mohan Wijewickrema, Eastern Province SLA Commander Parakrama Pannipitiya, SLA Civil Commander, Maj. Bertie Perera, Sri Lanka Army (SLA) Coordinating Officer Senior Police Commissioner, H. M. P. Herath and STF Head Ranjith Perera, along with senior officers from the civilian administration. The lack of clarity regarding the line of command with regard to decisions relating to resettlement and reconstruction in the East led to some confusion and delays in the resettlement process getting under way.

The situation that arose regarding cattle belonging to IDPs is a good example of the ways in which ethnic tensions and militarization contributed to complicate the lives of IDPs. In October, the Defence Ministry received complaints from Mr. Ameer Ali, Minister for Disaster Relief Services and a Member of Parliament for the East that Sri Lanka Army personnel and paramilitaries working alongside them were involved in the theft of cattle belonging to Tamil IDPs and that the stolen cattle were being sold in Polonnaruwa. The IDPs who were from

<sup>23</sup> The Island, October 5, 2007

Paduvankarai in Batticaloa, and who were housed in temporary shelters in Vantharamoolai, Sittandy and Kiran, had been told that there was an official Defence Ministry order to transfer nearly 20,000 heads of cattle belonging to them to the National Cattle Development Centre in Pollonnaruwa. This incident created a great deal of unrest among the IDP community, while the army maintained that the cattle constituted a danger to them since they were straying all over the main A5 road from Badulla to Chenkalady, which was in the process of being 'cleared'. Following this complaint, Defence Secretary Gotabhaya Rajapaksa issued instructions to the security forces in Batticaloa district to ban the transport of livestock from areas in Batticaloa district that have recently been brought under the control of the SLA.<sup>24</sup>

The assumption of some local security functions by the TMVP in collaboration with the Sri Lankan army and their attempts to influence government officials and humanitarian actors to work with particular communities has also contributed to the polarization between communities in the East.

# The politicization of humanitarian assistance

All existing and accepted standards regarding humanitarian assistance affirms that it should be delivered to communities of persons affected and displaced by conflict in a manner that does not privilege one group over another. The principle of equality and equal treatment is acknowledged as being crucial to ensure non-discriminatory allocation of assistance and to avoid the creation of tensions among the different social groups that have been displaced due to the conflict. Ensuring that delivery of humanitarian assistance if appropriate, affordable and non-discriminatory is based on the need to guarantee that the rights of

<sup>&</sup>lt;sup>24</sup>http://koneswaram.wordpress.com/2007/10/04/gotabhaya-bans-transport-of-livestock-from-abandoned-tamil-homes-in-batticaloa also see <a href="http://www.tamilnet.com/art.html?catid=13&artid=23449">www.tamilnet.com/art.html?catid=13&artid=23449</a>.

all IDPs and IDP communities are respected and protected irrespective of any differences in identity or status.

In the case of Sri Lanka, throughout 2007, there are many examples that clearly demonstrated that these principles were not being adhered to. The fact that the majority of those affected by the conflict were Tamils and that the conflict was taking place in the context of a demand by some Tamils for autonomy resulted in a series of interventions that treated Tamil IDPs with prejudice. The fact that all processes of resettlement that included relocation of IDPs at sites not their original homes would be politically charged and viewed as an attempt to alter the demographic patterns of a particular area would only be natural following a history of forced demographic change through state-sponsored colonization and development schemes.

In addition to the disparities between IDPs belonging to different ethnic and religious communities as well as living in different parts of the island, there are historical disparities between diverse groups of IDPs.

In the first instance, there continue to be disparities between the relief packages made available to those affected by the tsunami in 2004 and those affected by the conflict in 2006 and 2007. Many conflict affected IDPs are still living in temporary shelters more than a decade after being displaced, such as in areas of Puttalam and Jaffna, whereas the tsunami affected are already residing in permanent houses. Programmes for conflict affected IDPs have also been primarily focused on providing them with the minimum for survival rather than on assisting them to rebuild their lives, in particular by supporting the re-establishing of livelihoods. There are also disparities among different groups of IDPs affected by the conflict, as the 'older' groups of IDPs receive Government rations based on the 1995 formula<sup>25</sup> while newer IDPs, including

<sup>&</sup>lt;sup>25</sup> The relief allocation for a conflict affected person was dry rations worth Rs.336 per month and a family allocation (for five or more members) of Rs.1260 per month based on prices fixed by a circular formulated in 1995.

those from 2006 and 2007 receive WFP rations which are determined on the basis of a specific calorie intake. <sup>26</sup>

The politicization of humanitarian assistance has also resulted in constant disputes over the figures of IDPs at any given time during 2007. Figures put forward by civil society organizations and by smaller local NGOs and groups working with affected communities are often challenged on the basis that they have a vested interest in inflating figures. Statistics coming from government officials in the areas controlled by the LTTE are often challenged by the central government authorities on the basis that these figures are inflated so that some of the relief items can be passed on to the LTTE. The contestation of figures has often had severe implications on IDP communities since the quantities of relief are determined by figures. In addition, the speed with which some of the resettlement drives took place in the East in mid-2007 led observers to think that the government had an agenda to reduce IDP figures in order to present an image of the conflict as not having such a severe impact on civilians as alleged by civil society groups who were engaged in advocacy on behalf of IDPs.

The fact that different political actors representing diverse ethnic groups and political agendas are engaged with the conflict and with issues related to the conflict also makes equitable treatment of IDPs more difficult. Each time a fresh incident in the conflict occurs, and there is a new wave of internal displacement, politicians representing each ethnic group affected by that situation will emerge to lobby for their own constituency. This also shaped the timing, form and nature of the response. One such clear example is the intervention of Sinhala politicians when Sinhala villagers in Kebetigollewa were killed in a bomb explosion on a bus as opposed to the intervention of Tamil politicians when Tamil villagers in Vakarai were killed while fleeing from the conflict and as opposed to the intervention of a Muslim politician when Muslim villagers were killed in Potuvil.

<sup>&</sup>lt;sup>26</sup> CPA, "Puttalam Fact Finding Report," 19th July 2006, pg 7

# Threats and attacks on humanitarian actors

Attacks on humanitarian agencies and staff during 2007 constituted a major factor in depriving IDPs of access to relief and assistance. A report from the Law & Society Trust identified 44 humanitarian workers killed in the period from January 2006 to December 2007 and reported 23 disappearances of humanitarian workers during the same period. Every individual killed and abducted was a Sri Lankan, and the majority was of Tamil ethnicity.

While some deaths and injuries to humanitarian workers was due to their being caught in crossfire or in attacks targeting the combatants on either side, such as those who were victims of claymore attacks. Some abductions and killings seemed to be a consequence of the targeting of particular INGOs. The Halo Trust, a de-mining NGO in Jaffna, for example had several of its staff members abducted and killed. The political affiliations of some of the victims, as well as family connections, seemed to also be a causal factor.

Two shocking incidents relating to the killing of humanitarian workers caught national attention in 2007. One was the abduction and murder of 2 staff members of the Batticaloa office of the Sri Lanka Red Cross (SLRC) who had come to Colombo on official business and were abducted in broad daylight from the central railway station in Colombo in May 2007. The second was the killing of Catholic priest Fr. Nicholaspillai Packiyaranjith of Mannar who died when his van was caught in a claymore explosion in LTTE-controlled Mallavi in the Vanni on September 26. Fr. Packiyaranjith who was the Mannar District Coordinator of Jesuit Relief Services had been delivering relief items to communities trapped in the Viduthaltivu area as a result of the on-going fighting in the area.

The attacks on staff of humanitarian agencies as well as on officials and civilians engaged in providing relief to IDPs often led to

accusations and counter-accusations being traded between the security forces and the LTTE as to who was responsible. The climate of impunity prevented any serious and impartial investigation from taking place. This situation pointed to the collapse of respect for international humanitarian law by both parties to the conflict including the provisions guaranteeing the protection and neutrality of humanitarian actors.

Even though Sri Lanka has not signed up to Protocol II of the Geneva Conventions, including article 18 which deals specifically with the protection of humanitarian workers and has not included common Article 3 in the national enabling legislation for the Geneva Conventions,<sup>27</sup> the government remains bound by the principles of what has passed into customary international law which prohibit intentional attacks on civilians, including humanitarian workers.

The imposition of new forms of accreditation and registration on all internationals working for humanitarian and aid agencies in Sri Lanka, including the need to obtain Defence Ministry approval also acted as a deterrent on humanitarian workers in the conflict-affected areas of the country. The registration process was for individuals rather than agencies, and the type of information required made it clear that this was a way of monitoring INGOs especially in the North and East. In addition, restrictions were also imposed in terms of the geographic areas of operation with a time limit for the duration of the visa. These processes led to many delays and in some cases INGOs withdrew from Sri Lanka citing these delays and difficulties as factors that made it impossible for them to work effectively in the country.

Throughout the year 2007, there were also continuous attacks on humanitarian workers and on agencies engaged in the delivery of humanitarian assistance to IDPs in the North and East in some sections of the media, especially in the Sinhala press.

<sup>&</sup>lt;sup>27</sup> Geneva Conventions Act 2006

<sup>28</sup> HRW, "Improving Civilian Protection in Sri Lanka", September 2006, Pg 25

Following the success of military operations in Vakarai and in Batticaloa West that wrested control of these areas from the LTTE, the discovery of material and vehicles belonging to various international NGOs that had worked in those areas was reported by the military in a way that pointed to collusion between INGOs and the LTTE. Among the material found were medical items with the branding of ZOA Refugee Care in an abandoned LTTE run hospital in Tahngavelayuthapuram; fishing boats with labels of Save the Children Federation found in a LTTE coastal base in Vakarai; and plastic sheeting with the UN symbol that had been used to cover a LTTE bunker. In spite of all attempts by the NGO community to explain that these items had been captured by the LTTE by force and that there was no law enforcement agency active in the area to which they could make a report of the loss or theft, these reports fuelled the anti-NGO environment.

In November 2007, Customs impounded a consignment of Meals Ready to Eat (MRE) at a UNICEF warehouse in Colombo. UNICEF clarified that these consisted of a three day food ration pack for UN staff in accordance with global security measures stipulated by UN Headquarters. On November 23, the UN office of the Resident Coordinator issued a press statement saying that 'this false impression undermines the security of every UN staff member, obstructs the implementation of basic development projects for all Sri Lankans and erodes confidence of donor governments.'

The issue was made further complex by a government censure of UNICEF the following day for participation in a public demonstration in Colombo which had been organized to call for justice for humanitarian workers killed in conflict. The government was reported to have called on UNICEF Country Representative Phillipe Daumelle to "take appropriation action" against his staff members. There was further controversy regarding a vehicle imported by UNICEF which was allegedly bullet proof and had not come in to the country through the proper channels of the Ministry of Defence. UNICEF, in response, said that the

vehicle was not bullet proof but instead was modified to be 'blast proof'.

#### 11. Women:

The impact of displacement on women has been the subject of much discussion all over the world, and the Sri Lankan case is no exception. The Guiding Principles and the UNHCR Guidelines for the Protection of Refugee Women clearly detail the risks and vulnerabilities of women who are uprooted from their homes and familial environments and confront life in temporary and transitional shelters.

Key among the gender-specific problems related to displacement are the social and psychological issues relating to overcrowded and cramped living quarters, the lack of privacy and problems of safety and security including sexual and physical violence. In particular, many women IDPs voiced their concerns regarding the lack of covered bathing areas that would shield them from the eyes of strangers. In many of the welfare centres set up for persons coming into Batticaloa District at different moments during 2007, first from Vakarai and then from Batticaloa West, there were complaints regarding the lack of adequate toilets set aside for women.

During the process of resettlement, especially in Batticaloa West, there were several reports of incidents of violence against women including that of a rape that took place in August 2007. However, the security situation was such that the victim did not come forward to register a formal complaint.

## 12. Children:

The Guiding Principles explicitly describe children in situations of armed conflict as requiring special attention. In the conflict in Sri Lanka, the forced recruitment of children to the ranks of the LTTE and of the TMVP has been an issue of critical concern. In

addition, the conflict and processes of displacement have denied children access to education and to health care, as well as depriving them of a stable and healthy environment in which to grow. The physical, psychological and emotional impact of the conflict on children is the subject of study and research and in Batticaloa in particular there was a focus on designing psycho-social interventions aimed at strengthening their abilities to cope with their situation, and with the fear and anxieties that had become a part of their everyday lives.

The disruption of the education system due to displacement and the occupation of schools by internally displaced persons had a severe impact on all children living in the conflict affected areas. In addition children suffered more than adults from the chronic shortages of food that led to an unbalanced diet, and from lack of access to health care. A report by UNICEF on April 21 said that 11,200 of children under 5 in the IDP Welfare Centre (30-40% of the total number) suffered from one or the other form of malnourishment and undernourishment.

## 13. Conclusion

The government of Sri Lanka remains ill-equipped to deal with situations of displacement, especially the long-term and cyclic types of displacement that have taken place due to the conflict in the North and East of the country. The repressive nature of some laws and policies which are linked to the counter-terrorism activities of the law enforcement agencies of the Sri Lankan Government have contributed to the erosion of democratic institutions and practices in the country. Human rights abuses take place with impunity and have created an environment of terror that generates heightened tensions especially within the Tamil community. There have been many reports of the killing, abduction and intimidation of IDPs and a collapse in terms of the states obligation to provide them with security and with a safe

environment. In addition, the nature of the conflict and the manner in which it has played itself out over the past twenty years has resulted in a great deal of tension and hostility between and within the different ethnic and religious communities that live in the North and East, adding another layer of complexity to the issue of displacement and resettlement.

Both parties to the conflict have engaged in military actions with little or no consideration for the civilian population that is caught up in the conflict. Even in cases where the state decided to embark on military operations in areas occupied by civilians there has been no preparation made in advance to deal with the inevitable displacement that would follow as a result of these operations. Violations of humanitarian law, such as attacks of public buildings and on areas of civilian habitation, have taken place with impunity and other than the trading of charges and counter charges, no real investigations have been done into these incidents, nor have any perpetrators been identified and brought to justice.

By the end of 2007, it was clear that the year 2008 would contain more sustained military action in the North. In spite of the sustained nature of displacement experienced by Sri Lankans, the level of disaster preparedness was inadequate. The ethnicized and politicized nature of delivery of relief and humanitarian assistance led to delays in providing aid to displaced communities.

There was also little coordination between the different Ministries and state agencies mandated with the provision and care of IDPs as well as with the protection of the rights of IDPs. The dominance of military administration over the civilian administration during the processes of resettlement led to heightening tensions.

Attacks on INGOs, NGOs and civil society organizations working to provide assistance to IDPs and to raise awareness about violations of the rights of IDPs placed many obstacles in the way of groups committed to work for the improvement of conditions of life of IDP communities. At the same time, scarcity of financial

and human resources on the part of the state led to increased dependence on international and national NGOs to provide food, water and other essential amenities to IDP communities as well as to provide healthcare and education, in particular to children and to vulnerable groups such as pregnant and lactating mothers, those with illnesses requiring regular drugs and medication, the disabled and the elderly.

The shrinking space for humanitarian interventions that was obvious at the end of 2007 would inevitably carry over into the following year, 2008. The inadequacy of existing laws and procedures to cope with displacement related not only to conflict but also to natural and man-made disasters has become extremely clear in the past years, and advocacy for the creation of new legal frameworks in accordance with international norms and standards is critical.

The ethnic nature of the conflict that causes the government to view ALL Tamil IDPs with suspicion and therefore subject them to intense screening and interrogation on top of the trauma they have already suffered as a consequence of their flight must be viewed as a matter of grave concern. When formulating new laws and regulations regarding IDPs, the issue of security and adherence to universally accepted norms and standards regarding the treatment of IDPs and of the human rights of citizens must be respected.

## 13.1 Human rights violations suffered by IDPs: 2007

## 13.1.1. Extra-judicial executions

## March

02: Abdul Razak (24) and Priyantha (23), residents of an IDP

camp, were shot and killed by unknown people at Salapayaru in Trincomalee.<sup>29</sup>

04: Thillainayagam Theepan (18), T, male, resident at a tsunami transit camp, shot and killed by unknown people inside the camp at Sammanthurai, Amparai, at around 9.30 p.m.; his girlfriend had been abducted a few weeks previously<sup>30</sup>.

05: Srikumaran (27) a carpenter and an IDP from Mutur was shot and killed by unknown people at Kondayankerny in Batticaloa.<sup>31</sup>

## April

12: Seven Sinhala villagers, including a boy and 6 women, all civilians, shot and killed by unknown gunmen at Awaranthalawa, Southwest of Vavuniya town. The villagers had originally been settled there in the late 1970s, had been displaced and then resettled after the Ceasefire Agreement in 2002<sup>32</sup>.

21: Devathasan Indrakumar (28) Tamil, male, labourer, abducted by unidentified gunmen and shot dead nearby. The deceased was recently displaced from Karadiyanaru close to the Chenkalady-Badulla road and was living in an IDP camp at Vipulanandapuram, Mylampaveli in Batticaloa. <sup>33</sup>

## May

02: Bodies of Ponnusamy Sellathurai (46), from Eeralakulam, Nagalingam Thiruchelvam (42) and Ms. Poopalapillai Poomani (30), both from Perumaaveli, Sittandy, were found behind the Panankaattu Maariamman Temple in Sittandy; Eravur police recovered the bodies; All three were displaced chena crop

<sup>30</sup> Veerakesari 05/03/2007 p.1

<sup>29</sup> http://www.tamilguardian.com/tg344/p13.pdf

<sup>31</sup> http://www.satp.org/satporgtp/countries/shrilanka/timeline/2007.htm

<sup>32</sup> http://www.lankanewspapers.com/news/2007/4/13949 6.html
33 http://www.lankanewspapers.com/news/2007/4/13949 6.html

cultivators who had returned to their chenas to check on their crops.34

06: Mammangam Rasakumar (30), T, male, an IDP, living in a camp and working in a shop as a labourer, shot and killed in Koralankerni, Eravur.<sup>35</sup>

28: Mahenthirarajah Varathan (23), T, male, displaced from Nagamunai in Paduwankarai by unidentified armed and masked persons from his temporary dwelling with relatives at Beach Road, Chettipalayam and shot dead in Kaluthavalai, in Kaluwanchikudy, Batticaloa. His body was found in front of the Nagadampiran temple in Kaluwanchikudy.<sup>36</sup>

## June

03: Subramaniam Santheepan, 30, postmaster, from Mirusuvil North, displaced and living in Chankattanai, Chavakachcheri, was shot dead by armed men on a motorbicycle who on followed him while he was riding his own motorbicycle with his wife and two children along Vangkalavadi Road, Chavakachcheri'37

22: Sellathamby Anantharajah (43), displaced from Vakarai and resident of Vinayagapuram IDP camp in Valaichchenai abducted from the camp at about 10 at night; his body was found with gunshot wounds at Kalkudah, the next morning;<sup>38</sup>

## July

15: Vinayagamoorthy Visvalingam (22), and Vettivel Navaneethan (19), IDPs from Mutur, presently residents of Kaluvankerny Welfare Centre in Batticaloa, abducted while travelling on a bus; bodies found at Pavatkodichenai, in

35 Veerakesari 09/05/07 p.1

<sup>34</sup> http://www.tamilguardian.com/article.asp?articleid=1210

<sup>36</sup> http://www.tamilguardian.com/article.asp?articleid=1210

<sup>&</sup>lt;sup>37</sup>(http://www.tamilguardian.com/article.asp?articleid=1258)

<sup>38</sup>http://www.tamilsagainstgenocide.org/Docs/Final800pIndictment
Document.pdf

Unnichchai, Batticaloa.39

23: Bodies of S. Shanmugalingam (25) and N. Ganeshalingam (30), recently re-settled at Vakarai recovered by the Police in Batticaloa.

## 13.1.2 Deaths due to shelling and mines

April 15: A 6 month old female infant, Sathathari Thilliampalam, injured during artillery shelling by Sri Lanka Army (SLA) towards the LTTE controlled Paduvankarai area in Batticaloa two weeks ago, died of her injuries at Lady Ridgeway Hospital in Colombo. The parents are at the Welfare Centre for IDPs at Urani. 40

May 05: Ravindran Ravi (54), T, male and his wife Sindhurani (42), T, female, resident in IDP camp at Thadchinamarathamadu in Vavuniya, displaced from Pavatkulam, were killed in a claymore explosion at Paalampiddi, while they were cycling towards the camp.<sup>41</sup>

May 24: Nathiya Selvarajah (22), T, female, an IDP and her husband Gopi Selvarajah (24), T, male, killed in a claymore explosion which hit the motorcycle they were on, near Kunjukkulam on the Vavuniya-Mannar road, while they were on their way from Naddangkandal to Kunjukkulam to check their vacated house; <sup>42</sup> June 16: Asirvatham Mariyathas (41) displaced from Vadamarachchi east, temporary resident of Puthukkudiyiruppu, killed in SLA artillery fire on civilian settlements on coastal areas of Vadamarachchi East. <sup>43</sup>

September 01: 12 Tamil civilians including 2 children, fleeing from a Sri Lanka Army offensive towards Silavaturai in Mannar, were killed in a claymore explosion at Pasiththendral, in Musali, about

40 www.tamilnet.com/cat.html?catid=13&year...month

<sup>12</sup> VK 25/05/2007 p.10

<sup>39</sup> http://www.srilankatruth.com/news/newspublish/news.php?news\_id=815

<sup>41</sup> http://www.lankanewspapers.com/news/2007/4/13662.html

<sup>43</sup> http://www.tamilnet.com/art.html?artid=22499&catid=13

8.30 a.m. Identified as: Selvakumar (24), T, m, driver of the vehicle, his wife, Princy Selvakumar (25), T, f, their son Rehushan Selvakumar (04), T, m, and the boy's aunt Jesudasan Elizabeth (42), T, f,; Panimayam Jeyaraj (50), T, m, his son Panimayam Oscar (20) T, m, and a 19-year-old female relative, T, f; Puvisuvetha (04), T, f, Krishnapalan (24), T, m, of Vavuniya, and Saroja Nagamuththu (60), T, f.; Two bodies could not be identified.<sup>44</sup>

September 25: Ponniah Kalirajah (78), T, m, recently resettled, killed in shell explosion at Raalkuli, Mutur, Trincomalee around 8 p.m.;<sup>45</sup>

October 19: Jebmaalai Jesudasan (55), T, m, and his grandchildren Mary Milakshani Maximus (15), T, f, and Dilakshan Maximus (11), T, m, killed when a boat carrying civilian passengers was caught in crossfire in the seas off Viduthalthivu in Mannar; the mother and two other children were injured and admitted to the Mannar hopsital; 46

October 25: Parimalam Selvanathan (20), T, f, 8 months pregnant, Somasundaram Jeyabalasingam (61), T, m, and his daughter Kausalya Jeyabalasingham (9), T, f, killed in artillery firing at around 11 a.m. at the IDP camp at Periyamdau in LTTE-controlled Mannar; 9 others were wounded in the attack; <sup>47</sup>

December 20: Suppaiah Mohanraj (29), T, m, IDP from Silavaturai, Mannar, died in Mulangkavil hospital due to injuries sustained in artillery fire that hit the IDP camp at Periyamadu, Mannar, where he was living with his family, including two children, on October 26;<sup>48</sup>

45 http://www.tchr.net/cp\_sum\_sep2007.htm

<sup>44</sup> DM, p.1; 04.09.07, VK 02/09/07 p.1, TKK 02/09/07 p.1

<sup>46</sup> Lakbima.p1, 19 October 2007 (http://www.tchr.net/cp\_sum\_sep2007.htm)

<sup>47</sup> www.tamilnet.com/art.html?catid=13&artid=23590 48 www.tamilnet.com/art.html?catid=13&artid=24049

#### 13.1.3 Abductions

January 20: <u>Two boys</u>, displaced from Vaharai to Kannankiramam village in Valaichenai, Batticaloa were abducted by armed men in the afternoon; <sup>49</sup>

March 10: Kuttan Piraruban (15) a member of a resettled family in Thiriyai, Trincomalee, and a Year 9 student at Thiriyai Thamil Maha Vidyalayam, abducted by unidentified persons from his home at night; complaint lodged with the Kuchchaveli Police and the Sri Lanka Monitoring Mission (SLMM)<sup>50</sup>

11: Theiventhiran Ragunathan (36), of Vadaliyadaippu, a disabled person, displaced from his home due to military operations and living with relatives at Kalaivaani road, Jaffna, was abducted from Pandithirippu at about 4 a.m. by unidentified armed men in a white van; his wife registered a complaint with the HRC; <sup>51</sup>

May 18: Kanthasamy Sivananthan (22), from Kadukkamunai and Sinnathurai Muhunthan (17), of Ambalanturai, displaced due to recent offensive and resident in IDP camp at Kirankulam, were stopped by an STF road patrol while they were on a bicycle, and on their way to Eruvil; the STF denied the arrest when the Batticaloa district TNA MP. Ariyaneththiran contacted the Officer in Charge (OIC) of the Kaluwanchikudy STF camp; the boys were released from a vehicle that drove to the Kirankulam area on the night of May 20, Sunday<sup>52</sup>.

May 28: Mylvaganam Wigneswaran (20) and Manikkappody Gunasegaram (24) abducted by unknown people at 11.30 p.m. from Arayampathy, Batticaloa; They were IDPs from Kokkadicholai, presently living in a tsunami shelter;<sup>53</sup>

<sup>49</sup> www.tamilnet.com/cat.html?catid=13&year=2007

<sup>50</sup> http://www.tamilguardian.com/tg347/p13.pdf

<sup>51</sup> VK 12/05/2007 p.10; TKK 13/05/2007 p,.2

<sup>52</sup> http://www.tamilnet.com/art.html?catid=13&artid=22222

<sup>53 (</sup>http://www.tchr.net/cp\_sum\_sep2007.htm); VK 01/06/2007 p.1

# 13.1.4 Missing IDPs:

July 10: Manikkampodi Sivalingam (40), T, m, of Kachchaikkodi, a recently resettled village in Pattipalai , Batticaloa, was reported missing after going fishing in Pudukunaavai tank; 54

July 15: Gnanachandran Puviharan, IDP living in the Navanturai welfare centre Jaffna reported missing after leaving the camp on Saturday July 14;55

## 13.1.5 IDP Arrests:

March 31: 6 youths - Arulnayagam Joseph Jesuthasan (25), Sebastian Joseph Jebatheepan (28), Pushparajah Pushpakanthan (20), Muharasa Murali (22), Prakash Sripaskaran (28), and Selvanayagam Amalraj (25) - residing at the Welfare Centre for IDPs located at St. Antony's Church in Mutur were arrested by soldiers who came into the camp.<sup>56</sup>

April 04: Sri Lanka Army (SLA) arrested more than 35 Internally Displaced Persons (IDPs) who had gone to 38th Colony, Palayadivettai and Nellikaddu villages, located on the border between Amparai and Batticaloa districts, to inspect their houses which they had fled from, said refugees who escaped from SLA. The detained were taken to Kondaivettuvaan SLA camp in Amparai district, same sources said<sup>57</sup>.

54http://www.humanitariansrilanka.org/eResources/PDFdocs/ SituationReports/EPJul2007.pdf

<sup>55</sup> http://www.lankanewspapers.com/news/2007/7/17222 space.html

<sup>56</sup> www.tamilguardian.com/article.asp?articleid=1180 57 www.tamilnet.com/art.html?artid=21768&catid

# CONSTITUTIONAL REFORM IN THE MIDST OF VIOLENT CONFLICT

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Mario Gomez1

#### Introduction

The country yet again embarked on a process of constitutional reform in 2006. This came in the midst of intense and violent conflict amongst the government of Sri Lanka, the LTTE and the Karuna Faction. In this chapter we look at the process of constitutional reform that took place under the auspices of the All Party Conference (APC) and the All Party Representative Committee (APRC) in 2006.

In 2006 the President of Sri Lanka established an All Party Conference (APC) to design a political settlement to the ethnic conflict. The APC subsequently decided to establish an All Party Representative Committee (APRC) consisting of one representative from each political party and a Panel of 17 Constitutional Experts to advise the APC on the shape that such a political settlement should take.

The President's approach to a political settlement was based on a three step process:

1. The formulation of a framework of proposals for the

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devolution of power within an undivided Sri Lanka.

- 2. Negotiations with the LTTE based on this framework.
- The adoption of the new constitutional settlement and implementation of the agreement.

In his speech of 11 July 2006 to the Joint Meeting of the APRC and the Panel of Experts on Constitutional Reform the President observed that finding a political and constitutional solution to the national question required a multi-party and inclusive approach. He spoke of the need to devise a "home grown" solution drawing inspiration from the four religious traditions of the country. According to the President the framework for settlement that was devised should preclude the division of the country. At the same time it should allow people to take charge of their destiny and control their "politico-economic environment". It should be based on democratic values, the rule of law, promote political pluralism, the tolerance of dissent and human rights.

The APRC consisted of representatives from all the major political parties in Parliament except the Tamil National Alliance (TNA). The Panel of Experts consisted of constitutional and other experts from academia, the public service and civil society. The Panel of Experts published a notice in the media inviting public representations and received approximately 700 responses.

The APC and the APRC were established in the midst of an escalating war against the LTTE. While many welcomed the effort at trying to build a consensus amongst political parties in the South, others looked at the APC and APRC process with a degree of scepticism and as a ploy designed to appear to respond to the concerns raised by the international community in relation to the resumption of the conflict.

In December 2006 the Panel of Experts released two reports: a Majority Report endorsed by 11 members and a Minority Report

#### Constitutional Reform in the Midst of Violent Conflict

endorsed by four. Two members of the committee submitted separate reports agreeing with some parts of the other two reports. In January 2007, the chair of the APRC, Tissa Vitharana, released another report which he claimed was a synthesis of the four reports and invited political parties to respond to his proposals. By June 2007 most political parties barring the United National Party (UNP) and the Janatha Vimukthi Peramuna (JVP) had responded to these proposals.

In this chapter we look at some of the ideas for constitutional reform contained in the Majority and Minority reports and the Tissa Vitharana Proposals of January 2007.

## 2. The Majority Report

#### 2.1 Root Causes

According to the Majority Report, endorsed by 11 members, one of the root causes for the conflict was the exclusion of smaller ethnic groups from their due share of state power in what was a multi-ethnic and multi-religious country. As a result minorities had been alienated from the Sri Lankan state. On the other hand, greater power sharing among the communities would have facilitated greater national integration according to the Majority.

The Majority argued for a system of constitutional arrangements consisting of provincial institutions and local authorities to enable communities to exercise power and develop their own areas. At the same time all communities would also share power at the Centre which in turn would strengthen the unity and integrity of the country.

## 2.2 Nature of the State

The Majority Report was based on four key ideas about the nature of the Sri Lankan state:

Sri Lanka is a multi-ethnic, multi-lingual, multireligious and multi-cultural state.

Every "constituent people" will have the right to develop its own language, develop and promote its culture, and preserve its history.

Every "constituent people" will have the right to its due share of state power including the right to representation in institutions of government.

Sri Lanka will be described as "one, free, sovereign and independent State". Expressions such as unitary, federal, union of regions and provinces will be avoided.

#### 2.3 Unit of devolution

The Majority recommended the province as the unit of devolution and units that as far as possible should consist of geographically contiguous territories. Questions relating to the merger of the North and the East should be a subject for future peace talks at which there should be Muslim representation.

Merger of two or three provinces outside the North East would be possible so long as the merger was preceded by a referendum in those provinces.

# 2.4 Merger of the North and East

The Majority proposed the following options with regard to the merger of the Northern and Eastern Provinces to be discussed at future peace talks:

## Option 1

A single North-East Province with two internally

#### Constitutional Reform in the Midst of Violent Conflict

autonomous Sinhala and Muslim units will be established.

The Muslim unit will comprise of the Kalmunai, Sammanthurai and the Pottuvil polling divisions as the base, together with non-contiguous Muslim majority Divisional Secretary's Divisions in the North-East. According to this option the Muslim Unit will consist of a contiguous base unit in the East and non-contiguous units from other parts of the North-East.

The Sinhala Unit will consist of the contiguous Ampara polling division together with noncontiguous Sinhala majority Divisional Secretary's Divisions in the North-East.

Such units shall exercise legislative and executive powers relating to subjects and functions devolved by the Constitution itself. These would include law and order, education and culture.

Special arrangements would have to be made with regard to land as the bulk of State land available for future expansion lie in the Sinhala majority Divisional Secretary's Divisions.

Some constitutional guarantees, such as a double majority, may need to be incorporated at the level of the North-East Provincial Council to safeguard the interests of the Muslim and Sinhalese minorities.

## Option 2

Create three non contiguous units in the North East which will consist of a "Base Unit" and other

non contiguous areas to be "attached" to the Base Unit. The units will be:

- A. A non contiguous Tamil Unit consisting of the Northern Province as the "base unit" and the non-contiguous Tamil majority areas of the Eastern Province.
- B. A non contiguous Muslim Unit consisting of the Muslim-majority areas of the Eastern Province, with the polling divisions of Kalmunai, Samanthurai and Pottuvil forming the "base unit" and the other noncontiguous Muslim majority Divisions of the "North-East" linked to this base unit.
- C. A non contiguous Sinhalese Unit consisting of the Polling Division of Ampara serving as "base unit" and other Sinhalese-majority Divisions of the "North-East" linked to the base unit.

The alternative was to link the Sinhala majority areas to adjoining provinces and create two non contiguous Tamil and Muslim units instead of three.

## Option 3

The North and East will have one common Provincial Legislature and Government for an interim period of 10 years. At the end of 10 years a referendum will be conducted in the East to determine whether the East wishes to remain as part of the merged unit. This option is similar to that contained in the Draft 2000 Constitution

Bill.

In the interim period, safeguards such as internally autonomous Sinhala and Muslim majority units and double majority may need to be incorporated to protect the interests of the Muslim and Sinhalese minorities.

## Option 4

The Northern and Eastern Provinces will have separate provincial legislatures with an Apex Council to co-ordinate matters of common interest. The Apex Council will consist of members of the two legislative councils. This idea was taken from the Concept Paper and the Options Paper of the Mangala Moonesinghe Select Committee of 1993.

#### 2.5 Powers

The Majority recommended a National and Provincial List and the continuation of the Concurrent List. A Concurrent List would contain a minimum of subjects so as to reduce the possibility of the Centre overriding the provinces. The division of powers between the Centre and Provinces should be explicit and devoid of ambiguity. The Centre will not have legislative power over functions in the Provincial list and vice versa. Residuary powers would vest with the Centre and not with the Provinces.

# 2.6 Asymmetry for the North East

There would not be a Concurrent List for the North East and the powers and functions in the Concurrent List would be transferred to the unit or units of the North East. In this respect there would be a degree of asymmetry between the North East and the rest of the country.

However, it would be possible for other Provinces to subsequently negotiate with the Centre and seek the transfer of powers in the Concurrent List to the Province.

Theoretically then it was possible that the Concurrent List may become extinct if all the provinces succeeded in having the powers in the Concurrent List transferred to the respective provincial jurisdictions at some future date.

# 2.7 Defence, Law and Order

Defence, national security, regular, special and paramilitary forces and the coastguard will be matters exclusively for the Centre. Law and order will be devolved to the provinces except in the case of the city of Colombo and its immediate environment.

# 2.8 Supremacy of the Constitution and Constitutional Court

The Constitution would be supreme and all provincial and central government actions inconsistent with the constitution would be void.

A Constitutional Court that reflects the plural nature of Sri Lanka will interpret the Constitution and have the power to strike down provincial and central legislation that is in conflict with the constitution. The Constitutional Court will be outside the hierarchy of courts and consist of eminent members of the legal community and others who have a specialized knowledge in governance. There will also be a Panel of Experts to assist the Court at its discretion.

## 2.9 Presidential Intervention

No provincial council shall advocate or promote secession. If this happens and there is evidence of a "clear and present danger" to

#### Constitutional Reform in the Midst of Violent Conflict

the unity of the country then the President may assume the functions of the provincial council or impose emergency rule on the province concerned. In an extreme situation the council may be dissolved. In addition it should be possible for the Chief Minister to request the declaration of emergency in a province in appropriate cases.

The Majority Report envisages both judicial and Parliamentary control over these decisions of the executive although the processes for exercising these controls are not detailed.

#### 2.10 Second Chamber

A 60 member Senate consisting of representatives from the provincial councils would provide a way for the regions to share power at the centre and rectify imbalances in representation in the lower house of parliament. The representatives to the Senate would be elected by the respective provincial councils. The chair of the Senate will be one of the two Vice Presidents and it should be possible for a senator to sit as a member of the Cabinet. The lower house of Parliament would be restricted to 180 members.

## 2.11 Provincial Government

Provinces will be governed by a Provincial Board of Ministers. The majority recommended that "executive power sharing" operate at the level of the Board of Ministers and therefore posts on the Board of Ministers will be proportionate to the number of votes obtained by the each of the parties. However, a party may opt to remain out of the Board of Ministers.

The Majority recommended executive power sharing at provincial level only for a limited time period noting the importance of a vibrant opposition.

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## 2.12 Two Vice-Presidents

The Majority recommended two Vice Presidents who should come from communities other than that from which the President comes. One of the Vice Presidents will be the chair of the Senate and the other will be the chair of the "High Posts Commission." The chair of these two bodies would be rotated between the two Vice Presidents. The High Posts Commission will replace the current Constitutional Council and will be responsible for making appointments to the independent commissions and other independent positions.

## 2.13 Rights

The Constitution should have a comprehensive Bill of Rights that recognizes civil and political rights as well as economic, social and cultural rights. Children's rights should also be recognized. No mention is made of women's rights. The group recommended the inclusion of a provision similar to Section 29(2) of the Soulbury Constitution as a group right.

In addition to the Supreme Court, Regional Courts of Appeal would also have a fundamental rights jurisdiction. The Human Rights Commission would be recognized in the Constitution and provinces may also set up their own human rights commissions.

## 2.14 Language

Sinhala and Tamil will be the official languages while Sinhala, Tamil and English will be the national languages. Everyone will be entitled to transact business with the state in any of the national languages.

## 2.15 Land

Land in the province in relation to subjects and functions in the

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National List will vest with the Centre. All other land will vest in the Province. Both the Centre and Province may negotiate with each other for the transfer of land. A National Land Commission will frame land policy and make recommendations to the Centre and Provinces on other matters pertaining to land.

## 2.16 Indian-Tamil Zonal Councils

The Majority suggested the establishment of an Autonomous Zonal Council (AZC) in the Nuwara Eliya district and a "non-territorial" Indian Tamil Cultural Council (ITCC) to contribute to the advancement of the Tamils of Indian origin. About 30% of the Tamils of Indian Origin live in the Nuwara Eliya district.

The AZC would exercise the powers of the Pradeshiya Sabhas in addition to powers in respect of Tamil medium schools, vocational education, agricultural development, animal husbandry and cultural affairs. The AZC will have the power to make by laws although statute making power will remain with the provincial legislature.

The "non-territorial" ITCC will consist of members of Parliament, provincial councilors and nominated members who belong to the community of Indian Origin Tamils.

## 2.17 Centre-Province Disputes

The Majority recommended a number of mechanisms for Centre-Province disputes.

Mediation and conciliation by the Council of Chief Ministers chaired by the President.

Arbitration by a Tribunal appointed by the Second Chamber.

Reference to the Constitutional Court.

## 2.18 Fiscal Devolution

The Majority recommended that the fiscal and financial arrangements should be redesigned. Basic principles that should shape such redesigning are Provincial Autonomy, Revenue Adequacy, Equity, Efficiency and Predictability.

The Finance Commission should consist of five members to be appointed by the President on the recommendation of the High Posts Commission. The Majority also recommended a Finance Ministers' Forum.

## 2.19 Local Government

The Majority recommended the constitutionalizing of local government as a third tier of government. More powers should be vested in local authorities. They would have the power to make by-laws which would not necessarily need provincial legislative approval.

# 2.20 Changes to Provincial Functions

Where the powers of the Provinces are amended by Parliament, such amendments will apply in the province only after approval by the provincial legislature.

# 3. The Minority Report

The Minority, consisting of three lawyers and an academic, submitted a hard hitting dissent, disagreeing with the Majority on a number of substantive issues.

## 3.1 Unit of Devolution

The Minority agreed that the unit of devolution should be the

#### Constitutional Reform in the Midst of Violent Conflict

existing province. However, they strongly opposed the merger of the North and East. According to the Minority ethnicity and language should not be the criteria for the determination of provinces since this would lead to the disintegration of the country.

They also recommended Pradeshiya Sabha, Municipal Council and Urban Council areas to be a second tier of governance within each province and the creation of a third tier within the province to be called the Grama Sabhas. The powers of both these tiers would also be laid down in the Constitution.

The group also recommended the representation of minority communities on the Board of Ministers in the provinces. Communities who constitute at least one fifth of the population of the province should be represented on the provincial Board of Ministers.

#### 3.2 Central Territories

The Minority recommended the creation of several Central Territories on the grounds of national security. These Central Territories would be independent of provincial or local government control and would be controlled by the Centre:

Capital City/Ratmalana airport/Katunayake airport
Galle Port/Koggala airport
Hambantota Port/ Weerawila airport
Trincomalee Port/ China Bay airport
Mannar and Talaimannar
Kankasanturai and Palaly

# 3.3 Presidential Intervention

The Minority Report envisages a greater degree of executive control over the provinces. Although the Governor of the Province is expected to act on the advice of the Chief Minister, in matters

of security it should be possible for the President to give directions to the Governor. If the President is "satisfied" that there has been a "failure of administration" the President may assume control over the province concerned and Parliament may confer on the President the power to make statutes for the province till normalcy is restored.

The Minority suggested the inclusion of a number of provisions from the Indian Constitution that would strengthen the Centre's power to intervene in provincial matters.

## 3.4 Powers

The Minority recommended four lists of powers: Reserved, Provincial, Concurrent and Local. To the Minority, the Concurrent List provided a way to introduce uniformity and to ensure that all provinces had similar "standards" in areas where such uniformity was desirable. The two examples provided by the Minority were in relation to "drugs and poisons" and "infectious diseases" where the group felt it desirable that the Centre be allowed to intervene in those situations where the province was not meeting the required standards.

To the Minority the Concurrent List will also provide additional safeguards to the Minorities by allowing the Centre to intervene in those cases where the province does not address the interest of the minorities. The Minority report looked at minorities from the perspective of sub-national or provincial minorities and thus argued for stronger powers for the Centre. Such a perspective of course would dilute the strength of the minority when viewed from a national perspective.

## 3.5 Second Chamber

The Minority was "not averse" to the idea of a Second Chamber if it provided a vehicle for minorities to have a "voice" at the Centre. However, the group felt that minority interests would be better

#### Constitutional Reform in the Midst of Violent Conflict

served if key cabinet ministries were allocated to minority groups at the level of the Centre.

## 3.6 Language

The Minority was against giving English an enhanced constitutional status arguing instead that Sinhala and Tamil should be the direct link between the two communities and that the two languages should be taught in schools from the earliest and most appropriate point. This was not to devalue the importance of English, yet a higher legal status for English was not warranted.

## 3.7 Tamils of Indian Origin

The Minority suggested the establishment of a Ministry or a Department for the advancement of the Tamils of Indian Origin. They were of the view that the Centre and parliamentarians were more competent to bring the Tamils of Indian Origin into the mainstream than the provincial units.

## 3.8 Land and Water Commissions

Water should not be a provincial function and the group suggested the creation of Water and Land Commissions to frame policy and regulate these two resources.

## 3.9 Constitutional Court

The Minority opposed the idea of a Constitutional Court as suggested by the Majority. To the Minority such an institution could become the domain of "anti-national and alien interests". They were of the view that it was an attempt "to stealthily introduce interpretations to suit the so called alien NGO thinking to the Constitution of Sri Lanka".

## 3.10 Law and Order, Land

The Minority also opposed the vesting of law and order and police powers with the province. Similarly they also were against the vesting of state land in the provinces.

## 4. The Tissa Vitharana Proposals

In January 2007 the chair of the APRC, Tissa Vitharana, released a report which he claimed was a synthesis of the Majority and Minority reports. Although he claimed that he attempted to blend both reports, his proposals in effect were a summary of the report of the Majority. While the Majority Report was detailed and contained extensive proposals on a variety of matters, the Vitharana proposals are succinct and provide a potential framework for an enduring constitutional settlement. The following is a summary of the Vitharana Proposals:

- Sri Lanka is a multi lingual, multi religious and multi cultural state.
- The state shall be a "free, sovereign and independent" republic and shall consist of institutions of the Centre and the provinces which shall exercise power as provided by the Constitution.
- The Constitution will recognize the right of all constituent peoples to develop their language, culture and preserve their history. All constituent peoples have a right to their due share of state power.
- The form of government shall be parliamentary and the President shall act on the advice of the Prime Minister and the Cabinet. The Prime Minister will be directly elected with the entire country serving as the constituency. The Executive Presidency shall end at the end of the current Presidential term.

- The Constitution will be supreme and all actions of the Centre and the Provinces inconsistent with the Constitution will be void.
- A specially created Constitutional Court will have the power to strike down central and provincial legislation that is inconsistent with the Constitution. All existing law will be read subject to the Constitution.
- The Centre may intervene in the affairs of the province where there is a "clear and present danger to the unity, territorial integrity and sovereignty of the Republic." It would be possible for emergency rule to be imposed or for the President to assume the functions of the Provincial Council in a situation where the unity and territorial integrity of the country was at stake. In extreme situations, the President may dissolve the provincial council. However, the President's acts in such a case will be subject to parliamentary and judicial control.
- There will be two houses of Parliament: a House of Representatives and a Senate. The Senate will be elected by the provincial legislatures. The Cabinet shall consist of representatives from both Houses.
- There will be two Vice Presidents from communities other than that from which the President comes. One Vice President will chair the Senate and the other the Higher Appointments Commission.
- Executive power sharing will take place at provincial level for a limited time period.
- The unit of devolution will be the province. Provinces outside the North and East can merge so long as the merger is preceded by a referendum on the issue. The number of provinces outside the North East may be reduced.

- Merger of the North East is best left for discussion at subsequent peace talks at which there must be Muslim representation.
- Most powers and functions should be distributed between the National and Provincial Lists. A Concurrent List will also exist and contain a smaller list of functions and powers. The Centre will have no power with regard to the subjects in the provincial list and the provinces will have no power with regard to subjects in the National list. The Concurrent List will be further subdivided into List A and List B. Executive powers in relation to List A powers will be exercised by the provinces and executive power in relation to matters in List B will be exercised by the Centre. Contagious diseases and environmental pollution are examples of List B matters.
- National policy and national standards will lay down what
  is to be known as "Framework Legislation." "Framework
  Legislation" will be passed by Parliament but after a consultative
  process with the province. Framework Legislation will not amount
  to law but provinces will be required to conform to such a
  framework when passing laws. Provincial statutes inconsistent with
  Framework Legislation may be struck down by the Constitutional
  Court.

# The APRC Process: The Tensions between the Rhetoric and the Reality

Sri Lanka has been through at least two previous "All Party" processes, once during the Jayewardene regime and once during the Premadasa regime. Neither of the two previous processes resulted in a substantive outcome despite many months of discussions.

The ethnic conflict can only be addressed by a significant transformation of the Sri Lankan state. This has to be accompanied by a transformation of the LTTE, which must include a commitment to political pluralism, non-violence, the rule of law, democratic principles and human rights. The APRC process was initiated with the goal of addressing the former and then using its output to persuade the LTTE to transform.

For academia, civil society and others outside the political spectrum however, one of the fundamental difficulties lies in reconciling the APRC process of state reform with the current government's clear military strategy aimed at defeating the LTTE on the battlefield.

While the government has continued to proclaim in its public statements that it is committed to the Norwegian facilitated peace process and will seek a negotiated settlement to the conflict, there has been little it has done on the ground that has convinced neutral observers that its public rhetoric is genuine. While neither the state nor the LTTE has formally withdrawn from the Ceasefire Agreement of 2002, there has been a sharp increase in killings, disappearances, abductions and other human rights violations. This has been accompanied by verbal and physical attacks on NGOs, including humanitarian actors. On the other hand, acts by the government have added to the scepticism surrounding the APRC process. When the Majority Report of the Experts Panel was released in December 2006, the government explicitly distanced itself from the contents of the Majority Report fuelling further cynicism about this process of state reform.

The APRC process on constitutional reform is at sharp variance with the military realities on the ground. The military campaign has been accompanied by unprecedented human rights and humanitarian law violations and it is impossible to reconcile these two competing strategies. Yet, at the current moment the APRC process remains the only available political process to forge a consensus amongst political parties in the South and offers the

sole "glimmer of hope" in what is otherwise a very bleak political landscape.<sup>2</sup>

# 5.1 Enriching the Discourse Around the APRC

Despite the scepticism surrounding the APRC process, it has generated a broad range of ideas that have enriched the constitutional discourse and could potentially have an impact on a future constitutional settlement. Two of its key outputs – the Majority Report and the Tissa Vitharana Proposals – provide an imaginative base on which to fashion a sustainable political settlement. These two documents together with the 2000 Draft Constitution and the 1995 Proposals of the then Chandrika Government (also known as the GL-Neelan package) contain a number of ideas that could easily be used as basis for negotiation with the LTTE.

Although the Majority and Minority reports disagree on many fundamental issues, they both agreed on the province as the unit of devolution. Where they disagree is on the issue of merger and the number of centrally controlled territories. While the Majority was willing to look at several options with regard to merger, the Minority came out very strongly against the merger of the North and East. In addition, the Minority introduced a number of centrally controlled territories in addition to the City of Colombo. The unit of devolution is likely to be a major source of contention in any peace process. That two different ideological groups within the Panel of Experts were able to achieve some level of consensus on this issue then is a positive sign.

On other issues such as land, law and order, and the idea of a Constitutional Court, though, there were substantive disagreements between both reports. The Minority Report categorically rejected the idea of a Constitutional Court.

<sup>&</sup>lt;sup>2</sup> See Sumanasiri Liyanage and M Sinnathamby (eds.), A Glimmer of Hope (Colombo: South Asia Peace Institute, 2007).

One of the gaps in the report of the Majority Report is the lack of detail surrounding the amendment process. One of the essentials of any effective power sharing process is the need to protect it from unilateral amendment by the Centre. Any modification of a future power sharing arrangement for Sri Lanka should require the consent of the provinces and specifically the consent of the North East unit or units. The Majority did suggest that any constitutional amendments involving the powers of the provinces shall apply in a province after passage in Parliament only if it is approved by the relevant Provincial Legislature. A similar idea is contained in the Tissa Vitharana proposals. Yet it would have been better to have provided more detail in this regard. The exclusion of unilateral alteration by either party is essential in order to get both parties to subscribe to the arrangement.

The concept of Framework Legislation is ambiguous. The objective of the Framework Legislation is to ensure that all provinces have uniform standards where uniformity is desirable. Yet this could be used in some cases for the Centre to intervene in the affairs of the province especially since the Constitutional Court will be empowered to strike down provincial legislation that is inconsistent with the Framework Legislation. Sri Lanka's previous experiences with the Concurrent List have been unpleasant ones. Under the Provincial Council system the Centre has used the subject of "national policy" to intervene in the affairs of the province. Given this history it may be necessary to devise a different approach in those cases where uniformity in policy among regions is desirable. The Tissa Vitharana proposals have a slightly modified vision of Framework Legislation, yet even these ideas are likely to require some fine tuning if they are to be acceptable to the Tamil parties.

The Tissa Vitharana Proposals contain an imaginative framework for a multi-ethnic society based on power sharing and one which accommodates the aspirations of all communities. It is no doubt the way to go if Sri Lanka is to move from violence to a

constitutional peace and endeavour to address the other problems of poverty, social injustice and gender inequality. Its strong points are:

- The recognition of Sri Lanka as a multi ethnic state;
- The right of constituent peoples to participate in state power;
- Its implicit recognition of Power sharing as a basis for ethnic co-existence;
- The commitment Constitutional Supremacy;
- Its endorsement of the idea of a Constitutional Court, although the Majority Report's concept of a broader Constitutional Court is preferable;
- A Second Chamber consisting of representatives from the regions; and
- Contiguous areas as a basis for power sharing.

# Among its weak points are:

- The two Vice Presidents, which are unlikely to make a substantive impact; and
- The concept of National Framework Legislation, which could potentially provide an avenue for the Centre to intervene in Regional functions

There are a few areas where the Tissa Vitharana Proposals need to be strengthened. On the "Constitutional Amendment" process there needs to be greater clarity. Ideally constitutional amendment should entail a special majority in both houses of Parliament and approval by the Provincial legislatures, especially where the amendment deals with an alteration of the powers of the provinces.

Some references to "symbols" would also have been useful. Where constitution making is responding to identity conflicts then recognition of symbols such as anthems, flags, regional constitutions and historical names can be as important as the powers of autonomy granted to a region or ethnic group.

It would also be useful to explore some other imaginative mechanisms for blending self rule with shared rule such as the use of twin capital cities: one in Colombo and the other in Trincomalee. One capital city could house Parliament and the other could house the Constitutional Court and Supreme Court.

The Centre's powers of intervention where the territorial integrity of the country is under threat may also require greater detail. Where the Centre decides to intervene in the affairs of the Province then ideally there should be review and approval by a special majority of both houses of Parliament within a stipulated time frame. This should also be accompanied by the right of the Province concerned to petition the Constitutional Court for judicial review in appropriate cases.

Similarly the declaration of "national" emergency should also ideally require approval by a special majority of both houses of Parliament and by all provincial legislatures especially where such emergency rule is in force for a prolonged period.

One of the contentious issues in process of negotiations with the LTTE, the other Tamil parties and the Muslims will be the unit of devolution. The other will no doubt be the role and powers of the judiciary. Any powers sharing agreement will require an interpreter and an umpire. One of the questions that will have to be addressed is whether this role of interpreter and an umpire should be vested in the Supreme Court; a specially created Constitutional Court; a political body like the Second Chamber; or some other body that may consist of international judges.

If the option of the Constitutional Court is pursued, which it is submitted is the most preferable option then the Majority Report's conception is preferable to the Tissa Vitharana Proposals. The Majority envisaged a Constitutional Court that would consist of "eminent members of the legal community and others who have specialized knowledge in governance." The Tissa Vitharana Proposals however envisage a Constitutional Court as part of the

existing court structure and is ambiguous on whether it could include others with a specialized knowledge of governance and constitutional issues.

Another area that will require further reflection is the role of the Second Chamber. Is the Second Chamber to be a method for the Provinces to participate in governance at the Centre? Or will the Second Chamber play a wider role by scrutinizing certain key public appointments, monitoring the declaration of emergency and other acts of the executive?

# Conclusion: The Lack of Political Courage

The central challenge of constitution making in Sri Lanka over the past fifty years has not been the lack of proposals or ideas but rather the lack of political courage to adopt and then implement these proposals. We are nowhere closer to meeting this challenge. On the contrary some of the recent public statements from political actors indicate that political courage and political imagination have shrunk considerably rather than grown.

The state has once again embarked on a process of constitutional reform in the midst of violent conflict. This process of constitutional reform is in sharp contrast to its military strategy which is intensive and has paid little attention to human rights norms or international humanitarian standards. Is this process likely to produce an output of substance in the near future? Current political and military realities unfortunately suggest that this is extremely unlikely.

# CORRUPTION AND GOOD GOVERNANCE

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Rukshana Nanayakkara

#### 1. Introduction

The word corruption or the phrase 'anti corruption discourse' has gathered momentum over the last few years in Sri Lanka. The word corruption which was not popularly used in public discourse prior to 1994, received attention in the 1994 Election campaign of Ms. Chandrika Bandaranaike as she kept the elimination of "corruption and terror" in the forefront and as the motto of her campaign.<sup>2</sup> Since then the word "Dushanaya" (corruption) is commonly used in public discourse especially by politicians, political parties and civil society at large.

Around the globe, corruption impacts people's lives in a multitude of ways. In extreme cases, corruption costs lives. In countless other cases, it costs people their money, health and their fundamental freedom for human rights. There is no globally accepted single definition for corruption although different forms of corruption are readily identified and categorized. Transparency International, the global coalition against corruption had defined corruption as "misuse of entrusted power for private gain." This abuse of

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<sup>&</sup>lt;sup>2</sup>This does not suggest that there was no discourse in relation to anti corruption in Sri Lanka. For an analysis of Anti Corruption discourse in Sri Lanka read Status of Good Governance Report, 2007, Transparency International Sri Lanka.

entrusted power can take place in forms of bribery, graft, embezzlement, theft, fraud, patronage, abuse of discretion, nepotism, cronyism or favouritism.

The cost of corruption is fourfold: political, economic, social and environmental. On the political front, corruption constitutes a major obstacle to democracy and the rule of law. In a democratic system, offices and institutions lose their legitimacy and trust when they are misused for private advantage. Though this is harmful in any established democracy, it is even more so in newly emerging ones. An accountable and credible political leadership can not develop in a corrupt climate. Economically, corruption leads to the depletion of national wealth. It is often responsible for the funnelling of scarce public resources to uneconomic and politically motivated high-profile projects, at the expense of less spectacular but more necessary infrastructure projects such as schools, hospitals and roads, or the supply of power and water to rural areas. Furthermore, it hinders the development of fair market structures and distorts competition, thereby deterring investment. The effect of corruption on the social fabric of society is the most damaging of all. It undermines people's trust in the political and administrative system, in its institutions and its leadership. Frustration and general apathy among a disillusioned public result in a weak civil society. That in turn clears the way for despots as well as democratically elected yet unscrupulous leaders to turn national assets into personal wealth. Demanding and paying bribes become the norm. Those individuals unwilling to comply often emigrate, leaving the country drained of its most able and honest citizens, while the most eligible for a job may not apply. Environmental degradation is yet another consequence of corrupt systems. The lack of, or non-enforcement of, environmental regulations and legislation has historically allowed the West to export its polluting industry to the South. At the same time, careless exploitation of natural resources, from timber and minerals to elephants, by both domestic and international agents has led to ravaged natural environments. Environmentally devastating projects are given preference in funding, because they are easy targets for siphoning out public money into private pockets.3

The principal objective of this chapter is not to delve into these aspects of corruption at a conceptual level. Rather it focuses on incidents of corruption and the development of and drawbacks in the anti-corruption movement in Sri Lanka in 2007 and the years immediately prior to it together with governance issues that surround them.

The release of the COPE reports (Report of the Committee of the Public Enterprise) in January 2007 and August 2007, the VAT scam, use of public funds to establish a government owned budget airline, corruption in the defence sector with the escalation of the war, the lack of accountability and transparency standards in newly launched development programmes of the government, increasing nepotism and favoritism within the decision making process of the government together with the work of the USAID funded Sri Lanka Anti-Corruption Programme, and the involvement of civil society organizations in anti corruption work kept discussions on corruption related issues at the forefront in the past few years.

# <u>Mahinda Chintanaya (Mahinda Vision) - Does it Tackle</u> <u>Corruption</u>

Mahinda Chintanaya, the election manifesto of President Mahinda Rajapaksa makes no explicit reference to curbing corruption. Nevertheless, it should be understood that such a comprehensive development plan which lays out a number of visionary development goals cannot reasonably be achieved without a comprehensive plan of action to curb corruption.

<sup>&</sup>lt;sup>3</sup> For further knowledge visit on elements of corruption and its impact visit: http://www.transparency.org/news\_room/faq/corruption\_faq

# The COPE report

The Committee on Public Enterprises (COPE) was first established in 1979 as the second parliamentary oversight committee, after realizing that there existed an unmanageable number of public institutions to be handled by a single post budget committee. The Committee comprises 19 members reflecting the party composition in the House and is established under Standing Order 126, at the beginning of each parliamentary session. The duty of the Committee is to report to Parliament on the accounts examined, budget and estimates, financial procedures, performance and management of Corporations and other Government Business Undertakings.<sup>4</sup>

The accounts of these organizations are audited by the Auditor-General and form the basis of the investigations of the Committee. The Committee has the power to summon relevant officials and such other people as it thinks fit to obtain evidence and to call for documents. The Committee report to the Parliament and the recommendations contained therein are deemed to be directives to the respective Corporations or Statutory Bodies for due compliance.<sup>5</sup>

The first COPE investigation report under the Chairmanship of Mr. Wijeyadasa Rajapakshe was issued on 12th January 2007. The report had examined 26 state run institutions including the Central Bank of Sri Lanka, Ceylon Electricity Board, Bank of Ceylon, People's Bank, Samurdhi Authority, National Lotteries Board, Sri Lanka Ports Authority and Public Enterprises and Reform Commissions (PERC).6 The Committee under the same

<sup>&</sup>lt;sup>4</sup> The Parliament of Sri Lanka – http://www.parliament.lk/committees/public\_enterprises.jsp

<sup>&</sup>lt;sup>6</sup> First Report from the Committee on Public Enterprises, Presented by Hon. Wijeydasa Rajapakshe, M.P. Chairman of the Committee on Public Enterprises, Sixth Parliament of the Democratic Socialist Republic of Sri Lanka.

chairmanship issued its second report in August 2007. The second report of the COPE included detailed finding on another 20 state run institutions including the Associated Newspaper of Ceylon Ltd., Securities and Exchange Commission, Building Materials Corporation, National Youth Services Council, Export Development Board and Mahapola Higher Education Scholarship Trust Fund.<sup>7</sup>

It is noteworthy to refer to the general observations mentioned in both reports as they highlight serious governance issues in state run institutions in Sri Lanka. As per the report these deficiencies and irregularities are common in nature in all the institutions the Committee examined.

#### Failures and Omissions

- Failures and omissions on the part of the relevant Secretaries to supervise and follow up on the performance of the institutions which come within their purview
- Failures and omissions on the part of the relevant Ministries to keep under close observation the affairs of the institutions which come within the purview of their duties and obligations
- Poor supervision of the line ministry
- Delays or failures in responding to the Committee directives

## Management Issues

 Non-availability of update corporate plans and Action Plans

<sup>&</sup>lt;sup>7</sup> Second Report from the Committee on Public Enterprises Presented by Hon. Wijeydasa Rajapakshe, M.P. Chairman of the Committee on Public Enterprises, Sixth Parliament of the Democratic Socialist Republic of Sri Lanka.

- Lack of professionalism in the management of public enterprises
- Key senior management positions being held by persons in an acting capacity or on a contract basis for considerably longer periods
- Lack of quality management resulting in losses
- Idle and under utilized resources
- Absence of good governance practices
- Political interference

### Accountability Issues

- Very poor attention on profitability, liquidity and financial viability
- Lack of effective internal audit
- Poor treasury management
- Uneconomical transactions and mismanagement of funds
- Delaying in submitting accounts
- Non-compliance with financial rules and regulations
- Non-adherence with the accepted tender procedures
- Payment of withholding taxes by the institutions which amounts to a payment of double taxes

The reports further highlight that "as a result of above mentioned common deficiencies, profitability, liquidity and financial viability of most of the enterprises have declined." (sic)

The COPE reports have divulged mismanagement of over 150 billion rupees in state run institutions. However, the Parliamentary Committee is a mere fact finding committee and is not empowered to institute legal proceedings. Although the Parliament debated the reports issued by the Committee there was no clarity in structuring an effective mechanism to follow up on the findings of the Committee. This is also indicative of the unfortunate reality of the minimal interest of the Government in dealing with corruption in state run institutions. Currently the findings of the reports are with the Bribery Commission of Sri Lanka.

# 3. Major Corruption Scandals Revealed:

# 3.1. Corruption in the Defence Sector - MiG Deal and Lanka Logistics

The controversial multi million rupee MiG-27 deal was in the spotlight throughout 2006/07. The deal has come under scrutiny with many shady aspects being questioned. Interestingly just a day before the MiG-27 deal was signed in July 2006, a company called "Lanka Logistics" was set up to procure all goods and services relating to the armed forces and the police. The company is apparently headed by a brother of President Rajapakse raising serious doubts on its credibility.<sup>8</sup>

This prominent case involves the Sri Lanka Air Force (SLAF) and the Ukranian Company Ukrinmash, a subsidiary of the Ukranian government. The deal involved a payment of US\$14.6 million to an offshore company (Bellimissa Holdings Ltd. – registered in the United Kingdom) for the acquisition of four old MiG-27 fighter jets and the overhaul of four others. In the contract signed, Bellimissa Holdings Ltd. is described as the "Designated Party" and was touted as the "financier" of the deal. The Contract Article 24 gave the address of the firm as: 2<sup>nd</sup> Floor, 145-157, St. John Street, London EC1V4PY.9 As revealed in Sunday Times,

<sup>8</sup> See Sunday Times 3rd December 2006

http://www.sundaytimes.lk/070812/Columns/sitreport.html

12th August 2007 there is apparently neither any staff nor an office facility at this address.

The fighter jets bought on this occasion had been rejected by SLFA in the year 2000 based on their age. When MiG – 27 aircrafts were purchased in May and October 2000 the government spent approximately US\$1.75 and US\$1.6 million respectively on the air crafts. Whereas in 2006 an aircraft cost US\$2.4 million. It is alleged that two of the aircraft purchased were offered to the Air Force by D.S. Alliance Private Limited in May 2000 at a cost of US\$ 1.75 million. Thus the government has seemingly paid much more for older aircraft than their original price. The defence ministry has explained that the price difference was due to the extended lifetime of the aircrafts. According to ministry explanations, aircrafts purchased in 2000 allegedly had only two years of service and therefore required additional expenditure on overhauling, whereas those purchased in 2006 had many years of service left in them.

Following revelations by the weekly paper Sunday Times, the government announced the appointment of a parliamentary select committee to probe the deal, in August 2007.

Another controversial purchase was revealed in mid 2007 consequent to the LTTE attack on the Bandaranaike International Airport at Katunayake. This involved a corruption allegation over a purchase of MiG-29 aircraft. The aircraft was acquired despite the finding by a technical evaluation committee that such aircrafts were priced too high and such technology was not needed to face the recent enemy capabilities.<sup>11</sup>

A great deal of attention was given to these deals by a defence correspondent in his column in the Sunday Times. His exposure of several arms deals in the past has led to death threats against him and his family. On one occasion, former air force officers entered his home and threatened him at gunpoint whilst his family

<sup>10</sup> Ibid

<sup>11</sup> Morning Leader, 29th August 2007, State of the Nation, Sonali Samarasinghe

looked on. <sup>12</sup> This resulted in him receiving protection from a police commando unit provided by the authorities. After his in depth look at the MiG-29 aircraft deal, for reasons unknown, the authorities removed Mr. Athas's security. This inevitably led to serious constraints being placed on him as an investigative journalist. In August 2007, Mr. W G Guneratne, who translated the Sunday Times situation report for Sinhala Lankadeepa Newspaper, was allegedly threatened by an unidentified person on the pretext of being a Sri Lankan Air Force officer, in the newspaper's editorial premises.

#### 3.2. Mihin Air

Mihin Lanka Private Ltd was established on 26th October 2006, allegedly using funds from State Treasury and from the Employees' Provident Fund. Between May 2007 and March 2008 Mihin Lanka incurred a loss of Rs. 3 billion and continued to receive financial support from Central Bank of Sri Lanka. At the beginning of May 2008, it suspended its operations due to the lack of aircraft as the existing aircrafts were seized by the leasing companies due to non payment of instalments. Nevertheless the company purchased two new buses and leased ground handling equipment for a monthly rate of US \$ 223,000. At present, these items are idling, as buses and step-ladders are unnecessary at the Bandaranaike International Airport, which has bridges that provide direct access to the passenger terminals. A parliamentary debate took place in March 2008 on the conflict of interest and misuse of public funds. No actions have been taken since then.

## 3.3. VAT Scam

The Auditor General's Department of Sri Lanka uncovered two separate VAT scams to the tune of Rs. 3.57 billion and a further Rs. 360 billion. It has been stated that the fraud had been first

<sup>12</sup> http://www.sundaytimes.lk/010722/news2.html

<sup>13</sup> http://www.lankanewspaper.com/news/2008/4/26996\_space.html

<sup>14</sup> http://www.lankanewspapers.com/news/2008/5/27531.html

investigated by the CID as far back as 2003 but despite the magnitude of the fraud, the CID had discontinued the probe on the basis that the Bribery Commission was investigating the matter. Ultimately, neither party continued with the investigation till the matter was raised again and highlighted in the Auditor General's report.

The Sri Lankan government refunds VAT paid by manufacturers when they import raw materials and re-exports the finished goods. The alleged fraudsters in this scam received refunds of taxes that they had not in the first instance paid or in some instances to companies that did not exist. Only four of the 20 companies under investigation had done legitimate business and exported manufactured goods. But, even in these four companies the refunds were of sums vastly more than was legally due.

The investigation in this regard carried out by the Auditor General's Department resulted in Sri Lanka's Auditor General presenting an extraordinary report to Parliament alleging that, "either willfully or negligently," the Sri Lanka Inland Revenue Department caused the loss of 441 billion rupees (US\$3.89 billion) in taxes between 2002 and 2004. To put this in perspective, the total tax revenue from Sri Lanka's relatively small economy in 2004 was 397 billion rupees (US\$3.5 billion), meaning the money lost due to alleged fraud was more than all of the government's annual earnings. The report also concluded that the Rs.441 billion (US\$3.89 billion) was what could be computed and that "the amount that cannot be computed is extremely large." 15

Twelve businessmen and two top officials of the Inland Revenue Department are currently being indicted for misappropriation of Rs. 4,000 million. However, some of the important witnesses have already left the country.

Further, a report released by the Public Accounts Committee (PAC) of the Parliament in November 2007 stated that Inland

<sup>&</sup>lt;sup>15</sup> Visit <a href="http://report.globalintegrity.org/Sri%20Lanka/2007/notebook">http://report.globalintegrity.org/Sri%20Lanka/2007/notebook</a> for further information about the VAT scam

Revenue Department has entertained VAT declaration from two bogus companies in 2004. According to the PAC report the computer system of IRD had been manipulated so that two VAT assessment amount to Rs. 200 billion did not appear on the computer screen for control and audit. The report also revealed that 183 out of 235 documents relevant to the refund had gone missing and no internal investigation had been held into the matter, despite it being reported to the Finance Ministry. <sup>16</sup>

The Presidential Commission, appointed in August 2007 to investigate the fraud discovered a further large scale VAT fraud to the tune of Rs. 50 million in January 2008 committed by a polythene manufacturer. This company has submitted falsified documentation on export production to obtain VAT refund.<sup>17</sup>

#### 3.4. Mavilaru Fraud

In October 2006, the government decided to compensate farmers who had their paddy lands destroyed when the LTTE blocked the Mavilaru water supply. Affected farmers in Mavilaru, Muttur, Kantale, Serunuwara, Seruwila, Allai and Mahindapura and other farmer colonies in the Trincomalee district, whose paddy cultivations were severely affected as a result of the water blockade by the LTTE, were to be given Rs. 25,000 each per acre of destroyed paddy land for up to a maximum of four acres. The compensation was to be channeled through the Agricultural and Agrarian Insurance Board (AAIB) and released within a week as urgent assistance. Subsequently it was discovered that a cash fraud had been committed and some Rs. 6.7 million had disappeared. It was alleged that the perpetrators have included names of non-existent farmers to withdraw funds. 18

At present a court case is pending on the issue.

<sup>16</sup> http://www.dailymirror.lk/2007/11/30/front/05.asp

<sup>17</sup> http://www.lankanewspapers.com/news/2008/1/24043.html

<sup>18</sup> See The Sunday Leader, July 22nd 2007 for a full report of the incident

# 3.5 Amalgamation of the National Procurement Agency

The amalgamation of National Procurement Agency (NPA) with the Treasury of Sri Lanka created serious doubts about the independence and transparent conduct of the agency. The treasury comes under the Ministry of Finance and is subject to the direct control of the President who is also the Minister of Finance and Planning. In 2006, the NPA, as an independent agency, developed procurement guidelines and manuals for implementation, and trained a large number of officials. As almost 90% of all capital expenditure goes through the procurement agency, independence and transparency in the monitoring of all government procurement is crucial. This is extremely important in improving a healthy business environment and winning public trust with regard to the government's conduct. Thus the amalgamation of NPA with another agency raises serious issues about its independence as a public institution in the country.

# 3.6 Escalating Ministerial Expenditure

Currently Sri Lanka has 52 Cabinet Ministers, 20 Deputy Ministers and 35 Non-Cabinet Ministers. The increased expenditure required to maintain such a large group of ministerial troupe raises serious issues about the legitimacy of their existence, particularly at a time when the general public is faced with serious difficulties in meeting day to day expenses due to a skyrocketing cost of living. The lack of a Right to Information law in Sri Lanka closes direct avenues in obtaining information about the expenditure of ministers. Mostly the information is revealed in answers provided to the questions in Parliament. Details tabled in Parliament in recent months by some ministries in relation to question raised by parliamentarians over the use of rented vehicles show that some of them spend as much as Rs. 1.4 million a month on this item alone. <sup>20</sup> Details tabled in the House revealed that in

<sup>20</sup> The Sunday Times, 22<sup>nd</sup> July 2007

<sup>&</sup>lt;sup>19</sup>http://www.npa.gov.lk/guidelines/ProcurementGuidelines 2006-amded12 June.pdf

2007 Chamal Rajapaksa's Irrigation and Water Management Ministry pays as much as Rs. 207,000 a month for each of the seven vehicles it has rented from a private company. Accordingly the Ministry is required to pay rental of Rs. 17.3 million annually for its seven rented vehicles. Moreover, a monthly fuel allowance of Rs. 105,000 is paid for the jeep used by the Minister. Drivers of vehicles of a Ministry receive a wage of Rs. 412 per day and overtime payments.

In the face of growing public criticism over extensive privileges enjoyed by Ministers, the government has decided to reduce the salaries of ministers by 10%. Currently ministers' salaries are on par with those of MPs which is Rs. 54,285. Nevertheless it should be noted that in addition to vehicles related expenses, MPs receive a monthly payment of Rs. 104,635 including their salary. Other allowances include a fuel allowance of Rs. 33,350 (MPs close to Colombo get a lesser amount), Rs. 1000 as a refreshment allowance, Rs. 4,000 for every Parliament sitting, Rs. 2000 for hand phone usage and Rs. 10,000 as staff travel allowance.

Ministers also enjoyed additional allowance for overseas travelling and those who don't have houses in Colombo are paid Rs. 100,000 monthly for accommodation. The Ministers are also entitled to a fuel allowance ranging from Rs. 20,000 to 75,000 a month depending on the area in which they live, five telephone lines and a fax machine. Their personal staff are entitled to a monthly fuel allowance ranging from Rs. 13,200 to 19, 400. Ministers are also paid a monthly telephone allowance ranging from Rs. 17,000 to Rs. 34,000.

Some may tend to justify these expenses in the light of their duties and the current security situation in the country. This highlights the acute need of a study to look into the cost incurred by each of these Ministries/Ministers against the real impact that they make.

<sup>21</sup> Ibid

4. Right to Information and Curbing Corruption
Legislation which enables access to information would benefit the country in many ways. It will nurture a culture of openness and transparency. An informed public would have a higher say and level of participation in government affairs, and will, in the longer term, increase the value of democracy to a stable government. An accountable regime would lead to a decrease in the misuse of power where reasons for decision are made to seem more rational in the eyes of the public.

An attempt to introduce a freedom of information law in 2003 was aborted in Sri Lanka. A bill was passed by the Cabinet of Ministers but was never processed beyond as Parliament was dissolved immediately after that.

In Environmental Foundation Ltd. v. Urban Development Authority<sup>22</sup> the Sri Lankan Supreme Court held that for Article 14(1)(a)(freedom of Speech) to be meaningful and effective, there must be an implicit right of a person to secure relevant information from public authority in respect of a matter that should be in the public domain. In this case, Environmental Foundation Ltd. challenged the UDA's refusal to divulge information about the development plan of Galle Face Green. In addition to recognizing the right to obtain information, the Supreme Court upheld that the refusal to release the information requested for as per the circumstances of the case, in the absence of a specific reason, was an arbitrary exercise of power, violating Article 12(1) of the Constitution.

This judgment was a victory for the right to information campaign in Sri Lanka and an eye opener for the governing party to guarantee the right to information of Sri Lankan citizens.

# Surveys on Corruption in Sri Lanka

In 2007 the Social Indicator Unit – Centre for Policy Alternatives conducted a survey on corruption in Sri Lanka with the objectives

<sup>&</sup>lt;sup>22</sup> SC(FR) Application No. 47/04; SCM 28.11.2005

of measuring the perceived presence of corruption in society and measuring the frequency and prevalence of this activity.<sup>23</sup> The survey only took into account transactional corruption leaving out types of corruption such as embezzlement, cronyism and nepotism. Although perception is not always a mirror reality, the survey findings are worth summarizing here as they reveal the notion of corruption among the public of Sri Lanka.

## Key Findings of the Survey:

- Most corrupt and least corrupt 43% of the sample surveyed was of the opinion that the police are the most corrupt in Sri Lanka. 25% of the interviewees said that the education sector is the least corrupt in Sri Lanka. Interestingly 27% could not think any sector that is the least corrupt.<sup>24</sup>
- 88% of Sri Lankans agree that women are less likely to pay bribes than men, while 86% believe that women are less likely to accept bribes.
- 67% disagree with the statement that a poor man is more likely to take a bribe than a rich man
- Majority of the respondents feel that corruption at the national level is graver than the same activity at the village level.
- 88% of people feel that paying a bribe cannot be justified. However, more urban people felt that it was better to pay a bribe, than their rural counterparts.
- Spending on Bribers 8.5% of those who were interviewed stated that they paid bribes while 91% said they haven't. Interestingly 40% of the Tamil respondents who participated in the survey have paid bribes. Tamils in Colombo districts have spent Rs. 1778 as bribes and Up-Country Tamil respondents have spent a total of Rs. 717. On average members of the Muslim community had spent Rs. 1408 as bribes and hence are the second largest bribe payers. The Sinhala community seems to be the lowest in terms of

<sup>&</sup>lt;sup>23</sup> A Survey on Corruption in Sri Lanka 2007, conducted by Social Indicator – Centre for Policy Alternatives and commissioned by ARD-Anti Corruption Programme of USAID.

<sup>&</sup>lt;sup>24</sup> The survey measured the public perception on Police, Education, Health, Local Government, Land Registry, Public Utilities – Water Board and Electricity Board, Judiciary and NGOs.

Sri Lanka: State of Human Rights 2008 spending on bribes.

# 6. Impact of Corruption on Poverty and Economic Growth

In June 2007, a study on "Impact of Corruption on Poverty and Economic Growth" found corruption to be a contributory cause of poverty and that it significantly slows down investment and productivity particularly in rural areas in the country.25 Drawing on a household survey in four rural districts, the study reveals widespread corruption in the marketing of village agricultural products. For example, during the paddy harvesting season corrupt officials keep public storage facilities shut so that farmers are obliged to sell their rice at half the rate they would get from government buyers under the guaranteed price scheme. Revealing a collusion between the public and private agencies, these traders then sell the rice at a much higher price to the same paddy stores. This results in heavy economic loss to the farmers. The study finds that corruption is a serious problem in agricultural production and other economic activities in rural areas. Rural entrepreneurs also suffer from the fact that laws and regulations are misinterpreted or manipulated by officials as a result of a lack of knowledge within themselves, as well as among the general public, on the relevant laws and regulations. Further ethnic, social and income biases play an important role in the decision making process. As one fourth of the Sri Lankan community lives below the poverty line, the findings of the survey urges serious attention by the state to deal with the vulnerabilities of the rural community of Sri Lanka.

## Tsunami Recovery Process

A Brief Financial Analysis

<sup>&</sup>lt;sup>25</sup> The Impact of Corruption on Poverty and Economic Growth, USAID/SLEA 2007

The following table shows the financial situation of Tsunami Reconstruction work as at the end of the year 2006. This information was obtained from the Development Assistance Database (DAD) in March 2007. However, this information is not currently available for the public as the DAD website doesn't exist anymore. Efforts to obtain the most recent financial information from RADA were met with lacklustre responses by the officials. The observation in this regard was that officials were either reluctant to divulge the proper information or that they did not have the accurate figures about current expenditure status.

# Available statistics as per March 2007:

Committed (LKR)	Disbursed (LKR)	Expended (LKR)	
241,537,479,923	122,130,378,286	68,533,124,662	

#### Note:

- · Committed funds Funds promised by the donors
- Disbursed Funds handed over to the implementing agencies
- Expended Funds spent on various projects

According to the information provided, there is a large difference between the committed and disbursed funds. When inquiring about this difference, the implementing agencies informed that the amounts of money initially promised were not disbursed by the donors, mainly due to the deadlines of these projects not being met. Some donors have not been satisfied with the progress of the projects and have therefore withdrawn from their commitment after paying the first instalment.

The difference between the amounts disbursed and expended has been a controversial issue that does not have a credible explanation. While some officials were reluctant to divulge the information, there were some responsible bodies that implied that the funds have been utilized by the government for other purposes. There is

no precise evidence to explain the missing sum of Rs 53,597,253,625.

One year after the Tsunami, a report was issued jointly by the Government of Sri Lanka and Development Partners (multi-lateral donors, international financial authorities, bi-lateral and other donors and civil society). However, the second year report appears to be issued under the hand of the Government of Sri Lanka only.

According to RADA, Ministry of Finance, Ministry of Reconstruction, Resettlement and Rehabilitation, Ministry of Urban Development, Ministry of Food, Ministry of Health and Ministry of Foreign Affairs collaborated with the donors in obtaining funds and their subsequent disbursement. Hence it is the duty of these ministries to declare the current status of financial information to the people. Although there was a supervisory body called "Centre for National Operation" under the direct scrutiny of the President of Sri Lanka, the role of this institution is rather unclear to the general public.

Since the last Audit Report by the Former Auditor General of Sri Lanka in 2005, there has apparently been no audit conducted by the Auditor Generals Department. Thus the overall picture on finances is ambiguous and left open for speculation.<sup>26</sup>

### 8. Success Stories

8.1 Sri Lanka Anti-Corruption Action Plan

The final version of the National Anti-Corruption Action Plan prepared by the USAID Sri Lanka anti-corruption programme was presented on July 28, 2007 to senior representatives of the Government, Parliament and Judiciary at a National Conference held in Colombo.

<sup>&</sup>lt;sup>26</sup> Visit ww.tisrilanka.org for detailed position paper on Tsunami Recovery Process in Sri Lanka. The report was released on the 3<sup>rd</sup> Anniversary of Tsunami.

The Action Plan was drafted in consultation with professional associations, chambers of commerce, religious groups, unions, and other civil society organizations. An Action Plan Review Committee was formed to receive and review comments on the draft, and to finalize the Plan. In drafting the action plan, USAID with the collaboration of Transparency International Sri Lanka and Centre for Policy Alternatives conducted more than 100 workshops, seminars and conferences, primarily in tsunami-affected districts, to elicit feedback and involvement from the people of Sri Lanka. Although there is no definite governing body to take forward the action plan, it provides a comprehensive strategic direction to any party which is interested in taking forward a comprehensive anti-corruption programme in Sri Lanka.

# 8.2 Initiative by the Private Sector

In January 2007, the Institute of Chartered Accountants of Sri Lanka (ICASL) and the Securities and Exchange Commission of Sri Lanka (SEC) in consultation with the Colombo Stock Exchange started a join initiative to follow up on standards on corporate governance or mandatory compliance by companies listed in Colombo Stock Exchange. As the outcome of the deliberation, it was intended to incorporate these standards into the listing Rules of the Colombo Stock Exchange. The draft standards were developed by a select committee which took into account Corporate Governance in several jurisdictions including the United Kingdom and USA. The codes introduced a requirement for minimum numbers of non-executive and independent directors, the bases for determining independence, disclosures required to be made by listed companies in respect to its directorate, the minimal requirement to be met by auditing and remuneration committees of listed companies, among others.

<sup>&</sup>lt;sup>27</sup> Http://corruptionwatch.ard-acp.com/index.php?q=2&t=resource&id=82

# Legal and Institutional Framework

- Legislation: Anti-corruption related legislation in Sri Lanka is based on the Bribery (Amendment) Act No. 20 of 1994 and the Declaration of Assets and Liabilities Law, No. 01 of 1975., which stipulates that each year public officials must declare their assets and liabilities as at year end in order to enhance transparency, and to ensure that public officials are not enriching themselves illegally while in office. Although it is a criminal offence to ignore this demand, only 5% of the parliamentarians in 2003 had declared their assets. Not only is it a minority of public officials who declare their assets, but the declaration of assets does not seem to be followed by any independent auditing of the declarations, and there is no right for public access to this information due to the absence of a freedom of information act. Sri Lankan legislation does not supply any whistleblower protection. The most recent anticorruption legislative initiative is the Prevention of Money Laundering Act, No. 05 of 2006.
- Anti-Corruption Agencies: The Commission to Investigate Allegations of Bribery or Corruption (CIABOC) is supposedly an independent body functioning under the Bribery Amendment Act. CIABOC may investigate corruption cases, but it does not possess any powers to carry out proactive investigations on its own initiative. Rather, it must await a complaint from the public. From the recent past focusing on corruption prevention has become part of the agenda of CIABOC and it holds corruption awareness programmes both by itself and in partnership with other anti-corruption agencies. The CIABOC has been largely inefficient in curbing corruption in Sri Lanka. No major grand corruption case has resulted in a conviction. This might be due to the fact that most of the CIABOC investigators have poor or little experience in

the practice of law. The three commissioners are recruited from among retired judges, police or auditors, leaving no room for younger and more dynamic anti-corruption commissioners to assume office. CIABOC is faced with severe financial constraints as the Treasury has the authority to withhold funding allocated to it by Parliament. Finally, as CIABOC cannot, on its own accord, initiate investigations, the Commission is dependent on the public. However, there seems to be no incentive or encouragement for people to lodge a complaint for corruption in the absence of whistleblower protection. On the CIABOC website, cases of corruption detection and raids in which the Commission has been involved are posted. Yet the website reveals no large-scale corruption cases.

- The Auditor-General: The Auditor-General's Department monitors all government units at the national, provincial and local levels to ensure transparency and accountability. The Auditor-General is appointed by the President, and the Department is an independent body. The audit reports were previously referred to the two Parliamentary committees, the Committee of Public Accounts (COPA) and the Committee of Public Enterprises (COPE), which were supposed to take action on the audit reports. However, the moves by the ruling party with regard to these committees have raised serious concerns about their effectiveness. This has left the Auditor General's Department and its anti-corruption work in a weak state. The recent attempts by the Treasury and the high level politicians have raised serious concerns about the independence of this department.
- Ombudsman: The Ombudsman, called the Parliamentary Commissioner for Administration, investigates complaints against government departments, institutions, officials and government maladministration,

as well as corporations regarding infringements of rights. The Ombudsman does not investigate allegations of corruption, complaints about appointments, or transfers and promotions. Nevertheless, its work has a significant impact in assuring good governance in Sri Lanka.

- Public Procurement: The 2006 Procurement Guidelines stipulate that government procurements are to be advertised publicly, stating the specifications and timeframes of the tender. Unsuccessful bidders have a week. upon being informed of who got the contract, to complain to the Procurement Appeal Board, which will then launch an investigation. The National Procurement Agency (NPA) which supervises and administers the tender process has a list of blacklisted companies that are barred from bidding on contracts. A manual on the process and all relevant documents may be found on the NPA website. The tender-awarding process is a time-consuming process as most procurements must not only go through tender evaluation committees, but must also be approved by Cabinet. The NPA has a mandate to address corruption issues. However, it is extremely ineffective in this regard as they view their mandate narrowly. Military purchases are not advertised on the NPA website. Further, the amalgamation of the NPA with the Treasury raises serious concern about its independence.
- Whistle-Blowing: Sri Lanka does not have whistleblower
  protection, resulting in a general reluctance among citizens,
  private sector and public sector employees to report
  corruption.
- 10. Other Anti-Corruption Initiatives in a Nutshell
- Information Network<sup>28</sup> This Global Advice Network

<sup>28</sup> www.business-anti-corruption.com

on Anti-Corruption Information details contact information of relevant organisations and partners engaged in anti-corruption initiatives in Sri Lanka.

- Media: Investigative journalism has faced a seriously challenging era since 2006 with the escalation of the civil war.<sup>29</sup>
- Civil Society:
  - Transparency International Sri Lanka the local chapter of the global coalition against corruption is engaged in a number of research, advocacy and capacity building programmes to identify causes of corruption, minimize their impact and to create a greater public demand to assure good governance in the country.
  - Centre for Policy Alternatives Actively engaged in anti-corruption in Sri Lanka through various programmes.
- 11. Sri Lanka Situation from an International Perspective Major International Conventions Endorsed by the Country:
- The United Nations Convention against Corruption was ratified in 2004. Unfortunately little progress has been made in translating the essence of the convention into practice.
- The ADB/OECD Anti-Corruption initiative for Asia-Pacific: Anti Corruption Action Plan was endorsed on 27 March 2006.
- United Nations Convention against Transnational Organized Crimes was ratified on 22nd September 2006,.

<sup>&</sup>lt;sup>29</sup> Please refer to the other chapter about threat on Right to Information

# 12. Corruption Perception Index

Transparency International Corruption Perception Index (CPI) ranks countries in terms of the degree to which corruption is perceived to exist among public officials and politicians. It measures each country's level of corruption and places it on a scale from 0 to 10, where 10 stands for 'most clean' and 0 stands for 'most corrupt.' It is a composite index, a poll of polls, drawing on corruption related data from experts and business surveys carried out by a variety of independent and reputable institutions. The CPI reflects views from around the world including those of experts who are living in the countries evaluated. A country's score in the index is an indication of the perception level of corruption in the country. There are more than 200 sovereign nations in the world and CPI 2007 ranks 180 of them. Sri Lanka has been included in the CPI index since 2002 and the following table indicates how its position has changed over the years:

Figures for Sri Lanka	2002	2003	2004	2005	2006	2007
CPI Score	3.7	3.4	3.5	3.2	3.1	3.2
Total Number of Countries in the Index	102	133	146	159	163	180
Rank	52	66	67	78	84	94

### 13. Conclusion:

Some tend to argue that the fight against corruption is just another case of the West trying to impose its views and values on the South or more of an NGO conspiracy that has penetrated into Sri Lanka. For example some go on to say that gift giving and taking in the public domain is a normal tradition in many non-western cultures. Thus blatant introduction of anti-corruption strategies may harm

the cultural values of a country. Although this is a contentious position any eradication, elimination or minimizing strategy should focus on the cost of corruption on the country or selected societies. Such an approach would demand the legitimacy of welcoming anti corruption initiatives.

The primary responsibility in tackling corruption lies with governments. Nevertheless an active corporate sector and a civil society that demand anti-corruption initiatives and provide directional guidance to the government is imperative. Individuals of a country must also play a significant role in contributing to this campaign. If the citizens of Sri Lanka remain apathetic and expect the governments to change the status quo, the war against corruption will be only a visionary battle. Thus citizens of a country can contribute in numerous significant ways to curb corruption: <sup>30</sup>

- Know your rights: Learn about your legal rights and entitlements such as the right to information or eligibility under government schemes.
- Exercise consumer powers Patronize only businesses you believe to behave ethically and responsibly; your money is your economic vote.
- Encourage politicians who fight corruption Vote for people who vow to tackle corruption and check whether they are following through on their promises
- Support community groups who check local services This
  would include for instance parent teacher associations,
  associations that watch over the conduct of school
  management and neighbourhood groups which monitor
  social services.
- Learn how to file complaints find out how to lodge complaints against corrupt services whether directly or though NGOs or trade unions or business organizations.

<sup>&</sup>lt;sup>30</sup> These ideas were obtained from Asia Pacific Human Development Report – Tackling Corruption, Transforming Lives, Accelerating Human Development in Asia and Pacific, United National Development Programme, Page 155.

 Report corruption – take the time to report any instance of corruption you have encountered, however minor,

 Resist demands for bribes – while it may seem easier to pay bribes to sidestep red tape or gain quicker access, in the long run almost everyone loses.

• • • •

## RIGHT TO EDUCATION

Amal Siriwardena

#### 1. Introduction

In 2007 the Supreme Court of Sri Lanka took a major activist step in the domain of economic and social rights. Finding a suitable school had become a vexed issue, particularly for middle and lower middle class parents over the years. With the number of prestigious schools remaining almost static, competition for a limited number of places had become more and more fierce. Corruption and cheating had become rampant in the system. In previous years many cases had been filed in courts, but those usually ended with the authorities agreeing to admit the petitioner's children. On this occasion, the Supreme Court declared invalid on constitutional grounds the existing circular detailing admissions procedures and decreed that new procedures be formulated. It also laid down guidelines, the most significant of which was that children should be tested for their suitability for admission.

Another issue that received much publicity during the year was the reaction to the failure rate at the G.C.E. (O.L.) exam which was over 50%. The situation was not new; indeed there has been a slowly improving trend over the years. But the problem highlighted the fact that despite the Sri Lankan education system's many achievements in literacy, enrolment and gender equity, major

Lanka Software Foundation and Sri Lanka Education Forum. The views expressed are his own.

Sri Lanka: State of Human Rights 2008 shortcomings still remain.

# 2. International Covenants

# 2.1 Content of the Covenants

The right to education is enshrined in Article 26 of the Universal

Declaration of Human Rights as follows:1

(1) Everyone has the right to education. Education shall be free at least at the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

(2) Education shall be directed to the full development of the human personality and to the strengthening of respect of human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

(3) Parents have a right to choose the kind of education that

will be given to their children.

The right to education is also enunciated in Article 13 of the International Covenant on Economic Social and Cultural Rights<sup>2</sup> (ICESCR). The Article reads:

(1) The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall

<sup>1</sup> Richard Clayton and Hugh Tomlinson, The Law of Human Rights, Vol. I, Oxford University Press, Oxford, 2000, p. 1346

<sup>&</sup>lt;sup>2</sup>Office of the High Commissioner for Human Rights, International Covenant on Economic, Social and Cultural Rights, 1966, http://www.unhchr.ch/html/menu3/b/a\_cescr.htm

strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

- (2) The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:
  - (a) Primary education shall be compulsory and available free to all;
  - (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
  - (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
  - (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;
  - (e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

Though the above two instruments embody the same broad principles, they also have some differences. They both affirm the importance of universal and free primary education and the role of education in the development of personality. However, the

ICESCR goes further in emphasising the importance of adult education (implicitly) for those who have not completed primary education and the importance of the conditions of teachers. However sadly, teaching remains a relatively poorly paid profession in most countries, developed or developing.

# 2.2 Implementation Issues

Issues in implementation of the ICESCR covenants regarding education are detailed in General Comments No. E/C 12/1999/4³ (relating to primary education only) and General Comment No. E/C 12/1999/10⁴ (relating to education in general), both issued by the Committee on Economic, Social and Cultural rights in 1999 as explained below.

Each state which has not been able to provide compulsory primary education for all free of charge is required to prepare within two years a detailed plan for the progressive implementation of the same. This is to be an absolute right without option for the parents or the state. The lack of educational opportunities for children makes them vulnerable to other kinds of human rights violations such as forced labour and exploitation and child marriage in the case of girls. The Committee observed that 130 million children, two thirds of whom are girls in developing countries were without primary education but recognised the economic difficulties caused by structural adjustment programs, the debt crisis and financial crises, but held that education provided must be of quality, relevant to the child and promote the realisation of the child's other rights.

General Comment No. E/C .12./1999/10 (Right to Education) points out that:

<sup>&</sup>lt;sup>3</sup> Economic and Social Council, Plan of Action for Primary Education (Art.14) E/C. 12/1999/4. (General Comments), http://www.unhchr.ch/tbs/doc.nsf/(symbol)/E.C.12.1999.4.En?OpenDocument

<sup>&</sup>lt;sup>4</sup> United Nations Economic and Social Council, The Right to Education (Art.13), E/C. 12/1999/10 (General Comment), http://www.unhchr.ch/tbs/doc.nsf/(symbol)/E.C.12.1999.10.En?OpenDocument

Education is both a right in itself and an indispensable means of realizing other human rights. Education is recognized as a key driver, in uplifting economically and socially marginalized people, empowering women, safeguarding children, promoting human rights and democracy, protecting the environment and safeguarding population growth, Increasingly, education is recognized as one of the best financial investments States can make. But the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.

The following are essential features of education at all levels.

- Availability the availability of institutions and programs in sufficient quantity with the necessary infrastructure and facilities appropriate to the context.
- Accessibility Educational institutions and programs have to be accessible to everyone within the jurisdiction of the state.
- Accessibility has three components non-discrimination especially against vulnerable groups, physical accessibility by providing facilities within safe physical reach and affordability. In the case of affordability there is the differentiated wording of ICESCR 13(2) relating to primary, secondary and higher education.
- Acceptability the form and curricula of education, including curricula and teaching methods have to be acceptable (e.g. relevant culturally appropriate and of good quality) to students and in appropriate cases, parents.
- Adaptability education has to be flexible so it can adapt to changing needs and respond to the needs of students within diverse social and cultural settings .and could include 'alternative' programs which could parallel regular school systems.

The importance of Technical and Vocational Education (TVE) is recognized both as part of the right to education and the right to work. While the importance of TVE specifically in secondary education is recognised TVE has a wider role to play helping to achieve "steady economic social and cultural development and full productive employment." Introduction to technology and the world of work should not be confined to specific TVE programs but should be understood as a component of general education.

The right to education straddles the domains of economic and social rights and that of civil and political rights. The obligation of the state to provide education for its citizens has to co-exist with their right to have their children educated in accordance with their convictions. One major obstacle in enforcing economic and social rights is the question of resources. The above Covenants seem to have recognised this by making education free and compulsory only at primary or 'elementary' stages. It is difficult to be certain precisely what was in the minds of the architects of the Covenants at the time they were framed and it is tempting to think that due to resource limitations in third world countries it was decided to limit free education to primary levels. However, the widely accepted justification today is that social rates of return are high at primary and secondary levels. At the tertiary level, private rates of return exceed social rates of return.5 Furthermore, the different objectives set out above are not necessarily consistent. The liberty of parents to choose their children's schools could conflict with the objective of equal access. The first might entail permitting private fee levying schools which would not be affordable to poorer parents. The right of parents to have their children educated in denominational schools may also conflict with equal access as such schools may debar or limit access to children of other religions.

World Bank, Treasures of the Education System in Sri Lanka, Chapter 2, <a href="http://siteresources.worldbank.org/INTSRILANKA/Resources/233024-1120241837002/6-TESS">http://siteresources.worldbank.org/INTSRILANKA/Resources/233024-1120241837002/6-TESS</a> Chapter-2.pdf, 2005, page 13.

The Convention on the Rights of the Child – CRC (adopted by General Assembly Resolution 44/25 on 20th November 1989)6 sets out the Right to Education in very similar terms to the ICESCR.

Article 28 of the Convention refers to:

Free and compulsory Primary Education

- Encouraging the development of different form of secondary education, including general and vocational education, making them accessible to every child by appropriate measures such as the introduction of free education and financial assistance in the case of need.
- Making higher education accessible to all on the basis of capacity by every appropriate means.
- Making educational and vocational information and guidance available and accessible to all children.
- Taking measures to encourage regular attendance at schools and the reduction of drop-out rates.

The CRC in some respects goes beyond the ICESCR in that it mentions "offering assistance in case of need" for secondary education. The total cost of education includes not only tuition, but also other requirement such as books, uniforms, travelling and meals. It also mentions measures to increase attendance and reduce drop-out rates.

In realising the goals of the Covenants, all Third World countries face the inevitable question of resource limitations. Significantly the ICESCR has referred only to the progressive introduction of free secondary education. It should be the duty of the state to work towards the reduction of barriers and inequality. The writer's opinion is that equality of access is an opinion that needs to be progressively realised, but it may need a high degree of economic development to do so.

<sup>&</sup>lt;sup>6</sup> Ian Brownlie and Guy Goodwin, Basic Documents on Human Rights, Oxford University Press, Oxford, 2002, page 250.

The right to education is also recognised in the European Convention on Human Rights under Article 2 as follows:<sup>7</sup>

No person shall be denied the right to education, In exercise of any functions which it assumes in relation to education and teaching, the state shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."

The European Convention, though not directly applicable to Sri Lanka, is of interest in the way it has formulated the right to education, also to show how far jurisprudence in European countries is ahead of countries such as Sri Lanka. The types of cases that have occurred regarding parents are also of interest, if only to show to what extent parents can go to assert their rights in developed countries.

Significantly, here even though the context was in the developed West, the right was construed in a negative way as 'no person shall be denied' rather than giving as a positive obligation. This was decided after a lengthy debate as it was felt that a positive burden would put too much of a burden on states. It also stopped short of making explicit the level of education that must be provided.

In the Belgian Linguistic case (No.2)8 the court said that9

The negative formulation indicates ....that the contracting parties do not recognize such a right to education as would require them to establish at their expense, or to subsidise, education of any particular type or at any particular level.

In the same case the court held that educational rights under Article 2 comprise the following:

<sup>&</sup>lt;sup>7</sup> Richard Clayton and Hugh Tomlinson, The Law of Human Rights, Vol. 1, Oxford University Press, Oxford, 2000, page 1357.

<sup>\* (1968)</sup> I EHRR 252, 280 para 3.

<sup>&</sup>lt;sup>9</sup> Richard Clayton and Hugh Tomlinson, The Law of Human Rights, Vol. 1, Oxford University Press, Oxford 2000, page 1359

- A right to access to existing educational institutions
- A right to an effective education
- A right to official recognition of studies successfully completed (since otherwise the exercise of the right to education would not be effective)

Significantly the court held that 10 "there is a right to be taught in the national language ... there is no right for individuals to be taught in the language of their own (or their parent's) choice; nor was there a right of access to a particular school of choice." It is not very clear whether Article 2 confers a right for parents to establish private schools or educate them at home though such a right may be considered to be implied by the second part of the article. However, the state is under no obligation to subsidise these alternatives.

There have been numerous cases regarding the rights of conscience of parents. In *Valsamis vs Greece*<sup>11</sup> it was ruled that parents of the Jehovah's Witnesses denomination were within their rights in refusing to let their child participate in a parade commemorating the war because pacifism is a fundamental tenet of their faith. Parents have failed in attempts to decide the content of their children's education. Pleas that a child should be educated in a grammar school rather than a comprehensive school and that a seven-year old child should be taught arithmetic rather than modern mathematics have been rejected. So has a claim that enforcing school uniforms are an invasion of privacy.

The Indian Constitution provided under Article 45 in the chapter on directive principles of state policy, that universal education between the ages of 5 and 14 be implemented by 1960. This was successively rolled back on the ground that the target could not be realistically achieved to 1970, 1980, 1990 and 2000. Finally a

<sup>&</sup>lt;sup>10</sup> Richard Clayton and Hugh Tomlinson The Law of Human Rights, Vol. 1, Oxford University Press, Oxford, 2000, page 1359.

<sup>&</sup>lt;sup>11</sup> (1996) 24 EHRR 294 as cited in Richard Clayton and Hugh Tomlinson, The Law of Human Rights, Vol. 1, Oxford University Press, Oxford, 2000, page 1364.

constitutional amendment (the 86th Constitutional Amendment Act) guaranteeing compulsory education between these ages was passed in 2001. However, implementation has been stymicd over the enabling legislation mainly the issue of whether responsibility for implementation should be delegated to the states.

## Evolution of Education System

## 3.1 The Colonial Heritage

At the time of independence, Sri Lanka inherited a dual system of education from its colonial masters, primarily from the British. A system of education with English as the medium of education existed within the urban areas and the Jaffna peninsula. The Jaffna schools had especially good facilities for science education. These schools, many of which were originally created by Christian missionaries, served the purpose of providing a westernised elite for the lower rungs of the administrative service. The girls' schools may have served the purpose of training a generation of future mothers to rear their children in a semi-western cultural environment. The majority of these schools were private or assisted schools (privately managed but teachers' salaries paid by the state) but a few elite state schools such as Royal College also existed. During the early twentieth century a few Buddhist private institutions also emerged, as a response to the dominance by Christian parents. But even many urban Sinhala Buddhist parents had a preference for the Christian schools, believing that they had better standards of discipline and breeding.

Side by side with the English Schools, a parallel system of free 'vernacular schools' existed in the rural areas and for the urban poor. These schools provided a very inferior quality of education in Sinhala and Tamil and products of these schools had no hope of higher education. There was also a very separate system of schools for the plantation areas which was even more neglected.

A dent was made in this system by the introduction of a system of

state funded 'central schools' by C. W. W. Kannangara during the period of limited self-rule during the Donoughmore Constitution of 1932-47. This was an attempt to extend a high quality secondary education to rural areas and to disadvantaged districts. 54 central schools were established between 1940 and 1947. These schools provided education in English and had defined standards to be classified as central schools. Though Kannangara is widely considered the father of free education in Sri Lanka, his real contribution may be the central schools, since a system of free vernacular schools had always existed. However in the 1960s this policy was discontinued and policy makers succumbed to the temptation of catering to the demand for secondary education by haphazardly multiplying schools with arts streams only in rural secondary schools.<sup>12</sup>

The most significant piece of pre-independence legislation was the Education Ordinance of 1939. It was subsequently amended by a large number of Acts going up to 1973. It prescribed an elaborate structure including a Director-General of education, Deputy Directors of education, Regional Directors of education, central advisory council and local advisory committees for local areas and a school examinations advisory council. Members of the more important bodies were to be appointed by the minister. It also empowers the minister to make regulations for a large number of subjects including registration of schools, admissions to schools, medium of instruction, syllabi, assistance to poor students, recruitment and training of teachers and compulsory education for children between the ages of five and sixteen. The last was subject to the provision that parents could make alternative arrangements for the education of their children and no child should be caused to attend a school at a distance exceeding two miles. With the passage of time, the provisions of the Ordinance have been altered by other legislation or fallen into disuse. It is

<sup>&</sup>lt;sup>12</sup> Swarna Jayaweera, Fifty Years of Sri Lanka's Independence - A Socio-economic Review (Ed. A.D.V. de S. Indraratne), Sri Lanka Institute of Social and Economic Studies, Colombo, 1997, page 312.

fair to say that many of them are outdated, obsolete and not relevant in the present context.

## 3.2 Early Post-Independence Changes

With the advent of independence, nationalistic sentiments forced changes in the language of instruction. Even the socially conservative United National Party government of 1948-56 introduced compulsory education in Sinhala or Tamil initially for the first five and later eight years of primary education. However, students were able to switch over to English thereafter. But the major change came with the election of S.W.R.D. Bandaranaike's Mahajana Eksath Peramuna government of 1956. Bandaranaike, who had campaigned on the slogan of 'Sinhala only' was propelled into power by the rural Sinhala educated lower middle classes. These classes had long resented the domination of the English educated urban elite which it also saw as disproportionately Christian and Tamil, and also culturally alienated which indeed it was.

A large number of private and assisted schools, mainly Christian but including some Buddhist schools as well, were taken over under the Assisted School and Training Colleges Act No.5 of 1960. Provision was made to continue to respect the prevailing religious identity and the religious balance in new admissions existing at the time of takeover, The Acts also prohibited the creation of new private schools creating a quasi-monopoly of the state in school education, a rather unique situation outside the socialist bloc. A small number of private and assisted schools however continued to exist. The Overseas School of Colombo, established in 1957, and offering the International Baccalaureate Program, was initially licensed on the condition that it admitted only foreign students.

English education was gradually abolished starting from the batch that entered Standard 9 in 1964. Until this time if selected for the Science Stream students could switch over to English at Grade 9.13 However, a few communities such as Burghers and Muslims and some other smaller minorities were allowed to continue in English. This was abolished by the United Front Government starting from the early seventies, so that by the mid-eighties all national schools had exclusively Sinhala or Tamil as the medium of instruction.

However, the changes affected the medium of instruction not the system itself. Essentially the colonial education system remained albeit in Sinhala and Tamil. There were no serious attempts to encourage students to take to technical and vocational training. There were a large number of rural schools created especially those catering to the 'arts' stream, Widening of science facilities however was much more limited, though it has improved in recent times. With the introduction of Sinhala in the universities, a substantial number of rural students gained admission to the universities especially in the languages, social sciences and humanities disciplines. However, only a tiny minority of students could enter the university, a situation that prevails to this day. With a slowly growing economy the 'revolution of rising expectations' brought about by 1956, could not be sustained. The youth insurrection of 1971 was engendered by the frustration of the rural youth.

In the aftermath of the insurrection, the government took one significant step towards educational reform. Two pre-vocational subjects were introduced into the G.C.E. (O.L), (which was renamed the N.C.G.E.) Curriculum and schools were given a fair degree of discretion in the choice of subjects. There were some criticisms that the system created divisions. Urban schools introduced prestigious subject such as motor mechanics while such opportunities were not available to rural schools. However, with its shortcomings the changes were generally in the right direction in the context of the times. Unfortunately after 1977, the U.N.P government reverted to the old G.C.E. (O.L.) examination and

Delaine Weerakkody, Education for All, Vijitha Yapa Publications, Colombo, 2006, page 9.

abolished the pre-vocational studies. This is an example of the kind of ad-hoc political changes that have plagued the system.

## 3.3 Post 1977 Developments

A significant change happened in the early 1980's with the advent of the open economy. International schools began to be created circumventing the law prohibiting the creation of new private schools by registering as companies. This was done with the tacit collusion of the state. Their number has now grown to 150-200 and an estimated 70,000 students. Since they are officially not schools they do not come under the purview of any regulation by the ministry of education and thus have been operating in a total free market environment. A wide range of schools has emerged catering to different income levels with fees starting at about Rs. 36,000 per annum and ranging up to Rs1,000,000 per annum.

While the state system has remained nominally free to everyone this has been effectively nullified by the growth of a huge parallel private tuition industry. Advertisements for tuition classes are ubiquitous in Colombo, the provincial towns and even in some rural areas. It is common for quite young children to be put through six hours of tuition after six hours of school. Sadly, even upper middle class parents seem to accept this situation with complacency rather than use their social position to try to bring about improvements in the teaching. What is worse is that the state spends disproportionately on the privileged schools, which are disproportionately attended by the children of privileged parents. With our limited tax base and in recent times heavy military spending and heavy expenses on other welfare measures such as Samurdhi has led to limited resources to upgrade the less prestigious schools. A very high percentage (85-90) of educational

<sup>&</sup>lt;sup>14</sup> World Bank, The Treasures of the Education System in Sri Lanka, Chapter 1, <a href="http://siteresources.worldbank.org/INTSRILANKA/Resources/233024-1120241837002/5-TESS Chapter-1.pdf">http://siteresources.worldbank.org/INTSRILANKA/Resources/233024-1120241837002/5-TESS Chapter-1.pdf</a>, page 5.

spending is on teachers' salaries, 15 with the capital stock mainly remaining what was built in the 1950s and 1960s and before. Further with the primary source of government spending being indirect taxation, the state school system has a strongly economically regressive character. Indeed, it is possibly a system where the poor subsidise the relatively affluent.

The White Paper of 1981<sup>16</sup> suggested some innovative, though controversial changes. It envisaged school clusters formed for all schools except the very large urban schools and some isolated rural schools. This would enable sharing of facilities between schools to maximise efficient uses of resources. The principal of the largest school in the cluster would be the cluster school principal who would play a coordinating role but other principals would also retain their position. One of the major problems with our system is the very large number of small schools mostly scattered through the rural hinterland. There are about 4 900 schools, slightly over 50% of the total with fewer than 200 students. These neglected schools, are attended by the poorest students, whose parents usually pay scant attention to their education.

This proposal if properly implemented could have helped to improve the situation in these schools. The very large schools which command more resources will be made more self-reliant economically and no state funds would be allocated for capital expenses of these schools which would free up state resources for developing smaller schools. There would also be no further expansion in pupil numbers in these schools. The extent of vested interests resisting any changes in the system is shown by the fact that the then UNP government, with its virtually unchallenged political dominance and its five-sixths parliamentary majority was

<sup>&</sup>lt;sup>15</sup> World Bank, The Treasures of the Education System in Sri Lanka, chapter 3 <a href="http://siteresources.worldbank.org/INTSRILANKA/Resources/233024-1120241837002/7-TESS">http://siteresources.worldbank.org/INTSRILANKA/Resources/233024-1120241837002/7-TESS</a> Chapter-3.pdf ,2005, page 36.

<sup>16</sup> Ministry of Education, Education Proposals for Reform, 1981.

<sup>&</sup>lt;sup>17</sup> School Census, 2006, http://www.statistics.gov.lk/education/SUMMARY TABLES 2006.pdf page 7

not able to implement the contents of the White Paper.

Strangely, in spite of a long standing system of free education there was no legislation to enforce compulsory education in general till recent times. What is even stranger is that such legislation existed only in the estate sector, generally the most neglected of all sectors when it came to education. The Educational Ordinance of 1939 merely empowered the minister to make regulations to compel parents of children between the ages of five and fourteen to send their children to school, subject to the provision that such regulation should not cause a child to attend a school more than two miles distant; it also empowered the minister to make exceptions and qualifications to such regulations and also gives the parents an alternative to make "adequate and suitable provision for the education of such a child".

On the other hand in the estate sector parents residing on an estate were compelled to send children to school between the ages of five and fourteen. Estate owners were supposed to provide a school building, quarters for a married teacher and a playground and permit education authorities to establish a school on the premises. After the nationalisation of estates in the nineteen seventies most of the estate schools were vested in the state. However enforcement of the law in the estates has been extremely lax; this had to be since children were a source of cheap labour for the estates.

General compulsory education regulations were finally brought by gazette notification in 1997. The Compulsory Attendance of Children in Schools Regulations No.1 of 1997 made it compulsory for parents to send children between the ages of five and fourteen to school but makes an exception where parents have made alternative arrangements. The regulations provide for school attendance committees at grama niladhari level, monitoring

<sup>&</sup>lt;sup>18</sup> Mario Gomez, "Compulsory Education and the Law", Sri Lanka Journal of Social Science 1989 12 (1 & 2): page 47.

committees at divisional secretariat level and an authorised officer to be appointed for each division from the Sri Lanka Educational Administrative Service (to be appointed by the Provincial Director of Education) who is authorised to initiate action against the parents in case of non-compliance.

At present the school system consists of about 9,700 schools with about 3.7 million students. Schools are categorised as follows: 1 AB – those having G. C. E. (A. L.) science classes; 1 C – those having G. C. E. (A. L.) arts and commerce only; Level 2 – those up to G. C. E. (O. L.) only; and Level 3 – those up to standard 5 or standard 8 only. Some basic statistical information regarding the present status of the system is summarised below.<sup>19</sup>

1 AB	. 7 * 6.	659
IC		1,854
Level 2		4,225
Level 3		2,976
Total No. of Schools		9,714
Total No. of Teachers		204,908
Student-Teacher ratio		19
Male students		1,914,599
Female students		1,921,951

One significant fact is that the system has a very low overall teacherpupil ratio, 1:19 as at 2006. Indeed the ratio is even less today due to the recent large-scale recruitment of unemployed graduates to the teaching service. There is however wide variation in the ratio with prestigious schools having very large classes and backward schools having very low ratios. Though teacher-pupil ratio is generally considered one determinant of the quality of education we do not seem to have capitalised on it.

A task force appointed by the former President, Mrs. Chandrika Kumaratunga, produced a comprehensive policy document in

<sup>&</sup>lt;sup>19</sup> School Census 2006, Ministry of Education, <a href="http://www.statistics.gov.lk/education/SUMMARY TABLES 2006.pdf">http://www.statistics.gov.lk/education/SUMMARY TABLES 2006.pdf</a>, page 3.

1997.<sup>20</sup> One of the important proposals, later called the Navodya schools programme, was that 300 selected schools – at least one per *pradeshiya sabha* – be developed as centres of excellence. Regular in-service training was to be provided for teachers and principals of these schools were to be specially selected and trained. The concept of school based management was also introduced.

Schools would be managed by school boards, and Principals would be trained to be policy makers and financial controllers and not be mere administrators. Unfortunately the composition of the board was left to be determined. Each school and school board would be required to develop a school policy and program and taking into account the community which it serves, and schools would draw whatever expertise and resources from the community. Unfortunately, as is common with government, these proposals were not comprehensively implemented.

### 3.4 Genesis of the Grade 1 admissions problem

With increased awareness (and perception) of education as the path to advancement there has been increased demand for admissions to 'quality schools'. Compounding this has been the fact that for whatever reason there have been few new entrants to the class of prestigious schools. There are only two new schools that can be considered to have entered this class since the 1950s, D. S. Senanayake Vidyalaya and Sirimavo Balika Vidyalaya. There is fierce competition for entry to the elite 'club' of state schools such as Royal, Ananda, Nalanda, Visaka and Devi Balika. Entry to a small number of prestigious schools in the provincial towns such as Mahamaya in Kandy and Ratnavalie Balika in Gampaha is only a little less competitive.

Over the years a system has developed for selecting students based on various criteria such as proximity to the school, preference for

<sup>&</sup>lt;sup>20</sup> Ministry of Education- General Education Reforms (Report of the Presidential Task Force on General Education), 1997

old pupils' children and for children who have siblings in the school. The system as it existed when the issue came before the Supreme Court in 2007 is based on Education Ministry Circular No, 2006/20 dated 23.5.2006.

It is based on a system of quotas for different categories of applicants.

		T
No.	CATEGORY	%
1	Chief Householder's Children	40%
2	Children of Past Pupils	25%
3	Children who have siblings in the school	15%
4	Children of government officials who come to reside in the area due to transfers or children of members of parliament or provincial councillors who have to live away from their private residence.	
5	Children of persons other than the chief householder	7%
6	Children of employees of institutions directly connected with school education	5%
7	Children of persons who have returned from abroad	2%

There are detailed factors to be considered within each category.

The householder's category is for those residing permanently close to the school who would qualify on the basis of their residence, provided they have been resident for more than six years.

The priority was decided on the following:

- Ownership of the place of residence
- Evidence of permanent residence and the period
- Distance to the school from the place of residence.

Evidence of ownership would be by:

- Title deed
- Householders list
- Permit granted by the National Housing Authority
- Title deed of the grandparents, if the residence is the grandparents house
- A certificate issued by the head of the institution as regards residence in official quarters
- Any other applicable document

The circular states that a total of 39 students should be selected on the above for each class. An additional five places are to be reserved for children of members of the security forces serving in operational areas. The numbers, however, have been observed only in the breach. It is well known that prestigious schools have classes as large as 50-60. The circular also makes it clear that in the case of schools taken over under the Acts of 1960 and 1961 the religious ratios that prevailed at the time of takeover should be retained when recruiting students for each category.

The Supreme Court in its judgement made a detailed criticism of the existing system. The circular refers to a 'feeder area' in the vicinity of every school where the principals are supposed to obtain electoral lists. This is not clearly defined but the detailed guidelines for giving marks under criterion 1 gives a slab system of points for the distance from the school, going up to minimum marks for over 3,000 metres. It further states that the distances may be proportionately reduced depending on the experience of past applications and the distances. As commented by the Court:

The feeder area leading schools have become preposterously narrow to be as low as 600 meters for D. S. Senanayake Vidyalaya located between Bullers Road and Gregory's Road in Colombo 7 and 1000 metres for Ananda College abutting Maradana Road in Colombo 10.

Documents that can be produced in support of residence are listed, the main one of which is a deed. The basis on which points are awarded under this category are the minimum distance to the school and the period of residence.

The system produced rampant cheating and corruption, with parents going to any lengths to secure admission to a prestigious school for their offspring. Some school principals are rumoured to have amassed large fortunes in the process. A class of people, mainly lawyers, have emerged who provided falsified documents for a fee.

The Court went on to comment that:

It is possible that none of the children admitted live within this narrow official 'feeder area'. If the officials and particularly the principals of the schools stay outside the gates at commencement and close of school hours, they would see the 'feeder' buses and vans that, that transport school children are from as far out as Gampaha, Nittambuwa, Negombo and Kalutara.

It also quoted a newspaper editorial saying:

If the objective of education is to produce good citizens, the opposite of that happens in this country. Children are trained to be liars from the very beginning of their schooling. Parents forge bundles of documents to 'prove' that they live within the stipulated distance from the schools of their choice and their children are trained to memorise and utter blatant lies to cover up their crime at the interview, where they are debriefed by teachers and principals to check whether they are lying!

Counsel for the petitioners had made a serious criticism of the whole system of judging residence. He pointed out the defects in relying on a title deed as the most important document. There is no procedure to ascertain the validity of a deed other than the fact of registration. Registration in our law does not attribute title and is only a claim to priority.

The Court referred to a previous instance of Supreme Court Case

No. 101/2005 which related to an application for admission to Ananda College. It related to a house, 50 metres from Ananda College where parents had obtained a lease. There were several families supposed to be residing in that house according to the householder's list. Every year, the chief occupant has rotated among the different families, the reason being that being the chief occupant's child carries more weight than being the child of another occupant.

# 4. Supreme Court Directives and Implementation

## 4.1 Judgement

The Court made reference to the fundamental rights provisions in Article 12 (1) and 12 (2) of the Constitution relating to equality before the law and discrimination on specific grounds such as race, religion, sex etc. It gave a brief account of the evolution of the education system summarised as follows:

The law relating to Education in its primary sense originates from the education ordinance of 1939. However the provisions of the ordinance and many of the subsidiary regulations have fallen into disuse. While the government performed a major role as a regulator during the period when there were a large number of assisted schools when the government took over most assisted schools in 1961 it largely shed its role as a regulator and became an owner and manager. Under the 13th Amendment to the Constitution in 1987 the provision of facilities for all state schools other than those specially designated as national schools are devolved to the provincial councils. However, almost all leading government schools have been designated as national schools. The education ordinance has not been amended to cope with this new situation which leaves a vacuum in law regarding education.

This situation, as the Court observed, has led to a state of anarchy relating to education and self-styled experts tampering with the

system of education to bring about chaos. A survey carried out by the national education commission was reported to have found that 18% of Grade 6 students are illiterate. The Court found the existing circular deficient fundamentally in that though it should come within the ambit of 'national policy on all subjects' which is the opening line of the reserved list of the 13th Amendment, it does not have any of the characteristics of a national policy. Instead it is a mere circular purporting to be a statement of national policy. In the circumstances however, it has to be taken as 'the law' within the purview of Article 12 (1).

The Court quoted from the case of Roster Guano Co. vs The Commonwealth of Virginia.<sup>21</sup>

> classification must be reasonable not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced must be treated alike

The Court expressed the view that the circular has to be considered as issued in the context of the government's power to decide policy regarding school admissions. National policy should be interpreted together with the relevant provisions of Chapter VI which contains the directive principles of the constitution which refers to, "the complete eradication of illiteracy and the assurance of all persons of the right to universal and equal access to education at all levels".

The point of issue in this case would be whether the existing circular fulfilled the objective of giving equal access to education. The major deficiency the Court found in the circular was that there was no provision to ascertain the suitability of a child and the need of a particular child to receive education in a national school or any other state school. It also found that the system of weighted marking in the circular completely defeats the objective of providing equal access to education. In a key part of the judgement the Court observed that:

<sup>21 (1920) 253</sup> US page 412 at page. 415.

Counsel submitted that leading private schools in Colombo have adopted different methods to be applied in the election of students. The methods have been in certain instances structured to include interviews with parents and children and a suitable test which should be faced by the children seeking admission. These tests not being written tests are based on the methodology that is adopted in pre-school education

The Court impugned the previous circular and called for a new scheme of admissions to be formulated under the purview of the president as provided in the National Education Commission Act, and excluding "the authorities who have brought about this tragic situation".

On 26 July 2007 the Court issued further guidelines for the admissions procedures as follows:

- 50% of marks for suitability of the child
- 40% for parents background
- 10% for siblings

A draft circular was presented to the Court according to the above guidelines and approved by the Court. The subject was debated in parliament on the 7 and 8 of July 2007. There were numerous objections to the Supreme Court guidelines including testing the intelligence of children and status of parents.

The minister of education made an announcement that neither he nor the ministry of education had any part in the draft circular that was submitted. Finally an announcement was made by the minister of education that he has decided to implement the original circular with some modifications.

Subsequently a notification was made by the secretary to the ministry of education calling for fresh applications. Thereafter the past pupils associations of four schools, Royal College, Visakha Vidyalaya, Nalanda Vidyalaya and Pannipitiya Dharmapala Vidyalaya petitioned the Court that the new basis announced by

the secretary was not in accordance with the guidelines issued by the Court and asking that it be quashed.

On the 22 of August the court instructed the Secretary to formulate a new circular in accordance with court's guidelines. However it stated that the criterion regarding the status of the parents could be dropped but ruled that those relating to testing the suitability of children should remain. An amended circular on these lines was submitted and approved on 29 August and accordingly circular No. ED/01/12/10/06/01 detailing the new regulations for Grade one admissions was issued on 24 September.

The system under the newly formulated circular is tabulated below.

	Category 1: Applicants under: distance and residence in the feeder area	Category 2
Ranking of school in the order of proximity of school	20	
Old Pupils children		20
Siblings in the same school	5	5
A parent is a state employee/ serving in a private institution or self employed within the district in which the school is located	5	5
Parent is a member of the forces serving in the operational areas (If these marks are applicable then the above is inapplicable)	10	10
Maximum marks obtainable before the entrance test	35	35
Suitability and needs of child based on test	20	20
TOTAL MARKS	55	55

The system for giving marks for the proximity to the school is as follows:

 If the school is the nearest school to the residence, of the same category - 20

If it is the second nearest school of the same category - 19

If it is the third nearest school of the same category - 18
and so on.

The term 'category' is understood to mean a national/provincial school which has a primary section whichever is the type of the school applied for. Old pupils' children are given marks based on the length of time the parent has been in the school, the parent's academic or co-curricular achievements, and contributions to the development of the school.

The tests for children's suitability and requirements are to be based on:

 Things which a child not older than five years could be expected to do, see or hear in his everyday life in his home

 The child should be provided with several activities and suitability and need should be should be determined by

observing these activities

 This procedure should be administered by a group of teachers specialised in Primary school education. The Provincial Education Director should appoint this group of teachers. The testing should be observed by the school committee.

The circular also provided for the establishment of a committee to administer the admissions consisting of representatives of the school principal, education officials, the old pupils' association and one well wisher.

## 4.2 Implications of the new System

The major qualitative change the new system has made is the introduction of assessment of children and giving points instead of quotas. Regarding the introduction of tests the Supreme Court was

of quotas. Regarding the introduction of tests the Supreme Court was of the opinion that methodology of such testing is well established. With the greatest respect the writer finds it rather dubious whether there is universal agreement on this. But the greatest issue may not be the principle of testing itself but the manner in which it is implemented. There has not been time for comprehensive studies of this to be done but the following excerpts from the *Sunday Times* are a good indication of the problems that have arisen:<sup>22</sup>

Parents also feel that the interviews held for the children were unfair. They say they were not allowed to sit in at the interviews or were asked to stay some distance away. They say some children who had cried in fear had been given a second chance while others were not.

This incident highlights the stress the process puts five-year old children through. Even the Grade 5 scholarship exam, which children face at the age of nine or ten, is considered by many to put too much stress on young children. But the following are even more shocking:

In another instance, parents of a five-year-old girl said that when their five-year-old girl had gone for the interview she had been asked to name her best friend. When she had mentioned the name of a boy who happened to be her best friend in pre-school, primary school teachers who had interviewed her had apparently asked her whether he was the boy she would marry one day.

In another case a girl living close to (the school) who had gone for the interview with her parents was taken in to a room and locked in with teachers she didn't know. Her parents charge that after answering a few questions and identifying shapes of objects she had refused to do one task, blowing a balloon. She had apparently lost marks for that. The parents complain that neither she nor the parents were

<sup>&</sup>lt;sup>22</sup> Isuru Kaviratne, "Muddle over whose in and whose out", Sunday Times, 13 January 2008, <a href="http://sundaytimes.lk/080113/News/news00012.html">http://sundaytimes.lk/080113/News/news00012.html</a>.

given the opportunity to explain to the teachers that she had a fear of balloons ever since one burst in her hands when she was in pre-school.

Also the new circular does not seem to have eliminated the old problems regarding residence. In one glaring irregularity, it is alleged a child has been selected from an assessment number that is made up of only four concrete pillars and was advertised for sale soon after the admission application was made. These four pillars stand in the co-operative housing scheme at Kiribathgoda and the child has been selected to Vihara Maha Devi Balika Vidyalaya, Kiribathgoda. Some parents who live in permanent houses in the vicinity charge that their children have been left out.

Regarding the change from quotas to marks an interesting parallel exists with the case of *University of California vs Allan Bakke* in the United States. In this case the University of California at Davis had a quota for blacks and several other underprivileged minority groups. Bakke, a prospective white entrant to the medical school, who had been rejected, petitioned to the court that he had been unfairly discriminated against by the quota.

The case finally went up to the U.S. Supreme Court. There in a badly split ruling four judges ruled for the quotas while four judges voted completely against giving any weightage to race. The swing vote was cast by Justice Powell who ruled against the quota but at the same time held that it was permissible to have a system such as a points system, which considers race as one of many factors.

Although Justice Powell found that racial preferences were permissible in appropriate circumstances, he found that the Davis plan did not follow the constitutional standards. According to Powell the Davis dual admission program does not satisfy the constitutional standards. He found it unacceptable that because of his race Bakke was completely forbidden from competing for any of the sixteen medical

school places set aside for minority applicants. In Justice Powell's view, Bakke was an innocent individual and asked because of his race to bear the burden of redressing group grievances that were not of his making. <sup>23</sup>

The case, though in an entirely different context, has a parallel with the grade one admissions case in that it deals with admissions to educational institutions and resulted in a points system rather than quotas. A similar logic to Justice Powell's could be applied to the grade one admissions issue. In the previous system certain places were allocated exclusively on the basis of residence or to old boys' children. On the new basis children who scored exceptionally well in the test could compete with the others for all places even if the school they were applying for was not the closest school.

However there is a major difference between the two in that the Bakke case dealt with a scheme of affirmative action. The grade one admissions scheme, old or new hardly contains any element of affirmative action. The only possible exception is that for children of members of the armed forces. At present, when they are engaged in a war at great personal risk and since many of the lower rungs of the forces are from under-privileged social backgrounds this may be considered to be an element of affirmative action.

Giving priority to the children on the basis of residence in proximity to the school, though justifiable from the concept of the neighbourhood school only confers advantage on the already privileged. Schools such as Royal, Visakha, Devi Balika, Sirimavo Balika are located within residential areas of the middle class or the affluent. Similarly old boys from the prestigious schools are more likely to come from middle or upper middle class backgrounds. Thus the system gives practically no weightage to giving consideration to equality of access.

The Constitutional Dimensions of Affirmative Action in the USA, <a href="http://etd.unisa.ac.za/ETD-db/theses/available/etd-08112006-145645/unrestricted/lchapter10.pdf">http://etd.unisa.ac.za/ETD-db/theses/available/etd-08112006-145645/unrestricted/lchapter10.pdf</a>, pages 318-319.

### 5. Recommendations

## 5.1 Removal of the state monopoly

5.2 The basic problem is that the demand for quality schools far outstrips the supply. While this situation remains any changes to the system of admissions merely shifts those left out from one group to the other. Indeed some who take a purely economic view of things consider the corruption that occurs in the system to be the inevitable black market that occurs when demand exceeds supply, as also occurs when price controls for material goods are in force.

The suggestion has been made that the primary school should be removed from at least 50-60 of the most prestigious schools and admissions to these schools should be based entirely on the grade 5 scholarship examination. The writer reluctantly concurs that this is probably the best short term solution. The Grade 5 scholarship examination, while it exposes children to the stress and strain of competition at a tender age, has been free of the sordid corruption and abuse that has plagued the Grade 1 admissions, and may be the lesser evil.

It may be argued that this will increase the competitive pressures on children. But the reality is that it will only increase the competition for a small minority of children lucky enough by whatever means to enter one of the privileged schools from the start. A possible change is to have the examination at the end of grade 8 instead of grade 5. This will reduce the competitive pressure on students at a young age and foster the development of a large number of quality 'feeder schools'.

But a more comprehensive solution to the problem necessarily entails increasing the number of the quality schools and reducing the pressure on a few prestigious schools. The question is whether this can be left entirely to the state. The state for the last forty years has failed to address the problem, which is the reason for the present crisis. Also, the present restrictions on new private schools are rendered meaningless by the international schools, not to mention the private tuition industry. However, it should be stated that any responses to the issue are necessarily ideological in nature. Those who are more market oriented are bound to favour liberalisation; those who are more statist are bound to see the solution in terms of improving the state system only.

With the post-1977 liberalisation in many other sectors retaining this quasi-monopoly of the state in education seems incongruous. On the other hand the writer is sensitive to many of the objections raised against letting in the private sector. Opponents of education sector liberalisation point out that the post-1977 experience has been that whenever the private sector is let into a particular domain it has sooner or later led to the complete collapse of the public sector provision in that sector. The point deserves serious consideration in view of the experience in the transportation and the insurance sectors. The risk in the education sector may be not that the state sector will completely die but that the state will neglect the state system and not take any steps to narrow the disparities and promote equality of opportunity. Also even if the restrictions on new private schools are lifted, the vast majority of students will continue to have to be educated by the state in the foreseeable future. Leaving aside the question of affordability, it is unlikely that in the short term enough new private schools will be created to take in a significant proportion of the student population of 3.8 million.

The case that the writer wishes to present is that the system needs to be liberalised; but the liberalisation needs to be done with a framework for safeguards that will ensure not only the continuance of the state system but that the state will continue to develop the system and promote equality of opportunity. This of course is a reflection of the writer's ideological bent in that he is neither an extreme statist nor a hard line free marketer. At least some of this should be enshrined in the constitution and the rest in a new

education act. Detailed plans should be set out in white papers and other policy documents which should be debated and passed in parliament. The new act should safeguard against ad-hoc changes due to changes of government or leadership without debating and passing the amendments in parliament.

The state should also provide assistance for underprivileged students to gain access to private institutions so that the changes do not benefit the more affluent only. This could be done by scholarship funds, voucher systems, and new innovations such as state-private partnership institutions.

The legislative changes the writer suggests regarding private schools are as follows:

- The restrictions on new private schools should be removed and schools could be established subject to regulation by the Ministry of Education. International schools be regularised as a separate category of school and be brought within the scope of regulation. It should be compulsory for such schools to teach Sinhala/Tamil as a subject, at least for Sri Lankan students.
- The new private schools should be compelled to take 10% of scholarship students.
- While new denominational schools could be established such schools should be required to take at least a certain percentage of students of other faiths based on the religious breakdown of the district and commit to give equal opportunity in non-religious matters to such students.
- A possible innovation is to create a class of state-private partnership institutions. Such institutions:
  - Should have a state contribution towards their capital costs

- Should have at least one representative of the ministry on their Boards of management
- Should not have a particular denominational character and give equal opportunity to all races and religions
- The state should contribute to a scholarship fund to admit a certain percentage of underprivileged students
- o In addition the fee-levying students should support an additional percentage of scholarship students. For example if the state contributes for 20% of students and three fee paying students support one scholarship student you could achieve a 60-40 mix of scholarship and paying students.

The suggested legislative/constitutional changes regarding the state system are as follows:

- The state should continue to maintain systems of primary, secondary higher education and technical and vocational education.
- The state should continue to devote resources within practicable limits to develop the system, promote equal opportunity and improve the choices available to underprivileged students.
- The state should provide free education for the first nine years of schooling in a state school within a reasonable distance from the child's residence to every child whose parents desire education within the state system.
- The state should facilitate, assist and enable access to further secondary education to every child and such assistance should continue until the end of secondary

school for students who show the capability to do so.

- Depending on available resources and the needs of the country the state should facilitate, assist and enable as many students as possible to enter higher education of those who show a capability to do so.
- Depending on available resources and the needs of the country the state should facilitate, assist and enable as many students as possible to follow further vocational and technical training after leaving secondary school if they are unable to or unwilling to proceed to higher education.

The phrase 'facilitate, assist and enable' does not necessarily mean education in a state school. It could also mean assistance by way of scholarships or voucher systems to attend a private institution. On the other hand that assistance need not stop at providing schooling at a state institution; it includes the total cost of education including books, uniforms, transport and meals.

The above could be enshrined in the constitution, but would need to be enunciated in an education act pending this. In addition the following should be given legislative recognition: There should also be provision of facilities for all students for all streams of study within a reasonable distance; whereas at present there are only 625 1 AB schools – those providing G. C. E. (A. L.) science stream.

A system of performance indicators should be established for schools, for the system as a whole and for all levels in between including district and zones. The performance indicators should be fully transparent and all indicators should be available to any member of the public, preferably on the web. These include examination results, teacher pupil ratios, teacher qualification status, teacher training status and extra-curricular participation rates and achievements. To develop the state system, civil society activism and parental participation is a must. Education is too important and concerns too many people to be left entirely in the hands of politicians and policy makers.

### 5.2 Voucher System

Another idea that deserves to be seriously considered is voucher systems. Though the concept originated in the United States it has had limited reach in that country so far but has also been implemented in countries such as Sweden. The basis of a voucher system, at least in developed countries is that the state gives a voucher to students equivalent to what it would spend on educating a child in a state school. The parents could then use the voucher, possibly adding on a cash contribution to educate their child at a private school.

Voucher systems illustrate the conflict between choice and equity. Supporters of vouchers claim that vouchers expand choice while opponents claim that especially if add-ons are permitted they will only serve to widen disparities. In Sweden the voucher system was introduced as part of a reform by the Conservative Party in 1991.<sup>24</sup> Initially the value of the voucher was set at 85% of the cost of education in state schools. The same reform also shifted responsibilities for education from the central government to municipalities though the centre would continue to set objectives. A poll as early as 1993 found that parents valued their freedom of choice and thought that the competition has made teachers work harder.

Though the Social Democratic Party initially opposed the voucher system on coming to power it changed its stance. A subsequent reform in 1997 increased the voucher value to 100% of the cost in state schools but prevented parents from 'topping up' the voucher, private schools had to charge fees within the voucher value. Thus to some extent the Swedes have been successful in resolving the dilemma of choice and equity. This experience, compared to that of other countries seems to confirm the opinion the writer expressed earlier that the reconciliation between choice

<sup>&</sup>lt;sup>24</sup> Claudia Hepburn and John Merrifield, School choice in Sweden – Lessons for Canada, <a href="http://www.fraserinstitute.org/commerce.web/product\_files/SchlChceSweden2.pdf">http://www.fraserinstitute.org/commerce.web/product\_files/SchlChceSweden2.pdf</a>

and equity can be achieved only in an economically advanced country.

Vouchers may be experimented with but should proceed with extreme caution, due to the complexity of the issues involved. One has to keep in mind that in any social innovation, the results are never predictable. It is not practicable in the Sri Lankan context to give vouchers equivalent only to what the state spends as this will cover only a fraction of the fees at a private institution. The annual public expenditure per student in 2002, including both recurrent and capital expenditure was only Rs.6,032, approximately Rs. 500 per month. <sup>25</sup> Unassisted private schools, national or international, charge fees many times that amount.

If at all, vouchers could be given as a scholarship scheme, with vouchers as a prize. It is suggested that a special examination could be conducted at the end of grade 8 for this purpose. If on the average Rs. 5,000 per month be provided on the voucher, to include both tuition and also contribute towards board and lodging if necessary, and as an initial experiment Rs.500 million were set aside for vouchers about 8,000 students could be accommodated. Depending on its success the scheme could be subsequently expanded. Giving the vouchers from grade 9 onwards only would reduce the cost of the system. Indeed the possibility of replacing the grade 5 examination with a grade 8 examination could be considered.

The success of the liberalisation (in the sense of moving away from statism) depends on the successful working of a market in education. Markets have worked spectacularly well in Sri Lanka in areas such as mobile phones and insurance. But it may be debated as to how far it will work in a field such as education.

<sup>&</sup>lt;sup>25</sup> World Bank, Treasures of the education system in Sri Lanka- Chapter 3, <a href="http://siteresources.worldbank.org/INTSRILANKA/Resources/233024-1120241837002/7-TESS\_Chapter-3.pdf">http://siteresources.worldbank.org/INTSRILANKA/Resources/233024-1120241837002/7-TESS\_Chapter-3.pdf</a>, page 36.

## 5.3 G.C.E. (O. L.) Failure Rate

Another episode receiving wide publicity in the media during 2007 was the results of the G. C. E. (O. L.) examination that showed a pass rate of only 48.7%. Particularly poor were the pass rates in Mathematics and English, with only 42.63 % passing in the former and only 36.82% passing in the latter. The percentages relate to first-attempt school candidates only. The situation was not new, in fact the statistics show a slowly improving trend as shown below.<sup>26</sup>

Year	Pass Rate
1997	23.8
1998	26.0
1999	27.11
2000	29.34
2001	40.15
2002	41.51
2003	44.01
2004	45.04
2005	47.72
2006	48.70

The matter of doubt here is whether the improvement is real or whether it is a result of standards being lowered. However, the problem highlighted serious shortcomings in the education system despite its achievements in enrolment, literacy and gender equity. The poor performance in the G. C. E. (O. L.) may be symptomatic

<sup>&</sup>lt;sup>26</sup> Ministry of Education, G.C.E. (O. L.) Statistics, 2006.

of the problems of service delivery within the Sri Lankan education system.

Widespread disparities exist between rural and urban areas and certain backward rural districts are badly underserved. There is also an understandable reluctance of teachers to serve in certain backward rural districts, with inadequate facilities in housing, transport, water and electricity. There are substantial disparities. The following table highlights some of the disparities in results between some of the best performing and worst performing education zones.<sup>27</sup>

Educational Zone	Pass Percentage
Colombo	71.62
Gampaha	62.58
Kandy	70.01
Kurunegala	63.51
Teldeniya	34.23
Galewala	36.7
Madu	33.0
Mahaoya	38.12
Tabuttegama	38.06
Galenbindunuwewa	33.73
Moneragala	36.84
Kilinochchi	35.59
Wilgamuwa	24.61

<sup>&</sup>lt;sup>27</sup> Source: G.C.E. (O. L.) Statistics, Ministry of Education, 2006.

Some of the above are no doubt conflict affected areas, but even other backward areas show equally poor performance. The province-wise averages also show a substantial variation ranging from 48% in the Western Province to 31% in the Uva Province Exact statistics are not available of the O. L. results according to the category of school, but the list of the eleven worst performing schools are all described as Kanishta Vidyalayas or Vidyalayas. This suggests that many of the low performers may be of the level 2 category, the schools having only up to the G.C.E. (O. L.).

The Sri Lankan system has also failed to implement a consistent policy on teacher training. Traditionally there was no policy that University graduates need any kind of training before being put before a classroom. Even G. C. E. (O. L.) and A. L. qualified untrained persons, the so called 'uncertified teachers' were directly assigned to teaching. Although, policy decisions that all teachers should be put through pre-service training have been taken there has not been the political will to follow through. A recent example is the recruitment of 25,000 unemployed graduates directly into the teaching service.

However, the results raise a more fundamental question, the exclusively academic nature of the system. There are two conflicting viewpoints here: One is that students of less academic bent should be streamed off into vocational areas at a young are say, at grade 9. The other is that the former is an outdated idea, which is being abandoned in most of the developed countries which formerly had such a system, and we should try to get everyone to pass the ordinary level. It is argued that pass rates of the 90-95% which the prestigious schools achieve, or close should be achievable more generally if proper arrangements for service delivery are made. Those who take the second view cite the fact that we are now moving into the service economy and that the first option would not be acceptable to parents in the present socio-economic context.

An example of the first alternative has been the traditional German

system, which had three tiers of schools. Children were branched off at a young age to Grammar schools, Technical schools or Vocational schools. Generally this determined their career options for life. However the system came under the heavy fire, particularly from the political left, for limiting opportunities, streaming off students at a young age and in more recent times for being out of step with the needs of the economy. Starting from the sixties there was a social movement to form comprehensive schools which would give a more egalitarian access to the same type of education for everyone. These have mostly been located in the *lander* governed by the Social Democratic Party, while those in the *lander* governed by the Christian democrats have tended to continue with the traditional system.

The writer is not comfortable with the view that those with a particular range of aptitudes should be relegated to being considered as second rate and their talents should not be catered to. In this connection it is noteworthy that Article 13 of the ICESCR refers to 'Secondary education in all its forms including technical and vocational education'. Whatever may be said about the service economy our society will still continue to need electricians, plumbers, carpenters and masons. What we need to do is to improve the status of those vocations to make those less academically gifted to voluntarily take to these vocations. The streaming off could be done at grade 9, and a curriculum that includes vocational components could be introduced from grades 6 to 8. Those who follow the vocational stream should be provided with the path to continue to higher technical studies going up to the tertiary level.

#### 6. Conclusion

The present crisis in our education system illustrates the fact that measures that were seen to be progressive in one era could become counter-productive in a later era. The education act in 1961 could

<sup>&</sup>lt;sup>28</sup> An overview of the German System of education, Chapter 1-Introduction, part 2 of 3, 1998 at http://www.ed.gov/pubs/GermanCaseStudy/chapterla.html

then have been seen as a progressive measure to improve equality of opportunity in education. With the inability of the state to keep up with the demand for quality schools it has spawned this semi-legal class of institutions, the international schools, It has also resulted in a huge private tuition industry, widespread corruption and subjecting children at a young age to the competitive pressures of the grade 5 scholarship examination.

Likewise the abolition of the English medium could have been seen as a progressive measure to reduce the gap between the English educated and the Sinhala educated classes. However the reality is that it narrowed the opportunities for those from less privileged backgrounds to learn English and thereby widened the disparities. It has also fostered a culture of dependence on learning-by-rote due to the lack of supplementary reading material.

A significant failing of the Sri Lankan polity and administrative system is the purely ideologically driven legislation and policy making without considering the impact the existing legislation and policies were having on ground realities. Whatever judgments may be made today regarding the abolition of the English medium, the fact remains that the results would have been better if there had been a large scale translation program together with more attention to teaching English as a second language.

When residential criteria were introduced for the state schools in the sixties this was done heedless of the disparities of facilities, and the need to upgrade the smaller schools. The state, whatever political party was in power was reluctant to face unto its failure to keep up with the demand for quality schools and move seriously towards educational reform, despite all the evidence of the developing crisis in the grade one admissions. The state has also conspicuously failed to address the question of match of the education system with aspirations and the needs of the economy.

The writer is very conscious of the fact that some of the changes he has advocated are extremely difficult to achieve politically. 'Free

education' has an enormous emotional appeal even if this is based on perception rather than reality. Significant reform should be preceded by a long process of dialogue and debate, with alternatives being explored and grass roots level popular participation.

A major lacuna regarding education is the almost complete absence of civil society activism and lack of parental participation. This is a very surprising considering the number of people for whom education is a major personal concern. Tinkering with the problems such as Grade One admissions will not solve the fundamental problems. Only vibrant popular participation will enable our education system to overcome its present crisis and face up to the challenges of the twenty first century.

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#### WORKERS' RIGHTS<sup>†</sup>

B. Skanthakumar

#### 1. Introduction

This chapter surveys issues of workers' rights in Sri Lanka with attention to labour relations, disputes, legal reform and government policy. As the topic was last discussed in these pages some years ago, reference will be made to developments from 2005 onwards and up to the end of 2007.

Sri Lanka acceded to the International Covenant on Civil and Political Rights (ICCPR), that *inter alia* recognises the right of peaceful assembly (A. 21) and right to freedom of association including the right to form and join trade unions (A. 22), in June 1980. At the same time it also acceded to the International Covenant on Economic, Social and Cultural Rights (ICESCR), that recognises *inter alia* the right to work (A. 6); the right to just and favourable conditions of work (A. 7); trade unions rights including the right to strike (A. 8); and the right to social security

<sup>&#</sup>x27;In Memoriam Jayaratne Maliyagoda, President of the Lanka General Services Union (LGSU, Kandy), former President of the Joint Plantation Trade Union Centre (JPTUC), and founder-member of the Movement for Inter-Racial Justice and Equality (MIRJE).

Economic, Social and Cultural Rights programme, Law & Society Trust, Colombo. I am grateful to SH Mohamed (Friedrich-Ebert-Stiftung, Colombo) for rigorous review of an earlier draft, and Dilhara Pathirana for research support. The views expressed and any errors of fact or interpretation are mine.

<sup>&</sup>lt;sup>1</sup> Manori Witharana, "Workers Rights", Sri Lanka: State of Human Rights 2004, Law & Society Trust: Colombo 2004, pp. 94-112.

(A. 9).

Freedom of association and specifically the freedom to form and join a trade union are fundamental rights receiving constitutional protection in Sri Lanka.<sup>2</sup> However, the right of association may be restricted as prescribed by law "in the interests of racial and religious harmony or national economy." There is also statutory recognition of the right to form and join a trade union in the private and public sector, and the right to collective bargaining in the private sector alone. The right to strike, while not a fundamental right, is recognised as derivative of immunity from legal action granted to trade unionists in respect of "any act done in contemplation or in furtherance of a trade dispute".

Sri Lanka has been a member of the International Labour Organisation (ILO) since independence in 1948 and has ratified the eight core conventions, in addition to 23 others. The core conventions are C29 (Concerning Forced Labour); C87 (Concerning Freedom of Association and Protection of the Right to Organise); C98 (Concerning Right to Organise and Collective Bargaining); C100 (Concerning Equal Remuneration); C105 (Concerning Abolition of Forced Labour); C111 (Concerning Discrimination in Employment and Occupation); C138 (Concerning Minimum Age for Admission for Employment); and C182 (Concerning Prohibition and Elimination of Worst Forms of Child Labour). No additional Conventions were ratified in 2007.

<sup>2</sup> A. 14(1)(c) and (d) respectively, Constitution of the Democratic Socialist Republic of Sri Lanka 1978.

A. 15 (4), Constitution of the Democratic Socialist Republic of Sri Lanka 1978. Emphasis added. This last ground for derogation is particularly troubling as economic development is thereby counter-posed to rather than complementary of human rights. The Katunayake Free Trade Zone was established in the same year of enactment of the present Constitution (1978) and it was the declared intention of the JR Jayewardene government to exclude labour unions and some labour laws from operation within the Zone as one among other incentives to foreign investors.

<sup>4</sup> Trade Unions Ordinance, No. 14 of 1935 (as amended by Act No. 15 of 1948) and Industrial Disputes Act, No. 43 of 1950 (as amended by Act No. 14 of 1957).

However, neither all the rights in these Conventions nor their full import have found expression in domestic law and practice as has been frequently observed by the ILO's Committee of Experts on the Application of Conventions and Recommendations including in its examination of state reports in 2007 (see discussion below).

Thus, even where constitutional and legal protections are to be found they are unevenly applied, particularly in free trade or export processing zones and other Board of Investment-licensed export-oriented enterprises where unfair labour practices by employers are rife.<sup>6</sup>

## 1.1 Labour Force Composition

The labour force in 2007 was estimated to be 7.489 million from a total population of 20 million, of whom 447 000 were recorded as unemployed;<sup>7</sup> therefore in percentage terms unemployment levels were around 6 percent – which is a significant reduction from the rate of 10.5 percent a decade before and 15.9 percent in 1990.<sup>8</sup> Of course disguised unemployment and underemployment are less easily quantifiable.

The Central Bank attributed falling rates of unemployment to "healthy [economic] growth experienced in [services, industry and agriculture] during 2007", while the 7.6 percent increase in outmigration to the Middle East recorded that year, particularly of males in construction and manufacturing, boosting total foreign employment abroad to 1.6 million was a major contributory factor, as was recruitment to the public service and the armed forces.

9 Annual Report 2007, Central Bank of Sri Lanka, Colombo 2008, p. 89. Interpolation is mine.

<sup>&</sup>lt;sup>6</sup> Lance Compa, Justice for All: The Struggle for Workers Rights in Sri Lanka, American Centre for International Labor Solidarity, Washington D.C. 2003, esp. pp. 8-26.

<sup>7</sup> Table 30, Economic and Social Statistics of Sri Lanka 2008, Central Bank of Sri Lanka, Colombo 2008, p. 22. Data excludes the Northern and Eastern provinces.

<sup>8</sup> Table 2.13, Labour Statistics – 2007 Sri Lanka, Department of Labour, Colombo 2008, p. 43. Data excludes the Northern and Eastern provinces.

<sup>9</sup> Annual Propert 2007, Control Bank of Sri Lanka, Colombo 2008, p. 89.

68.2 percent of males over the age of ten were in the labour force in 2007 as were 33.7 percent of females over the age of ten. <sup>10</sup> 19.2 percent of young people between the ages of 15 and 19 were in the labour force. <sup>11</sup> Although no official data is available on working children between the ages of 10 and 14, the Deputy Commissioner of Labour (Women and Children's Division) has estimated their number at around 30 000, mostly to be found in domestic work as well as in petty trade and 'boutiques' (small shops). <sup>12</sup>

By sector composition:<sup>13</sup> 42.1 percent of total employment was accounted for by services (that is trade, tourism, transport and communication, finance and insurance, personal services and so on); 31.3 percent by agriculture (including forestry and fishing); and 26.6 percent by industry (that is manufacturing and construction including electricity, gas and water supply).

By status of employment: <sup>14</sup> 42.7 percent of the labour force was accounted for by private sector employment; 30.4 percent by self-employment; 13.8 percent by public sector employment; 10.5 percent by unpaid family labour and 2.8 percent by employers.

#### Labour Relations

Many trade unions and workers were hopeful that the election of a former Labour Minister and the god-father of the ill-fated 1995 'National Workers Charter' as Executive President in 2005, as well as the political complexion of the United Peoples Freedom

<sup>13</sup> Table 4.9, Annual Report 2007, Central Bank of Sri Lanka, Colombo 2008, p. 89. Data excludes the Northern and Eastern provinces.

<sup>14</sup> Table 4.10, Annual Report 2007, Central Bank of Sri Lanka, Colombo 2008, p. 89. Data excludes the Northern and Eastern provinces.

<sup>15</sup> Franklyn Amerasinghe, 'The National Workers Charter' in Sri Lanka: State of Human Rights 1995, Law & Society Trust, Colombo 1996, pp. 113-119.

<sup>&</sup>lt;sup>10</sup> Table 30, Economic and Social Statistics of Sri Lanka 2008, Central Bank of Sri Lanka, Colombo 2008, p. 22. Data excludes the Northern and Eastern provinces.

<sup>11</sup> Table 30, Economic and Social Statistics of Sri Lanka 2008, Central Bank of Sri Lanka, Colombo 2008, p. 22. Data excludes the Northern and Eastern provinces.

<sup>12</sup> Don Asoka Wijewardena, "Over 30,000 child labourers in country", The Island, 26 August 2008.

Alliance coalition government would be of benefit to them after decades of being on the defensive.

The results have been mixed. Privatisation has been halted and public sector employment boosted. However, the Government did not repeal the labour law amendments introduced by the previous United National Front regime and opposed by trade unions in 2003. There is remarkable continuity in labour relations from 1977 onwards, since 'Open Economy' or economic liberalisation policies became the norm, to the detriment of organised labour.<sup>16</sup>

Private-sector employers were reluctant to confront workplace trade unions believing the latter to enjoy government sympathy. Therefore aside from the now privatised plantation sector and occasionally garment factories, labour conflict has been most pronounced in recent years in the public sector, particularly in health and education.

There has been a decline in industrial disputes since 2004. 25 strikes were recorded in 2007 in comparison to 53 strikes in 2006 (private sector strikes decreased from 34 to 16 and plantation sector strikes decreased from 19 to 9 over the same period); the total number of workers on strike in 2007 was a mere 7 416 (as against 209 803 in 2006).<sup>17</sup>

As of end 2007, there were 1 879 functioning trade unions registered with the Labour Department. 18 Due to poor reporting their total membership is uncertain, and in any case likely to be inflated and therefore unreliable. Union density may be between

On the historical and current context of organised labour see Samanthi Gunawardana and Janaka Biyanwila, 'Trade unions in Sri Lanka: Beyond party politics' in John Benson and Ying Zhu (eds.), *Trade Unions in Asia: An Economic and Sociological Analysis*, Routledge: London and New York 2008, pp. 177-198

 <sup>&</sup>lt;sup>17</sup> Table 11, Sri Lanka Labour Gazette, Vol. 59, No. 2 (April-June 2008), p. 166.
 <sup>18</sup> Table 12, Sri Lanka Labour Gazette, Vol. 59, No. 2 (April-June 2008), p. 167.

15 and 20 percent on average; rising to anywhere between 70 and 90 percent in plantations and the public sector.

#### 2.1 Anti-Union Discrimination in Free Trade Zones

30 years since the establishment of the first free trade zone in Katunayake in 1978, the largely women workers in the zones have yet to enjoy the spectrum of labour rights that are their lawful entitlement including the right to form and join a trade union and to exercise trade union rights without fear of discrimination and victimisation.

The Board of Investment (BOI) arbitrates in labour disputes within the Zones in the first instance and is perceived as proemployer. In any case, it has no statutory powers in settlement of disputes which authority is vested solely in the Labour Department; and there is a clear conflict of interest as the BOI's primary function is the promotion of foreign direct investment.

Some instances of anti-union discrimination in free trade zones in 2007 are recounted below.<sup>20</sup>

From early 2007, management at three Star Garment factories in the Katunayake Free Trade Zone resisted all attempts to unionise workers in those enterprises. Initially the tactics were underhand but mild for example, pro-union workers were offered handsome severance packages to voluntarily leave, while the in-house employees' council was packed with pro-management employees. When this failed, the management called in the police who broke up a strike in July, arrested five activists and confiscated union literature. Meanwhile thugs were used to intimidate workers and warn them against joining the union. Union activists were falsely

<sup>20</sup> International Trade Union Confederation, Sri Lanka: Annual Survey of violation

of trade union rights 2008 http://survey08.ituc-csi.org/

<sup>19</sup> Emmanuel Teitelbaum, "Can a Developing Democracy Benefit from Labour Repression? Evidence from Sri Lanka", *Journal of Development Studies*, Vol. 43, No. 5 (July 2007), pp. 830-855, esp. pp. 835-836.

accused of violence by management subjecting some of them to temporary incarceration by the local police. Finally, on 23 July 2007, the management of Star Garments agreed to recognise the branch union while continuing not to recognise the parent Free Trade Zone and General Services Employees Union (FTZGSEU).

At Smart Shirts Lanka where a strike ended on 11 December following Labour Department intervention, workers who participated in the industrial action complained of subsequent victimisation by management who proceeded to sack two union leaders. At Brandix Finishing too, workers who had participated in industrial action reported that they were being victimised and intimidated.

It should be noted that all three companies referred to above are leading and large-scale concerns and not 'fly-by-night' employers or sub-contractors. At least one among them is associated with the 'garments without guilt' campaign that promotes Sri Lankan ready-made-garments abroad as an ethical choice for buyers and consumers. However, they have undermined and obstructed freedom of association within their enterprises.

Therefore, it should come as no surprise, that in only 12 out of 264 factories in the free trade zones had branch unions received recognition by employers,<sup>21</sup> and even where recognised, that management often refuses to negotiate with the parent union.

## 2.2 CCS Elsuma Dispute

Anti-union discrimination and the victimisation of workers seeking to exercise their right to form and join a trade union are not confined to the export processing zones. Unfortunately neither the Labour Department nor the courts have satisfactorily enforced labour laws guaranteeing the right to organise and the

<sup>&</sup>lt;sup>21</sup> Country Reports on Human Rights Practices in 2007: Sri Lanka, Bureau of Democracy, Human Rights and Labor, Department of State, Washington D.C. http://www.state.gov/g/drl/rls/hrrpt/2007/.

right to collective bargaining and the right of workers to engage in industrial action.

This may be illustrated through the chronology of a dispute in 2007 at CCS Elsuma, a Board of Investment licensed Swiss-owned factory, manufacturing computer parts and other electronics equipment, in Kochchikade near Negombo.<sup>22</sup>

Industrial disputes have been commonplace at CCS Elsuma since its inception stemming from dissatisfaction over working conditions and the unwillingness of management to take on board workers grievances. On 1 and 2 March 2007, the entire 550 unorganised workers went on strike in protest at the salary revision on offer.

The Labour Department and Board of Investment intervened in the dispute and brokered an agreement between management and workers in which the latter would form an employees' council (sevaka sabhava) to represent them in negotiations with management. Employees' councils are preferred by employers to trade unions as they are perceived as enterprise or 'in-house' bodies devoid of influence (and also support) from external organisations and are promoted by the Board of Investment for the same reason.<sup>23</sup>

<sup>&</sup>lt;sup>22</sup> The facts are extracted from Asian Human Rights Commission, "Foreign company based in Sri Lanka disregards worker's conditions and threatens their representatives and human rights defenders", AS-178-2007, 1 August 2007 <a href="http://www.ahrchk.net/statements/mainfile.php/2006statements/1136/">http://www.ahrchk.net/statements/mainfile.php/2006statements/1136/</a>; reprinted in Protection and Participation: South Asia Legal Reforms and Human Rights, Vol. 4, No. 3 (2007), pp. 34-36.

As SH Mohamed underlines in a personal communication, "employees' councils are 'soft' organisations initiated with the support of the management as provided for by the regulations of the Board of Investment of Sri Lanka. These councils are not within the scope of the Trade Unions Ordinance and thus not entitled to any of the safeguards guaranteed by the statutory law in furtherance or contemplation of a trade dispute. Employees Councils are also not deemed to be recognised legal entities unlike trade unions".

Therefore the strike ended with the expectation of the workers that the management would recognise the employees' council and negotiate with it in good faith over the demands that had triggered the action. Subsequently the workers elected a 12 member council who from among their number elected a president and secretary as office-bearers.

On 20 May, the employees' council presented management with their grievances, consisting mainly of salary anomalies within the company in addition to the fact of long-term employment of some 200 workers on a renewable contract basis and therefore with no security of employment and attendant rights and benefits. Management prevaricated on the proposals and refused to even formally acknowledge its receipt.

Therefore on 5 June the president of the employees' council met with the Personnel Director. At this meeting the Director alleged that a woman worker had complained of being threatened by the worker representative. On the following day, the president of the employees' council was interdicted by the management on this charge. The members of the employees' council and 400 workers at the factory signed a petition to the Labour Department and the Board of Investment requesting an inquiry into the interdiction that they believed to be an attempt to derail their right to organise and bargain collectively within the factory.

As no interest was shown by the Labour Department or the Board of Investment, workers began a picketing campaign after working hours to demand the reinstatement of the president of the council.

The factory management sought to undermine the protest through a malicious complaint to the police of alleged threats from the picketing workers. These allegations were investigated but not pursued for lack of corroboration. On July 20, in a further attempt to intimidate the picket, some unknown persons believed to be associated with the management, took photographs of the protestors.

On 26 July, the president of the council was served with a letter of termination. At no time was he afforded the opportunity to answer the charge against him or to present his case before an internal inquiry. Instead he had been summarily dismissed.

When the picketing campaign continued and with the support of a community-based human rights organisation, Right to Life, the management sought an injunction from the Negombo District Court barring four named individuals from participating in the picket.

In an unprecedented ruling on 15 February 2008, the District Court issued a permanent injunction against the former president of the employees' council, M. K. Rodrigo; the co-ordinator of a workers welfare association, Ashila N. Mapalagama; and two other human rights defenders from *Right to Life*: Britto Fernando and Philip Dissanayake, barring them from gathering on the public road near the factory premises or holding further protests.<sup>24</sup>

At no time had the picket been anything but peaceful, and protests such as the picket campaign and involving the solidarity of 'outsiders' from the workers and human rights movement are legitimate expressions of freedom of expression and association.

The injunction had its desired effect of halting the protest, demoralising the workers, and smashing the fragile employees' council.

#### War on Terrorism'

The resumption of armed hostilities between the Government of Sri Lanka and the Liberation Tigers of Tamil Eelam (LTTE) and

Asian Human Rights Commission, "Sri Lanka: A court attacks human rights defenders' right to engage in peaceful protest", AHRC-STM-046-2008, February 26 2008, <a href="http://www.ahrchk.net/statements/mainfile.php/2008statements/1395/">http://www.ahrchk.net/statements/mainfile.php/2008statements/1395/</a>. An appeal against the injunction is pending before the Supreme Court as of late 2008.

the re-imposition of the state of emergency on 13 August 2005 was accompanied by a sharp increase in human rights abuses including extra-judicial killings, 'disappearances', preventive detention, and curbs on media freedom and dissent.<sup>25</sup> Inevitably the prevailing climate of repression, impunity and fear impacted on the workers movement.

On 6 February 2007, three media workers on a railway trade union newspaper, Akuna, were abducted from separate locations in Colombo. The trade unionists were Sisira Priyankara, Lalith Seneviratne and Nihal Serasinghe. A large protest outside the Fort Railway Station took place the following day demanding their immediate release. On 8 February, the government admitted that the men were in its custody and thereby acknowledged that state security personnel had been responsible for their abduction.

Government spokespersons alleged that the (Sinhala) men were supporters of the Tamil separatist LTTE. A government media blitz followed that labelled the men 'Sinhala Koti' ('Sinhala Tigers') and included the release of a video-taped 'confession' by the men of their association with the LTTE. The video footage showed physical evidence of bruising on the men's faces and evident duress.<sup>27</sup> The public hysteria whipped up by the government led to arson attacks on the homes of the men's families driving them into hiding. The men remained in detention as of the end of 2008.

Subsequently, several of the leading trade unionists who had organised the protest against the abductions themselves became targets of a poster campaign that branded them as 'traitors' and

<sup>&</sup>lt;sup>25</sup> B. Skanthakumar, "'The Enemy Within': Human Rights Defenders in Sri Lanka", LST Review, Vol. 19, Issue 253 (November 2008), pp. 1-15, http://www.lawandsocietytrust.org/PDF/Enemy%20Within%20HRDs%20 in%20 Sri%20 Lanka.pdf.

<sup>&</sup>lt;sup>26</sup> Reporters Without Borders, "Kidnap of three journalists with trade union monthly", 6 February 2007, <a href="http://www.rsf.org/article.php3?id">http://www.rsf.org/article.php3?id</a> article=20939.

<sup>&</sup>lt;sup>27</sup> S. S. Selvanayagam, "Suspects tortured and made to confess: Counsel", *Daily Mirror*, April 9 2007.

'terrorists' and demanded their arrest. Those vilified in this manner were Anton Marcus (Free Trade Zone and General Services Employees Union), Saman Ratnapriya and Ravi Kumudesh (Health Sector Trade Union Alliance), Sampath Rajitha and Raja Kannangara (Joint Railway Trade Union Alliance) and Joseph Stalin (Ceylon Teachers Union). These trade unionists have been longstanding critics of government policy and militant labour rights defenders.

Following the poster campaign, death threats were also received by these trade unionists warning them to desist from their activities. Complaints were made to the police seeking investigation of the source of these threats and requesting police protection so that the trade unionists concerned could carry on with their lawful activities. However, the complainants allege that there was no seriousness demonstrated by the police as they failed to uncover any leads in their inquiries and made no attempt to ensure the personal safety of the trade unionists concerned.

It is in this context that a politically diverse group of mainly private sector trade unions complained in a letter to the President dated 30 May 2007, of "a fear psychosis among people in the exercise of their legitimate rights" and expressed concern over the plight of civilians in conflict areas, the relegation of political approaches to the war in favour of militarism, the victimisation, intimidation and threats to peace advocates, and occurrence of serious violations of human rights.

<sup>&</sup>lt;sup>28</sup> "Trade Unions concerned over War, Intimidation and Repression", Christian Worker, 4<sup>th</sup> Qr. 06 – 3<sup>rd</sup> Qr. 07 (December 2007), p. 57. The signatories were the Ceylon Workers Congress (CWC), Lanka General Services Union (LGSU), Ceylon Federation of Trade Unions (CFTU), Ceylon Federation of Labour (CFL), Jathika Sevaka Sangamaya (JSS), Lanka Jathika Estate Workers Union (LJEWU), Joint Plantation Trade Union Centre (JPTUC), Free Trade Zones and General Services Employees Union (FTZGSEU), United Federation of Labour (UFL), National Workers Congress (NWC), Ceylon Estate Staffs Union (CESU) and Ceylon Tamil Teachers Union (CTTU).

A conclave of private and public sector trade unions on 25 August 2007 drew direct connections between the cost of living and the inflationary spiral and the war policy of the Government, and protested the establishment under emergency rule of a "a virtual Military/Police dictatorship". In a hard-hitting statement the trade unions declared: "The issue that faces all sections of the organized working class and the rest of our people, therefore, is whether they are to continue to submit to the deterioration in their living standards and suppression of their basic rights or to take positive action to oppose the policies that President Rajapakse and his Government are pursuing to their detriment."<sup>29</sup>

This perspective is not shared by trade unions in the Joint Trade Union Centre (JTUC) whose members are affiliated to President Rajapakse's Sri Lanka Freedom Party (SLFP) nor trade unions affiliated to the Janatha Vimukthi Peramuna (JVP), both of which parties are supportive of the war.

## 4.0 Legal Reforms

In 2007 there were no legislative reforms related to labour rights. The draft Safety, Health and Welfare at Work Act intended to modernise the framework of occupational safety and health – bringing domestic legislation in conformity with ILO Convention 155 of 1981 (Concerning Occupational Safety and Health) which Sri Lanka has yet to ratify – although apparently approved by the Cabinet of Ministers did not reach the statute books even a year later. The section below therefore notes developments in 2005 and 2006.

<sup>&</sup>lt;sup>29</sup> "Trade Unions Confer on the War and its Consequences", Christian Worker, 4th Qr. 06 – 3th Qr. 07 (December 2007), pp. 56-57. The participants were the Ceylon Mercantile Industrial and General Workers Union (CMU), Ceylon Bank Employees Union (CBEU), United Federation of Labour (UFL), Health Services Trade Union Alliance (HSTUA), Federation of Media Employees Trade Union (FMETU), Government Printers Union (GPU) and several public sector unions.

# 4.1 Penal Code (Amendment) Act, No. 16 of 2006

The Amendment Act to the Penal Code creates a range of new offences relating to the abuse or exploitation of children.

Of particular relevance to this chapter, a new section is inserted that criminalises the worst forms of child labour, that is, subjection to debt bondage or serfdom; forced or compulsory labour; slavery; and use of children in armed conflict. These terms are comprehensively defined in the enactment, and in accordance with international law a child is defined as a person below eighteen years of age. 31

A person found guilty of engaging in debt bondage or serfdom; forced or compulsory labour; or slavery shall be liable to imprisonment for a term not exceeding 20 years and a fine. A person convicted of engaging or recruiting a child for use in armed conflict shall be liable to imprisonment for a term not exceeding 30 years and a fine.<sup>32</sup>

The trafficking of persons including children is criminalised. The recruitment, transportation, transfer, harbouring or receiving of any person or any child for the purpose of forced or compulsory labour or services, slavery, servitude, removal of organs, prostitution or other forms of sexual exploitation or any other act which constitutes an offence under any other law creates the offence of trafficking.<sup>33</sup>

A person on conviction for the offence of trafficking shall be imprisoned for a term not less than two years and not more than

<sup>30</sup> S. 358A (1) (a) - (d) respectively, Penal Code as amended by s. 7, Penal Code (Amendment) Act, No. 16 of 2006.

<sup>31</sup> S. 358A (3), Penal Code as amended by s. 7, Penal Code (Amendment) Act, No. 16 of 2006.

<sup>32</sup> S. 358A (2), Penal Code as amended by s. 7, Penal Code (Amendment) Act, No. 16 of 2006.

<sup>33</sup> S. 360C (1) (b) & (c), Penal Code as amended by s. 8, Penal Code (Amendment) Act. No. 16 of 2006.

20 years and may also be punished with a fine; and where such offence is committed against a child, shall be imprisoned for not less than three years and not more than 20 years and may also be punished with a fine.<sup>34</sup>

# 4.2 Employment of Women, Young Persons and Children (Amendment) Act, No. 24 of 2006

The above Act makes it unlawful to employ any person under the age of eighteen in any hazardous occupation.<sup>35</sup> Under the UN Convention on the Rights of the Child, ratified by Sri Lanka in 1991, a child is defined as a person below the age of eighteen years. In Sri Lanka the minimum age for admission to employment is fourteen years.<sup>36</sup>

The 2006 amendment brings domestic law in compliance with international obligations on regulation of employment in hazardous work under the UN Convention on the Rights of the Child and ILO Convention No. 182 Concerning Worst Forms of Child Labour.

Article 32 (1) of the Convention on the Rights of the Child obliges state parties to protect children "from performing any work that is likely to be hazardous ... or to be harmful to the child's health or physical, mental, spiritual, moral or social development". Article 3 (d) of Convention No. 182 includes among the 'worst forms of child labour': "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".

<sup>&</sup>lt;sup>34</sup> S. 360C (2), Penal Code as amended by s. 8, Penal Code (Amendment) Act, No. 16 of 2006.

<sup>&</sup>lt;sup>35</sup> S. 20A (1), Employment of Women, Young Persons and Children Act, No. 47 of 1956 as amended by s. 2 Employment of Women, Young Persons and Children (Amendment) Act, No. 24 of 2006.

<sup>&</sup>lt;sup>36</sup> For a succinct discussion of inconsistencies across sectors and statutory confusion in Sri Lanka see, Savitri Goonesekere, *Children, Law and Justice: A South Asian Perspective*, Sage Publications: New Delhi 1998, pp. 265-266.

The 2006 Act does not define 'hazardous occupations' but provides for the Minister concerned to do so, bearing in mind "the nature or the circumstances in which the occupation is being carried out and the harm that may be caused as a result to the health, safety or morals of a person [below the age of eighteen]". It also provides that any person in employment of a person under the age of eighteen years in a hazardous occupation is liable to be fined a sum not exceeding Rs10 000, or sentenced to imprisonment for a period not exceeding one year, or to both.

Labour Department inspections in 2005 revealed the employment of children, some under the age of fourteen, in the manufacture of crackers and fireworks.<sup>39</sup> However, regulations for implementation of the *Act* were not framed in 2007 and therefore its enforcement is in doubt as underlined also by the lack of prosecutions.

# 4.3 Social Security Benefits Scheme for Media Personnel Act, No. 29 of 2006

The object of the Act is to create a voluntary contributory pension scheme for 'media persons' who are not beneficiaries of any other social security scheme, with the exception of the Employees Provident Fund. 40 Any 'media person' employed in a media organisation whether on a permanent or contract or freelance basis and between the ages of 18 and 50 is eligible to join and make contributions.

<sup>&</sup>lt;sup>37</sup> S. 20A (2), Employment of Women, Young Persons and Children Act, No. 47 of 1956 as amended by s. 2, Employment of Women, Young Persons and Children (Amendment) Act, No. 24 of 2006. Interpolation is mine.

<sup>&</sup>lt;sup>38</sup> S. 20A (3), Employment of Women, Young Persons and Children Act, No. 47 of 1956 as amended by s. 2, Employment of Women, Young Persons and Children (Amendment) Act, No. 24 of 2006.

<sup>39</sup> Administration Report 2005, Department of Labour, Colombo u. d. (2007?), p. 26

<sup>&</sup>lt;sup>40</sup> S. 3 & s. 4 (c), Social Security Benefit Scheme for Media Personnel Act, No. 29 of 2006.

The definition of 'media person' is restricted to "a person who being a journalist is engaged in the gathering of, preparation and dissemination of news and information and comments on such news and information, through any medium of communication inclusive of the print and electronic media", and therefore does not include media workers as a whole.

The Scheme is managed by the Social Security Board (established in 1996); and in the enrolment of contributors, the Board is to co-operate with the Sri Lanka Working Journalists Association. 42

Members of the Scheme become eligible for monthly benefits upon reaching the age of 60 and until death. The computation of the benefit depends upon the period in which contributions were made; the age of the contributor; and the total amount of contributions. Where the member dies before the age of 80, the surviving spouse becomes the beneficiary until the contributor would have reached the age of 80, or in the absence of a surviving spouse then the child or children of the member become the beneficiary until reaching the age of 21 years. 44

A Social Security Benefit Fund for Media Personnel is created with the initial capital of Rs100 million contributed by the State; and the Fund is managed, controlled and operated by the Social Security Board. In addition to members' contributions, the Fund will receive such sums of money as may be voted by Parliament; money earned as interest or profit by the Board; sums received by way of donation, gifts and grants; and sums vested by any

<sup>41</sup> S. 22, Social Security Benefit Scheme for Media Personnel Act, No. 29 of 2006.

<sup>&</sup>lt;sup>42</sup> S. 8 & s. 9 (2), Social Security Benefit Scheme for Media Personnel Act, No. 29 of 2006.

<sup>&</sup>lt;sup>43</sup> S. 5 & s. 6 (1), Social Security Benefit Scheme for Media Personnel Act, No. 29 of 2006.

<sup>&</sup>lt;sup>44</sup> S. 6 (2) & (4), Social Security Benefit Scheme for Media Personnel Act, No. 29 of 2006.

<sup>&</sup>lt;sup>45</sup> S. 13 (1 - 3), Social Security Benefit Scheme for Media Personnel Act, No. 29 of 2006.

Government Department or Public Corporation.<sup>46</sup> The expenditure incurred by the Board in its management of the Fund shall be charged to it.<sup>47</sup>

# 4.4 Workmen's Compensation (Amendment) Act, No. 10 of 2005

The purpose of the above Act is to remove the waiting period for payment of compensation for temporary or minor injuries; and to adjust monetary amounts prescribed in the Workmen's Compensation Ordinance, No. 19 of 1934 (last revised in 1990), regulating workers who suffer personal injury or contract an occupational disease in the course of or attributable to employment.

In cases of temporary injury, the three day minimum waiting period is removed making compensation payable with effect from date of disablement.<sup>48</sup> Previously, employers were liable for compensation payments only on expiry of three days therefore denying workers financial relief during that period.

The maximum amount of compensation payable in advance to dependants of a deceased worker is raised from Rs1 000 to Rs10 000.<sup>49</sup> The Commissioner for Workmen's Compensation may serve as custodian, on behalf of the beneficiary, of any sum not less than Rs1 000.<sup>50</sup> The Commissioner may now disburse towards funeral expenses of a deceased worker, from the compensation received, sums of up to Rs10 000; Rs15 000; and Rs20 000

<sup>46</sup> S. 13 (4), Social Security Benefit Scheme for Media Personnel Act, No. 29 of 2006.

 <sup>&</sup>lt;sup>47</sup> S. 13 (5), Social Security Benefit Scheme for Media Personnel Act, No. 29 of 2006.
 <sup>48</sup> S. 6 (1) (D), Workmen's Compensation Ordinance, No. 19 of 1934, as amended by s. 2, Workmen's Compensation (Amendment) Act, No. 10 of 2005.

<sup>&</sup>lt;sup>49</sup>S. 11 (1), Workmen's Compensation Ordinance, No. 19 of 1934 (amended by s. 6, Act No. 15 of 1990), as amended by s. 3 (i), Workmen's Compensation (Amendment) Act, No. 10 of 2005.

<sup>&</sup>lt;sup>50</sup> S. 11 (2), Workmen's Compensation Ordinance, No. 19 of 1934 (amended by s. 6, Act No. 15 of 1990), as amended by s. 3 (ii), Workmen's Compensation (Amendment) Act, No. 10 of 2005.

respectively, where compensation does not exceed Rs200 000; Rs300 000 and Rs500 000 respectively.<sup>51</sup>

The maximum quantum of compensation payable in cases of death; permanent total disablement; and temporary disablement is doubled from 1990 levels to Rs550 000; Rs550 000 and Rs5 500 (half-monthly) respectively.<sup>52</sup>

# 4.5 Budgetary Relief Allowance of Workers Act, No. 36 of 2005

Through the above enactment of 18 October 2005, but with retrospective effect from 01 August 2005 onwards, private sector employers are obliged to award a monthly allowance of Rs1 000 to all employees receiving Rs20 000 and below.<sup>53</sup> Where a worker is daily paid and earns cumulatively Rs20 000 or less each month, such worker shall receive an additional Rs40 each day but not amounting to more than Rs1 000 each month.<sup>54</sup> A worker employed on a piece-rate basis is entitled to an allowance not less than 10 percent of wages paid each month.<sup>55</sup> Where the worker's salary is more than Rs20 000 but less than Rs21 000, the employer shall pay the difference as the monthly allowance.<sup>56</sup> Therefore payment of this allowance ceases in toto once the gross salary rises above Rs21 000.

The current salary, allowances or other payments enjoyed by the worker may not be varied by the employer in any way that is unfavourable to the former, following the introduction of the new

<sup>&</sup>lt;sup>51</sup> S. 12 (1) (i – iii), Workmen's Compensation Ordinance, No. 19 of 1934 (amended by s. 7, Act No. 15 of 1990), as amended by s. 4, Workmen's Compensation (Amendment) Act, No. 10 of 2005.

<sup>52</sup> Schedule IV, Workmen's Compensation Ordinance, No. 19 of 1934 (amended by s. 23, Act No. 15 of 1990), as amended by s. 5, Workmen's Compensation (Amendment) Act, No. 10 of 2005.

<sup>53</sup> S. 3 (1) (a), Budgetary Relief Allowance of Workers Act, No. 36 of 2005.

<sup>54</sup> S. 3 (1) (b), Budgetary Relief Allowance of Workers Act, No. 36 of 2005.
55 S. 3 (1) (c), Budgetary Relief Allowance of Workers Act, No. 36 of 2005.

<sup>56</sup> S. 3 (2), Budgetary Relief Allowance of Workers Act, No. 36 of 2005.

allowance.<sup>57</sup> Further, as the allowance forms part of the basic salary, it has to be included in the calculation of Employees' Provident Fund/Employees' Trust Fund/pension contributions, holiday and overtime pay, maternity benefits and gratuity.<sup>58</sup> Any employer who fails to comply with the *Act* shall be liable on conviction before a Magistrate, to a fine not more than Rs 10 000, or to imprisonment for not more than six months, or both.<sup>59</sup>

The employer is obliged to maintain a register of those workers eligible for the allowance with details of the name, work role, and amount paid. Such register must be preserved for at least six years and produced to the Competent Authority (that is, Commissioner-General of Labour) when required. The Competent Authority may enter and inspect any workplace to examine such register and/or verify implementation of the Act. Obstruction of the Competent Authority leads on conviction to a fine not exceeding Rs10 000, or term of imprisonment not exceeding six months, or both.

The introduction of this new allowance was justified as necessary protection of private sector workers from sharp rises in the cost-of-living through price increases of imported foods such as rice, sugar and milk-power, as well as fuel, and even locally-produced items such as coconut, vegetables and fruits following in the wake of drought and tsunami in the previous year. The impending presidential election a month later on 17 November 2005 may explain the timing of government intervention.

The Act excludes from its application those workers covered by a

<sup>57</sup> S. 4, Budgetary Relief Allowance of Workers Act, No. 36 of 2005.

<sup>58</sup> S. 8, Budgetary Relief Allowance of Workers Act, No. 36 of 2005.

<sup>59</sup> S. 9 (1), Budgetary Relief Allowance of Workers Act, No. 36 of 2005.

S. 5 (1), Budgetary Relief Allowance of Workers Act, No. 36 of 2005.
 S. 5 (2), Budgetary Relief Allowance of Workers Act, No. 36 of 2005.

<sup>&</sup>lt;sup>62</sup> S. 6 (a), Budgetary Relief Allowance of Workers Act, No. 36 of 2005.

<sup>63</sup> S. 7, Budgetary Relief Allowance of Workers Act, No. 36 of 2005.

<sup>&</sup>lt;sup>64</sup> Annual Report 2005, Central Bank of Sri Lanka, Colombo 2006, pp. 58 & 66-67. Public Sector wages had been increased by around 40 percent in 2004.

collective agreement; or to whom the Labour Minister has extended the scope of a collective agreement.<sup>65</sup> Therefore in addition to some organised private sector workplaces in urban areas, tea and rubber workers were also denied the allowance. This was to cause enormous discontent among estate sector workers, whose monthly wages are well below those of the lowest-paid public or private sector worker, fuelling subsequent industrial action.

A grace period of up to six months before operation of the *Act* may be extended to any trade, "taking into consideration the relevant economic conditions", at the Minister's discretion and through publication of an Order to that effect in the Government Gazette. 66 Therefore, shortly afterwards, the Labour Minister deferred its application to the garment and security services trades for a period of five months that is until 31 December 2005, 67 following representations by employers in those trades claiming economic hardship in view of the phase-out of the Multi-Fibre Agreement and the client contract renewal cycle respectively. 68

## 5.0 ILO Case No. 2519 (Re Sri Lanka Ports Authority Trade Union Action)

The ILO's Committee on Freedom of Association delivered its conclusions and recommendations in November 2007<sup>69</sup> on a

<sup>65</sup> S. 3 (4) (a) & (b) respectively, Budgetary Relief Allowance of Workers Act, No. 36 of 2005.

<sup>66</sup> S. 3 (5), Budgetary Relief Allowance of Workers Act, No. 36 of 2005.

<sup>&</sup>lt;sup>67</sup> Gazette of the Democratic Socialist Republic of Sri Lanka Extraordinary (No. 1417/22), Thursday 3 November 2005, 1A.

<sup>68</sup> Annual Report 2005, Central Bank of Sri Lanka, Colombo 2006, p. 74.
69 Complaint against the Government of Sri Lanka presented by the Health

<sup>69</sup> Complaint against the Government of Sri Lanka presented by the Health Services Trade Union Alliance, the Free Trade Zone and General Services Employees Union, the Jathika Sewaka Sangamaya, the Suhada Waraya Sewaka Sangamaya, the United Federation of Labour, the Union of Post and Telecommunication Officers, the Dumriya Podhu Sewaka Sahayogitha Vurthiya Samitiya, supported by the International Textile, Garment and Leather Workers Federation (ITGLWF) and the International Transport Workers Federation (ITF), Report No. 348 of the International Labour Organisation's Committee on Freedom of Association, Case No. 2519 [hereafter 348th Report, Case No. 2519].

representation received from several Sri Lankan trade unions (and supported by two global union federations) alleging violation of ILO Conventions No. 87 and No. 98 arising from the portworkers dispute of the previous year.

## 5.1 Background

On 13 July 2006, 14 trade unions representing workers employed by the state-owned Sri Lanka Ports Authority began a 'work-to-rule' action whereby only contractually specified work was performed while additional duties were declined. This protest stemmed from a dispute over wage increments that had been running since March of 2006 without any willingness on the Port Authority to discuss union grievances.

One of the main demands of the unions was for a salary increase of Rs3 000 per month that the workers believed to be affordable if alleged corruption and malpractices in the Ports Authority were curtailed. The financial cost of the six-day action was estimated by unions to be in the region of Rs5.1 billion.<sup>70</sup>

Initially, the Minister of Ports refused to negotiate with the trade unions but relented on 19 July 2006 when he conceded to some of their demands and appointed a committee to inquire into remaining issues. On the basis of this compromise and with the Minister's assurance that a final solution to their demands would be forthcoming within three months, the unions suspended industrial action with effect from 20 July.

It was at this juncture that a third party, an association of apparel and garment export production manufacturers known as the Joint Apparel Association Forum (JAAF), petitioned the Supreme Court on 21 July, alleging that the trade union action by port

<sup>&</sup>lt;sup>70</sup> Nirmala Kannangara, "SLPA incurs a loss of Rs.5, 100 million", *The Morning Leader*, 19 July 2006.

workers hindered their normal business activities and therefore violated their fundamental right to equality and lawful occupation. The relief sought by the JAAF was for cessation of trade union action and resumption of work as normal.

The Supreme Court issued an interim order<sup>71</sup> the same day prohibiting trade union activity until 25 July when the matter was next due to be heard; and granting leave to the JAAF to proceed with its fundamental rights application.

In the same order the Court commented on the "prima facie illegality" of the industrial action and the "extensive continuing loss suffered by the country". For enforcement of the order, the Inspector-General of Police was instructed to deploy sufficient personnel in and around ports and to request assistance from the armed forces if necessary.

On 25 July the Supreme Court extended its earlier interim order to 25 November 2006, although it was informed by counsel for the unions that the industrial action had ended.

### 5.2 Issues and Arguments

The first issue raised in the complaint to the Committee on Freedom of Association was the Supreme Court's characterisation of the port-workers action as a "go-slow" rather than "work-to-rule". The implication of the former is that the workers had breached their contract of employment thus allowing for disciplinary action against them. However, the unions maintained that the contractually specified work norms had in fact been adhered to and that no evidence to the contrary had been furnished. It was argued separately, that in any case both are acceptable forms of industrial action recognised by the ILO's

<sup>&</sup>lt;sup>71</sup> Joint Apparel Association Forum and Others vs. Sri Lanka Ports Authority and Others, SC (FR) No. 248/06, SCM 21.07.2006, Order by Sarath N. Silva, CJ with Raja Fernando, J. and Gamini Amaratunga, J. agreeing.

principles on freedom of association and therefore lawful and protected.

The second issue complained of was the Supreme Court's permissiveness to the judicial intervention by the Joint Apparel Association Forum (JAAF's) in the dispute to which it was not a party. The unions argued that the consequence of such action was to compel port workers to resume full levels of productivity notwithstanding their grievances with the ports authority and therefore to undermine the right of workers to determine their own terms and conditions of work voluntarily.

Further, the unions challenged the averred infringement of the JAAF's alleged right to equality and lawful occupation as unrecognised by the Sri Lankan Constitution, since the jurisdiction of the Supreme Court is confined to the infringement or imminent infringement of fundamental rights through executive or administrative action, that is actions of the State.

The third issue raised was the foundation of the Supreme Court's interim order determining that the port workers action amounted to executive or administrative action and therefore falling within the ambit of the fundamental rights chapter of the Constitution. The complainants argued that their actions were purely industrial and recognised as such by the Trade Unions Ordinance. The unions drew attention to the grave precedent of allowing third party petitions on spurious fundamental rights grounds with the clear intention of frustrating lawful trade union actions and strengthening the power of employers to force terms and conditions on workers. Thus, the complainants urged that the Committee find the interim order to be invalid and inconsistent with ILO Conventions Nos. 87 and 98.

The fourth and final issue of complaint was the Government of Sri Lanka's decision on 3 August 2006 to declare a broad sweep of services as 'essential' under the prevailing state of emergency including inter alia "all services, work or labour of any description

whatsoever necessary or required to be done in connection with the export of commodities, garments and other products"<sup>72</sup> with the intention of restricting the right of workers and unions in relevant sectors including the Ports Authority from taking strike or other forms of industrial action.

#### 5.21 Essential Services Order 2006

Under the revised Emergency Regulations,<sup>73</sup> an essential service is defined as "any service which is of public utility or is essential for national security or for the preservation of public order or to the life of the community and includes any Department of the Government or branch thereof "<sup>74</sup> specified in the Schedule to the Regulations or that may be added at any time to the Schedule by the President.

Any person absent from, or fails or refuses to, or walks out from work or who fails to perform work as directed by her/his employer including outside normal working hours and on holidays, whether or not in furtherance of a strike or other organised action in an 'essential service' is deemed to have terminated or vacated her/his employment and in addition becomes guilty of an offence.

Any person who impedes, obstructs, delays or restricts the carrying

<sup>72</sup> Para (i), Schedule to Regulation 40 of the Emergency (Miscellaneous Provisions and Powers) Regulation, No. 01 of 2005 as amended by Regulations under the Public Security Ordinance, Gazette of the Democratic Socialist Republic of Sri Lanka Extraordinary (No. 1456/27), Thursday 3 August 2006.

vas originally also numbered Regulation 40 of the Emergency (Miscellaneous Provisions and Powers) Regulation, No. 01 of 2005, Gazette of the Democratic Socialist Republic of Sri Lanka Extraordinary (No. 1405/14), August 13 2005 and that had been repealed in October 2005 viz. Regulation No. 2 (5) of Emergency (Temporary Suspension of Regulations) Regulations, No. 3 of 2005, Gazette of the Democratic Socialist Republic of Sri Lanka Extraordinary (No. 1414/22), Thursday October 13, 2005.

<sup>&</sup>lt;sup>74</sup> Regulation 2 of the Emergency (Miscellaneous Provisions and Powers) Regulation, No. 01 of 2005, as amended by Regulations under the Public Security Ordinance, *Gazette of the Democratic Socialist Republic of Sri Lanka Extraordinary* (No. 1456/27), Thursday 3 August 2006.

out of an essential service, whether directly or indirectly; or who incites others to do so; or who encourages the establishment or maintenance of any other service in lieu of or parallel with that of a Government department or branch; or who by any speech or writing encourages any other person to contravene the Essential Services Order is also guilty of an offence.

The President may proscribe an organisation (that is, trade union) whose members are committing, aiding or abetting the commission of any act contrary to the Essential Services Order. Every person who is a member of a proscribed organisation and employed in a Government department or public corporation shall be deemed to have vacated their employment and is also guilty of an offence. Any bank in which a proscribed organisation maintains an account shall not allow its operation.

Any person deemed to have terminated or vacated her/his employment shall vacate government quarters provided to her/him within three days of such termination or vacation. Any person who fails to vacate government housing within the period stipulated shall be guilty of an offence.

The penalty upon conviction in addition to any other penalty imposed by the court is the forfeiture to the state of all movable and immovable property of such person or organisation (that is, trade union); and the voiding of any alienation or disposal of such property by such person after the operation of the present regulations.

The severity of the punishment, its breadth of application and the ease with which it can be indiscriminately imposed catching almost any act and any person in its net is self-evident.

Following the outcry from trade unions, the President personally assured trade unionists in the tripartite National Labour Advisory Council that the Order would not be invoked against trade unions.

On 29 September 2006, the Regulations on essential services were revised. The Schedule specifying services deemed to be essential was repealed in full. However, the amended Regulations were arguably even more draconian because the President is now empowered to declare "any service to be an essential service for the purpose of these regulations" and unlike in the past these services have not been listed creating uncertainty as to what may constitute an "essential service".

#### 5.3 Decision and Recommendations

The Committee began by dealing with a preliminary objection by the Government of Sri Lanka as to its consideration of the dispute when the Supreme Court of Sri Lanka had yet to hear the case and arrive at its final decision. The Committee noted that under its own procedures for the examination of complaints alleging violations of freedom of association, "its competence to examine allegations is not subject to the exhaustion of national procedures". Therefore, while respectful of ongoing proceedings in Sri Lanka, the Committee was not barred from proceeding with its own examination of the case.

The Committee turned to the issue of restrictions placed on industrial action by port-workers through the Supreme Court's interim injunction prohibiting industrial action on the ground of the economic loss incurred by employers and the State; as well as through passing of emergency regulations that deemed the ports to be an essential service.

The Committee observed that the criterion for prohibition of a

<sup>75</sup> Regulation 2 under Public Security Ordinance, Gazette of the Democratic Socialist Republic of Sri Lanka Extraordinary (No. 1464/26), Friday 29 September 2006. Emphasis added. I am grateful to Ms Gnana Hemasiri (Nadesan Centre for Human Rights through Law) for locating this notification.

<sup>&</sup>lt;sup>76</sup> Para. 30 of Annex 1 in Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, Fifth (revised) edition, International Labour Office, Geneva 2006 [hereafter Digest of decisions].

strike is "the existence of a clear and imminent threat to the life, personal safety or health of the whole or part of the population".77

Meanwhile an "essential service" is defined as "services whose interruption would endanger the life, personal safety or health of the whole or part of the population" and "ports do not constitute an essential service in the strict sense of the term".

As the only harm complained of had been economic loss caused to the garment manufacturers association, JAAF, and no material facts had been submitted to satisfy the criterion for prohibition, the Committee concluded that the restrictions on port-workers imposed in the Supreme Court's interim injunction was contrary to the principles of freedom of association.

The Committee considered the alleged illegality of the industrial action by the port-workers, described by themselves as a 'work-to-rule' and by the Government and Supreme Court of Sri Lanka as a 'go-slow'. Regardless of precisely how the action was classified the Committee recalled that it had always recognised "the right to strike by workers as a legitimate means of defending their economic and social interests" and that "restrictions ... may be justified only if the strike ceases to be peaceful." The Committee recommended that the Government of Sri Lanka expedite the judicial process on the case and that it apprise the Supreme Court of the Committee's conclusions particularly on the right to strike.

The Committee noted that a number of services declared to be essential services under emergency regulations such as services in the petroleum sector, postal service, the Central Bank, export services, rail and public transportation, public corporations, tea, coffee and coconut plantations and broadcasting services are not

<sup>77</sup> Para. 581, Digest of decisions.

<sup>78</sup> Paras. 582-583, Digest of decisions.

<sup>79</sup> Para. 587, Digest of decisions.

Para. 545, Digest of decisions.

<sup>81</sup> Para. 1143, 348th Report, Case No. 2519.

considered to be essential according to its jurisprudence.

The Committee therefore recommended that the Government, in consultation with representatives of workers and employers organisations, review and take necessary measures to amend the schedule of essential services to bring it in conformity with ILO Conventions Nos. 87 and 98.82

#### 5.4 Outcome

When the ILO's Committee on Freedom of Association released its conclusions and recommendations on the port-workers case at the end of November 2007, the case was still pending before the Supreme Court of Sri Lanka which had yet to rule on the merits following its interim order in the previous year. However, the foreseeable clash between the Chief Justice and international mechanisms was pre-empted by the JAAF's decision to withdraw its legal suit at the beginning of December 2007.

The JAAF claimed that its withdrawal was due to the settlement that had been reached between the unions and the Ports Authority such that work had resumed as normal.<sup>83</sup> However, as recounted above, this agreement had in fact been brokered the day before the JAAF applied for the interim injunction.

It is more likely that the JAAF was concerned about the adverse publicity that the case had attracted in Western Europe and the implications for preferential access of Sri Lankan ready-madegarments to its biggest export market after the United States of America.

The JAAF was clearly anxious that the clear breach of ILO Conventions as well as disregard for the Committee on Freedom of Association would contribute to an unfavourable review of the

<sup>82</sup> Para 1144, 348th Report, Case No. 2519.

<sup>&</sup>lt;sup>83</sup> Sunday Times, "Apparel exporters back off as ILO backs striking workers", *The Sunday Times*, 09 December 2007.

Union's Generalised System of Preferences Plus (GSP+) scheme that offers tariff reductions in return for compliance with international human rights, labour rights and environmental laws.

As discussed above the Government of Sri Lanka did indeed revise the Essential Services Order of 2006 through repeal of the Schedule of essential services listed therein.

However, the Government did not qualify its over-broad definition of "essential services" in accordance with international labour law standards; nor did it address its obligations under ILO Conventions and international human rights law to respect, protect and fulfil the freedom of association where the exercise of such rights does not pose a "a clear and imminent threat to the life, personal safety or health of the whole or part of the population"; and nor did it rescind the regulations on essential services therefore allowing for their future operation at Executive whim.

While the Government has not invoked the essential services regulation to date, it is inexplicable as to why it was included in the emergency regulations in the first place, except for the purpose of acting as a deterrent to trade union action and to intimidate unions and unionists.

## 6.0 Collective Agreement No. 37 of 2007

A fresh Collective Agreement was negotiated between plantation companies (represented by the Employers Federation of Ceylon – EFC) and leading trade unions (Ceylon Workers Congress – CWC, Lanka Jathika Estate Workers Union – LJEWU and Joint Plantation Trade Union Centre – JPTUC) in the tea and rubber estate sector in 2007.

Collective Agreement No. 37 of 2007 over-rode Collective

Agreement No. 37 of 200684 that was to have remained in force for two years until 31 December 2008, though for appearance's sake it was referred to as a "revision" of the 2006 Agreement.

Estate unions reneged on the 2006 Collective Agreement by taking strike action in September of 2007. Ramalingam Chandrasekeran, Janatha Vimukthi Peramuna (JVP) parliamentarian and President of the JVP-affiliated All Ceylon Estate Workers Union explained: "The estate sector is one of the most poverty hit sectors where workers undergo enormous hardships with the minimum facilities. The cost of living has made life extremely difficult for a worker whose daily wage is insufficient to make ends meet." 85

The rate of inflation was in excess of 19 percent and the world market price of wheat flour that is the staple of Up-Country Tamil estate community diets had also sharply increased at this time. However, the wage demands were also a reaction to large increases in public sector salaries and the increase of the minimum monthly wage in the private sector to Rs5 000.

The 2006 Collective Agreement had followed a protracted 36 daylong strike at the end of that year that cost the industry billions in lost revenues. The Regional Plantation Companies were initially unwilling to countenance the breach of the 2006 Agreement that had increased daily wage rates by 33 percent. Their refrain was that production costs in Sri Lanka were already 40 percent and 35 percent higher than in India and Kenya respectively and that further wage increases would lead to the collapse of the domestic tea industry. Incidentally in 2007, despite the after-effects on tea production of the crippling strike in 2006, export earnings from tea reached record levels topping US\$1 billion.

85 Lalin Fernandopulle, "Another plantation strike will have dire consequences – Ravi Peiris", *The Sunday Observer*, 16 September 2007.

<sup>&</sup>lt;sup>84</sup> "Plantation Workers Wage Collective Agreement – 2006", Gazette of the Democratic Socialist Republic of Sri Lanka Extraordinary No.1480/14 – Thursday, January 18, 2007.

However, when the Ceylon Workers Congress (coalition partner in the United Peoples Freedom Alliance government) secured the direct intervention of the President of the Republic and on the side of the unions, opposition from the employers crumbled.

The Employers Federation of Ceylon (EFC) acquiesced in the negotiation of a fresh agreement while protesting that the "fundamentals of collective bargaining which expect the parties to ensure that the terms agreed and set out in the collective agreement are observed during the full period of the agreement" had been compromised.

According to Collective Agreement No. 37 of 2007, the daily wage for tea and rubber workers is increased to Rs200 (from Rs170). The rate of other payments is unchanged from the 2006 Collective Agreement: the daily price share supplement is fixed at Rs20 and the daily attendance incentive is fixed at Rs70 (where attendance is 75% and over of the number of days of work offered per month). Thus the total daily wage is now Rs290 and the monthly wage (if 25 days in each month are worked) is Rs7 250.

The importance of Collective Agreements between the EFC and the CWC, LJEWU and JPTUC is that its terms and conditions are extended by the Labour Department to every employer on the island engaged in tea and rubber growing and manufacturing<sup>88</sup> and therefore becomes the industry norm.

# 7.0 National Policy on Decent Work

Globalisation has been associated with a 'race to the bottom' in

<sup>&</sup>lt;sup>86</sup> "Sri Lanka planters slam political meddling in wages", *Lanka Business Online*, 29 November 2007.

<sup>&</sup>lt;sup>87</sup> Clause 1 (A - i) and (B - i), "Plantation Workers Wage Collective Agreement", Gazette of the Democratic Socialist Republic of Sri Lanka Extraordinary No. 1524/6 – Tuesday, November 20, 2007.

No. 43 of 1950", Gazette of the Democratic Socialist Republic of Sri Lanka Extraordinary No. 1530/31, Friday, January 04, 2008.

the interests of economic competitiveness such that the quality of jobs deteriorates as do rights at work. Therefore in recent years the International Labour Organisation has promoted the concept of 'decent work' defined as "opportunities for men and women to obtain productive work, in conditions of freedom, equity, security and human dignity".

There are four dimensions or pillars to the concept of 'decent work':

- (1) Opportunity for Work i.e. all persons who seek work should be able to find work (defined as any form of economic activity, including self-employment, unpaid family work and wage employment in the formal and informal sectors).
- (2) Rights at Work i.e. work should not be forced; workplaces should be free from discrimination; some forms of work such as bonded or slave labour and child labour are unacceptable and should be eliminated; and workers are free to join workers organisations.
- (3) Social Protection i.e. obligation to safeguard health at work and to provide financial and other protection in the event of ill-health, old age and loss of work or livelihood.
- (4) Social Dialogue i.e. workers be treated with respect at work; be able to voice concerns and participate in decision-making about working conditions; and the right to represent their interests collectively.

In August 2006, the Ministry of Labour Relations and Foreign Employment adopted the National Policy and National Plan of Action for Decent Work in Sri Lanka.<sup>89</sup>

<sup>89</sup> Ministry of Labour Relations and Foreign Employment, National Policy for Decent Work in Sri Lanka, International Labour Office: Colombo 2006.

The themes in the National Policy are structured around the above four dimensions of decent work and are: Challenges in Employment Creation; Challenges in Ensuring Rights at Work; Challenges in Encouraging Social Dialogue; and Challenges in Providing Social Protection.

The National Plan of Action aims to implement policy prescriptions through identifying specific actions; appropriate agencies; and prioritisation of actions as short, medium and long-term; and will be accompanied by decent work monitoring indicators for Sri Lanka adapting 30 indicators developed by the International Labour Organisation.

# Some recommendations in the National Policy are:

 Women to be recruited by Government to nontraditional jobs and facilities provided for women with family responsibilities to continue work.

 Sexual harassment at work to be discouraged through awareness-raising of criminal penalties and access to justice mechanisms for affected women.

 Night-work for women in the information technology sector (presently regulated by the Shop and Office Employees Act, No. 19 of 1954) to be legalised.

 Trade Unions to be encouraged to shift from adversarial to consensual relations with employers for e.g. formation of Joint Consultation Councils and other alternatives to traditional collective bargaining methods.

 Proposals for expansion of coverage of labour legislation and mechanisms to the informal sector from High Level Committee on Labour Law Reform.

 Trade Unions to ensure adequate representation of women in decision-making bodies whether through quotas or other processes.

 Access to employment for persons with disabilities to be increased creation of a statutory Disability Rights Authority for implementation of the 2003 National Policy on Disability.

- Proposed National Policy on HIV/AIDS will integrate ILO Code of Practice on HIV/AIDS in World of Work.
- Tripartite National Labour Advisory Council mandate, functioning and composition to be enhanced and reconstituted as a statutory body with policy-making and advisory powers.
- National Mediation Council for resolution of disputes in the public sector to be established.
- Some Wages Boards to broaden their role from wage determination to conciliation of disputes.
- Unemployment Benefit Scheme to be devised.
- Extension of social security schemes to the informal sector and establishment of a single regulatory body.
- Unique social security number for every citizen to be introduced.
- Occupational safety and health legislation to be enacted and responsibility to be shared between employer, trade unions and employees in the workplace supported by Government regulation.

The National Policy on Decent Work also proposes some initiatives to create an enabling environment for the implementation of its proposals. These include: restructuring the Labour Department including upgrading use of information technology; revision and consolidation of labour laws; more accurate and comprehensive data collection; and greater coordination between ministries, regulatory bodies and other government agencies.

## 8.0 Unemployment Insurance Scheme Proposal

In 2007, the Institute of Policy Studies (IPS) – a semigovernmental research organisation – canvassed the creation of an Unemployment Insurance Scheme in place of the Termination Sri Lanka: State of Human Rights 2008

of Employment of Workmen (Special Provisions) Act of 1971.

The latter enactment has long been singled out by advocates of labour market flexibility<sup>90</sup> for reform if not repeal. The Act provides that where a worker has been in employment for longer than one year (and actually worked at least 180 days in that year) and in a workplace with more than fifteen employees, her/his employer must obtain the prior written consent of either the worker or the Commissioner of Labour before any non-disciplinary termination of employment.

Therefore the Act removes the absolute freedom of an employer to fire at will; vests the power to terminate in the Labour Department; ensures that termination is neither arbitrary nor of immediate operation; and that the worker is compensated through severance payment.

Consequently for employers associations, economists and multilateral financial institutions, the Act creates labour market rigidities that "reduce employment generation in the formal sector, push workers into the informal sector and reduce the efficient allocation of workers across the economy"; 91 while also reducing the productivity of workers as they do not fear summary dismissal. 92

In the alternative to the Termination of Employment of Workmen Act, the Institute of Policy Studies proposes an Unemployment Insurance Scheme as a form of social protection for retrenched workers in place of "job protection – which distorts the allocation of workers and reduces the size of the formal labour market". Such

<sup>91</sup> Institute of Policy Studies, Sri Lanka: State of the Economy 2007, Institute of Policy Studies: Colombo 2007, p. 132.

<sup>90</sup> Martin Rama, Flexibility in Sri Lanka's Labor Market, Policy Research Working Paper 1262, World Bank: Washington D. C. 1994.

<sup>&</sup>lt;sup>92</sup> Ramani Gunatilaka and Saman Kelegama, Study on the Impact of Labour Legislation on Labour Demand in Sri Lanka, Department of National Planning, Ministry of Finance and Planning: Colombo 1996, p. 15.

a scheme according to IPS should be funded entirely through a contributory scheme to which both employers' and employees contribute; benefits should be kept low to ensure that workers "have an incentive to find alternative employment quickly"; and payments should only be for a limited period for example 6 months or less. 93 The proposed Scheme would not cover the unemployed and those in informal employment but rather workers in the formal sector presently protected by the Termination of Employment of Workmen Act.

While there is no imminent prospect of the repeal or reform of the 1971 Act, it should be recalled that the National Policy on Decent Work adopted by the Ministry of Labour Relations (discussed above) favours an unemployment benefits scheme. Therefore, the IPS intervention may be testing the waters, and the harbinger of future labour law reforms.

## 9.0 Application of ILO Conventions and Recommendations

State parties to ILO Conventions are required to submit regular reports on national compliance and enforcement of Conventions that have been ratified to the Committee of Experts on the Application of Conventions and Recommendations (CEACR). In 2007, Sri Lanka's reports on several conventions were examined by the Committee of Experts. The discussion below is confined to selected observations and recommendations that highlight lacuna or deficiencies with the legal, policy and institutional labour relations regime in Sri Lanka.

<sup>93</sup> Institute of Policy Studies, Sri Lanka: State of the Economy 2007, Institute of Policy Studies: Colombo 2007, p. 134.

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## Convention No. 87 (Concerning Freedom of Association and Protection of the Right to Organise)<sup>94</sup>

The Committee reminded the Government of Sri Lanka (GOSL) that under the Convention judicial officers enjoy the freedom of association and asked that necessary measures be taken to guarantee this right to them in law and in practice.

The attention of the GOSL was drawn to the discrepancy between the minimum age for admission to employment (14 years) and the minimum age for membership of a trade union (16 years) and its harmonisation was recommended.

The Committee requested that necessary measures be taken to guarantee access for trade union representatives to free trade zones and to remove the threat and incidence of violence against trade unionists and union members within the zones.

The GOSL was urged to speedily amend the Trade Unions Ordinance such that public sector unions are (lawfully) allowed to federate among themselves as well as with private sector unions.

The Committee requested that the broad discretionary powers vested in the Minister of Labour to refer disputes to compulsory arbitration notwithstanding objection from parties to the dispute be restricted to instances where both parties assent to arbitration, or in the case of essential services in the strict sense of the term, or in the case of public services exercising authority in the name of the State.

Finally, the GOSL was requested to take all necessary measures to ensure that where an administrative dissolution of a trade union by the Registrar of Trade Unions is appealed in the courts, that

ACEACR: Individual Observation concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) Sri Lanka (ratification: 1995) Published: 2007, ILOLEX No: 062007LKA087.

the administrative decision will not take effect, notwithstanding any interim relief that may be granted to the union in the mean time, until the final decision is delivered.

# 9.2 Convention No. 98 (Concerning Right to Organise and Collective Bargaining)<sup>95</sup>

The Committee requested information from the Government as to the deterrent effect of the maximum fine for anti-union discrimination which is Rs20 000% as representations had been received that it was too low to effectively discourage such practices.

It was observed that trade unions should have direct access to the courts for examination of their complaints on anti-union discrimination. The government claims that no cases of anti-union discrimination had been referred to the Commissioner-General of Labour and that there are no time limits within which the Labour Department should refer such cases to the Magistrate's Court in the event that such unfair labour practices persist.<sup>97</sup>

The Committee noted from the Government report that within the free trade zones only two collective agreements had been signed in 2004, two more in 2005, and that six were in negotiation and that unionisation within the zones now extended to 10 percent of

<sup>&</sup>lt;sup>95</sup> CEACR: Individual Observation concerning Right to Organise and Collective Bargaining Convention, 1949 (No. 98) Sri Lanka (ratification: 1972) Published: 2007, ILOLEX No: 062007LKA098.

<sup>96</sup> S. 4 (2), Industrial Disputes (Amendment) Act, No. 56 of 1999.

<sup>&</sup>lt;sup>97</sup> In a personal communication SH Mohamed observes that, "contrary to the position of the government that no cases of anti-union discrimination had been forwarded to the Commissioner General of Labour, trade unions claim that a large number of instances of anti-union discrimination have been brought to the attention of the government. The unions further claim that the Commissioner General of Labour has failed to initiate action before the Magistrate's Court and they have brought this fact to the attention of the ILO CEACR through the International Confederation of Free Trade Unions (ICFTU). According to unions this action has now resulted in the ILO taking up the position that unions should have direct access to courts in order to have their complaints examined, without requiring the intervention of the Labour Commissioner for judicial remedy."

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the workforce. Therefore, the Committee observed that collective bargaining requires promotion in the free trade zones and elsewhere.

The Committee asked the GOSL to respond to the complaint that public sector workers are denied collective bargaining rights and noted that under the Convention all workers including those in the public sector, with the exception of those engaged in the administration of the State, are extended those rights.

The Committee noted that the threshold for compulsory recognition of trade unions for purpose of collective bargaining is 40 percent; and that some employers were alleged to manipulate procedures to deny recognition. The Committee observed that where no single union organises at least 40 percent of workers, collective bargaining rights should be granted to all unions in that workplace, so that they may negotiate at least on behalf of their own members.

# 9.3 Convention No. 182 (Concerning Worst Forms of Child Labour)<sup>99</sup>

The Committee noted that 50 types of work or occupations likely to harm the health, safety or morals of children had been identified in Sri Lanka including work in slaughterhouses; heavy manual work in construction and demolition; work with explosives; underground work; melting of metal and manufacture of glass. However, regulations under the Employment of Women, Young Persons and Children Act remained to be adopted (see discussion of 2006 Amendment Act above).

<sup>98</sup> S. 32A (g), Industrial Disputes Act, No. 43 of 1950 as amended by s. 2, Industrial Disputes (Amendment) Act, No. 56 of 1999.

<sup>&</sup>lt;sup>99</sup> CEACR: Individual Direct Request concerning Worst Forms of Child Labour Convention, 1999 (No. 182) Sri Lanka (ratification: 2001) Submitted: 2007, ILOLEX No. 092007LKA182.

# 9.4 Convention No. 100 (Concerning Equal Remuneration)<sup>100</sup>

The Committee commented on wage differentials between men and women in the tobacco and cinnamon trade. It requested the GOSL to compile and analyse statistics on current wage rates for men and women in different sectors and in particular the tobacco and cinnamon industry and to inform it of progress towards elimination of wage inequalities.

It asked the GOSL promote and ensure the application of the equal remuneration principle in the negotiation and implementation of collective agreements setting wages above the minimum wage.

It wished to know progress made in minimum wage setting for all sectors including the plantations, and in the establishment of a national minimum wage.

Finally, the Committee asked to know about the reduction in the number of wages boards proposed by the Labour Department (as many are inoperative or redundant) and towards simplification of the setting of wages and conditions of employment.

# 9.5 Convention No. 111 (Concerning Discrimination in Employment and Occupation)<sup>101</sup>

The Committee requested the GOSL to indicate steps taken or envisaged to incorporate a prohibition against direct and indirect discrimination, on grounds of sex among others, in employment and occupation in the private sector in national legislation.

<sup>&</sup>lt;sup>100</sup> CEACR: Individual Observation concerning Equal Remuneration Convention, 1951 (No. 100) Sri Lanka (ratification: 1993) Published 2007, ILOLEX No. 062007LKA100.

CEACR: Individual Observation concerning Discrimination (Employment and Occupation) Convention, 1958 (No. 111) Sri Lanka (ratification: 1998)
 Published 2007, ILOLEX No. 062007LKA111.

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It also asked for information on discriminatory laws in the area of employment and occupation and efforts taken or envisaged to bring them in conformity with the Convention.

Finally, the Committee enquired as to specific measures taken or envisaged by the GOSL with respect to the promotion of upward employment mobility of women and their access to a wider range of sectors and occupation; the prohibition and prevention of sexual harassment in the workplace, particularly in the plantation sector; and the improvement of working conditions of the majority women workers in the export processing zones.

# 9.6 Convention No. 11 (Concerning Right of Association in Agriculture)

The Committee requested that legal reforms be enacted to ensure that self-employed farmers be granted the same association rights as other workers including the right to represent their members and the right to strike.

## 9.7 Convention No. 81 (Concerning Labour Inspection)

The Committee observed the lack of information about the numbers and qualifications of labour inspectors; the infrequency of inspections; and the character of sanctions; the lack of information about transport facilities and means; the administrative and legislative obstacles hindering freedom of inspectors to visit establishments (especially in export processing zones); the lack of information about powers of labour inspectors (for example to issue orders relating to defects in the plant and working methods that endanger the health and safety of workers); and the need to publish an annual inspection report containing labour statistics as required in the Convention.

#### 10.0 Conclusion

Some specific recommendations for the improvement of workers' rights in Sri Lanka – and to achieve full compliance with its obligations as a member of the International Labour Organisation – have been identified in the preceding section.

Considering Sri Lanka's largely pro-worker domestic labour law regime and its impressive record of ratification of ILO Conventions and UN Covenants and treaties, the most pressing issue for labour rights activists is that of implementation and scrupulous enforcement.

In this regard, the Labour Department ought to be more assertive vis-à-vis the Board of Investment and employers in the Free Trade Zones; more supportive of workers and unions exercising their right to organise, collective bargaining and to strike; and demonstrate greater urgency in its processing and handling of complaints and disputes to minimise denial of labour rights and union-busting.

As public sector workers in Sri Lanka are excluded from the operation of the Industrial Disputes Act, the Government in consultation with unions should rectify this situation such that workers and unions in the public sector enjoy collective bargaining rights and have recourse to independent and impartial processes for conciliation, mediation and dispute settlement.

This would have an immediate impact on the incidence and intensity of industrial action in the public sector, while also ensuring that public sector workers enjoy the freedoms afforded to them under ILO Conventions.

ILO Convention No. 151 (Concerning Labour Relations in Public Service) of 1978 should be ratified as it provides the framework for appropriate domestic legal reforms.

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The Convention protects the right to organise of public sector employees including acts of anti-union discrimination (A. 4). It provides that workers organisations in the public sector should be independent of the State and be protected from acts of interference by State authorities in their establishment, functioning or administration (A. 5). Public sector unions are to be afforded facilities to enable them to carry out their functions during and outside their hours of work (A. 6). Processes for negotiation of terms and conditions of employment between State authorities and workers organisations should be encouraged and promoted (A. 7). Processes for settlement of disputes in connection with the terms and conditions of employment shall be sought (A. 8). Public sector workers should not be denied the civil and political rights essential for the exercise of freedom of association (A. 9). National laws and regulations may impose restrictions on the application of the Convention to high-level State employees and to members of the armed forces and the police (A. 1).

A trend of extreme concern, in the period under review, is the direct intervention of the judiciary in labour disputes: the port workers action discussed in extenso above, but also of school teachers unions in September 2007, with the desired effect of curtailing the right to industrial action. Formal sector workers and their unions, meanwhile, sought to defend their labour rights within conditions circumscribed by emergency laws and economic crisis, and in a time of war.

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#### SCHEDULE I

UN Conventions on Human Rights and International Conventions on Terrorism signed, ratified or acceded to by Sri Lanka as at 31st December 2007.

(30 in total, in alphabetical order, with the 1 signed/ratified/acceded to in 2007 denoted by an asterisk)

Additional Protocol to the Convention on Prohibitions or Restrictions on the use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (Protocol IV, entitled Protocol on Blinding Laser Weapons)

Acceded on 24 September 2004

Convention Against Corruption

Acceded on 11 May 2004

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

Acceded on 3 January 1994

<sup>&#</sup>x27;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 formation 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 for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others

Acceded on 15 April 1958

Convention on the Elimination of All Forms of Discrimination against
Women (CEDAW)

Ratified on 5 October 1981

Convention on Prohibitions or Restrictions on the use of Certain
Conventional Weapons which may be deemed to be Excessively Injurious
or to have Indiscriminate Effects (with Protocols I, II, and III)

Acceded on 24 September 2004

Convention on the Prevention and Punishment of Crimes Against
Internationally Protected Persons, including Diplomatic Agents
Acceded on 27 February 1991

Convention on the Prevention and Punishment of the Crime of Genocide

Acceded on 12 October 1950

\* Convention on the Rights of Persons with Disabilities
Signed on 30 March 2007

Convention on the Rights of the Child (CRC)

Ratified on 12 July 1991

Convention on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation

Acceded on 6 September 2000

International Convention Against the Taking of Hostages
Acceded on 6 September 2000

International Convention for the Suppression of Acts of Nuclear Terrorism

Acceded on 14 September 2005

International Convention for the Suppression of financing of Terrorism
Ratified on 6 September 2000

International Convention for the Suppression of Terrorist Bombings

Ratified on 23 March 1996

International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)

Acceded on 18 February 1982

International Convention on the Protection of All Migrant Workers and Members of their Families

Acceded on 11 March 1996

International Covenant on Civil and Political Rights (ICCPR)

Acceded on 11 June 1980

International Covenant on Economic, Social and Cultural Rights (ICESCR)

Acceded on 11 June 1980

International Covenant on the Suppression and Punishment of the Crime of Apartheid

Acceded on 18 February 1982

Optional Protocol 1 to the International Covenant on Civil and Political Rights (ICCPR)

Acceded on 3 October 1997

Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

Acceded on 15 October 2002

Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict

Ratified on 6 September 2000

Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography

Ratified on 22 October 2006

Protocol Against the Smuggling of Migrants by Land, Sea and Air – Supplementing the United Nations Convention Against Transnational Organised Crime

Signed on 15 December 2000

Protocol on Prohibitions and Restrictions on the use of Mines, Booby traps and Other Devices (Protocol 11 as amended on 03 May 1996) annexed to the Convention on Prohibitions or Restrictions on Use of certain Conventional Weapons

Acceded on 24 September 2004

Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children – Supplementing the United Nations Convention Against Transnational Organised Crime

Signed on 15 December 2000

Protocol on Prohibitions and Restrictions on the use of Mines, Boobytraps and Other Devices (Protocol 11 as amended on 03rd May 1996) annexed to the Convention on Prohibitions or Restrictions on Use of certain Conventional Weapons

Acceded on 24 September 2004

United Nations Convention Against Transnational Organised Crime
Signed on 15 December 2000

Vienna Convention on Consular Relations

Acceded on 4th May 2006

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Randed on 6 deptember 2000

## **SCHEDULE II**

ILO Conventions Ratified by Sri Lanka as at 31"
December 2007

No	Convention Name	Ratified Date	Present Status
C4	Night work (Women)		
	Convention, 1919	08.01.1951	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	19	2 .
	(Agriculture)		_ ,
	Convention, 1921	29.11.1991	Denounced
C11	Rights of Association		
	(Agriculture)		
	Convention, 1921	25.08.1951	<u> </u>
C15	Minimum Age		
	(Trimmers & Stockers)		<u></u>
	Convention, 1921	25.04.1951	Denounced
C16	Medical Examination of		
	Young Persons (Sea)	05.04.4050	
Cic	Convention, 1921	25.04.1950	
C18	Workmen's		
	Compensation		
	(Occupational Diseases)	47.05.4050	
	Convention, 1925	17.05.1952	

No	Convention Name	Ratified Date	Present Status
C26	Minimum Wage Fixing	10	
	Machinery		
. ,	Convention, 1928	09.06.1961	
C29	Forced Labour	0.5.04.4050	35 1
	Convention, 1930	05.04.1950	
C41	Night Work (Women)	00.00.4050	D
	Convention (Revised), 1934	02.09.1950	Denounced
C45	Underground Work	20 42 4050	
	(Women) Convention, 1935	20.12.1950	
C58	Minimum Age (Sea)	40.05.4050	
	Convention (Revised), 1936	18.05.1959	
C63	Convention concerning		
	Statistics of Wages and	05.00.4050	D
	Hours of Work, 1938	25.08.1952	Denounced
C80	Final Articles Revision	00 00 1050	
	Convention, 1946	00.09.1950	
C81	Labour Inspection		
	Convention, 1947	03.04.1950	
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 Wage		
	Convention, 1949	27.10.1983	
C96	Pre-charging Employment		
	Agencies Convention		
	(Revised), 1949	30.04.1958	

No	Convention	Ratified	Present
J	Name	Date	Status
C98	Rights to Organise and		Ottatao
	Collective Bargaining		
	Convention, 1949	13.12.1972	
C99	Minimum Wage Fixing		
	Machinery (Agriculture)	*	
	Convention, 1951	05.04.1954	An a pr
C100	Equal Remuneration		
	Convention, 1951	01.04.1993	
C103	Maternity Protection	4.	*   ** - 2
	Convention (Revised), 1952	01.04.1993	
C105	Abolition of Forced		
	Labour Convention, 1957	07.01.2003	
C106	Weekly Rest		
	(Commerce and Offices)	A-	
	Convention, 1957	27.10.1983	
C108	Seafarers' Identity		
	Documents		
	Convention, 1958	24.04.1995	
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	06044074	
-	Convention, 1961	26.04.1974	
C131	Minimum Wage	47.02.4075	
6125	Fixing Convention, 1970	17.03.1975	
C135	1	46444076	
Ciac	Convention, 1971	16.11.1976	<del> </del>
C138	0,		1
	Admission to	44.00.0000	
	Employment, 1973	11.02.2000	

No	Convention Name	Ratified Date	Present Status
C144	Tripartite Consultations to Promote the Implementation of ILO Convention, 1976		
C160	Labour Statistics Convention, 1985	01.04.1993	
C182	Worst Forms of Child Labour Convention, 1999	01.03.2001	

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#### **SCHEDULE III**

Humanitarian Law Conventions Ratified by Sri Lanka as at 31<sup>st</sup> December 2007

Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in the Armed Forces in the Field, 1949

Ratified on 28 February 1959

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Geneva Convention for the Amelioration of the Conditions of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, 1949 Ratified on 28 February 1959

Geneva Convention Relating to the Protection of Civilian Persons in Time of War, 1949

Ratified on 28 February 1959

Geneva Convention Relating to the Treatment of Prisoners of War, 1949

Ratified on 28 February 1959

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#### SCHEDULE IV

Some Human Rights Instruments NOT Ratified by Sri Lanka as at 31st December 2007

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Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 1968

Convention on the Political Rights of Women

Convention Relating to the Status of Refugees, 1954

ILO Convention No 102 concerning Minimum Standards of Social Security

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 143 concerning Migrants in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers

ILO Convention No 151 concerning Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service

ILO Convention No 154 concerning the Promotion of Collective Bargaining

ILO Convention 168 concerning Employment Promotion and Protection against Unemployment

Optional Protocol II to the International Covenant on Civil and Political Rights (ICCPR)

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Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)

Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol 11)

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Protocol to the Convention relating to the Status of Refugees, 1967

Rome Statute of the International Criminal Court (ICC)

Sri Lanka: State of Human Rights 2008

## SCHEDULE V

## Fundamental Rights (FR) Cases decided in 2007

Article 11 - Freedom from torture and inhuman or degrading treatment

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Dharmawardana v. Constable Gunathilaka and Others SC (FR) 149/2006, SCM 05.04.2007

Danapala Maturage v. OIC (Special Crimes) Mirihana Police SC (FR) 614/2003, SCM 20.03.2007

## Article 12 (1) - Fundamental Right to Equality

Dissanayake v. General Manager Railways and Others SC (FR) 256/2005, SCM 25.07.2007

Lancelot Perera v. National Police Commission and Others 2007 (2) ALR 24, SC (FR) 290/2006

Sunil Abeyratne Munasinghe v. Vandergert and Others SC (FR) 333/2005, SCM 03.08.2007

Samaraweera v. People's Bank of Sri Lanka SC (FR) 85/2004, SCM 24.07. 2007

V.I.S. Rodrigo v. Ms. Imalka, S.I Kirulapone et al SC (FR) 297/2007, S.C Minutes 2<sup>nd</sup> December 2007

#### Article 14 (h) - Freedom of Movenent

Sarjun v. Kamaldeen – PC 39753, Police Station, Habarana SC(FR) 559/03, S.C. Minutes 31st July 2007 (violation of fundamental rights by security personnel manning checkpoints in

various parts of the country, national security)

V.I.S. Rodrigo v. Ms. Imalka, S.I Kirulapone et al SC (FR) 297/2007, S.C Minutes 2<sup>nd</sup> December 2007; 2007 (1) ALR 1

Wijebanda v. Conservator General of Forests and Others SC (FR) 118/2004, SCM 05.04.2007

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#### SCHEDULE VI

## Cases Cited - Sri Lanka and other jurisdictions

Anisminic Case [1969] 2AC 47 (H/L)

Bulankulama v. Minister of Industrial Development [2000] 3 SLR 243

Binudunuwewa Case - S.C. Appeal 20/2003 (TAB) H.C. Colombo No. 763/2003 SCM 21.05.2005

Chaturanga v. University of Peradeniya and Others CA 1722/2005, CA Minutes of 27.09.2007

Fernando v. Peoples Bank and Others SC(FR) 283/2004, SCM 08.07.2005

Fernando and Others v. Wayamba Development Bank and 69 Others CA 2254/2004, CA Minutes of 16.01.2007

Heenatigala and Another v. Moratuwa Municipal Council and the Urban Development Authority, CA 1246/1999, decided on 18.01.2007

Jayawardene v the State, CA No 98-100/97; [2000] 3 SLR 192

Joint Apparel Association Forum and Others vs. Sri Lanka Ports Authority and Others, SC (FR) No. 248/06, SCM 21.07.2006

Kottabadu Durage Sriyani Silva VS. Chanaka Iddamalgoda, Officer in Charge, Police Station Payagala and Six others, [2003] 2 SLR 63

King v Peiris Appuhamy 43 NLR 412

Leeda Violet & Others v Vidanapathirana & Others [1994] 3 SLR 277

Lal Wimalasena v. Asoka de Silva, et al SC (FR) 473/2003, SCM 04.08.2005

Machchavallavan Case, (Kanapathipillai Machchavallavan vs OIC, Army Camp, Plantain Point, Trincomalee and Others (SC Appeal No 90/2003, SC (Spl) L.A. No 177/2003, SCM 31.03.2005

Nallaratnam Sinharasa v Attorney General and Others, S.C. SpL (LA) No. 182/99, SCM15.09.2006

Premachandra v. Jayawickrama [1994] 2 SLR 90

Premathilaka v the Republic of Sri Lanka 75 NLR 506

Ridge v. Baldwin [1964] AC 40 (H/L)

Republic of Sri Lanka v. Nanda Warnakulasuriya and Others, Case No 119/2003, High Court of Kurunegala, HC Minutes 25.06.2007

Republic of Sri Lanka v. Sathisgamage and others, HC Case No (indistinct), High Court of Galle, High Court Minutes 04.05. 2007

Republic of Sri Lanka v. Ramyasiri and others, HC case No 2854/06, High Court of Galle, HC Minutes 10.12.2007

R. v. Hanley Barrister [1912] 3KB 518.

Seelawathie v. Minister of Lands and Others CA 1622/2005, CA Minutes of 15.10.2007.

Sriyani Silva vs Iddamalgoda [2003] 2 Sri LR 63

Sumanasekara v AG [1999] 3 SLR, 137

Sunderakaran v. Bharathi [1989] 1 SLR 46

W.K.C. Perera v. Prof. Edirisinghe [1995] 1 SLR, 148

Wasana Trading Lanka (Pvt) Ltd v. Jayathilaka, DG of customs and Another CA 1081/2005, CA Minutes of 20.09.2009

Wagaachige Dayaratne vs IGP and Others SC (FR) 337/2003 SCM 17.5.2004

Wewalage Rani Fernando case, SC(FR) No 700/2002, SCM 26/07/2004.

Weerawansa v AG, [2000] 1 SLR 387

## UN Human Rights Committee cases cited

Anthony Michael Emmanuel Fernando v Sri Lanka, CCPR/C/83/D/1189/2003, adoption of views on 31 March 2005

Avellanal v Peru, Case No. 202/1986, adoption of views on 28 October 1988

Bleier Lewhoff and Valiño de Bleier v Uruguay, Case No. 30/1978, adoption of views on 29 March 1982
Bleier v. Uruguay, Case No. 30/1978, adoption of views on 24
March 1980

Baboeram v. Surinam, Case No. 146/1983, adoption of views on 4 April 1985

Celis Laureano v. Peru, Case No. 540/1993, adoption of views on 25 March 1996

Dingiri Banda Case, CCPR/C/91/1426/2005, adoption of views on 26 October 2007

Dissanayake Mudiyanselage Sumanaweera Banda v Sri Lanka CCPR/C/93/D/1373/2005, adoption of views on 22 July 2008

Hugo Dermit v. Uruguay, Case No. 84/1981, adoption of views on 21 October 1982

S. Jegatheeswara Sarma v Sri Lanka, CCPR/C/78/D/950/2000, adoption of views on 16 July 2003

Jayalath Jayawardena v Sri Lanka, CCPR/C/75/D/916/2000, adoption of views on 22 July 2002

Mabaka Nsusu v Congo, Case No. 157/1983, adoption of views on 26 March 1986

Quinteros v. Uruguay, Case No. 107/1981, adoption of views on 21 July 1983

Raththinde Katupollande Gedara Dingiri Banda v Sri Lanka, CCPR/C/D/1426/2005, adoption of views on 26 October 2007

Sanjuan Arevalo v Colombia, Case No. 181/1984, adoption of views on 3 November 1989

Sister Immaculate Joseph and 80 Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka v Sri Lanka, CCPR/C/85/D/1249/2004, adoption of views on 21 October 2005

Sundara Arachchige Lalith Rajapakse v Sri Lanka, CCPR/C/87/D/1250/2004, adoption of views on 14 July 2006

Soratha Bandaranayake v Sri Lanka, CCPR/C/93/D/1376/2005,

adoption of views on 24 July 2008

Vicente et al. v Colombia, Case No. 612/1995, adoption of views on 29 July 1997

Vadivel Sathasivam and Parathesi Saraswathi v Sri Lanka, CCPR/C/93/D/1436/2005, adoption of views 8-7-2008

Victor Ivan Majuwana Kankanamge v Sri Lanka, CCPR/C/81/D/909/2000, adoption of views 27-07-2004

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#### BIBLIOGRAPHY

#### Books, Journals and Internet Reports

Amerasinghe, Franklyn. "The National Workers Charter", Sri Lanka: State of Human Rights 1995. Colombo: Law & Society Trust, 1996

Amerasinghe, A.R.B. "The Legal Heritage of Sri Lanka", Colombo: Law & Society Trust, Royal Asiatic Society and Sarvodaya Vishva Lekha Publishers, 1999

Amnesty International. "Sri Lanka: Amnesty International calls on the United Nations Human Rights Council to address violations", Public Statement, 4 Sep. 2007, ASA 37/019/2007, available at http://amnesty.ca/resource\_centre/news/view.php?load=arcview&article=4037&c=Resource+Centre+New

-----. "Sri Lanka. "Armed groups infiltrating refugee camps", ASA 37/007/2007, 14 March 2007

Appellate Law Recorder 2007 (1) Colombo: Law & Society Trust, 2007

Arbour, Louise. United Nations High Commissioner for Human Rights. "Statement to the Human Rights Council on December 10th 2007", excerpt available at http://campaigns.ahrchk.net/monitoringsl/ran.php

Asian Human Rights Commission (AHRC) A Forwarded Report. "SRI LANKA: CPA on Commission of Inquiry and IIGEP", 17 February 2007 http://www.ahrchk.net/statements/mainfile.php/2007statements/926/

——, Urgent Appeals, "Sri Lanka: Several media personnel killed while investigation has failed", http://www.ahrchk.net/ua/mainfile.php/2007/2635/

- ——, UPDATE (Sri Lanka): "Compensation granted to the torture victim by the Supreme Court while criminal prosecution against perpetrators delayed", Urgent Appeals Program, 7 May 2007, available at http://www.ahrchk.net/ua/mainfile.php/2007/2373/
- ——, 'UPDATE (Sri Lanka): "List of another 22 disappeared persons", 30 April 2007, available at http://www.ahrchk.net/ua/mainfile.php/2007/2359/
- , "Foreign company based in Sri Lanka disregards worker's conditions and threatens their representatives and human rights defenders", AS-178-2007, August 1, 2007 http://www.ahrchk.net/statements/mainfile.php/2006statements/1136/
- ——, "Sri Lanka: A court attacks human rights defenders' right to engage in peaceful protest", AHRC-STM-046-2008, February 26 2008, http://www.ahrchk.net/statements/mainfile.php/2008statements/1395/

Basic Law of the Federal Republic of Germany. http://www.iuscomp.org/gla/statutes/GG.htm#2

Brownlie, Ian and Guy Goodwin. Basic Documents on Human Rights, Oxford University Press, 2002

Budgetary Relief Allowance of Workers Act, No 36 of 2005

Centre for Policy Alternatives (CPA) "Puttalam Fact Finding Report," July 19 2006, http://www.cpalanka.org/

——CPA, INFORM, IMADR, LST. "Report of the fact finding mission to Batticaloa" May 17-18 2007, http://www.lawandsocietytrust.org/web/images/PDF/may%202007%20fact%20finding%20mission\_batticaloa.pdf

#### Central Bank of Sri Lanka, Annual Report 2005

- ----, Annual Report 2007
- ----, Economic and Social Statistics of Sri Lanka 2008

Christian Worker (2007a), "Trade Unions concerned over War, Intimidation and Repression", *Christian Worker*, 4th Qr. 06 – 3rd Qr. 07 (December 2007)

—, (2007b), "Trade Unions Confer on the War and its Consequences", 4th Qr. 06 – 3rd Qr. 07, (December 2007)

Clayton, Richard and Hugh Tomlinson. The Law of Human Rights, Vol. I, Oxford University Press, Oxford, 2000

Commissions of Inquiry Act, No. 17 of 1948

Committee against Torture. Concluding Observations on Sri Lanka in 2005, (CAT/C/LKA/CO/1/CRP.2. 7-25 November 2005)

Compa, Lance. "Justice for All: The Struggle for Workers Rights in Sri Lanka" Washington D.C: American Centre for International Labour Solidarity, 2003

Constitution of the Democratic Socialist Republic of Sri Lanka 1978

Constitution of Finland, (as amended up to 802/2007), Ministry of Justice, Finland, English translation, http://www.finlex.fi/fi/laki/kaannokset/1999/en19990731.pdf

de Almeida Guneratne, J. 'Judicial Response to the Concept of Sovereign Power of the People of Sri Lanka' in Marsoof, Saleem and Nirmalan Wigneswaran (eds.), In Pursuit of Justice, The Kamalasabayson Foundation, Colombo 2008 Department of Labour (u.d.), Administration Report 2005, Colombo: Department of Labour, Ministry of Labour Relations & Manpower

——, Labour Statistics – 2007 Sri Lanka, Colombo: Department of Labour, Ministry of Labour Relations & Manpower, 2008

de Almeida Guneratne, J. The Swiss Constitution: Lessons for Sri Lanka, CEPRA, Colombo 1995

Employment of Women, Young Persons and Children (Amendment) Act, No. 24 of 2006

Fernando Basil. "Sri Lankan Government must show Sincerity", 14 December 2007, http://srilanka-lawlessness.com/2007/12/ 14/sri-lankan-government-must-show-sincerity/

Fonseka, Bhavani. "A Profile on Internally Displaced Persons Living with Host Families", www.cpalanka.org

Free Media Movement. E- Bulletin November 2007 http://www.freemediasrilanka.org/English/news.php?id=47&section=news\_reports

Fundamental Rights of the European Union, December 18 2000, http://www.europarl.europa.eu/charter/pdf/text\_en.pdf

Gazette Extraordinary No 1474/5 of December 7 2006 – Amendment to Emergency (Prevention & Prohibition of Terrorism & Specified Terrorists Activities) Regulations

Gazette Extraordinary No. 1499/25 of May 30 2007

Gazette Extraordinary No 1518/8 October 8 2007

Geneva Conventions Act, No. 4 of 2006

"German System of education, an overview", http://www.ed.gov/pubs/GermanCaseStudy/chapter1a.html

Gomez, Mario. "Compulsory Education and the Law", Sri Lanka Journal of Social Sciences, [1989] 12 (1 & 2)

Goonesekere, Savitri. Children, Law and Justice: A South Asian Perspective, New Delhi: Sage Publications, 1998

Guiding Principle 10 on IDPs, www.internal-displacement.org.

Gunaratne, Malinga, "For a sovereign state", Ratmalana: Sarvodaya Book Publication Services, 1988.

Gunatilaka, Ramani and Saman Kelegama. "Study on the Impact of Labour Legislation on Labour Demand in Sri Lanka", Colombo: Department of National Planning, Ministry of Finance and Planning, 1996

Gunawardana, Samanthi and Janaka Biyanwila (2008), 'Trade unions in Sri Lanka: Beyond party politics' in Benson, John and Ying Zhu (eds.), Trade Unions in Asia: An Economic and Sociological Analysis, Routledge: London and New York 2008

Hansard 6 June 2007. http://www.lankanewspapers.com/news/2007/7/16862.html

Hasbullah, S.H. "Muslim Refugees: The forgotten people in Sri Lanka's ethnic conflict", Noraicholai, Research and Action Forum for Social Development 2001

Hepburn, Claudia and John Merrifield. "School choice in Sweden – Lessons for Canada", http://www.fraserinstitute.org/commerce.web/product\_files/SchlChceSweden2.pdf

"Human Rights Committee. Concluding Observations -

Burundi", of 3 August 1994 (United Nations document CCPR/C/79/Add.41, par. 9)
"——, Honduras", UN Doc CCPR/C/HND/CO/1 of 13 December 2006
"——, Observations of the Human Rights Committee on the third periodic report of Senegal", 28 December 1992, CCPR/C/79/Add.10
"Human Rights Situations that Require the Council's Attention", Human Rights Council, Sixth session, A/HRC/6/NGO/21, 4 September 2007, http://daccessdds.un.org/doc/UNDOC/GEN/G07/139/35/PDF/G0713935.pdf?OpenElement http://www.alertnet.org/thenews/newsdesk/ COL285170.htm
Human Rights Watch (HRW). Sri Lanka: "Karuna Group and LTTE Continue Abducting and Recruiting Children" 27 March 2007, http://www.hrw.org/en/news/2007/03/27/sri-lanka-karuna-group-and-ltte-continue-abducting-and-recruiting-children,
——, Sri Lanka: "Human Rights Commission Downgraded", 17 December 2007, http://www.hrw.org/en/news/2007/12/ 17/sri-lanka-human-rights-commission-downgraded
, "Improving Civilian Protection in Sri Lanka", September 2006
—, "Sri Lanka — "Return to war: Human rights under siege", http://hrw.org/reports/2007/srilanka0807/srilanka0807webwcover.pdf
—, "Sri Lanka: End expulsion of Tamils from Colombo", 8 June 2007 http://hrw.org/english/docs/2007/06/08/slanka16106_txt.htm

——, "Complicit in Crime-State Collusions in Abductions and Child Recruitment by the Karuna Group", 23 Jan. 2007, http://www.hrw.org/en/reports/2007/01/23/complicit-crime

Inter-Agency Standing Committee. "Conflict related internal displacement in Sri Lanka: A study on forced displacement, freedom of movement, return and relocation", 15 July 2007, http://www.internal-displacement.org/8025708F004CE90B/%28http Documents%29/CEC4E2879AB1E061C125735B005FB3D7/\$file/Conflict-Related+Displacement+in+Sri+Lanka\_1.pdf

Immigration and Refugee Board of Canada, "Sri Lanka: Reports of forced removals of Tamils from Colombo after 7 June 2007", 15 October 2007. LKA 102597.E, http://www.unhcr.org/refworld/docid/47d65461c.html, cited as IRBC 2007

Industrial Disputes Act, No. 43 of 1950 (as amended)

Institute of Policy Studies, Sri Lanka: State of the Economy 2007, Colombo: Institute of Policy Studies, 2007

International Bar Association. "Sri Lanka: Failing to protect the Rule of Law and the Independence of the Judiciary, 2001

International Convention for the Protection of all Persons against Enforced Disappearances, adopted on 29 June, 2006

International Covenant on Civil and Political Rights ('ICCPR') on 11 June 1980

"ICCPR Intermingling Law, Politics and Policy", The Official Government News Portal of Sri Lanka, 18 April 2008, http://www.news.lk/index.php?option=com\_content&task=view&id=5574&Itemid=52

International Independent Group of Eminent Persons. Public Statement of 11 June 2007 (IIGEP), http://www.ahrchk.net/statements/mainfile.php/2006statements/1056/

International Press Institute. World Press Freedom Review 2007: Sri Lanka, http://www.freemedia.at/cms/ipi/freedom\_detail.html?country=/KW0001/KW0005/KW0132/

International Labour Office. "Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO," Fifth (revised) edition,
International Labour Office, Geneva 2006

International Trade Union Confederation. Sri Lanka: Annual Survey of violation of trade union rights 2008 http://survey08.ituc-csi.org/

Iqbal M.C.M. "Some Current Human Rights Issues in Sri Lanka (2007)", 5th May 2007, http://www.ruleoflawsrilanka.org/resources/writings-of-m-c-m-iqbal/2007-current-human-rights-issues-in-sri-lanka

Internal Displacement Monitoring Centre. Civilians in the way of Conflict: Displaced people in Sri Lanka, 26 September 2007, http://www.internal-displacement.org/idmc/website/resources.nsf/%28httpPublications%29/A1F18D805D587AFEC12574C2004B10AB?OpenDocument

Jayaweera, Swarna. Fifty Years of Sri Lanka's Independence-A Socioeconomic Review Ed. A.D.V. de S. Indraratne, Colombo: Sri Lanka Institutive of Social and Economic Studies, 1997

Kalin, Walter. 'Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons", A/HRC/8/6/Add.4, 21 May 2008

Lanka Business Online, Sri Lanka Online Journalist Shot in Capital, 31 Oct. 2007 http://www.lankabusinessonline.com/fullstory.php?nid=2014801834

Liyanage, Sumanasiri and M Sinnathamby (ed.). A Glimmer of Hope Colombo: South Asia Peace Institute, 2007

"President Asks IGP for Immediate Report", Media Centre for National Security news release, June 9, 2007, http://www.nationalsecurity.lk/fullnews.php?id=6169

"Mahinda to meet rights watchdogs", BBC Sinhala, 13 June 2007 http://www.bbc.co.uk/sinhala/news/story/2007/06/070613\_president\_geneva.shtml

Marsoof, Saleem. "The Expanding Canvass of Judicial Review", X/BALJ 18

Media Centre for National Security. Ministry of Defence, Public Security and Law and Order, http://www.nationalsecurity.lk/fullnews.php?id=2087

Ministry of Education. Education Proposals for Reform, 1981.

Ministry of Education." General Education Reforms" (Report of the Presidential Task Force on General Education).

Nowak, Manfred "Special Rapporteur on Torture Concludes Visit To Sri Lanka", United Nations Press Release, 29 Oct. 2007, http://www.freemediasrilanka.org/English/news.php?id=45&section=news\_reports

——, "Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment", A/HRC/7/3/Add.6, 26 February 2008

Office of the High Commissioner for Human Rights, International Covenant on Economic, Social and Cultural Rights, 1966

Parliament of Sri Lanka - http://www.parliament.lk/committees/public\_enterprises.jsp

Penal Code (Amendment) Act, No. 16 of 2006

"President has historic audience with the pope", 20 April 2007 http://www.president.gov.lk/sinhala/html/news/200704/20070420news.htm

Presidential commission of inquiry and the public on human rights violations in Sri Lanka: January-August 2007, LST Review, Vol.18, nos.239/240

Rajapakshe, Wijeydasa. "First Report from the Committee on Public Enterprises", presented by Hon. Wijeydasa Rajapakshe, M.P. Chairman of the Committee on Public Enterprises, Sixth Parliament of the Democratic Socialist Republic of Sri Lanka.

Rajapakshe, Wijeydasa. "Second Report from the Committee on Public Enterprises", presented by Hon. Wijeydasa Rajapakshe, M.P. Chairman of the Committee on Public Enterprises, Sixth Parliament of the Democratic Socialist Republic of Sri Lanka.

Rama, Martin. "Flexibility in Sri Lanka's Labor Market", (Policy Research Working Paper 1262), Washington D. C.: World Bank 1994

Ramachandran, Sudha. "Sri Lanka's explosive Muslim factor" http://www.atimes.com/atimes/South\_Asia/EI18Df01.html

Report of the Expert Group Meeting on Gender and Racial

Discrimination convened by the United Nations Division for the Advancement of Women http://www.un.org/womenwatch/daw/csw/genrac/report.htm.

Report of the 1994 Presidential Commission of Inquiry to investigate the Involuntary Removal or Disappearances of Persons in the Western, Southern and Sabaragamuwa Provinces, Sessional Paper No V – 1997.

Report of the Representative of the Secretary General on the Human Rights of Internally Displaced persons, Walter Kalin: Mission to Sri Lanka: UN doc. A/HRC/8/6/Add.4, May 2008

Reporters Without Borders (2007). "Kidnap of three journalists with trade union monthly", 06 February 2007, http://www.rsf.org/article.php3?id\_article=20939

Rome Statute of the International Criminal Court. Text of the Rome Statute circulated as document A/CONF.183/9 of 17 July 1998 and corrected by procès-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002

Sessional Papers No 11 and No V – 1997. Interim and Final Reports of the Western, Southern and Sabaragamuwa Provinces

Sessional Papers No III and VI – 1997. Interim and Final Report containing the Annexure of the Central, North Western, North Central and Uva Provinces,

Sessional Papers No 11 and No V – 1997. Interim and Final Reports of the Northern and Eastern Provinces, respectively

Sessional Paper No. 1 2001. Final Report of the All Island Commission (March 2001), Sessional Paper No 1- 2001

Seventeenth Amendment to the Constitution

Skanthakumar, B. (2008), "The Enemy Within': Human Rights Defenders in Sri Lanka", LST Review, Vol. 19, Issue 253 November 2008

South Asians for Human Rights. "IDPs in Sri Lanka: Report of the fact finding mission to the North and East of Sri Lanka to assess the state of displaced persons", August 2007.

Sri Lanka Country Study of the Humanitarian Agenda 2015: Feinstein International Centre, Tufts University; Oct 2007

Sri Lanka Labour Gazette (2008), Vol. 59, No. 2 (April-June 2008).

Social Security Benefit Scheme for Media Personnel Act, No. 29 of 2006.

"Sri Lanka: List of media workers killed, abducted and arrested", www.freemedia.org

"Sri Lanka Arrests 16 over Abductions, Extortion." 4 July 2007 http://uk.reuters.com/article/latestCrisis/idUKCOL17649420070704

Teitelbaum, Emmanuel. "Can a Developing Democracy Benefit from Labour Repression? Evidence from Sri Lanka", Journal of Development Studies, Vol. 43, No. 5 July 2007

The Constitutional Dimensions of Affirmative Action in South Africa, http://uir.unisa.ac.za/bitstream/10500/2012/8/10chapter9.pdf

Trade Unions Ordinance, No. 14 of 1935 (as amended)

UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 9: The domestic application of the Covenant, 03 December 1998, E/C.12/1998/24, http://www.unhcr.org/refworld/docid/47a7079d6.html

UN Committee on Economic, Social and Cultural Rights, *The Right to Education (Art.13)*, E/C. 12/1999/10 (General Comments), http://www.unhchr.ch/tbs/doc.nsf/0/ae1a0b126d068e868025683c003c8b3b?Opendocument

UN Declaration on the Protection of All Persons from Enforced Disappearances, G.A. res. 47/133, 47 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/47/49 (1992)

UN Human Rights Committee. (CCPR/CO/79/LKA)

UN Human Rights Committee. General Comment No. 6, HRI/GEN/1/Rev.1 (1994), http://www1.umn.edu/humanrts/peace/docs/hrcom6.htm

United Nations Committee against Torture, Second Periodic Report, CAT/C/48/Add.2 06/08/2004, at paragraph s 63 and 64

United Nations Economic and Social Council, Plan of Action for Primary Education (Art.14) E/C. 12/1999/4 (General Comments).

United Nations Special Rapporteur on the Independence of the Judiciary in April 2003 to the UN Commission on Human Rights (E/CN.4/2003/65/Add.1 25, February 2003

UN General Assembly Resolution 47/133 of 18 December 1992

University Teachers for Human Rights (Jaffna) "Can the East be won by Human Culling? Special Economic Zones. An Ideological Journey Back to 1983", Information Bulletin, August 2007

US Department of State. 'Sri Lanka: Country Report on Human Rights practices 2007, 11 March 2008, http://www.state.gov/g/drl/rls/hrrpt/2007/100620.htm

US Department of State. 2007 Country Reports on Human Rights Practices: Sri Lanka, 11 March 2008, http://www.unhcr.org/refworld/docid/47d92c63b5.html

Weerakkody, Delaine. Education for All. Colombo: Vijitha Yapa, 2006

Weeramantry, C.G. Case of Thalidomide children, The Law in Crisis, at p.248, Cape Moss, London, 1975

Welikala, Asanga and Edrisinha, Rohan "GSP+ Privileges: The Need for Constitutional Amendment" www.cpalanka.org/newspaper\_Articles/Article\_on\_ICCPR.pdf

Witharana, Manori (2004), "Workers Rights", Sri Lanka: State of Human Rights 2004, Colombo: Law & Society Trust

Women and Media Collective. Women's Rights Watch 1998, Colombo 1999

Workmen's Compensation (Amendment) Act, No. 10 of 2005

World Bank, Treasures of the Education System in Sri Lanka, http://www.worldbank.lk/WBSITE/EXTERNAL/COUNTRIES/SOUTHASIAEXT/SRILANKAEXTN/0,,contentMDK:20569083~menuPK:287057~pagePK: 141137~piPK:217854,~theSitePK:233047,00.html, 2005

## Newspapers and other media

Andappa, T. "Journalist claiming unlawful detention further questioned", Sunday Times, 28 Jan. 2007

"Apparel exporters back off as ILO backs striking workers", The Sunday Times, 09 December 2007

"Child abduction allegations based on hearsay material", Sunday Times, 11 Feb. 2007 http://www.sundaytimes.lk/070211/News/110news.html

David, Antony. "Speak now or hold your silence forever", Sunday Times, 2 September 2007

"Deadly Bomb Attacks in Sri Lanka", 28 November 2007, BBC News http://news.bbc.co.uk/2/hi/south\_asia/7116335.stm, 23/12/2009

De Silva, Pramod and Irangika Range. "No Forcible Eviction of Lodgers – Keheliya", *Daily News 8* June 2007, http://www.dailynews.lk/2007/06/08/pol01.asp

Fernandopulle, Lalin "Another plantation strike will have dire consequences – Ravi Peiris", *The Sunday Observer*, 16 September 2007

"FM cautions UN of exaggerated figures', Daily Mirror, 24 May 2007

Fuard A., "Government Denies HRW Charges", Sunday Times, 28 Jan. 2007

—, "Mystery bodies: Once again it's who killed whom" Sunday Times 11 March 2007 http://sundaytimes.lk/070311/ News/113news.html

"Fully fledged air defence system vital to counter Tiger air threat", Sunday Observer, 6 May 2007

"Gajanayake's complaint that backfired on the Rajapakses", Sunday Leader, 15 July 2007

"Govt claims some MPs assisting Tigers", Daily Mirror, 31

## May 2007

Hadunnetti, Dilrukshi. "Forcing a government change defined as terrorism", The Morning Leader, 5 September 2007

"High security zones set up in Trinco", Sunday Leader, June 6 2007

'Human Rights Commission officers threatened', Daily News, 24 December 2007

"IASC frowns upon government handling of IDPs", Sri Lanka: Civilians who fled fighting are forced to return, *The Morning Leader*, 5 September 2007

"Interview with Mahinda Samarasinghe" The Nation, 18 March 2007

Jayasiri, Sunil. "Capacity of SLAF and Tiger air raids", Daily Mirror, 27 April 2007

·Jayasekera, Sandun A. "Several houses hit, civilians injured", Daily Mirror, 30 April 2007

Kannangara, Nirmala. "SLPA incurs a loss of Rs.5, 100 million", The Morning Leader, 19 July 2006

Kaviratne, Isuri. "Schools: muddle over who's in and who's out", Sunday Times Online, 13 January 2008

"Lanka apologises for Tamils' expulsion", Times of India, 10 June 2007

Lasantha Wickrematunge. "The Sunday Leader Blows the Lid on Eviction Drama Following the President's Call for Probe," Sunday Leader, June 10, 2007

"LTTE air raid over Colombo", Sunday Leader, 29 April 2007

Perera, Amantha. "Disappearances on the rise charges AI", Sunday Leader, 2 September 2007

"Pillayan gives final warning to Karuna", Daily Mirror, 28 May 2007.

Pinto-Jayawardena Kishali. "Protecting a finely poised balance of the media and the law" *Sunday Times Column*: Focus on Rights. 01st April 2007, http://www.sundaytimes.lk/070401/Columns/focus.html

Rahman, Maseeh. 'Italian Ambassador Hurt in Tamil tiger attack', The Guardian, 27 February 2007, http://www.guardian.co.uk/world/2007/feb/27/maseehrahman

"Red cross workers killed in Colombo" BBC Sinhala 3 June 2007 http://www.bbc.co.uk/sinhala/news/story/2007/06/070603\_icrc\_killed.shtml

Reddy, Muralidhar. "Celebrating war", Frontline, 10 August 2007

"Reporter allegedly assaulted by airmen", Daily Mirror, 29 June 2007

Rutnam, Easwaran. "34 abductions in the East within one week, says SLMM", Daily Mirror, 25 June 2007

Samarasinghe, Sonali. "State of the Nation" Morning Leader, 29 August 2007

——. "Democracy continues Sri Lanka style: The Karuna affair and Pillayan", Sunday Leader, 11 November 2007

"Sampur FR petition dismissed", BBC Sinhala.com, 17 July

2007, http://www.bbc.co.uk/sinhala/news/story/2007/07/070717\_sampur\_hsz.shtml

"SLFP Condemns Mervyn's Actions", *Daily News* 28 December 2007, http://www.dailynews.lk/2007/12/28/news03.asp, accessed on 23/12/2009.

Sri Lanka protests UN statement, BBC Sinhala com 30 November 2007 www.bbc.co.uk/sinhala/news/story/2007/11/071130\_mahinda\_arbour.shtml

"Sri Lankan rebels launch air raid" 26 March 2007 http://news.bbc.co.uk/1/hi/programmes/letter\_from\_america/6494121.stm

Transparency International. Elements of corruption and its impact, http://www.transparency.org/news\_room/faq/corruption\_faq

"Tamilnet blocked in Sri Lanka", BBCSinhala.com, http://www.bbc.co.uk/sinhala/news/story/2007/06/070620\_tamilnet.shtml

"UNHCR pulls out of resettlement process in east" Daily Mirror, 22 March 2007

Wijewardena, Don Asoka. "Over 30,000 child labourers in country", *The Island*, 26 August 2008.

Zuhair, Ayesha. "The resuscitation of the 17th amendment: Does anyone care", *Daily Mirror*, 11 January 2007.

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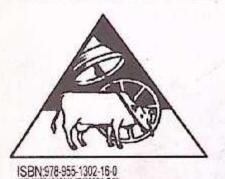
This is a detailed account of the state of human rights in Sri Lanka focusing on the period January to December 2007

Sri Lanka: State of Human Rights 2008 contains the following chapters

- Overview: Human Rights in Sri Lanka in 2007
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- Judicial Protection of Human Rights
- Enforced Disappearances: The Legitimacy of the Law in Grave
- Human Rights Violations
- Internal Displacement and Humanitarian Concerns: Human Rights
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ISBN: 978-955-1302-16-0

Price: SLRs550/US\$12



Law & Society Trust 3, Kynsey Terrace

Colombo 8

Tel : +94 11 2691228 / 2684845

Fax : +94 11 2686843 Email : lst@eureka.lk

Website : www.lawandsocietytrust.org

Printed by : Globe Printing Works,

No. 5, Stork Place, Colombo 10.

Tel: 0777-315971